
Moran Zhang
Who Will Defend Chinese Dining Tables -
A Review of Chinese Food Safety Law After the Sanlu Milk Scandal

MORAN ZHANG*

I. Introduction

The saying “we are what we eat” may reveal the greatest challenge faced by public security in China today. The past few years have witnessed a notable summit of public health incidents caused by unsafe food in China: the melamine tainted milk powder; dried mushrooms preserved by copper sulfate; hot pots seasoned by formaldehyde;¹ and restaurant dishes prepared with recycled cooking oil that is 100 times more poisonous in toxicity than arsenic.² The oils recycled from the kitchen leftovers and restaurant garbage, according to Professor He Dongping of Food Science and Industrial

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* Moran Zhang is an LL.M. graduate of New York University School of Law, Class of 2011. This article is composed under the guidance of Professor Jerome A. Cohen and Professor Benjamin Van Rooij for purpose of Chinese legal and societal study. The author particularly would like to thank Relic Sun for her constructive help editing the contents and footnotes of this article.


² Zhongguo ren yi nian chi dao 300 wan dun di gou you, che di jin jue xu yao 10 nian (中国人一年吃掉 300 万吨地沟油 彻底禁绝需 10 年)[The Chinese Consume 300 Million Tons of Recycled Cooking Oil, Elimination May Take 10 Years.]. XINHUA NEWS (Mar. 18, 2010), http://news.xinhuanet.com/politics/2010-03/18/content_13191842.htm (last visited Dec. 15, 2011) [hereinafter Xinhua News].
Institution of Wuhan Polytechnic University, are used in one of every ten meals consumed in China.³

The disturbing situation in China also raised international concerns among countries that rely heavily on food imports from China. China is, for example, the second largest source of food import of the United States.⁴ In 2007 the Food and Drug Administration (FDA) and U.S. Department of Agriculture (USDA) reported that melamine-contaminated vegetable proteins imported from China caused thousands of pet fatalities⁵ and were used to feed chickens consumed by 2.5 to 3 million people in the United States.⁶ The impact of food safety is far beyond China’s borders.

The declining situation in China calls for every need to defend a safe dining table. What is the reason of massive food deterioration? How did Chinese government deal with the problem stimulated by the milk scandal in 2008? How well, if at all, does the new food regulation work to improve the situation? What else remains to be considered to curb the food safety pitfalls? To answer these questions, this essay looks into recent legal developments in China, mostly inspired by the milk powder scandals, which endorse both administrative legislation reforms and innovations in private action regimes. This essay argues that the bottom-up approach led by individual, grass-root victims in

⁴ Christy O’Berry, Good Importer Practices: Can the FDA Afford to Rely on the Importer for Food Safety?, 18 ANNALS HEALTH L. 133, 135 (Spring 2009).
⁵ Id. at 134.
private litigation should play a more important role in countering food safety deficits in China.

II. Cause of Food Safety Crisis

The starting point of countering food-borne illnesses is to understand the economic, legal and political incentives that prompted adulteration activities. There are a number of scholarly theories exploring this topic. First, from the prospective of law and economics analysis, the market itself does NOT produce sufficient motivations for food producers to voluntarily secure a higher standard of food safety. These scholars refer to the foods traded in market as the “credence goods”.  

Although consumers are generally willing to pay a higher price for safer foods, they are simply unable to tell whether the food is indeed safe or not. That is because while consumers can taste the food’s quality, flavor or even freshness, the vast majority of consumers cannot discern the compositions of additives and melamine or other chemical residuals in the food. In the case of recycled cooking oil, for instance, there is no efficient, practical method to detect poisonous ingredients without thorough laboratorial tests. Since the presence of contamination is basically invisible to consumers, they can only assume the creditability of producers. Therefore, in spite of the consumers’ demand for clean food, for which they

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8 Xinhua News, supra note 2.
are willing to pay a higher price, there is nonetheless information asymmetry between the seller and buyer.9

When food producers make the decision whether to adopt higher safety standard or not, they weigh their private benefits and costs.10 Because of the information asymmetry, the benefits of reducing the food contamination are hardly noticeable for producers except in the event of a food-borne illness outbreak. However, the possibility of an outbreak is usually deemed slim by manufacturers, while the costs to ensure food safety are comparatively high.11 As a result, the food producers tend to pursue higher profit at the sacrifice of food safety, and the market itself has proven systematically incapable of responding to the demand of adequate consumer protection for goods of credence characteristics. Instead, governmental and judicial interventions that impose a higher cost on potential offenders through strict liability may achieve better protection for consumers.12

The other reason that contributes to the food safety crisis is local government’s zealous pursuit of economic development which led to the insufficient regulatory framework.13 Having struggled to boost the economy, the local governments assume a

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11 See Stearns, supra note 9 at 246.

12 See Segerson, supra note 7 at 16.

13 Chenglin Liu, The Obstacles of Outsourcing Imported Food Safety to China, 43 CORNELL INT’L L.J. 249, (Spring 2010).
profit-chasing role of a businessman rather than a regulatory supervisor--at the sacrifice of food safety and quality.\textsuperscript{14} To make matters worse, the evaluation of local officials’ performance is mostly based on the rate of economic growth in their governing regions, making the increase of tax revenue and gross domestic product (GDP) the priorities over food safety concerns.\textsuperscript{15}

The third factor that hampers Chinese government’s ability to secure food safety is its vast geography coupled with the rudimentary system of the food industry and national inspection.\textsuperscript{16} Chinese food industry is made up of over 170,000 food processing firms, of which 72% employed fewer than 10 workers,\textsuperscript{17} 29% did not have any quality standards, 60% did not conduct quality checks, and 50% lacked sanitation certificates or production licenses.\textsuperscript{18} In many cases small production firms frequently changed locations to evade inspections.\textsuperscript{19} Consequently, regulatory supervision over small producers is difficult and inefficient.

