

# The Legitimation of Media Regulation in China

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**Abstract** This paper explores media regulation in China and argues that the country's broadcasting regulatory strategies of becoming more legal-rational and law based have been affected by two forces: the Chinese Party-state's attempt to recast the foundation of its political legitimacy, and the legitimizing power of legal rationality per se. The legitimization of media-regulatory efforts have primarily centered on procedural justice of the rule of law in the following ways: enacting stable new broadcasting laws (stability); instituting public consultation in rule making (procedural inclusiveness); strengthening law enforcement (enforcement); and placing checks on administrative power (restriction of state power). The advantages of this procedural legitimization are that it provides predictability by restricting arbitrariness in the exercise of administrative power and providing some opportunity for public participation, while limiting regulatory authority. On the other hand, Chinese media regulation still requires mechanisms to secure its operational transparency, accountability and deliberation to avoid being cast as a legitimizing ritual. This paper also argues that procedural legality and justice is a necessary, but insufficient condition for obtaining the media regulator's legal-rational legitimacy, and given the status of the country's constitution and its weaknesses in political participation, accountability and transparency in national law making, the content of the media regulation itself must also manifest the social and political values of protecting citizen and media rights.

**Keywords** Media regulation · Chinese media · Rule by law · Legitimacy · Administrative law

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## 1 Introduction

This paper aims to shed light on the important questions in Chinese political and media studies. First, what are the sources of Chinese regulatory and political legitimacy? Second, has the change in the Party-state's political legitimation strategies, i.e., the adoption of legal rationality and thin rule of law, affected the legitimacy of China's broadcasting regulation? If so, in what way? And why?

Regulation is a form of social control and its effectiveness partly depends on the legitimation of the regulatory regime. The level of legitimation is very important not only in assessing the authority of a regulatory regime, but also in assessing the strength of a state. This paper reveals that legal rationality, or procedural justice of the rule of law, has been used as a source to legitimate both regulatory and political regimes in a nondemocratic China, though the Party-state is still short of features of fairness, transparency and accountability. It argues that the installation of legal rationality and administration according to law reform in China's broadcasting sector are partly motivated by the Party-state's desire to strengthen its governing competence, which is perceived as indispensable to reshaping its legitimacy. The installation is also motivated by the normative and cognitive powers of legal rationality in legitimizing media regulator's authority per se.

The legal-rational legitimation efforts in broadcasting regulation have primarily centered on the procedural justice of rule of law or the thin conception of rule of law in the following ways: enacting new broadcasting laws with higher legal status to replace arbitrarily issued normative documents (stability); instituting public consultation in regulation rule making (procedural inclusiveness); strengthening the enforcement of laws (enforcement); and placing checks on the government's administrative power (restriction of state power). Theoretically, the elements of thin rule of law include (1) the supremacy of the law and equality of all before the law; (2) that laws must be made in accordance with procedural rules and norms to be valid; (3) that laws must be public and readily accessible; (4) that a law must be generally applicable; (5) that laws must be relatively clear, consistent and relatively stable; and (6) that laws must be enforced. Thin rule of law aims to serve some limited normative purposes including: (1) ensuring stability; (2) securing government in accordance with the law by limiting arbitrariness; (3) enhancing predictability; (4) providing a fair mechanism for the resolution of disputes; and (5) bolstering the legitimacy of the government. Besides, the creation of the appearance of impartiality entailed "crafting a kind of formalism" that "generated occasional just outcomes results in either frustrated ruling class objectives or protected commoners' interests in particular cases" (Benton 2002, 256). Thus, the advantages of the procedural justice of the rule of law are that they provide some degree of predictability, impartiality, protection of rights and freedom, and limits on arbitrariness (Peerenboom 2004). Given the absence of contestation of substantive fairness in the law-making process, the state can still enact illiberal laws that restrict individual rights and media freedom. The law thus has meaning simultaneously as "an instrument of power and as an imagined realm that transcended everyday power and operated outside its ambit" (Ocko and Gilmartin 2009).

This article is structured into five sections. The first section examines the concepts of legal–rational authority, and of regulatory and political legitimacy, and of their adoption in China; it then studies the structures and features of Chinese media regulation; the third sector analyzes the installation of legal rationality (administration according to law) in China’s broadcasting regulation and its relationship to political and regulatory legitimization. This paper concludes by pointing out the limitations of the scope of administration according to law, and argues that legal–rational legitimacy entails both the legality of a law’s enactment (legitimacy of the source of the law) and the rationality of a law’s content (the intrinsic merit of the law itself). It urges that the legality and procedural justice of broadcasting legislation is a necessary, but insufficient condition for media-regulatory legitimacy: given the status of China’s Constitution and weaknesses in democratic participation, as well as in accountability and transparency in national law-making processes, the content of media law must also manifest values that include fairness and political protection of citizen and media rights.

## 2 Legal Rational Authority and Regulatory Legitimacy

Studies show that the more citizens perceive regulatory authorities as legitimate, the more they are likely to obey rules and regulations, support official proposals and decisions, and follow rules of legal institutions voluntarily (Levi and Sacks 2009; Murphy 2005). Governmental processes, including regulatory processes, will be regarded as legitimate (deserving legitimacy) if they can maintain that they have fulfilled one or more five key claims that have led people to regard a particular regime as legitimate (Morgan and Yeung 2007; Baldwin and Cave 1999). These claims are:

1. the legislative mandate claim, according to which the regulatory system is based on clear orders from the main democratic organ of the state;
2. the accountability claim, according to which the system is accountable to democratic institutions;
3. the due process claim, according to which the system is based on fair, accessible and open procedures;
4. the expertise claim, according to which the system involves ‘objective’ expertise;
5. the efficiency claim, according to which the system and/or the produced results are efficient (Baldwin and Cave 1999, 77; Morgan and Yeung 2007, 238).

