TRANSPARENCY VERSUS STABILITY:

THE NEW ROLE OF CHINESE COURTS IN UPHOLDING
FREEDOM OF INFORMATION

CHEN Yongxi*

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Abstract

This paper explores the inconspicuous but increasingly important role of Chinese courts in handling the often conflicting goals of promoting government transparency and maintaining social stability within the Party-state context. The Regulation on Open Government Information created an unprecedented right of access to information with the potential for improving administrative accountability, but established a peculiar exemption of social stability. “Stability maintenance” has long been an overwhelming political task for Chinese state organs, and has profoundly affected legal practices, posing a challenge to judicial control of abuse of the aforementioned discretionary exemption. Added to the challenge is the obscurity in the standards for judicial review of discretion.

The paper reviews how the courts respond to this challenge by focusing on representative cases concerning government claims that disclosure would endanger social stability. It finds that in referential cases adopted in official publications, the courts have developed creative approaches to scrutiny. However, other sources indicate that meaningful review is largely absent from cases involving appropriations of private properties and those concerning large-scale maladministration. It argues that the judicial inaction can be attributed to two concerns underlying the common practice of the stability maintenance system, i.e. containing collective mobilization and inhibiting expression of public mistrust in governance. The courts demonstrate their ability in judicializing the political concept of social stability in the context of right to information, and thus assume more than a deferential role in the politics of stability maintenance. Nevertheless, they remain captive to the imperative of securing core regime interests. The liberalization implications of transparency reform are hence minimized through the judicial process.

I. INTRODUCTION

The enactment of the Regulation on Open Government Information (ROGI) in China is a milestone for a country with an ingrained history of secrecy, and is also a significant event in the global expansion of Freedom of Information (FOI) laws that now extend to over 100 countries. The Regulation implicitly confers

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1 FOI law refers to a law that confers on individuals or interested parties a general right of access to government information, which is presumptively disclosed unless exempt by the same law. See TOBY MENDEL, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY 31-32 (2d ed. 2008). For a comprehensive review of FOI law’s rapid global expansion, see John M. Ackerman & Irma E.
upon citizens a right of access to information held by governments at all levels and, furthermore, allows citizens to enforce that right through the courts. It is this general and enforceable right that renders the new transparency regime remarkably different from the incremental reforms of open government that have been introduced since 1978, the beginning of China’s reform and opening up policy. Ostensibly, this new regime resembles a FOI regime that is commonly understood as an institutional innovation to consolidate democratic and responsive government and, in particular, as a legal tool to hold the expanding administrative state accountable to the public.2

Noteworthy as the ROGI is, doubts remain over its effects, and particularly over the enforceability of the right of access to government information (hereinafter referred to as right to information). FOI laws usually develop on the basis of, and in turn seek to enhance, representative democracy and press freedom. The ROGI, the Chinese version of FOI law, grew out of a special Party-state context. In particular, the ruling Chinese Communist Party (CCP) has instructed the state apparatus under its control to adhere firmly to the principle of maintaining social stability.3 Long before and along with implementation of the ROGI, local governments have resorted to the mechanism of “social stability maintenance” (维稳, usually shortened as stability maintenance in official discourse), a key component of which being information control, when facing growing social discontent or public protests.4 The pursuit of absolute stability has often resulted in excessive measures that deviated from the law and further impinged on individual rights, counteracting the Party’s efforts in promoting law-based administration to improve the state-citizen relationship. Against this backdrop, the ROGI has the potential for empowering citizens to break the monopoly of information by government agencies and to realize values that underpin FOI laws, such as upholding individuals’ substantive rights, strengthening government

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3 Ackerman & Sandoval-Ballesteros, supra note 1, at 88-93.
4 For the role of social stability maintenance in the CCP’s political agenda, see Xie Yue (谢岳), Weiwen de Zhengzhi Luoji (维稳的政治逻辑) [The Political Logic of Stability Maintenance] 246-76 (2013).

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accountability, and enhancing public participation in the governance. At the same time, however, resistance against public access to information is strong under the existing governance structure which tends to prioritize political goals other than transparency. The intractable tension between transparency and social stability is highlighted by the creation, and problematic agency applications, of a peculiar exemption under the ROGI that disclosure of information should not endanger social stability (hereinafter referred to as the social stability exemption).

Given the prevalent inclinations among agencies toward opacity and misusing exemptions from disclosure, enforcement of the right to information by the judiciary — the only external review body — becomes the key to fulfilling the ROGI’s potential. Through judicial review of non-disclosure decisions, the courts theoretically play a pivotal role in directing the application of exemptions toward fostering meaningful transparency. Yet Chinese courts’ review power is far from consolidated, especially in respect of administrative discretion. Furthermore, they are susceptible to extra-legal pressures when handling cases that, according to local governments and Party committees, involve collective protests or otherwise threaten social stability. These invite inquiries into the actual judicial control of exemptions, in particular the social stability exemption, and the effectiveness of the control. Despite the growing body of literature on government transparency in China, the important role of the courts in shaping the transparency regime remains insufficiently researched.