\textsuperscript{14} Jing Li, \textit{Wo guo shi pin an quan jian guan de zhi du kun jing} (李静, \textit{我国食品安全监管的制度困境}) [The Institutional Dilemma in Chinese Food Safety Regulation: the Case of Sanlu Milk Powder Incident], 292 \textit{ZHONGGUO XINGZHENG GUANLI} [CHINESE PUB. AD.], 10 (2009), at 30.

\textsuperscript{15} Hao Huang, \textit{Maximizing Chinese Imports’ Compliance With United States Safety And Quality Standards: Carrot And Stick From Whom?}, 18 S. CAL. INTERDISC. L.J. 131, 135 (fall 2008).

\textsuperscript{16} O’Berry, \textit{supra} note 4, at 136.

\textsuperscript{17} Feihu Ying, \textit{Wan shan wo guo shi pin zhi liang xin xi chuan dao ii zhi yin dai shi pin an quan wen ti} (应飞虎, \textit{完善我国食品质量信息传导机制应对食品安全问题}) [Improvement of China’s Information Exchange on Food Safety], 5 \textit{ZHENGZHI YU FALU} [J. POL. & L.] 24, 26 (2007).


\textsuperscript{19} See Liu, \textit{supra} note 13, at 258.
Furthermore, corruption also contributes to the food safety crisis in China in spite of the central government’s longstanding efforts to curb corruptions via severe criminal punishments including capital penalty. For example, in 2007 Mr. Zheng Xiaoyu the former head of the State Food and Drug Administration (SFDA), one of the major government departments in charge of food and drug safety in China, was convicted and executed for bribery. Mr. Zheng received bribes from pharmaceutical companies to facilitate the licenses of introducing new drugs into the market. In 2004 alone, the SFDA approved 10,009 new drugs under Mr. Zheng’s tenure while the FDA, the counterpart in U.S., only approved 148 new drugs in the same year. In other words, the SFDA approved 27 new drugs every day. This record, though may understandably celebrate the efficiency of the organization, nevertheless casts reasonable doubt on the level of scrutiny implemented in the process. The negligent and in some situations unethical administrative practices have induced chaos in the drug market, harmed public safety and even caused lives. Mr. Zheng was quickly executed after the trial, a gesture made by China’s central government to the world underscoring its commitment to defend food safety and battle against corruption. Ironically, however, in June 2010 the then

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deputy director of SFDA, Mr. Zhang Jingli, was again under investigation for alleged business bribery with a US-based transnational corporation.\(^{23}\) This time, Mr. Zhang was suspected to have received monetary benefits and in return abused his license authority allowing new medical apparatus and instruments enter the market without due examination.\(^{24}\) With the heads of the drug officials being corrupted one after another, it is clear that the entire regulatory system has encountered inside, top-down difficulty on its path to eventually secure food safety.\(^{25}\)

Finally, environmental degradation is also found to severely impede the improvement of food safety. In March 2010 the Greenpeace issued a report of the testing of hazardous chemicals in common carp and southern catfish – both are commonly consumed in China – that were collected from four cities along the Yangtze River, China’s longest river.\(^{26}\) In almost all of the samples, the test found hazardous chemicals

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including heavy metals mercury, lead and cadmium as well as hazardous organic chemicals such as alkylphenols. The latter is universally acknowledged as endocrine disruptors, able to mimic natural estrogen in organisms and lead to altered sexual development. This finding may help explain the sexual precocity reports in the Hunan province occurred in August 2010.27

The Greenpeace report views the result within the larger context of economic development and accompanying environmental degradation in the Yangtze River. While the Yangtze River feeds 400 million people in China, it also absorbs more wastewater than any other river in the country. Eighty percent of the 200 lakes nationwide surveyed by the National Urban Drinking Water Security Project are not suitable for human consumption because of industrial pollution and contamination of eutrophication, a phenomenon caused by large quantity of phytoplankton.28 Based on research conducted by the Chinese Academy of Science, 20 million hectare of arable lands, approximately

27 See, e.g., Wuhan San nv ying yi shi yong yi pin pai nai fen zhi xing zao shu (武汉三女婴因食用同一品牌奶粉致性早熟) [Three Female Infants in Wuhan Fed on Same Milk Power Were Suspected of Sexual Precocity], WANGYI NEWS, http://news.163.com/10/0807/06/6DFCU3QU00014AED.html (last visited on Dec. 13, 2011) (identifying that there have been a handful of published reports of sexual precocity cases across China in 2010, including three cases in the same town near Wuhan, a large city near Yangzte River. Since the patient infants all feed on same brand of milk power, there is strong suspect that milk power, tainted by hazardous substance caused the illness. However, the official investigation conducted by Administration of Sanitation negated the proposed causal link between infants’ symptoms and usage of milk powder. There is also no evidence affirming the high level of alkylphenols in fish and water caused the symptoms).

1/5 of total arable lands nationwide, are polluted by heavy metal substances. The environment is an important link in the chain of food safety. Serious environmental pollution in China makes ensuring high level of food safety even more difficult.