Baldwin and Cave conclude that, if the ratings of a particularly regulatory regime according to these five claims are improved, the overall legitimacy of the regime increases. Similarly, Majone (2003, 291) points out that the legitimacy of any regulatory agency has two distinct dimensions: procedural and substantive. Procedural legitimacy implies that the agency is created by democratically enacted statutes: the regulators are appointed by elected officials; regulatory decision-making follows formal rules, which often require public participation; and agency decisions must be justified and are open to judicial review. In addition, two of four broad types of

normative legitimacy (“based on assessments that this is the ‘right thing to do’”) and cognitive legitimacy (“based on assumptions that things could not be any other way”) claims, synthesised by the renowned regulatory scholar Julia Black (2008, 18), also point to the need for conformity with the written norms and legal values of procedural justice and other broadly based constitutional values (constitutional claims), and the extent to which the regulator or regulatory regime is congruent with a particular model of democratic governance, i.e., representative, participatory, or deliberative (democratic claims).

All these discussions accord significance to the role of the law (Morgan and Yeung 2007). First, the legislative mandate in the form of written norms and enacted statutes shows that the coercive directions issued by the state in legal form legitimate the exercise of regulatory power. Secondly, the accountability and judicial review requirement implies the existence of a legal framework which specifies the groups or institutions to whom the regulator must account for their decisions. Finally, the due process resonates with the values of procedural fairness and transparency embodied in the ideal of the thin rule of law. Therefore, the degree of legitimacy of a regulatory regime is closely associated with its embeddedness within the procedural justice of rule of law in its regulatory principles and practices.

The aforementioned legitimation of a regulatory regime and its embedded role of law are important issues in the political debate in both democratic societies and authoritarian states such as China. In the EU context, Weimer’s study shows the importance of legal rationality, i.e., procedural safeguards, in conferring the legitimacy of authorization. Legal rationality provides institutional structure, which in turn structures the forms of decision-making, hinders the arbitrary use of discretion, and compensates for the lack of substantive judicial review. Legal rationality would invite the participation of all stakeholders, serving the purpose of bringing scientific rationales and socioeconomic/ethical values into ‘a lasting equilibrium within stable institutional structures of governance’ (Weimer 2010, 657). Sun et al.’s study of public cooperation with police in China (2017) shows that procedural justice plays an important role in predicting Chinese views on police legitimacy and willingness to cooperate with the police. Also, “procedural justice is the only significant predictor for both legitimacy and cooperation” (p. 471). More interestingly, the authors argue that studies in Western democracies show that police legitimacy was mainly shaped by procedural justice, i.e., the fairness of decision-making and power-exercising processes, than other factors such as police effectiveness. In non-Western, nondemocratic countries where cultures and socio-political settings (poorly developed markets, authoritarian political regimes, and religious traditions) are different from Western democracies (market economies, democratic political systems, and Judeo-Christian religions) and also where police power is less constrained, the formation of police legitimacy and the influence of procedural justice may be quite unique; it is thus crucial to understand the formation of legitimacy and role of procedural justice within a non-Western setting, but there is a problematic lack of sufficient attention to such concerns in nondemocratic societies in the police legitimacy literature. Despite this interesting thesis, the authors conclude in their case study that, in a nondemocratic China, while short of the fairness and accountability found in Western policing (an independent, non-party oversight system to effectively prevent and discipline police misconduct; judicial and public oversight,

and restrained power of the police), the influence of procedural justice is surprisingly resilient as it plays an important role in predicting Chinese views on police legitimacy. The authors thus suggest that Tom Tyler's perspective of the centrality of police procedural fairness in influencing citizen's views of the legitimacy of police authority can be extended from Western democracies to authoritarian China (Sun et al. 2017, p. 471; Tyler 1990). This observation, however, raises the important questions of whether and to what extent the legal rationality or the procedural aspect of rule of law are actually being used as an important source of the legitimization of authorities in other regimes in China, and why. We will explore these questions in the case of China's media-regulatory regime in this paper.

### 3 Political Legitimacy, Legal–Rational Legitimation and Rule of Law

Regulatory legitimacy sometimes is seen by political sociology as a form of political legitimacy concerned with “understanding why or when people obey, respect or show allegiance to a particular government or governance regime, or why they revolt, disobey or otherwise act disloyally” (Yeung 2009, 274). In the Chinese context, regulatory legitimation cannot be fully explained in a meaningful way without placing it into a broader context of Chinese politics. In fact, regulatory legitimation is tightly linked to the crisis of political legitimacy of the ruling Chinese communist Party-state. This link is forged partly by the dynamic relation between the political and regulatory legitimacy in theory, and partly by the fact that regulators in China are rarely independent organizations but rather government departments that derive their legitimacy more or less from the Party-state. To answer the question of regulatory legitimation in China, therefore, demands the understanding of the political legitimacy of the Party-state.

Lipset (1981, 64) defines legitimacy as “the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.” The stability of any given state depends on economic development, and on the effectiveness and legitimacy of its political system, i.e., the legitimacy of state power as perceived by citizens and by the state elites (Lipset 1981; Zhao 2001; Keman 2014). The process of seeking to acquire authority or legitimacy is called legitimation (Holmes 1993, 13 and 19). Legitimation can be sought in various forms depending on the source and means of acquiring legitimacy (Kwon 2005). Leslie Holmes (1997: 44–45) observes seven domestic dominant modes of legitimation in various communist and post-communist societies: “old traditional”, charismatic, legal–rational, goal–rational (teleological), eudaemonic, official nationalist and “new traditional” modes.<sup>1</sup> The first three modes of legitimation represent Max Weber's three models on which authority is based (Max Weber cited in Bendix 1962).

<sup>1</sup> In the traditional model, “a leader claims the right to rule on the basis of a long-established or widely accepted tradition.” In the charismatic mode, “legitimacy is based on the charisma of a leader.” The term goal–rational (teleological) legitimation describes the dominant form of legitimation in many socialist states, in which the leaders seek legitimacy in terms of their ability to steer a given country to the distant end goal of communism. The new traditional form is taken by the communist leaders who attempt to enhance their own authority by reference to an earlier phase of the communist era (Holmes 1997, pp. 44–45).