In addition, existing studies on the relation between China’s judicial system and the extra-legal system of stability maintenance emphasize on the latter’s impacts on the former, but pay scant attention to the courts’ assessments or critiques of government

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5 For values and functions of FOI law, see Ackerman & Sandoval-Ballesteros, supra note 1, at 85-93; Mendel, supra note 1, at 4-5. These values are broadly consistent with the ROGI’s legislative intent, which is provided under art. 1: “[t]o enhance transparency of the work of government, to promote administration in accordance with the law, and to bring into full play the role of government information in serving the people’s production, livelihood and economic and social activities.”


8 The current literature focuses primarily on two themes: (1) accessibility of a certain category of information, such as financial expenses or environmental information, and (2) factors that may have affected the bureaucracy’s compliance with transparency regulations.

9 For recent research on the impacts of stability maintenance on justice and security practices, see THE POLITICS OF LAW AND STABILITY IN CHINA (Susan Trevaskes et al. eds., 2014). For that concentrated on the impacts on state protection of individual rights, see SARAH BIDDULPH, THE STABILITY IMPERATIVE: HUMAN RIGHTS AND LAW IN CHINA (2015).
claims about stability maintenance. A major reason is that these studies focus on lawsuits in which social stability concerns are external or merely incidental to the disputed issues (such as cases concerning land appropriations, housing demolitions, environmental pollution, and labor claims), and hence are not directly addressed in judicial decisions. It is noteworthy that in open government information cases (hereinafter OGI cases) involving the social stability exemption, the courts confront head-on government claims on social stability, and have the opportunity to scrutinize their legality and even reasonableness. By developing grounds of judicial review with respect to agency use of this exemption, the courts can not only determine the legal confines of the right to information, but also intervene in the “politics of stability maintenance.” A study of the courts’ performance in this regard will shed new light on the interaction between judicial review and the political imperative of stability maintenance, and more generally between the courts and the Party-state’s shifting reform agenda.

This paper thus explores the new role of Chinese courts in handling the seemingly conflicting goals of promoting government transparency and maintaining social stability. It analyzes the approaches taken by the courts in reviewing agency use of the social stability exemption, and assesses whether the courts have effectively exercised their power to control administrative discretion so that the abuse of stability maintenance claims are restricted and the progressive objectives of transparency are supported. Considering the characteristics of China’s judicial system, this study combines doctrinal legal analysis with empirical investigation, the latter focusing on representative samples of OGI cases adjudicated in the 2008-2015 period.

After a description of data sources and sampling methodology that follows this introduction, Section II of the article analyzes the characteristics of the ROGI and its special social stability-based exemption, discussing the relevant challenges posed to government transparency and judicial remedy. Identifying administrative discretion as the linchpin in using this exemption with open meaning and undefined conditions, Section III summarizes the grounds of


12 Zhang Wanhong & Ding Peng, Ripples across Stagnant Water: Stability, Legal Activism and Water Pollution Disputes in Rural China, in THE POLITICS OF LAW AND STABILITY IN CHINA 59 (Susan Trevaskes et al. eds., 2014).

13 Biddulph, supra note 9, at 32-81.
judicial review of discretion that are either stipulated by law or endorsed by the Supreme People’s Court (SPC) in referential cases, and uses them as benchmarks for assessing the courts’ performance. Section IV investigates, from a realist perspective, the courts’ handling of the exemption with reference to three samples, namely, referential cases, judgments retrieved from databases, and cases covered by the media. It further examines the courts’ approaches in the various cases. Section V further reflects on the positive but limited role of the courts in improving the approaches of judicial review and supporting the values of freedom of information, and highlights the persistent constraints that the courts face within the politics of stability maintenance. Finally, Section VI concludes the findings and discusses the legal and political implications.

Sources of Cases and Sampling Methods
To reveal the true picture of the judicial review of administrative acts in China, we should first analyze carefully the sources of cases. One attempt to analyze landmark cases, the usual approach in comparative FOI research, is ill-suited to our purposes here. Because of the statutory principle that “the court of second instance is the court of final instance,” neither the SPC nor any provincial-level high people’s court acts as the appellate court for all litigation in a given region. Therefore, there are hardly any landmark cases in the sense of such cases establishing a new principle or creating an interpretation of the law for the courts to abide by in future cases. The only exception is the “Guiding Cases” that are prescribed under the SPC’s 2010 Provisions Concerning the Work of Case Guidance (hereinafter Case Guidance Provisions). Such cases are selected and promulgated by the SPC’s Trial Committee, and shall be referred to by local courts when the latter adjudicate similar cases, thereby

14 Xingzheng Susong Fa (行政诉讼法) [Administrative Litigation Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 4, 1989, amended Nov. 1, 2014, effective May 1, 2015) (2014); arts. 7 & 88 (Chinalawinfo) Renmin Fayuan Zuzhi Fa (人民法院组织法) [Organic Law of the People’s Court] (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1979, effective Jan. 1, 1980) (2006) art. 11 (Chinalawinfo). The ALL was amended in 2014. Since all the cases studied in this paper were adjudicated or resolved according to the ALL as before being amended, only provisions of the old ALL are cited and analysed hereinafter (hereinafter ALL 1989).