III. Two Mechanisms: Administrative Regulation and Civil Liability

The Sanlu milk powder scandal of 2008 is only the tip of the iceberg of food safety problems in China. In response, the National People’s Congress (NPC) passed the latest Food Safety Law (FSL) on February 28, 2009, which became effective on June 1, 2009, and the corresponding regulations to implement the new law also came into effect on July 20, 2009. The latest lawmaking reform established a new overarching

29 See, e.g., Chen zhong de dao xiang, shang pin liang ji di Hunan Xiangtan de zhong jin shu you huan (沉重的稻香，商品粮基地湖南湘潭的重金属忧患) [Heavy Wheat, the Concern of Heavy Metal in Commercial Crops Base of Hunan Xiangtan], NANFANG ZHOUMO [S. WEEKEND], available at http://discover.news.163.com/11/0109/11/6PV0KH22000125LI.html (last visited Dec. 13, 2011)

30 See Liu, supra note 13, at 272.

31 Yaohua Tao & Xiaofeng Zhang, Cong San lu nai fen shi jian qian xi wo guo shi pin an quan jian guan Xianzhuang Ji Duice (陶跃华&张晓锋, 从三鹿奶粉事件浅析我国食品安全监管现状及对策) [A Brief Discussion of Chinese Food Safety Regulation and Suggestions Based on Sanlu Milk Incident], ZHONGGUO WEISHENG JIANDU ZAZHI 362, 362 [CHINESE J. OF HEALTH INSPECTION], 04 (2010). (Sanlu Milk Scandal is known as the most influential food safety crisis ever seen in the history of PRC. On September 11, 2008 the Administration of Health reported the milk powder labeled as Sanlu, a famous infant milk powder brand in China, was adulterated with melamine for the purpose of higher protein content. The unethical practice caused urinary system symptoms in 294,000 infants all over China, 52019 of which were hospitalized and 6 died).
administrative scheme for the food safety. A close reading of FSL reveals that the new law offers two mechanisms to address possible food adulteration – administrative oversight enforced by heightened regulatory penalty, and judicial intervention that usually results in monetary compensations for plaintiffs.

A. Administrative Regulations

1. Historical Background

The establishment of food safety administrative regulation dates back to the year of 1965 when the State Council enacted the Food Sanitation Regulation (the Regulation). In 1982, the Food Sanitation Law (the 1982 Law) replaced the Regulation and had been put on trial implementation until October 1995 when it was officially launched. Roughly in the same time period, the national legislature and executive administrations passed rules and regulations in support of the 1982 Law, such as the regulations governing safety of agriculture products, meat and genetically modified


food.\textsuperscript{35} The new Food Safety Law of 2009 repealed the 1982 Law and made innovative reforms complemented by a number of rules and regulations.\textsuperscript{36}

2. Regulators

   a. National Authorities

   According to China’s Constitution, the ultimate law making power rests with the National People’s Congress (NPC).\textsuperscript{37} The State Council, the highest executive organ, is responsible for implementing laws in accordance with authorization of NPC.\textsuperscript{38} In the case of food regulation, the national supervisory legislature follows the same legal structure.

   According to FSL, the State Council is responsible to authorize the Ministry of Health to coordinate other regulators, set food quality standards, assess risks and disclose

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\textsuperscript{35} Ye Yongmao, \textit{Zhong guo Shi pin an quan li fa ruo gan si kao yu jian yi} (叶永茂, \textit{中国食品安全立法若干思考与建议}) [Thoughts on Food Safety Regulation in China and Suggestions].

http://www.foodlaw.cn/lawhtml/dcjy_46_415.shtml (last visited Jan. 25, 2011) (noting that unlike the legislative branch in U.S., which are separated from executive organs, the State Council (central executive organ) and local governments in China are entitled to promulgate respective administrative regulations in compliance with Law made by legislative organs. Here, the safety regulations include Product Liability Law (1993/2000), Agriculture Law (1993/2002), Ordinance on Pig Slaughtering Management (1997), and Administration Measures for Genetically Modified Food (2002)).

\textsuperscript{36} Food Safety Law (P.R.C.), art. 104. (noting that as a common practice in the Chinese administrative law regime, a new law is usually accompanied with respective implementation rules. According to the disclosure of Ministry of Health, the supporting rules include Food Safety National Standards Regulations (2010), Catering Service License Regulation (2010), New Food Addictives Regulation (2010) and Regulation on Implementation of the Food Safety Law (2009), http://www.moh.gov.cn/publicfiles/business/htmlfiles/zwgkzt/pfg/list.htm.)

\textsuperscript{37} XIAN FA [Constitution] art. 57 (1982) (P.R.C.)

\textsuperscript{38} XIAN FA art. 85 (1982) (P.R.C.)
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food safety information. Meanwhile, the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), State Administration for Industry and Commerce (SAIC), and State Food and Drug Administration (SFDA) should supervise and administer food production, food circulation and catering services pertaining to the FSL. Additionally, a number of regulatory domains are assigned to several specialized administrations under the State Council. For example, the pig slaughtering inspection is handled by the Ministry of Commerce (MOFCOM) and the organic food accreditation by the Ministry of Environment Protection (MEP). See Graphic 1 for the relationship among the national regulators under the lead of State Council.