Weber considers that the ultimate mode of legitimation in the modern state is the legal–rational form of legitimation. Such legal rational authority gains legitimacy by acceptance of the legality of enacted rules and the right of officials to issue them (Galligan 2006, 246). Laws are legitimate if they have been rationally enacted, in conformity with the laws prescribing the procedures to be followed (Bendix 1962). Rulers derive their right of command and subordinates derive their corresponding duty of obedience from the laws (Matheson 1987). In other words, the political order is legitimated in terms of rules and laws that are rationally established by a legally constituted authority and binding on all citizens; thus, impersonal norms and a legal order give those in authority the right to rule. Legitimacy problems arise when the dominant mode of legitimation fails to have its desired effect.

In China, the state claimed its legitimacy from a goal-rational model, i.e., the ideological terms of the Four Cardinal Principles before the late 1980s, to economic and moral performance and political stability maintenance after 1992. Since 1997, nationalism was incorporated as a legitimizing force, but it is unlikely to function as a remedy for upholding the Party-state's legitimacy for the long run (Chen 1997). Although China arguably has become one of the more stable authoritarian regimes in the world, in the last two decades the Party-state has experienced a gradual erosion of the state's coercive power and a legitimacy crisis of its social control mechanism as a result of its rapid social and economic transformations (Holbig 2011; Sun et al. 2017, 457). This political legitimacy crisis has not only manifested itself in one sphere of society, but also in China's ideological, economic, and political spheres. Articles published by the Chinese Communist Party's Party website *CPCNEWS* (中国共产党新闻网) and newspaper *Guangming ribao* (光明日报) explicitly acknowledge that legitimacy concerns the foundation of political power, which is the primary issue that all political parties face. China is at the critical stage of transformation, which manifests itself in institutional changes and changes in interest relations (Zhu 2012): "Contradictions and conflicts of interest not only result in disorderly transactions, unfair distribution, spread of corruption, and widening gap between regions and the rich and poor, but also [...] hinder the unification and value identification of members of society and further exacerbate pluralism and cultural conflicts". If individual and social conflicts and problems cannot be effectively solved, they will easily turn into a social crisis of a holistic nature and may even have a serious impact on the legitimacy of the government (Zhu 2012; Liu 2017). Alongside social progress, demands for political values, such as democracy and rule of law, and for fairness and justice, by the Chinese public have become even more prominent. The failure of the Party to respond to and meet the new expectations and demands of the public could weaken the foundation of the ruling party, and generate a crisis of political legitimacy (Zhu 2012). Economically, compared with the rapid growth of the previous 30 years, China's economic growth continued to slow down in recent years, and the state needed to find new growth points and patterns more aligned with people's livelihood (Zhou 2015). This need further undermined the performance legitimacy possessed by the Party-state. The new President Xi Jinping's tightening of ideological control reveals the regime's fear of overthrow or disintegration (Zhao 2016, 1188).

In fact, a legitimization crisis may lead to a system collapse if the leaders fail to overcome legitimacy problems. A shift in the dominant legitimization modes can prevent system collapse and can divert the attention of the masses from problems with the existing legitimization mode and renew people's faith in the system (Holmes 1997). The Party considers winning popular support (*minxi*, 民心) as the basis for its legitimacy and proclaims that popular support is reflected in people's attitudes toward the Party's various policies and the Party's ruling philosophy, style of conduct and value orientation (Liu 2017; Yang 2017). To meet such perceived popular sentiments, the Party's official line re-conceptualizes the sources of its political legitimacy as consisting of four clusters: historical legitimacy based on the Party's revolutionary liberation of China; structural legitimacy based on its advanced political parties and institutional arrangements; performance legitimacy based on a mode that surpasses the Western mode of modernization; and goal-rational legitimacy based on the goal of the great rejuvenation of the Chinese nation and the building of a human community of shared destiny (Liu 2017; Yang 2017). The Party sees "the enhancing of its governing competence is an inevitable requirement for the construction of the legitimacy of the Party" (Zhu 2012).

Intellectually, although the mainstream academic literature tends to attribute the regime legitimacy in China to two main factors—economic growth and nationalism (Chen 1997; Roskin 2009; Pan 2008)—other studies reveal the importance of additional clusters of legitimacy sources such as governance or institutionalization (Holbig 2011:18; Inglehart and Welzel 2005; Zeng 2014). In particular, institutionalization of the regime has been taken increasingly seriously by the Party and scholars as a strategy and key source of legitimacy (Gilley and Holbig 2009; Yang 2004; Nathan 2003). This institutionalization incorporates four factors: bureaucratic efficiency, the empowerment of people's congresses, the rule of law, and inner party democracy (Gilley and Holbig 2009; Holbig 2011). A study of 125 Chinese articles concerning political legitimacy in China, published between 2008 and 2012, identifies a fundamental shift in the discourse of Chinese intellectuals, including party intellectuals, on political legitimacy: goal-rational and eudaemonic legitimacy have been replaced by strategies of improving bureaucracy, propaganda, the rule of law, and the promotion of equality in maintaining legitimacy (Zeng 2014, 634). Recent developments in the Party's legitimization efforts actually suggest that the Chinese Party-state moved to expand its legitimacy to include a mixed source of historical tradition, economic performance, goal orientation/ideological adaptation, institutionalization, and legal rationality. The rule of law, a solid ground for legal-rational legitimacy, is used as a core rationale in the Party's legitimization efforts, as we shall see below.

However, explicit liberal strategies of legitimization are rare in Chinese politics. Concepts such as human rights, civil society, the separation of party and government functions, and multiparty democracy remain marginal to the overall political plan (Holbig 2011). The legal-rational legitimization is sought because "bureaucratic-authoritarian" modes, such as those in Singapore and Latin America, demonstrate that more efficient, professional, transparent, and consultative institutions can satisfy demands for participation and effective governance for a

considerate time (Holbig 2011, 32). Therefore, instead of embracing the thick concept of the rule of law, underpinned by substantial liberal democratic values, in China the relevant term is rule by law (*yifazhiguo*, governing the country by law). Rule by law in China was taken generally to mean that gradually the law would govern all governmental affairs, and the country's political, economic, and social life under the Communist Party's leadership (Xiao 2007).