15 On the inexistence of case law in China, see Shen Zongling (沈宗灵), Dangdai Zhongguo de Panli: Yige Bijiaofa Yanjiu (当代中国的判例——一个比较法研究) [Case Law in Contemporary China: From a Comparative Law Perspective], 3 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI] 32, 33-36 (1992). On the distinction between precedents in the common law system and “guiding cases” that Chinese courts at various levels published before 2010, see Hu Yunteng (胡云腾) & Yu Tongzhi (于同志), Anli Zhidao Zhidu Ruogan Zhongda Yinan Zhengyi Wenti Yanjiu (案例指导制度若干重大疑难争议问题研究) [On Major Controversial Issues Concerning the Case Guidance System], 6 FAXUE YANJUI (法学研究) [CHINESE J. L.] 3, 7-8 (2008). The lack of precedent has contributed to the phenomenon of “like case, different judgments” that prevails in China. See Xu Xin (徐昕), Maixiang Sifa Tongyi de Anli Zhidao Zhidu (迈向司法统一的案例指导制度) [Case Guidance System as A Step toward Unified Judiciary], 5 XUEXI YU TANSUO (学习与探索) [STUDY & EXPLORATION] 157, 157-64 (2009).
establishing a system that shares certain features of precedents in the common law system. Nevertheless, only nine Guiding Cases concerning judicial review have currently been published. Among them, merely one case concerns the right to information, and provides no information on the court’s stance toward the exemption under discussion. Similarly, the anecdotal accounts of high-profile cases - that one can find in sporadic media outlets are unable to reflect the vast and still increasing number of OGI cases.

To acquire meaningful and representative samples of OGI cases, this study collected cases from three categories of sources. This source diversity corresponds to the fact that the observable population of judicial opinions (judgments and decisions) is scattered among different publications rather than included in a unitary repository or comprehensive indices.

The first source is seven case collections that are published by the SPC or compiled under its supervision. Their characteristics are briefly described in Appendix I of this article. Cases adopted in these collections are generally called “referential cases” that have persuasive authority (as opposed to the aforementioned Guiding Cases, which bear binding force to a certain extent according to the Case Guidance Provisions). Referential cases are widely

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18. For instance, case digests or case reports can be found in various periodicals, newspapers, or special compilations edited by the SPC and various provincial high courts. For a comprehensive review of the categories of case collection, see Tian Jiange (田建设), Woguo Anli Wenxian de Chuban jiqi Chaxun (我国案例文献的出版及其查询) [The Publication and Query of Literature about Judicial Cases in China], 3 FALÜ WENXIAN XINXI YU YANJIU (法律文献信息与研究) [INFO. & RES. LEGAL LITERATURE] 3, 5-8 (2004).

19. Before the adoption of the Case Guidance Provisions of 2010, the SPC and various high courts had tried different ways in using exemplary cases to unify the application (and judicial interpretation) of law and to guide inferior courts in the adjudication of cases. These cases were named “referential cases”, “model cases” or even “guiding cases”. This paper uses the term “referential case” to refer to such cases, so as to distinguish them from the Guiding Cases. For the SPC’s initiatives to introduce referential cases, see Zhongguo Anli Zhidao Zhidu de Goujian he Yingyong (中国案例指导制度的构建和运用) [The Construction and Use of China’s Case Guidance System] 47-50 (Su Zelin (苏泽林) ed., 2012). For high courts’ initiatives, see Zhou Daoluan (周道鸾), Zhongguo Anli Zhidu de Lishi Fazhan (中国案例制度的历史发展) [The Historical Development of China’s Judicial Case System], 5 FALÜ SHIYONG (法律适用) [J. L. APPLICATION] 2, 7 (2004). For the difference between these referential cases and Guiding Cases, see Zuigao Renmin Fayuan Zhidaoxing Anli Canzhao yu Shiyyong (最高人民法院指导性案例参照与适用) [The Reference to and Application of Guiding Cases Issued
considered by the Chinese legal community to reflect (to varying extents) the intent of the SPC and its departments to guide local courts on the adjudication of a particular type of case or application of law in a certain field.20 A search through the collections yields three referential cases that pertain to the social stability exemption.

The second source is taken from two mainstream legal databases, including the official portal designated by the SPC to publish judgments rendered by courts at various local levels, chinacourt.org and its successor, China Judgments Online,21 and a popular commercial legal database, ChinaLawInfo. Although judgments adopted in these databases partially overlap with one another, together they account for the largest proportion of all judgments handed down by the Chinese courts that can be practically retrieved by researchers. In consideration of the overrepresentation of certain regions in the OGI judgments retrieved from the two database,22 and the soaring of annual volume of judgment after 2013,23 a sampling method was applied to this source to secure a more balanced and manageable sample for analysis. The scope of searching is restricted to the judgments of the second instance rendered in eight provincial units: Heilongjiang, Beijing, Henan, Shanghai, Guangdong, Shaanxi, Xinjiang and Xizang. The selected regions include provinces across the nation, at various level of industrialization, and with different composition of ethnic groups. Compared to judgments of the first instance, appeal judgments usually involve more detailed examinations of legal issues, and hence may better reflect judicial polices regarding the exemption concerned. Within the defined


22 Most of the OGI judgments included in the official portal as well as ChinaLawInfo come from provincial-level regions with a longer history of online publication of judgments, such as Henan Province and Shanghai Municipality in particular. This distribution does not accord with the proportion of OGI case volumes in different provinces as recorded in the annual OGI reports published by each provincial government respectively.