39 Food Safety Law (P.R.C.) art. 4.
40 Id.
43 Jun, supra note 41, at 75 (noting there is uncertainty about the responsibility of organic food authentication. According to a Notice to Transfer the Authentication of Organic Food issued by Ministry of Environment Protection (MEP) and Certification and Accreditation Administration (CAA), the duty to approve organic food production has been shifted to CAA from MEP. However, in spite of the joint issued document, until November 2010 the Ministry of Environment Protection still handles the organic food production check and information disclosure. See http://sts.mep.gov.cn/trhjbh/yjspgl/)
44 Guo wu yuan ban gong ting guan yu yin fa guo jia shi pin yao pin jian du guan li ju zhu yao zhi ze nei she ji gou he ren yuan bian zhi gui ding de tong zhi (国务院办公厅关于印发国家食品药品监督管理局主要职责内设机构和人员编制规定的通知) [Notification on Governance Structure and Human Resource of SFDA Issued by State Council]
One structural innovation of the 2009 FSL is that it explicitly requires the State Council to establish a new organ named Food Safety Committee on top of the current regulatory structure.\textsuperscript{45} The Committee is higher than Ministry of Health and other departments in hierarchy and will function as the final decision maker coordinating the lower executive branches including the Ministry of Health.\textsuperscript{46} Headed by Mr. Li Keqiang, the current Vice Prime Minister of China, the Committee is the highest administrative

\textsuperscript{45} Food Safety Law (P.R.C.) art. 4

\textsuperscript{46} Guo wu yuan guan yu she li guo wu yuan shi pin an quan wei yuan hui de tong zhi (国务院关于设立国务院食品安全委员会的通知) [Document on Establishment of Food Safety Committee by State Council] (Feb. 10, 2010), St. COUNCIL 6[2010], http://www.gov.cn/zwgk/2010-02/10/content_1532419.htm (last visited Dec. 15, 2011).
executive department in charge of food safety.\textsuperscript{47} This innovation aims to address the fragmented authorities of safety regulation that the Administration of Health alone is unable to handle.\textsuperscript{48} However, the seemingly contradictory and overlapping relation between the Administration of Health and the Food Safety Committee is a new problem to be solved.\textsuperscript{49}

b. Local Authorities

However, a regular person in daily life does not deal with the regulators on national level. It is rather the local governments that are on the frontlines of food inspections.\textsuperscript{50} The 2009 FSL allocates the regulatory responsibility to local governments (such as the mayor’s office) as well as local branches of ministries and administrations (such as SAIC municipal branch).\textsuperscript{51} The latter is subject to the supervision of both the local government of higher level, such as the provincial governor’s office, as well as the ministries of higher level such as SAIC provincial branch.\textsuperscript{52} Meanwhile, the proper function of local branches of national administrations depends on enforcement support of the local government and police power.\textsuperscript{53} This dual-leadership governance structure is

\textsuperscript{47} Id.

\textsuperscript{48} See Shi pin an quan ren duo tou guan li, wei yuan hu yu che di gai ge (食品安全仍多头管理，委员呼吁彻底改革) [Food Safety Multi-authority Regulation: Committee Requests Thorough Reform], XINHUA NEWS, http://news.sina.com.cn/c/2009-03-01/032315236384s.shtml [hereinafter Reform].

\textsuperscript{49} Id.

\textsuperscript{50} Liu, supra note 13, at 268.

\textsuperscript{51} Food Safety Law (P.R.C.) art. 5

\textsuperscript{52} Id.

\textsuperscript{53} See Reform, supra note 48.
constantly criticized as the breeding bed of inefficiency and local protectionism, which this article will discuss this question further later in the section “Central – Local Tension”.

3. Licensing and Quality Standards

License is generally the starting point to start a food business. There are three categories of license: food production, food circulation and catering services. Obtaining one license may lift the duty to apply for another. For example if a pig-feet (a popular street food in China) chef runs a catering place that serves house-made pig-feet, the chef only needs to register the production license and is exempted from obtaining a catering license. The power to make the decision of license is split among AQSIQ, SFDA and SAIC branches in locality.

Presumably, the license is not approved unless applicants meet the food safety standards and other requirements set by the FSL. The Ministry of Health and the Ministry of Agriculture are as a current matter jointly working to fill in the gaps of incomplete standards in the area of agricultural products. On the other hand, in cases of legislature

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54 Food Safety Law (P.R.C.) art. 29.


vacuums, food manufacturers are allowed to set their own manufacture quality rules.\textsuperscript{57} All standards are to be disclosed to the public free.\textsuperscript{58} The FSL also prescribes a number of other safety standards. For instance, package labels must include the manufacturer’s address and ingredients; the employees of the food manufacturer enterprise should be healthy and well trained, etc.

4. Enforcement Measures

a. Call Back

In a case of a food adulteration incident, the manufacturer is required to initiate a call back procedure and make every effort to mitigate impairment.\textsuperscript{59} If the manufacturer continues the unqualified operation, the local authorities must step in and compel a call back.\textsuperscript{60}

b. Inspection

The regulators are entitled to conduct on-site inspections and investigations targeting any food manufacture.\textsuperscript{61} They may enter the manufacturing site to inspect the operation, examine food samples, and look into invoices, contracts and balance sheets.\textsuperscript{62}

c. Seizure

\textsuperscript{57} Food Safety Law (P.R.C.) art. 25.
\textsuperscript{58} Food Safety Law (P.R.C.) art. 26.
\textsuperscript{59} Food Safety Law (P.R.C.) art. 53.
\textsuperscript{60} \textit{Id}.
\textsuperscript{61} Food Safety Law (P.R.C.) art. 77.
\textsuperscript{62} \textit{Id}.
During an on-site inspection, if any evidence of illegal acts is revealed, officials may legally detain the unqualified food products, materials and utensils.\textsuperscript{63} The operation sites are then locked up with seals on doors.\textsuperscript{64}

d. Fine

The amount of monetary penalty may range from 2,000 RMB (roughly US $ 286) to 50,000 RMB (roughly US $ 7,143), that is, if the value of illegal products is less than 10,000 RMB (roughly US $ 1,429). For offenses in any larger amounts, the fine can reach five to ten times of the goods’ value.\textsuperscript{65}

e. Suspension

Suspension and de-licensing may be jointly used with fines.\textsuperscript{66} The managers of the unlawful activities subject to suspension will be forbidden from practicing in the food operation field within five years.\textsuperscript{67} Experts who provide false quality examination reports will be expelled from the test panel and disbarred for ten years.\textsuperscript{68}

f. Criminal Punishment

Notably, criminal acts, including the “crime of producing sham or shabby products” and “crime of producing unsanitary food, or hazardous food”, are punishable

\textsuperscript{63} Id.