“To govern the country according to law and establish a socialist legal system country (*shehuizhuyi fazhi guojia*)” was enshrined into the amendment of the Chinese Constitution as early as in 1999. The state council also identified the lack of rule by law in the country as an obstacle to economic development and harm to people's interests as well as to the government's image (State Council 2004). It was not until a decade later in 2012 that the former Party Secretary Hu Jintao started to set out measures to promote the law-based governance and improve the mechanism for check and oversight over the exercise of power (Wang 2014). Under Xi Jinping's presidency, the principles of governing the country according to law—in particular the Party's leadership in legislation, law enforcement, judiciary support, and the authority and equal binding power of both constitution and the law—are repeatedly stressed and placed at the top of the policy agenda (The Decision 2004). In addition to broadening people's rights and freedoms, and enhancing their participation in managing state affairs, it is proclaimed that the rule by law also aims to make the Party's decisions become the national will through statutory procedures, and to ensure the candidates recommended by the Party become leaders in state political bodies through statutory procedures (The Decision 2004).

In the arena of governance, in 2012, the former Party Secretary Hu Jintao announced a plan to

1. promote law-based governance, by which the government must administrate in accordance with the law, and law enforcement must conduct itself in a strict, fair, and civilized way, according to due procedures;
2. improve the mechanism for conducting checks and oversight over the exercise of power, according to which decision-making, executive and oversight powers should check each other, and government bodies must exercise their power in accordance with statutory mandates and procedures (Wang 2014).

Principles such as openness, accountability, public participation, and transparency are subsequently introduced in the national government's 2016 policy guideline as features of rule by law (“Open Government Opinions”) (Xinhuanet 2016a, b; Horsley 2016). Instrumental measures introduced include: (1) disclosure of government-held records; (2) reasons given by government officials for their actions to curb abuse of discretion and enhance government accountability; (3) public participation in rule making and policymaking through means of hearings, workshops, surveys, consultations, and media communication. Expert debate, risk assessment, reviews of legality, and collective discussion and decision-making are designated as statutory procedures for major administrative



policy decisions involving vital public interests to ensure open processes and clear responsibilities; furthermore, an explanation of the collected opinions and how they were considered should be published; (4) making public the scope of enforcement authority, the procedures and the results of enforcement actions, and their remedies to improve the transparency, fairness, and justice of administrative law enforcement (Xinhuanet 2016a, b; Horsley 2016).

The above examination shows that legal rationality, or the procedural rule of law, has been used as an important source of both police regulatory and political legitimacy in China. This interesting intersection can be explained partly by the normative and cognitive power of legal rationality per se. But in the Chinese context, it can also be explained by the factor of political influence on regulator legitimization. As argued before, given the lack of independence of regulators in China, the regulatory regime's legitimacy is tightly linked to the political legitimization of the Party-state. In the following sections, I will test this argument by examining China's media regulation's legitimation and analyzing to what extent and in what way it has been affected by the adoption of legal-rational political legitimacy and rule by law of the Party-state.

The legitimation of media regulation is chosen as the case of examination for two reasons. First, the regulatory legitimization of the media is an under-researched area in the literature of Chinese politics, public administration, and media studies. Secondly, China's media sector is heavily politicized, controlled, and censored by the Party as an ideological apparatus; the development of its regulatory model could serve as a significant determination of the direction of Chinese politics and governance.

#### 4 An Overview of Broadcasting Regulation in China

As an administrative department under the state council, the media regulator—the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT)—and its predecessors follow the policies and strategies of the Party, State Council and Ministry of Propaganda. SAPPRFT's function to publicize Party and government policy and guide public opinion has not changed given its political status, but its instrumental measures of regulation have evolved over time.

The SAPPRFT mainly regulates the country's media through a command and control mechanism which involves state promulgation of legal rules prohibiting specific conduct, or demand of some positive action, or laying down of conditions for entry into a sector, underpinned by coercive sanctions civil and criminal in nature (Morgan and Yeung 2007; Baldwin and Cave 1999). In the Chinese context, media regulation also involves administrative authority in the issue of normative documents backed by administrative sanctions.

However, no single standalone broadcasting law (*fa*lv, 法律) has been promulgated by the NPC or its Standing Committee before 2016. The SAPPRFT and its predecessors regulate the country's broadcasting in two ways: administrative legislation and normative documents. Administrative legislation includes two major

categories: administrative regulations (*xingzheng fagui*, 行政法规) promulgated by the State Council, whose legislative status is only second to law, and department rules (*xingzheng guizhang*, 行政规章) enacted by the State Council's broadcasting department, i.e., SAPPRT or SARFT (Yang 2002). Both administrative statutes and department rules have legal status. Compared to administrative regulations, the process of the promulgation of department rules is rather less complicated, as it is mainly drafted by SAPPRT's (and previously, SARFT's) Department of Law and Regulation. The new department rules must also be submitted to the State Council's legislative department to be recorded.

Since SAPPRT or its local bureaus operated most television stations in China, in addition to administrative law, those under their direct administration were usually governed via normative documents (*guifanxing wenjian*, 规范性文件), including decisions, orders and directives, issued either by the State Council or SAPPRT. Normative documents are administrative orders issued by administrative departments in accordance with the law, administrative regulations, or department rules to control citizens, legal persons, and other organizations' behavior (Zhang 2006). These normative documents do not need to be recorded by the State Council, but are only applicable to stations subjected to SARFT's administration. They may not have legal status, and it is up to the courts to decide on their standing.<sup>2</sup> The document-making process is closed to the outside. Negotiations are between SAPPRT, its local bureau and television stations through varied channels, such as the annual national working conference, internal reports, and surveys. The use of normative documents was intense between 2000 to the middle of 2014, when at least 438 normative documents were issued.<sup>3</sup> Although they were issued randomly and without firm standards, these documents significantly shaped today's Chinese media landscape. For instance, many normative documents were issued by SARFT to regulate online audiovisual enterprises and these decisions were angrily received by critics, although the media industry would conform to them eventually. This type of regulatory pattern has given the regulator great power to exert direct administrative interference in the operations of broadcasting media, resulting in market and industry instability, as well as the "ad-hoc, informal, reactive, self-contradictory, incoherent, shortsighted" nature of China's media regulation (Hu and Du 2002, 175–176; Keane 2001).