23 With regard to the official portal, while the volume of the OGI judgments rendered in 2008-2012 is less than 300, the annual volume for 2013 increases to 1,432, and that for 2015 even soars to 17,141. Searching with ChinaLawInfo also shows a sharp hike after 2012 in the annual volume of OGI judgments.
scope, searches with the keywords “政府信息公开” (open government information) and “社会稳定” (social stability) yielded 92 judicial opinions, nine of which concern substantive challenges against the use of the social stability exemption. One of the cases therein overlaps with a case reported in the SPC publication.

In addition to the aforementioned primary sources, the third source consists out of news reports about OGI cases published in 170+ media outlets. An introduction to the categories of these outlets is given in Appendix II. It is noteworthy that the OGI cases reported by the media (hereinafter media-reported cases) are more representative of the status of adjudication across the country than those covered by the other two sources. Besides its skewed geographic distribution, the official portal for judgments has omitted cases that are deemed as “unsuitable for publication” by local courts.24 Some omitted cases are likely to have touched on sensitive issues which the defendant authorities found inconvenient, and by the same token may well include the problematic applications of the social stability exemption.25 ChinaLawInfo shares this critique. For example, it does not indicate the sources of their judgment collections, and their search results exhibit a similar geographic bias to that noted in the case of chinacort.org. The official standards for keeping judgments offline also apply to commercial databases. News reports, in contrast, cover government transparency-related disputes in each provincial-level region, and have recorded OGI cases in 16 regions. They also discuss cases concerning sensitive issues which

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24 According to the SPC’s instructions applicable to the period of the author’s investigation, judgments should not be published online if, in addition to other specified circumstances, they are “unsuitable for publication.” This discretionary exemption actually existed in a series of previous rules made by the SPC and several high courts with respect to putting judgments online. See Provisions on the Issuance of Judgments on the Internet, supra note 21, art. 4(4); Zuigao Renmin Fayuan Guanyu Sifa Gongkai de Liuxiang Guiding (最高人民法院关于司法公开的六项规定) [Six Provisions of the Supreme People’s Court on Judicial Openness] (promulgated by Sup. People's Ct., Dec. 8, 2009) point 5 (Chinalawinfo); Henansheng Gaoji Renmin Fayuan Caipan Wenshu Shangwang Gongbu Guanli Banfa (河南省高级人民法院裁判文书上网公布管理办法) [Measures of Henan Provincial High People’s Court on the Online Publication of Judgements] (promulgated by Henan Provincial High People’s Court, Oct. 9, 2009) art. 5.

25 According to the Henan Measures (supra note 24), the courts can withhold from publication cases ‘that are sensitive, or involving mass incidents or having major social impacts hence entailing delayed publication’ and those ‘in which one of the parties explicitly demands non-publication of judgment with justified reasons’. Both standards are open to extensive interpretation in practice. It is unsurprising that several intermediate courts in Henan have considered that more than half of their judgments are exempt from publication. See Han Yong (韩永), “Fei Dianxing Yuanzhang” Tuidong Henan Panjueshu Shangwang ( “非典型院长”推动河南判决书上网) [“Atypical President” Promotes Online Publication of Judgments] ZHONGGUO XINWEN ZHOUKAN (中国新闻周刊) [China News Week], Nov. 9, 2009. There is also discrepancy between the number of judgments published online and the actual number of judgments rendered in different provinces. See Zhongguo Caipan Wenshu Shangwang Niandu Baogao (2013) (中国裁判文书上网年度报告2013) [Annual Report on Online Publication of Judgments in China (2013)]. CHINALAWLIB (法律信息研究网), http://www.chinalawlib.org.cn/LunwenShow.aspx?FID=200812241110233122&CID=2008122414143590155&AID=20150602134953400966 (last visited June 2, 2015).
often become subject matters of OGI requests filed by activists. Media-reported cases can therefore reveal more about local courts’ attitudes toward exemptions in cases often labeled as sensitive by local authorities, and in greater depth than the judgments retrieved from databases can. An initial search of news reports for all OGI cases yielded more than 2000 news stories covering 343 cases, in 245 of which the court decisions are reported. Of these 245 cases, five were identified that concern a review of the target exemption. However, two of these cases overlap with cases retrieved from the first and second sources.

Before the case samples are analyzed, it is key to first put our focus onto the legislative framework that sets basic, however vague, standards for resolving OGI disputes.

II. **Vague Transparency Framework and Unique Exemptions**

* A. Regulation on Open Government Information

The ROGI is an administrative regulation passed by the State Council. Enjoying force that is subordinate only to the constitution and laws passed by the National People’s Congress, the regulation establishes a general framework for the right to information. However, it leaves several issues untouched because of the ambiguity of its wording and the conflicts with other laws.