\textsuperscript{64} Id.

\textsuperscript{65} Food Safety Law (P.R.C.) art. 84, 85, 86.

\textsuperscript{66} Id.

\textsuperscript{67} Food Safety Law (P.R.C.) art.92.

\textsuperscript{68} Food Safety Law (P.R.C.) art.93.
by fines, prison terms or even the death penalty.\textsuperscript{69} The crime of “endangering public health” can also induce an execution.\textsuperscript{70}

5. Outcome and Obstacles

Almost two years after the Sanlu milk powder scandal and legislative reform, a new wave of milk scandals launched attack on public health and industrial credence. In September 2010, a journalist reported that Yashili, a famous dairy manufacturer, recycled tainted milk powder and sold it as its new products.\textsuperscript{71} Another milk powder brand Scient, a manufacturer based in the United States, also received consumer complaints in 2010 that its product contained a large proportion of melamine.\textsuperscript{72} Moreover, in March 2010 a district court in Shanghai found three domestic manufacturers guilty of recycling tainted Sanlu milk powder that was not destroyed in a timely manner.\textsuperscript{73} The dread caused by Sanlu milk scandal of 2008 is still haunting public health. Combined with a number of

\textsuperscript{69} Xing Fa [Criminal Law] (promulgated by Nat’l People’s Cong. last amended by Standing Comm. Nat’l People’s Cong. on Feb. 28, 2009), article 140, 143, 144, LAWINFOCHINA [hereinafter Criminal Law (P.R.C.)]

\textsuperscript{70} Criminal Law (P.R.C.), art. 330.


\textsuperscript{73} Chen Jing & Liu Qi, Anjian Jianxun (陈静 & 刘淇, 案件简讯) [Case Briefs], 50 CHINA TRIAL J., (Apr. 5, 2010).
astounding incidents in the food industry as a whole, such as the recycled cooking oil scandal in 2010, there is a dominant feeling of insecurity and distrust among the public.⁷⁴

A number of Chinese scholars seem to have reached agreement on the possible obstacles preventing the government from ensuring public food safety. These scholars believe, arguably, that the primary problem is rooted in the governance structure that splits the regulatory power among different government executive organs resulting in a supervision vacuum area and executive chaos.⁷⁵ Thus, according to their theory the solution is to enhance the executive power by dividing responsibility properly and building a seamless regulatory net.

While there may be some truth to this argument, it fails to address the core issue. There is, apart from the mere lack of cooperation among regulators, a systematic failure in the executive machine of safety regulation that cannot simply be cured by the centralization of the governance structure. Rather, the problems are mostly caused by the core issues of China’s modern institutional reform: (a) tension between central and local governments, and (b) institutional corruption.

a. Central – Local Tension


⁷⁵ See Tang, supra note 41, at 74, see also, e.g., Hong, supra note 18.
The local government has a strong impulse to maximize its economic and social benefits, and this tendency further sets off competition among local governments.\(^\text{76}\) As a result, the trade barriers between provinces in China are probably more severe than those between some countries.\(^\text{77}\) This situation by and large originates from the mechanisms to evaluate performance and promotion of local officials.\(^\text{78}\)

The heads of local officials are not directly elected by constituents; instead, they are appointed by government officials on a higher level. The decision to promote a public official is supposedly based on the assessment of candidate’s previous leadership performance including a set of key figures of economic growth.\(^\text{79}\) Furthermore, the evaluation results are compared with those of sister provinces.\(^\text{80}\) As a result, local governments are inclined to pursue respective economic growth in order to survive competition among localities, even though collective cooperation may lead to a better


\(^{77}\) Id.


\(^{79}\) Liu, supra note 13, at 272.

\(^{80}\) Xie, supra note 76, at 58.
overall result. The food safety standard cannot conveniently prep up an evaluation figure and therefore seems less important to local officials.

Furthermore, in the process of maximizing economic growth, local officials have forged close and mutually beneficial relationships with local industries. Given the obvious economic contribution from local industries, the governments incline to provide preferential treatments to local entrepreneurs with respect to safety standard and quality inspections. For example, before the milk powder scandal broke out, the Sanlu product was officially exempted from regulators’ inspection because the regulators believed its products consistently satisfied safety and quality standard. Such exemption is a status awarded to only a few well-behaved enterprises subject to strict examination. When the municipal government of Shijiazhuang, where the milk power company was based, learned of the melamine adulteration, its response to the crisis was not to call back the tainted products; rather, it helped the company cover up the scandal and acquiesced Sanlu to continue producing tainted milk. In its apology letter, the Shijiazhuang municipal

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81 Liu, supra note 78, at 392 (noting that, as the author pointed out, the situation of local protectionism illustrates a classic example of “prisoner’s dilemma” where each government unit independently works hard to maximize individual value while cooperation may achieve a better result).