According to Zhu (2004), the former director of the Law and Regulation Office at the SARFT, the wide use of administrative interventions and slow development of rule by law is due to the political features and ownership structures of the Chinese broadcasting sector.

As part of the Party-state's propaganda machine, Chinese media's highest priority is to guarantee correct public opinion guidance (Zhu 2004): "propaganda work targets at constantly changed domestic and international situations and public opinions, [it] needs to follow the Party's unified deployment, and rapidly, timely, flexibly, and appropriately manage the propaganda work. [It has to] be policy-oriented, random

<sup>2</sup> Senior official at the SARFT's Department of Law and Regulation, 18 September 2003, personal interview.

<sup>3</sup> This figure was gathered from the SAPPRT.

and flexible” and the regulator thus needs to use a large amount of easy-to-modify, flexible, and timely normative documents.

Meanwhile, media organizations are institutional units of the government, and they are under the government’s administrative management and remain relatively closed. They rely on the government’s departmental protection and have little motivation and need to initiate the rule by law reform. Also, the media and economic reforms have intensified the commercialization of media organizations, which may not comply to the regulator’s decisions for commercial interests; media commercialization is accompanied by the decentralization of SAPPRT’s regulatory structure, and thus the regulator has faced a struggle to find a balance between maintaining effective governance and inviting rule by law into its governance, which could lead to a restriction of its power (Chin 2011).

## 5 Governing According to Law in Broadcasting Regulation

The slow installation of legal rationality and rule by law in Chinese media’s regulatory regime is closely associated with concern over both the Party-state’s governing competence and the regulator’s legitimacy. Tian Congming, the former deputy head of SARFT, once proclaimed that administration according to law was a necessary measure to strengthen the Party’s leadership and governance so that the Party could adapt to a new environment (Tian 2006). The Party’s third Plenary Session of the 18th Central Committee in 2013 announced the new policy target of promoting the rule of law in China. In 2014, the Party held its first ever plenum on rule of law to promote the norms and practices of rule of law in China (Peerenboom 2014, 2015). Yan Xiaohong, the deputy head of the regulator, SAPPRT, acknowledged in a newspaper interview that the government’s continuous emphasis on rule of law with regard to the Internet and cultural market administration “has provided new impetus for us to strengthen legal legislation, law popularization and enforcement. Press and publication departments bear the important function of ideological management. Under the new situation, strengthening and improving the ideological management requires us to see and handle problems according to rule of law” (Wei 2014). On a different occasion, another deputy head, Gang Tong (2014), reminded his colleagues that “accompanying the deepening of broadcasting reform, many institutional problems would finally translate into institutional conflict and legal clashes, [and] legal institutions would become the most important, and probably the last line of defense for risk prevention”. Therefore, the regulator has appealed to the legal–rational authority and rule of law to both boost the Party-state’s leadership and governance, and legitimize its regulation based on the power of legal rationality *per se*.

As early as in 2010 (SARFT 2010a; State Council 2010), SARFT, the regulator already pledged to improve the democratic and scientific nature of its decision-making, the fairness of its law implementation, and the strength of its civil and administrative oversight and accountability system so that social conflict can be effectively prevented and resolved. Its “Work Plan of Strengthening Rule of Law Government” (“the Work Plan 2010”) also pledged to accelerate broadcasting legislation,

promote open government, review existing regulations and normative documents, and strengthen the power of administrative reconsideration and administrative litigation.

In practice, the regulator's administration according to law has focused primarily on four areas: making new legislation, public consultations, implementation of the "Administrative License Law", and regulatory enforcement. Relying on department rules and normative documents in its past administration was considered as problematic, and the regulator intended to accelerate national legislation (*falv*, 法律) to improve the legality of its regulatory power (SARFT 2015). SARFT began to draft two new national laws (*falv*, 法律): the "Law on Protection of the Broadcasting and Film Program Transmission" and the "Film Promotion Law". After many drafts and public consultation,<sup>4</sup> the "Film Promotion Law" was enacted by the Standing Committee of China's National People's Congress on November 7, 2016, and took effect on March 1, 2017.

Meanwhile, regulatory documents that contradicted or conflicted with law of higher legal status were required to be revised or revoked. SARFT/SAPPRFT has therefore continuously reviewed and simplified its department rules and normative documents (SARFT 2010a). By 2005, seven administrative regulations, 42 department rules, and a large number of normative documents were in effect, and SARFT revoked 172 normative documents and 18 department rules (Zhao 2006; SARFT 2005). By 2010, effective legislations included nine administrative regulations, 39 department rules, and 301 normative documents, while SARFT further revoked 154 normative documents and 3 department rules (SARFT 2007, 2010b, c).

In terms of the process of rule making, between 2010 and 2016, SARFT and SAPPRFT released a total of 18 department rules for public consultations and promulgated four department rules. In the earlier period, the department rule making was not open to public participation. For instance, in 2007, SARFT and the Ministry of Information Industry jointly promulgated a department rule: "the Administrative Provisions on Internet Audio-Visual Program Service" (SARFT and MII 2007). The legislative process was brought in under the instruction and closed leadership of the Party. The SARFT started to draft the proposal for the department rule in 2005, following the senior Party leaders' instruction and the release of the Party's 2004 document "Opinion Regarding Further Strengthening Internet Administration Work" (CCP 2004). In 2006, the SARFT submitted the proposal to the Ministry of Central Propaganda for approval, and the Ministry supervised the proposal's amendment and decided to upgrade the proposal from a normative document to a department rule, which was jointly promulgated by the SARFT and the Ministry of Information Industry (Zhao 2006).

The public consultation system of SARFT/SAPPRFT's administration regulation and department rule was set up at the national level in 2011. The consultation is operated through State Council Legislative Office's *Chinese Government Legislative Information Network—Public Consultation System*.<sup>5</sup> For normative documents

<sup>4</sup> The Film Promotion Law was open for public consultation in 2011.