The ROGI imposes comprehensive obligations of proactive publication on government agencies. Article 9 provides that agencies should disclose on their own initiatives information that “involves vital interests of citizens” or “concerns issues which need to be extensively known or participated in by the public.” Articles 10 to 12 further stipulate the categories of information to be proactively released by agencies at different levels, covering not only administrative decisions with direct impacts on the people’s livelihood — such as land taking or inspections of food and drug safety — but also government activities that bear on the public interest but do not necessarily affect the material interests of individuals, such as administrative licensing standards and annual budget reports. In particular, several enumerated categories address the issues in relation to which popular resistance and collective protests have arisen in the past two decades, such as rural land taking, urban housing demolition and relocation, the sale of collectively owned enterprises, and the implementation of family planning policies. It was nevertheless unclear whether agencies could be challenged before the courts for failure to fulfill these obligations of proactive disclosure until the SPC instructed local courts not to
admit such challenges under its 2010 judicial interpretation of the ROGI.26

As to the right to request and obtain information, which is the core of FOI law, the ROGI provides for it in an implicit way. Article 13 stipulates that “in addition to government information [provided] for in articles 9 through 12, [citizens] may also, based on the special needs of such matters as their own production, livelihood and scientific and technological research, etc., file requests [to] obtain relevant government information.” This ambiguous wording gives rise to the debate on whether or not the requester should demonstrate his or her need in obtaining the information when exercising the right to information. Unfortunately, the General Office of the State Council (GOSC) has issued directives allowing agencies to reject OGI requests “irrelevant to [the] requester’s special need.”27

The absence of a presumption of disclosure is another of the framework’s defects. The ROGI does not stipulate an exhaustive list of exemptions, but allows for the withholding of information on various grounds stipulated in different parts of the regulation. First, in the chapter entitled “Scope of Disclosure”, Article 14 contains “exemption clauses” that are similar to those found in many FOI laws. Under the terms of this article, agencies are required to refuse access to information involving state secrets. Additionally, they are allowed to discretionarily withhold information on trade secrets and personal privacy. The scope of these exemptions, however, is left undefined. Second, as the ROGI is an administrative regulation, it bows to the secrecy provisions of other laws, such as the Law on Guarding State Secrets, which provides extremely vague and expandable standards for classification, and the Archives Law, which seals documents stored in state archives for 30 years. Third, Articles 7 and 14 refer agencies to the “provisions of the State” that stipulate examination and approval procedures prior to the release of certain kinds of information. With the range of such provisions left undefined, the ROGI risks being replaced by the pre-existing regimes that govern information control and news censorship. Finally, in the “General Provisions” chapter, Article 8 provides a special prohibition against disclosure, proscribing that the “disclosure of

government information by agencies shall not endanger national security, public security, economic security and social stability.”

As is legislative practice in China, the general provisions in a statute usually include that statute’s legislative purpose and scope of application, as well as the general principles to which the provisions in remaining sections of the statute should conform. Hence, Article 8 governs each aspect of the proactive release of government information and disclosure upon request, including the scope, procedure, form, timing, and fee. It is thus understandable why most Chinese scholars agree that Article 8 actually functions as an exemption, although they criticize its vagueness.  

This article, due to its inherent distinctiveness and vagueness with respect to its special provision on social stability, merits further exploration.

**B. Social Stability as a Dominant Exemption**

1. An Unorthodox but Paramount Exemption Clause

The exemptions provided under Article 8 are absolute and supreme. Officials of the State Council Legislative Affairs Office explain that, although protecting lawful access to government information is the legislative intent of the ROGI, Article 8 stipulates that the access shall not endanger the national and public interest. For the reason that the “improper disclosure of government information is extremely likely to cause adverse effects on public administration,” and can even lead to the “utilization of information by lawbreakers”, agencies should “firmly defend the national and public interest” by preventing OGI work from endangering the three types of security cited above, i.e. national, public and economic security, and social stability.  

Article 8 also functions as a guiding principle for agencies to fulfill obligations and to establish a coordination mechanism for releasing information (provided under Article 7) and a mechanism for secrecy examination prior to release (Article 14). Furthermore, according to some scholars who participated in drafting the ROGI, Article 8 is crucial because it stipulates the general principle that disclosure should protect the public interest. This is a principle that operate in tandem with two other principles, namely, that disclosure should be just, fair, and convenient to the people (Article 5) and that it should be timely and

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30 Id. at 43.
accurate (Article 6). The opinions of these drafters reveal that the national and public interests embodied in security and social stability are seen as the ROGI’s paramount values.

Consequently, exemptions on their basis are not subject to any balancing test. Instead, they can override the findings of public interest tests regarding other exemptions. For example, even though the disclosure of certain information involving trade secrets would promote a certain public interest (e.g., the exposure of corruption in public procurements), it should nevertheless be barred if it is deemed to endanger any of the interests listed in Article 8. In other words, Article 8 provides a strong basis for “discretionary non-disclosure,” whereas Article 14 provides a rather weak basis for “discretionary disclosure.”

As a de facto exemption clause, however, Article 8 has fundamental defects: it gives equal and absolute protection to values that bear different degrees of importance, and includes an excessively broad concept.

2. Three Types of Security

Activities threatening the three prescribed types of security are commonly used to create exceptions for other laws or regulations of the People’s Republic of China (PRC), and they are per se legitimate interests in a democratic society. Exemptions based on national or economic security are common in most FOI regimes. Public security, if understood as having the purpose of law enforcement or related to investigations and proceedings conducted by public authorities, is also a valid reason to bar disclosure in many countries. Nevertheless, the ROGI takes a unique approach in

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32 For example, the activities jeopardizing national security are widely described by Guojia Anquan Fa (国家安全法) [National Security Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 2015) art. 4 (Chinalawinfo). Activities endangering public security are defined in Xing Fa (刑法) [Criminal Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 6, 1979, effective July 1, 1980) (2015) ch. 2 (Chinalawinfo), and variously provided for in a series of laws and regulations.