82 Id, at 392.

83 Id, at 392.


85 Li, supra note 14, at 13. (noting that with the help of Shijiazhuang government Sanlu managed to conceal the scandal from public attention. However, the government cannot control the behavior of its business partner: Fonterra. This New
government explained its cover-up was due to the concern of damaging Sanlu’s corporate reputation. The attitude revealed the government’s tendency to protect local industry other than to safeguard public health.\(^8\)

In summary, the local government may not only overlook safety regulation in pursuit of economic growth but also curtail safety standards in order to protect the local industry. Although the central government aims to promote public safety and health, the local governments may factually head toward a different direction. Unfortunately, it is the local governments that execute the public policy on a daily basis. Accordingly the local protectionism is so strong that “it is practically impossible for the leadership in Beijing to maintain sustained and systematic monitoring across China, with the possible exception of a handful of key issuers, because enforcement costs are prohibitive”.\(^7\) Although the voices from public and academia have called for the legislature to separate local branches of administrations from the local government’s leadership so that the central government might be able to extend more influence on local level, the legislative reformation of the 2009 FSL does not respond to the request and therefore fails to address the core issue of local protectionism and localism.\(^8\)

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Zealand multinational dairy company reported to the New Zealand government which eventually informed the General Administration of Quality Supervision in Beijing).

\(^6\) Liu, supra note 13, at 392.

\(^7\) Liu, supra note 13, at 393.

\(^8\) Supra note 46 (noting that the scholars and institutional reformists have long recognized the necessity to change the governance structure. In 2000 the drug administration started the reform of vertical management, independent from local governments’ control. However after eight years of reformative efforts, in 2008 the State Council put an end to the reform and reassigned the management duty to local governments. The decision was met with waves of critics including an open letter from 1,144 directors of drug administration branches in 19 provinces and regions).
b. Institutional Corruptions

A review of Chinese regulatory development suggests that the regulatory institutions are often born with congenital flaws. The internal flaws become the seedbed for institutional corruption. Mr. Zheng Xiaoyu, the former head of SFDA, provides an example of the individual’s struggle and compromise with the institutional flaws.

Mr. Zheng, before being investigated for bribery, was a forceful and constructive reformist. Heading the State Drug Administration, which later became the SFDA in 2003, Mr. Zheng initiated a series of reformations to centralize the drug administration. He abolished the different and varying local drug safety standards and replaced them with unified, more rigorous national rules. Also, he concentrated the power to authorize drug license to the central administration from local branches. In addition, he required all drugs on the market to adhere to the new national standard, which might cause many drug companies to suspend their sales and productions.

However, the new policy produced an opposing outcome. Due to the lack of manpower in SDA, Mr. Zheng’s office actually stooped to a lower standard of drug safety review in order to meet Mr. Zheng’s ambitious goals and imperative market demands. Also Mr. Zheng’s centralization policy was contradictory to the interests of local industry owners who were worried to sustain financial losses and uncertainty


90 Id (within the three months after the new policy, Mr. Zheng’s office certified 147,900 locally registered drugs as satisfying national standards).
because of higher drug standards, thus in the process of dealing with the local industries, there emerged personal enrichment opportunity for Mr. Zheng himself. Eventually, he caved in to these pressures and adopted lower regulatory standards.\footnote{91} Because of the institutional flaws, the corruption scandals followed one after another in the SFDA, and Mr. Zheng’s case was no way an exceptional incident. As long as the inner deficits of the regulatory institutions are not eliminated, the systematic corruption will continue to take place.

B. Civil Liability

Apart from the reforms of administrative oversight, the new law also fosters private actions brought by individual victims. Article 96 of the FSL of 2009 entitles the purchasers of any sham or shabby food may claim extra compensation for losses or injury incurred, and the total number may amount to ten times of the purchase price.\footnote{92} In the case that the defendant is insolvent, the company should pay off civil liabilities before any other administrative penalty.\footnote{93} This ten-time compensation provision immediately invited rigorous public attention when it was first incorporated into the draft of the FSL.\footnote{94} The proponents of the provision believed that the new law encouraged consumers to exercise their compensation rights even in cases of small purchases.\footnote{95}

\footnote{91} Id.

\footnote{92} Food Safety Law (P.R.C.) art. 96.

\footnote{93} Food Safety Law (P.R.C.) art. 97.


\footnote{95} Id.
the opponents of the ten-time compensation scheme believed the fixed and predictable compensation was not practical for varying situations, nor can it work properly to deter adulteration behavior. As of today this article has been put into effect for two years, and this paper will briefly examine its implementing effects in judicial practice and address the possible solutions to the obstacles in the process.

1. Article 96 in Practice

Due to traditions and culture backgrounds in China, lawsuits are usually deemed to be a last resort. In the context of food quality, conflicts are more likely to be settled through the mediation than the courts, and the Article 96 could provide a guideline for the compensation number in mediation and settlement, while still preserve the possibility of civil litigation like a Sword of Damocles that hovers over the food sellers and producers.

a. Mediation

When ordinary consumers find that the food they bought is somehow deficient, the first impulse is usually to deal with the grocery store or supermarket from which they bought. If this initial contact results in vein, consumers then turn to third-party organizations that will act as mediators, including China Consumer’s Association local branches, AQSIQ and SAIC. The first application of the ten-time compensation in Tianjin, the fifth largest city in China, occurred in June 2009 between a supermarket and a customer who bought eight packs of outdated juice powder for ¥109. With the help of