<sup>5</sup> <http://zqyj.chinalaw.gov.cn/index>.

directly affecting personal and organizational rights and duties, the “work plan 2010” demands that they have to go through stages of public consultation, judicial legality checks, and collective approval by SAPPFT’s leaders. Without passing those procedures, normative documents cannot be promulgated. Since 2011, 18 SARPPFT’s department rules (draft) and four administrative regulations (draft) were published for public consultation on the system. The consultation period usually lasts for 1 month, during which the public can submit comments online and respond to the content of the proposal point by point. For instance, the proposal of department rule *Administrative Provisions on Online Publishing Service* was first published for public consultation in 2012.<sup>6</sup> The SARPPFT received tens of thousands of words in comment. The sources of comments comprised a wide range of actors including government departments, Internet companies, overseas organizations, lawyers, and individual citizens. The regulator said that it “carefully organized and studied [those comments], strictly followed [...] the principle of promoting standardized management and orderly development, [...] and absorbed many of them” (Xinhuanet 2016b). On the other hand, it did not provide any details about its reasoning and deliberation processes.

To discipline broadcasters and regulate markets, administrative licensing is another important measure for media regulators. In China, the “Administrative License Law” does not allow the establishment of administrative licenses in department rules or normative documents. The Law was adopted in 2003 and implemented in 2004; it was intended to narrow the scope of activities for which a license or approval was required, and in cases where a license was required, the law was in favor of self-regulation, and the imposition of fees for licenses or application documents was prohibited unless regulation expressly provided otherwise. The law aimed to curb the monetary incentives to impose licenses and the tendency toward corruption, and to reduce the unreasonable procedural delays and non-meritorious rejections of applications (Lester 2004). To implement the law, the SARFT enacted temporary provisions on supervision of administrative license implementation in 2004, together with provisions on radio, TV and film legislative procedures and measures on radio, film, and television administrative reconsideration (SARFT 2001). These three department rules standardized the SARFT’s licensing activities and expressly regulated the establishment of administrative licenses, together with enforcement and grievance procedures (Zhao 2004). By 2014, SARFT and SARPPFT had revoked, demoted, or amended 14 administrative licenses (Wei 2014).

In addition, SAPPFT is responsible for overseeing the effective enforcement of regulations. According to Yan Xiaohong, the regulator has attempted to gradually change its regulatory mechanisms from prior approval to ex-post regulation (Wei 2014): “While there are fewer administrative licenses and prior approvals, there are heavier ex-post supervision responsibilities”. Besides, the number of administrative reconsideration cases the regulator received has increased annually, which “reflects the fact that there are still problems at the grassroots level in law enforcement and administration”, even though the regulator considered the strengthening of

<sup>6</sup> Other departments at the State Council and local broadcasting departments were also consulted.

enforcement supervision as a main line of its work, especially at the grassroots level (Wei 2014). Law enforcement agencies and administrative departments are required to strictly implement the responsibility system for administrative law enforcement and protect procedural justice. They must establish administrative discretion reference systems, refine, and quantify administrative discretion, refine law enforcement procedures to guarantee procedural fairness, and safeguard the legitimate rights and interests of administrative counterparts. Administrative approval, administrative supervision, and the enforcement of supervisory authorities are expected gradually to be separated. Enforcement supervisory power is said to belong to legal institutions. Administrative supervisory power is said to be distributed among the NPC and its committees, the Chinese People's Political Consultative Conference, the People's Courts, public opinion supervision, intra-departmental supervision, and the National Audit Office and Ministry of Supervision (Wei 2014).

## 6 The Limits of “Administration According to Law” and Legal Rationality

Turning to the implications of the shift in the basis of political legitimacy for broadcasting regulation, the above analysis demonstrates that “administration according to law”, i.e., procedural rule of law, at the SARFT and SAPPFT is motivated by two forces. It is partly motivated by the Party-state's emphasis on rule of law in managing the Internet and cultural market, which in turn aims to strengthen its governing competence, perceived as indispensable to the construction of the legitimacy of the Party. It is also motivated by the normative and cognitive power of the legal rationality in legitimating the media regulator's regulatory authority. Procedural justice is a significant predictor for the public's view of regulatory legitimacy. While legal rationality can also provide institutional structure to determine the forms of decision-making, hinder the arbitrary use of discretion, provide participation of all stakeholders, and compensate for the lack of substantive judicial review.

The regulator's legal-rational legitimation efforts were primarily congruent with certain elements of the procedural aspects of rule of law: legislative mandate, fairness, public participation, openness, and enforcement. These elements are expressed through measures restricting arbitrary administrative power by enacting new laws and higher-ranked laws to replace the arbitrarily issued normative documents, allowing public participation in ruling making and rationalizing government's administrative discretion and enforcement power.

In a democratic society, governmental legitimacy is conferred through democratic and legal procedures, i.e., elections. As a result, government policy is legitimate and it is expected to be enforced by government agencies through the medium of law and to be obeyed by citizens. By contrast, the governance of the Chinese Communist Party and government lacks democratic legitimacy and tends to secure the legitimacy of its policies and rule making through legal-rational legitimation: in other words, it chooses to rest its legitimacy claims on the legality of rules, i.e., commands that are legitimate because they are prescribed by law, and increasingly on procedural forms of justice (thin theory of the rule of law). The Party and

government incorporate impersonal norms and a legal order which are increasingly enacted in accordance with legally defined procedures in the hope of giving those in authority the right to rule while downplaying substantive aspects of the rule of law, such as certain rights and freedoms guaranteed by the constitution.