33 Several surveys compare categories of FOI exemption in developed countries. For the comparison among five member states of the British Commonwealth (Australia, Canada, Ireland, New Zealand, and the U.K.), the U.S., and the Netherlands, see a survey carried out by the U.K. Home Office when it drafted the FOIA: Freedom of Information: Consultation on Draft Legislation, Cm 4355 May 1999 19-22. For a comparison of France, Germany, Italy, Spain, and Sweden, see research conducted by the Commission of Access to Administrative Documents in France: Constanze Lademann, Etude de Droit Comparé Sur L’Accès Aux Documents Administratifs”, 7/8 CADA – LETTRE MENSUELLE D’INFORMATION 10-11 (2010). For a comparison of Japan and other developed democracies, see Bruce E. Cain, et al., Towards more open democracies: The expansion of freedom of information laws, in DEMOCRACY TRANSFORMED? EXPANDING POLITICAL OPPORTUNITIES IN ADVANCED INDUSTRIAL DEMOCRACIES (Bruce E. Cain, et al. eds., 2003), at 122-23.

34 Id.
subjecting information concerning the three types of security to the same kind of harm test. In contrast, a discriminative approach to such security is adopted in many mature FOI regimes. Though information affecting national security is usually categorically withheld, other information is generally not withheld unless it seriously or substantially harms certain aspects of the national economy (this is the case in New Zealand and Australia). Also, information related to law enforcement or the conduct of investigations may be released if the public interest in disclosure outweighs the injured interest (as in the case of Canada and the Netherlands). In fact, the ROGI’s approach is determined by the Law on Guarding State Secrets (LGSS). According to the LGSS and the extremely broad regulations and rules deriving from it, information whose release may injure national security, economic security, or public security may well be classified as a state secret, and hence withheld without discrimination.

3. Social Stability

If the definitions of national, economic and public security are imprecise to varying extents, recognizing social stability as a reason to override openness is particularly problematic. In the complex context of China’s state governance, social stability becomes a catch-all concept that has been used to entertain a wide range of concerns, whether legitimate or not, by governments at various levels.

According to the drafters of the ROGI, social stability should be understood in the context of the lines and principles taken by the CCP. Maintaining social stability became one of the CCP’s most important governing principles in 1990, and was accorded more policy weight during past two decades, as social conflicts.

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35 Official Information Act 1982, s 6(e) & 27(1)(a) (N.Z.).
36 Freedom of Information Act 1982 s 47D (Austl.).
37 Access to Information Act, R.S.C. 1985, c A-1, art 16(1) (Can.).
38 Government Information (Public Access) Act Oct. 31 1991, s 10(2)(c)-(d), (Neth.).
40 Cao & Zhang, supra note 29, at 42.

It was Deng Xiaoping who put forward the idea that “stability is of overriding importance” in the late 1980s. During the administration of Jiang Zemin as the General Secretary, the CCP proceeded to elaborate the core of Deng’s theory to “appropriately handle the relationships among reform, development and stability.” According to the Party doctrine, development is the goal, reform the motivating power, and stability a prerequisite for reform and development. See Deng Xiaoping Lilun Jiben Wenti (邓小平理论基本问题) [Fundamental Issues Concerning Deng Xiaoping Theory] (Zheng Bijian (郑必坚) et al. eds., 2002). After 2002, under the administration of Hu Jintao, the CCP reiterated on many important occasions that maintaining stability was the top priority. See Zhonggong Zhongyang guanyu Jiaqiang Dang de Zhizheng Nengli Jianshe de Jueding (中共中央关于加强党的执
intensified and “mass incidents” that involve collective resistance proliferated.\textsuperscript{42} Imbalance between far-reaching economic reform and protracted political reform is widely regarded as a major reason for the growing tension between local authorities and the people affected by the former’s activities.\textsuperscript{43} Though initially perceived as a synonym to public order and security, the concept of social stability in official discourse has been given more flexible meanings and political implications that correspond to the political environment of the time and the leadership changes, which allows local authorities great latitude in interpreting the relevant Party lines and principles.\textsuperscript{44}