96 Qiming Gao, Shi pin an quan fa ke su xing wen ti yan jiu (高其明，食品安全法可诉性问题研究) [The Study on Litigious Ability of Food Safety Law], ZHONGGUO WEISHENG FAZHI [CHINA SANITATION LAW] 103(Nov. 2009), at 17, CAJ (find at http://china.eastview.com).

the Tianjin Consumer Association, the consumer received a refund for the purchase, a

ten-time compensation, and extra commute fee adding up to ¥ 1,230, a somewhat

considerable amount of economic benefit compared to the minimum monthly income of

¥ 920 in Tianjin. Also, in Nanjing City, the local consumer association helped a

customer obtain ¥ 35 compensation for a ¥ 3.5 purchase from the supermarket, and

another consumer gained a ¥ 200 compensation for a ¥ 11.2 purchase. The

compensation provision in the FSL has indeed made a positive impact on mediation

efforts and incited customers to hold sellers accountable even in small purchase cases.

b. Litigation

Since the new FSL was effected in June 2009, there has been an increasing

number of litigations brought by consumers claiming the ten-time compensation.

However, less than 10% of these claims are ruled in favor of the plaintiff. The first

winning case came into being in May 2010 in Beijing, almost one year after the

effectuation of new law. The defendant merchant was ordered to refund the plaintiff

98 See Tian jin shou ci chu xian shi pin an quan “shi bei pei chang” an li (天津首次出现食品安全“十倍赔偿”案例)

[Tianjin Has the First Food Safety Ten Times Compensation Case] (June 1, 2009).


99 See Shi bei pei chang an li lv xian, shi pin jing ying zhe xiao xin yi yi (十倍赔偿案例屡现,食品经营者小心翼翼)

[A Number of Ten Time Compensation Cases Makes Sellers Aware] (July 4, 2010), available at


100 Da Feng, Jia feng jiao bei pan shi bei pei chang (大风, 假蜂胶被判十倍赔偿) [Fake Propolis Was Ruled to Ten

Time Compensation], XIAOFEI [Consumption] (Magazine), CAJ (find at http://china.eastview.com).
consumer the original purchase price of ¥1,100 as well as the ten-time punitive damages of ¥11,000.101

Though the consumers are explicitly entitled to bring private actions by the provision of the new law, the efficiency of Article 96 may be hindered by a number of factors, including the calculation method of compensation, plaintiff’s burden of proof and government interruption.102

i. Quasi-Punitive Damages

Chinese tort law has long avoided embracing the idea of punitive damages.103 Article 49 of the Consumer Protection Law is deemed as the first appearance of the compensation with the nature to punish; however the concept of punitive damage in Chinese tort law differs greatly from that in the U.S. legal eye.104 For one thing, the total amount of compensation is usually calculated by multiplying original price with a certain number X. For example, the Article 49 of the Consumer Protection Law calculates compensation by doubling the price paid (The number X is 2). The plaintiff can only claim this amount of damage, no more and no less.105 It is not surprising to see that the

101 Id.
102 Gao, supra note 96, at 17.
103 See Liu, supra note 78, at 398.
105 Xue Feng, Cheng fa xing pei chang li wo men yi ran yao yuan (薛峰，惩罚性赔偿离我们依然遥远) [Punitive Damage is Still Far], HUA ZHANG [Magnificent Writing] (Magazine), available at http://china.eastview.com.
FSL also follows the legislative pattern of the Consumer Protection Law in strictly defining the amount of proper “punitive damages” (The number X is 10).

However, this measurement of liability is criticized for a lack of flexibility and its weakness to punish and deter.106 Because food is generally an inexpensive purchase, in some cases the ten-time compensation combined with the actual loss damage may still be trivial monetarily, sometimes not enough to cover attorneys’ fees.107 Another limitation of punitive compensation is that it may be viewed as conveniently fixing the cost of breaking the law,108 not mentioning that the amount of “punitive damage” is too trivial to be taken seriously by comparatively rich and powerful defendants.109 But for the spiritual


109 Liping Huang & Chao Ju, *Wo guo shi pin an quan fa zhong de cheng fa xing pei chang yan jiu* (黄莉萍&琚超, 我国食品安全法中的惩罚性赔偿研究) [Study on Punitive Damages in China’s Food Safety Law], *JIANCHAN LUNTAN* [JIANCHAN FORUM], (Dec. 2009), CAJ (find at http://china.eastview.com).
comfort or some other unusual reasons, a normal person is in general not willing to resort to litigations.\textsuperscript{110}

ii. Burden of Proof

Though the civil procedure law assigns the burden of proof to the defendant, the plaintiff is still required to show the injury and causal relation to prove the standing.\textsuperscript{111} In the 2009 FSL, there is an additional element that the plaintiff must establish in order to qualify for the ten-time compensation: the defendant’s intention to engage in food fraud.\textsuperscript{112} As a result many food fraud cases stayed out of the courts because the plaintiff cannot prove the fraudulent intent.\textsuperscript{113} Moreover, it is especially difficult to prove the causal relation if the injury will continuously grow or will only manifest in the long term. Similarly, it is also difficult for the plaintiff to prove that the food was not switched or contaminated after consumers broke the packages.

iii. Government’s Stability Concern


\textsuperscript{111} Zui gao ren min fa yuan guan yu min shi su zheng ju de ruo gan gui ding (最高人民法院关于民事诉讼证据的若干规定) [Regulations on Civil Procedure Evidence by Sup. People’s Ct.] (promulgated by SUP. PEOPLE’S CT. Dec. 6, 2001, effective on Apr. 1, 2002) (P.R.C.)