Despite the improved legislative mandate and public participation in regulation rule making, both of which ought to enhance the regulator's credibility and legitimacy, the roles of experts and the public are still marginal and the rule-making procedure still lacks transparency and accountability, as the regulator has not been willing to lose control over the process. Anderson (1998, 575) argues that authentic participation includes two things: (1) the creation of a relatively safe, structured space for relevant stakeholders' voices to be heard, and (2) addressing the ultimate ends of participation, so as to constitute a democratic citizenry and redistribute justice. In the case of China's broadcasting rule by law-regulatory reform, according to the Chinese President Xi Jinping (Xi 2012, 2014), the ultimate ends are to guarantee the broad rights and freedom of the people according to law, and thus legitimate the Party's policy and leadership. The SARFT claims the aim is to improve democratic and scientific decision-making and accountability, and to prevent social conflicts. The question of whether the current participation model has achieved such ends has not been considered and discussed. More importantly, a debate on whether those ends are justified, and what kinds of ends participation should aim to serve, is lacking. The consultation process of *Administrative Provisions on Online Publishing Service* proposal cannot be regarded as an instance of authentic participation in rule making. The consultation neglected the reason-giving component: the proposal did not provide any detailed explanation of the content of the department rule; the public did not receive responses from the regulator regarding their input; the consultation conclusion and the details of the deliberation were not made public. Thus, public participant could not know whether their voices were heard, nor could they know the reasons for rejection or acceptance of their views. On the other hand, experts and elites were invited to the closed-door consultation meetings and had the privilege of knowing the process and feedback (Wang 2017); such different practices of participation could result in the reinforcement of the elite privilege. Furthermore, although the public consultation was conducted, the regulatory decision-making was not transparent and accountable to the public, especially to underprivileged participants such as NGOs and non-elite citizens. Thus, on the one hand, the public consultation and participation could provide a social space in which citizens can learn and exercise the skills of dialog and debate necessary for the development of democratic citizenry (Anderson 1998); on the other hand, the lack of transparency, accountability, and real deliberation could also reduce participation to a legitimating ritual, such that the procedure's legitimacy function is more important than its actual efficacy (Meyer and Rowan 1977).

Additionally, though the "work plan 2010" demands that important normative document must be accompanied by public consultation and judicial legality check, this policy has not been fully implemented. Legality cannot resolve the deep-rooted problems of lack of democratic decision-making of this administrative order, but rather is bound to lead to questioning of its effectiveness and legitimacy. Zhang

argues that “such administrative measures do not comply with the development trend of administrative law, and they also inhibit the formation of pluralistic forces in television program regulation” (Zhang 2012: 99). Only the combination of pluralist forces (co-regulation)—government management, social supervision, and self-discipline—can achieve the effective regulation of television programs (ibid).

More importantly, it is unsustainable to assume the effectiveness and legitimacy of media regulation could solely rest on procedural fairness (transparency, participation, and reason giving) as a result of the fact that the top media policymakers at the Party, State Council, and SAPPFT lack democratic electoral mandate. Precisely because of such absence, in China procedural legality is an essential condition and one step further to legitimating the media policy and regulation, but it is not a sufficient condition, without the accompanying elements of substantive fairness and rationality (such as balancing the divergent interests of multiple stakeholders and other social goals). The substantive fairness of social policy and regulation involves setting social objectives and responsibilities, and thus it is de facto political decision-making related to values embedded in the “thick” rule of law.

Nevertheless, to focus on the procedural aspects of a “thin” rule of law avoids the dilemma of applying the “thick” concept of the rule of law, which requires a moral and political philosophy that is always subject to dispute. The thick concept of the rule of law is part of a broader social and political philosophy, and this decreases the likelihood that a consensus on its meaning will emerge (Peerenboom 2001, 12). The advantages of a thin concept of the rule of law, compared to none at all, are that some degree of predictability and limitation on arbitrariness and protection of individual rights and freedoms are likely (ibid). Also, historically, China has favored substantive justice over procedural justice, and favored particular justice at the expense of generality and rationality (Peerenboom 2001, 10); therefore, the promotion of the more procedural aspects of a thin rule of law includes values that entail imposing meaningful limits on state actors: that the law be stable, the law be the supreme legal authority, the law be transparent, the lawmaker be accountable to the public, and the law be fairly applied. This list presents an important step forward for China’s media regulation.

Meanwhile, existing legal supervision of legislation and its implementation, such as administrative litigation and administrative reconsideration, are still ineffective as remedies to restrict the government department’s abuse of power. For instance, in 2008, two Chinese lawyers filed an administrative action against the SARFT in the Beijing First Intermediate People’s Court on the basis that the administrator had failed in their duty by issuing a film screen license to the movie “Lust, Caution”, and the content had caused huge emotional damage to them. They sought a court order to revoke the license as well as for compensation. The court refused to accept the case, citing that the reason for “the complaint [emotional damage] does not belong to the scope of administrative proceedings”. A legal researcher affirmed the legality of the court’s decision based on the existing provisions of China’s *Administrative Litigation Law*, while also arguing that many cases involving the public interest were deemed beyond the narrow scope of the courts’ jurisdiction and thus dismissed. Consequently, citizens who challenged administrative decisions had suffered many defeats (Shi 2008). For instance, Article 12 of the *Administrative Litigation Law*



stipulates that “the people’s courts shall not hear actions initiated by citizens, legal persons or other organizations concerning any of the following matters: [...] (2). Administrative rules and regulations, or decisions and orders with general binding force formulated and promulgated by administrative organs”. To seek remedy for rights infringed upon by administrative rules and regulations, parties have to appeal to the *Administrative Reconsideration Law* that is enforced by the relevant higher-ranked administrative department. In SAPPRT’s case, an appeal against its administrative acts will first be reconsidered by the said department itself. Only after refusing to accept a decision made through the administrative reconsideration process may the applicant bring an administrative lawsuit before a People’s Court, or apply to the State Council for arbitration (Article 14 of Law of the People’s Republic of China on Administrative Reconsideration 2011). Given that the SAPPRT exercises its administrative power mostly through department rules or normative documents, remedy can only be sought through administrative reconsideration. In other words, it is a de facto self-disciplinary system, and it is neither effective nor justifiable. As the Chinese legal scholar Wang Xixin (Yang 2008, 73) suggests, restrictions of administrative power cannot be expected to rely on self-discipline given the unbalanced power between regulator and regulated. The establishment of an institutional mechanism to restrict the administrator’s power and protect individual and public rights is a must. Thus, institutional reform to improve accountability and oversight is a necessary condition for successful administration according to law. Without effective external checks, departmental interests could drive the administrative department to use its lawmaking power to satisfy its own ends, thus risking that the law become a tool for controlling people, thus invalidating the spirit of the rule of law. For instance, without going through any legal procedures, in 2008 the SARFT issued a document to ban all Chinese television, film, and advertisements featuring the Chinese actress Tang Wei, following her appearance in the 2007 erotic espionage thriller “Lust, Caution” to reduce Tang’s ‘bad influence’ over the young generation (Yang 2008, 73). One way to improve China’s administrative supervision system would be to enhance the judicial review power, i.e., to relax the scope of the types of cases accepted under the *Administrative Litigation Law*. However, civil rights empowerment of the public’s rights of expression, information, participation, and supervision—is, if not more, at least as important in constituting effective and rational constraint on the administrative power.