As a result, for Party cadres and government officials at the local level, social stability no longer refers only to the overall social order and political quietude, but also implies the absolute stillness resulting from the inhibition of collective protests and even elimination of expression of discontent irrespective of their origins and causes.\textsuperscript{45}
With the “stability-overrides-all” mentality that has since prevailed in local governments from 2006, ad hoc mechanisms for the purpose of stability maintenance have been generated at immense public cost, and continue to operate in parallel to the legal and administrative institutions. These said mechanisms are widely employed to suppress “unstable factors” that are said to be associated with the collective activities engaged by groups of individuals that wish to assert their rights and interests. These often involve overdue salary claims by laborers, resistance against forced demolitions by residents, petitions against illegal land seizures in villages, protests for the elimination of environmental hazards, fights for fair compensation by those victimized by contaminated food, as well as demands for investigations into cheaply-built buildings by the injured. The aforementioned events are often related to, if not directly caused by, suspected malfeasance or non-performance of statutory duties by government agencies and constitute the majority of mass incidents. Although the victims often seek no more than...
damages for their economic loss or compensation for the violation of their personal rights, these activities are too often perceived by local officials as threatening the governance, and are treated as political disputes that fall within the remit of the ad hoc mechanisms. The abusive use of social stability claims can be best illustrated by two news stories: a district government of Changsha City used stability maintenance as a reason to defy a court ruling that concerned an illegal land transfer, and the government of Shaanxi Province used it as an excuse to “demand” that the SPC uphold the government’s decision in an appeal case. The temporary absolute stability has increasingly become a paramount objective pursued by the local authorities, which overrides the other fundamental values in the Chinese society. These include, but are not limited to, justice, fairness, and equality. In reality, distorted standards of stability have not only assisted in protecting vested interest groups and throttled the people’s expression of interest, but would also likely result in ultimate damages to genuine and long-term social stability.

Openness is the first and key value to be threatened by the ambiguity that clouds social stability. Articles 9 to 12 of the ROGI mandate the proactive release of certain kinds of government information in an attempt to rein in, through transparency, several serious infringements to the immediate interests of the public. Paradoxically, a substantial part of such information (e.g., information concerning land expropriation, environmental protection, and the safeguarding of food safety) is considered as capable of inducing “unstable factors” by many local authorities. Information

Xiangmuzu (法治指数创新工程项目组) [The Creative Project of Legal Index], Quntixing Shijian de Tedian, Youyin ji yi Yinghu (群体性事件的特点、诱因及其应对) [Mass Incidents: Characteristics, Incentives and Counter-Measures], in Zhongguo Fazhi Fazhan Baogao (中国法治发展报告) [Annual report on China’s rule of law No. 12 (Blue Book of Rule of Law)] 270, 277-83 (2014).

50 On the politicization of mass incidents, see Feng, supra note 42, at 69-72, 81-85.

51 Cao Yong (曹勇), Bei “Weiwen” de Fayuan Caijue (被“维稳”的法院裁决) [The Court Ruling Which Was Subject to “Stability Maintenance”]. NANFANG ZHOUKAN (南方周刊), Nov. 4, 2010, available at http://www.infzm.com/content/52174.


53 See Sun et al., supra note 48; Yu Jianrong (于建嵘), Yali Weiwen de Zhengzhixue Fenxi: Zhongguo Shexui Gangxing Wending de Yuansheng Ji zhi (压力维稳的政治学分析——中国社会刚性稳定的运行机制) [Political Analysis of the Pressure-Based Maintenance of Stability], 4 ZHANLUE YU GUANLI (战略与管理) 85, 55 (2010).

54 Despite that stability maintenance apparatus was constantly reinforced since 2008, the number of mass incidents was generally on the rise from 2006 to 2012, as admitted by scholars working at the Chinese Academy of Social Sciences, think tank of the State Council. See 2010 Nian Zhongguo Shexui Xingshi Fenxi yu Yuce (2010年中国社会形势分析与预测) [Chinese Society 2010: Analysis and Forecast] 93-94 (Ru Xin 罗新 et al. ed. 2009); 2013 Nian Zhongguo Shexui Xingshi Fenxi yu Yuce (2013年中国社会形势分析与预测) [Chinese Society 2013: Analysis and Forecast] 13-14 (Li Peilin 李培林 et al. eds., 2012); Tan Yifei (谭倚飞), Xinguan Quntixing Shijian (新兴群体性事件) [New Observations of Mass Incidents], CAI JING ZAZHI (财经杂志) [CAIJING MAG.], June 27, 2011, at no. 15.
blackouts in the name of stability maintenance are frequently exposed by both official and market-oriented media. For instance, from July to September 2010, there had been three successive events occurring across the nation that breached the relevant transparency requirements: (1) a county government in Fujian Province, Southeast China, along with a listed national mining company, concealed an accident that involved leakage of polluted water into a nearby river by a company-owned factory; (2) the quality inspection authority of Hunan Province (in Southcentral China) deliberately withheld its inspection findings which showed the existence of carcinogen in a widely-consumed cooking oil for half a year from the public; and (3) a city government in Henan Province, Central China refused to release information concerning a major epidemic contracted by a species of insect.

In relation to emergencies, mass incidents in particular, which result in massive harms or serious rupture of social orders and are often considered threatening social stability by the officials, information tends to be withheld from the public, despite the