\textsuperscript{112} Food Safety Law (P.R.C.) art. 96.

In a massive tort case, the government sometimes steps in and assumes the responsibility of compensating the victims even though nowhere in the Food Safety Law explicitly contains such authorization.\textsuperscript{114} According to some scholars, the central government yarns for controls because it is concerned with the social unrest that an unsatisfactory judgment could spark.\textsuperscript{115}

For instance, in July 2010, tons of acidic waste water leaked from the sewage of Zijin Mining, the biggest gold producer corporation in China, into the Ting River of Fujian province.\textsuperscript{116} The leakage accident caused health concerns and economic loss to villagers alongside the river. The county government worked out a compensation plan for villagers who suffered from the pollution. Nevertheless, most of the villagers complained that the compensation standard was too low.\textsuperscript{117} The dissatisfaction resulted in the crowd of hundreds of villagers jamming the doorway of the Letter and Calls Office in Fujian Province. One week after their fruitful visit, the compensation plan was altered in

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114 Liu, supra note 13, at 271.
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115 See, e.g., Liu, supra note 78, at 397.
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117 Shang hang bu fen cun min bu man zi jin kuang ye wu ran shi gu pei chang biao zhun (上杭部分村民不满紫金矿业污染事故赔偿标准)\cite{Villagers of Shang Hang Are Not Satisfied with Zijin Mining Pollution Accident}
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accordance with the standards suggested by villagers. Similarly, in Tuo River pollution incident of 2004, the local government took over the compensation operation and explicitly prohibited all the lawyers registered in its jurisdiction from taking cases brought by villagers, and such restriction was exposed anonymously on the Internet as part of an internal document. It is therefore not surprising to learn that in Sanlu scandal the government again wore the shoes of victim families and reached a compensation agreement on behalf of the injured babies with 22 engaged milk powder manufacturers.

c. Conclusion

The brief review of the Article 96 in practice reveals that the ten-time compensation mostly favors the food safety conflict that occurs in small amount purchase. With the assistance of mediation organizations, the parties may reach the compensation agreement in accordance with the ten-time standard under the 2009 FSL in a convenient and timely manner. However, due to the inflexibility of Article 96, government intrusion


and other litigation hurdles, the ten-time-compensation rule is less beneficial for food frauds on a large scale that resort to litigation.

2. Bottom-up Approach to Food Safety

Since the top-down administrative supervision is increasingly under attack, the bottom-up approach offers a second paradigm that has become increasingly influential.\textsuperscript{121} China now adopts a joint system of safety regulation and civil liability to redress the problem in food industry. That being said, the Chinese government would rather prefer an administrative regulation system instead of private actions in practice.\textsuperscript{122}

However, one potential problem is that administrative penalty is not likely to achieve the same level of deterrence effect as punitive damages do.\textsuperscript{123} In an empirical study based on all the food safety incidents reported from 1990 to 2000 in the United States, a comparison between food safety performance measurements shows that the number of food incidents in the states where punitive damages are awarded is lower than that in states that do not allow punitive damages.\textsuperscript{124} It also reveals that application of strict liability joined with punitive damages increases the applied rate of care by food firms.\textsuperscript{125} Though the research was conducted in the context of U.S. socio-economic characteristics, the conclusion on the effect of punitive damages is still valuable for the study of the food safety in China.


\textsuperscript{122} Liu, \textit{supra} note 78, at 399.

\textsuperscript{123} Id.


\textsuperscript{125} Id.
IV. Conclusion

Security of food safety is a complexity that calls for both institutional reforms and the guarantee of the bottom-up pursuit of justice. The legislation reform in the post milk-scandal era establishes the structure of governing agencies and a wide range of enforcement instruments such as callback, on-site inspection, fine, imprisonment and even the death penalty. However, the tension between central and local governments frustrates implementation of the new law. Also, the administrative regulation is embedded with institutional flaws that induce corruption.

Apart from regulatory inspections, the judicial intervention is the other mechanism to redress food safety. The new law explicitly provides a ten-time compensation scheme against malicious food safety rule violations brought up by the individual victims. In practice, the provision may sometimes work efficiently for informal legal solution such as mediation, but in litigations the application of the new law is troubled by inadequate number of monetary compensation, burden of proof, and the government’s social stability concerns. However, the bottom-up approach to food safety seems contain much value to complement the rule of regulators. The channel to carry out private litigations and the security of activists themselves must be assured in order to empower the grass-root, individual consumers.

The development of food safety law has often been inspired by massive food-borne illness outbreaks or scandals, such as the meat industry scandal depicted in the novel The Jungle and the drama of “poison squad” test that preceded the food regulation
reform in United States.\textsuperscript{126} Hopefully, the tainted milk, recycled cooking oil and other food safety incidents will introduce the beginning of a new food safety era in China.

\footnotesize
\textsuperscript{126} Lewis, Carol, \textit{the Poison Squad and the Advent of Food and Drug Regulation}, U.S. Food and Drug Admin. Consumer Mag. (Nov. – Dec. 2002), at 2, available at http://www.toxicology.org/gp/21_PoisonSquadFDA.pdf (noting the \textit{Jungle} refers to the novel written by Upton Sinclair in 1906, which demonstrated the corruption of the American meatpacking industry. The novel raised public concern over food safety in America, and, as the author stated, it aimed at the public’s heart but by accident hit the stomach. The poison squad is an experiment that fed 12 men with food additive in the early 20th century. The test drew national publicity and was deemed to induce the creation of FDA).