It is expected that the Party will continue to control the ideological sphere, and that it will also continue to oversee and coordinate reforms and determine the overall direction for China. It will propose constitutional amendments and review major legislation by the NPC, and ensure that the Party’s major policy decisions are enacted as laws and regulations (Peerenboom 2001, 10). In the absence of democracy, marginal public participation, and lack of accountability in the law-making process, the ruling power can still enact illiberal laws that restrict individual rights. Thus, it is a necessity for governing according to law to require the “rationality” of the law that may, as some Chinese commenters suggest, entail values such as justice, peace, order, and freedom (Dong 1998, 57). In fact, Weber’s category of legal–rational legitimacy, as it has been pointed out, comprises two analytically distinguishable bases: the legality of a law’s enactment (legitimacy of the source of the law) and the

rationality of a law's content (the intrinsic merit of the law itself) (Matheson 1987, 211). To obtain a legitimate and effective legal–rational authority of broadcasting regulation in China, it is argued that the legality and justice of media law-making procedure is a necessary, but insufficient condition, given the status of the country's constitution and weaknesses in democratic participation and transparency in national law-making processes; rather, the content of media law must also manifest values including fairness and protection of citizen and the media rights.

## 7 Conclusion

This paper intended to answer two questions: first, what are the sources of China's regulatory and politic legitimacy?; secondly, has the change of the Party-state's political legitimacy, i.e., the adoption of legal rationality or procedural justice of rule of law, affected the legitimacy of China's broadcasting regulation, and, if so, in what way and why?

This paper reveals that, although a non-liberal democratic China has weak political participation in policy and rule decision-making, and is short of the features of fairness and accountability found in Western democracy (such as an independent, non-party oversight system to effectively prevent and discipline administrative misconduct, and independent judicial and public oversight), the influence of legal rationality or procedural justice of rule of law is surprisingly resilient as it not only plays an important role in predicting Chinese views on police legitimacy, but also has been used as an important source of the legitimation of the Party-state's political authority and Chinese media regulator's regulatory authority. This interesting intersection can be explained partly by the normative and cognitive power of legal rationality in legitimation. In the Chinese context, the adoption of legal rationality as source of regulatory legitimacy can also be explained by the factors of the immense political influence on regulatory legitimation and lack of political and administrative independence of China's media regulator. The slow installation of legal rationality and rule by law in Chinese media's regulatory regime is partly motivated by the desire to boost the Party-state's leadership and governance, and partly by legal rationality's normative and cognitive legitimation power per se.

The Party-state has appealed to the legal rationality and its embedded rule by law to rationalize its governance and legitimize its political order. The legitimacy of the Chinese state was originally based on a concrete promise (performance or ideological legitimacy), such that if anything went wrong, the government had to take all of the blame for the faults arising from its policy. As a result, the whole Chinese communist regime and political system could subsequently lose its legitimacy. In a democratic country, by contrast, the media attack the government but not the system. The government's legitimacy is based on the consent of the people. The government can be changed through a democratic procedure, but the legitimacy of the political system will not be questioned or challenged. In China, because of the lack of this procedural legitimacy, the political regime's legitimacy could be seriously undermined or challenged if the media criticize the government or attack its wrongdoing

(Zhao 2001, 324–327). Thus, as communist ideology, economic performance, and official virtue decline, a shift from a regime in which legitimacy is derived from economic performance to one including procedural legality and justice may ease pressure on the Party, government and the media.

This paper's analysis shows that the administration according to law in the broadcasting sector instances both a responsive adjustment to the Party-state's legitimacy crisis and a measure to obtain the broadcasting regulator's legal-rational legitimacy. The administration according to law has focused primarily on four procedural aspects of the thin version of the rule of law (i.e., rule by law): making new legislation, implementing the "Administrative License Law" to restrict the regulator's licensing power, instituting public consultation in law making, and improving regulatory enforcement. By doing so, the regulator, SAPPRFT, wanted to change the past regulatory mode—which relied heavily on a few department rules and a large number of ambiguous and arbitrarily issued normative documents—to a more formalist and binding regulatory rule-making mode featuring stability, predictability, a higher level of legal authority, restricted administrative power, and limited public participation in the rule-making process.

Despite the limited installation of procedural legality in broadcasting regulation, and improved public participation in law-making by including public consultations, the lack of transparency and accountability of the public consultations could also reduce participation to a legitimating ritual by which the legitimacy function of the procedure is more important than its actual efficacy.

Moreover, relying solely on procedural legality, i.e., the legality of a law's enactment, could provide predictability, restrict arbitrariness in regulation, generate occasional just outcomes, and improve the authority of the Chinese regulatory regime, but it cannot resolve the deep-rooted problems of rights-oriented values in regulatory decision-making given the lack of democratic mandate of policy regulation makers at the top of the political hierarchy. Thus, it is a necessity for those governing according to law to require the rationality of the law that may, as some Chinese commentators suggest, entail values such as justice, peace, order, and freedom. In fact, Weber's category of legal-rational legitimacy comprises two analytically distinguishable bases: the legality of a law's enactment (legitimacy of the source of the law) and the rationality of a law's content (the intrinsic merit of the law itself) (Matheson 1987, 211). To obtain a legitimate and effective legal-rational authority of broadcasting regulation in China, this paper argues that the legality and justice of media law-making and implementation procedure is a necessary, but insufficient condition given the status of the country's constitution, its weaknesses in political participation, and its lack of transparency and accountability in national law-making processes; rather, the content of the media law must also manifest values including fairness and political protection of citizen and the media rights. This paper's observation, however, raises important question of whether and to what extent the legal rationality or the procedural aspects of the rule of law are actually being used as an important source of legitimacy of state authority in other regimes in China and why, and these questions deserve further study.

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