55 See Ma Liya (马丽娅), Shanghang Xian Yinman Zijin Kuangye Wuran Shigu? Xuanchuan Bu ChengMetingshuo Manbao (上杭县隐瞒紫金矿业污染事故？宣传部称没听说瞒报) [Zijin Mining Co.’s Pollution Accident Was Concealed in Shanghang County? Propaganda Department Claimed Unaware of Any Cover-up], PEOPLE’S DAILY ONLINE (July 13, 2010), http://www.people.com.cn/G/14748/12133162.html; Liang Weihao (梁卫浩), Zijin Kuangye Feishui Shenlou Tingjiang zhi Liuyu Yanzhong Wuran Chibao Jiutian (紫金矿业废水渗漏汀江致流域严重污染迟报九天) [Sewage Leaking by Zijin Mining Co. Led to Serious Pollution in Ting River: Report Overdue of Nine Days], CHINA NATIONAL RADIO NET (July 13, 2010), http://www.cnr.cn/china/newszh/yaowen/201007/20100713_506723238.html. It has also been reported that a considerable number of county government officials served concurrently in the mining company. See Cao Haidong (曹海东), Wuran Yuelai Yuejin, Zhouxiang Yuelai Yueyuan? (污染越来越近，真相越来越远？) [Pollution Comes Nearer While the Truth Becomes Farther Away?], NAFANG ZHOUKAN (南方周刊) [SOUTHERN WKLY.], July 21, 2010, available at http://www.infzm.com/content/47936. The concealment violated Huanjing Xinxi Gongkai Banfa (Shixing) (环境信息公开办法(试行)) [Measures on Open Environmental Information (for Trial Implementation)] (promulgated by the State Environmental Protection Administration, Apr. 11, 2007, effective May 1, 2008) art. 11.

56 See Zhao Hejuan (赵何娟) & Zheng Zheng (郑正), Wenti Chayou Mimi “Zhaohui” (问题茶油秘密“召回”) [The Secret “Recall” of Problematic Tea Tree Oil], 35 XIN SHUI ZHOUKAN (新世纪周刊) [NEW CENTURY WKLY.] 58, 58-60 (2010). The production of tea-seed oil is an industry supported by the Hunan government. The company involved is located in a county that is usually called home of the tea-seed in China, and obtains special assistance from the local government. It is suspected that local governments at various levels were concerned about the negative impact on the tea-seed industry if news about the contamination were released. The withholding violated Shipin Zhaohui Guanli Guiding (食品召回管理规定) [Administrative Provisions on Food Recall] (promulgated by General Administration for Quality Supervision, Inspection and Quarantine, July 24, 2007) arts. 20 & 26.


58 For an analysis of the openness of information concerning emergencies that occurred in 2009-2011, see Lai Shipan (赖诗攀), Wenze, Guanxing Yu Gongkai: Jiuyi 97 Ge Gonggong Weiji Shijian De Difang Zhengfu Xinxi Gongkai Zhuzhi (问责、惯性与公开:基于97个公共危机事件的地方政府
Emergency Response Law’s mild requirement that local governments accurately and timely release information on the development of and measures in response to such emergencies. More appallingly, various local governments, under the disguise of social stability, have not only refused to release the relevant information, but also suppressed the reports involving the health and safety of children, many of which at the centers of grave national concern. For instance, the censored news was originally aimed to cover the causes for the collapse of schools during the Sichuan Earthquake in Southwest China, with a fatality of over 5,500 students, the production of milk contaminated with tripoly cyanamide by companies in North China, which affected more than 52,800 infants nationwide, and injections of substandard vaccines in Shanxi Province, Northwest China, as allegedly correlated with the deaths of four children and the sickening of 74 others.

To a considerable extent, “endangering social stability” has become the favored discourse of local authorities that is equivalent to the embarrassment of officials, damage to the government’s image or a loss of confidence in government—none of which is considered a valid interest under the FOI regimes of most democratic countries. As long as the meaning of social stability is unduly generalized with close control absent, recourse to such stability as an absolute exemption bears the risk of rendering the disclosure obligations imposed by the ROGI largely meaningless. The responsibility thus

行为研究] [Accountability, Inertia and Publicity: A Study of Local Government Behavior Based on Ninety-Seven Public Crisis Cases], 10 GONGGONG GUANLI XUEBAO (公共管理学报) [J. PUB. MGMT.] 21, 21-24 (2013).


62 See Ren Bo (任波), “Sanlu” Wenti Nai’fen Weiji (三鹿问题奶粉危机) [The Crisis over Sanlu’s Contaminated Milk Powder], CAIJING ZAZHI (财经杂志) [CAIJING MAG.], Sept. 15, 2008, at no. 19; Shen Ying (沈颖), Sanlu Baoguang Qian bei Zhebi de Shi yue (三鹿曝光前被遮蔽的十个月) [The Ten-Month Cover-up before the Exposure of Sanlu], NANFANG ZHOUKAN (南方周刊) [SOUTHERN Wkly.], Jan. 8, 2009, available at http://www.infzm.com/content/22472/1.

falls upon the courts for confining the use of this exemption to serving the legitimate purpose of maintaining public order.\textsuperscript{64}

Given the vagueness inherent to Article 8, agencies are provided with wide discretion in the application of the social stability exemption, and the grounds of judicial review of administrative discretion have become major tools for the courts to resolve disputes concerning the exemption. As the grounds are not clearly stipulated by law, it is necessary to first review the relevant doctrines of Chinese administrative law and their implications for the courts.

III. GROUNDS OF JUDICIAL REVIEW

It is widely acknowledged that the control of administrative discretion is one of the weakest links of judicial review in China.\textsuperscript{65} As the relevant grounds of judicial review are provided by legal doctrine\textsuperscript{66} rather than expressly stipulated by the Administrative Litigation Law (ALL), local judges often experience uncertainty in determining how to wield their review power. Furthermore, doctrinal debates over the intensity of judicial review concerning a special type of discretion (that is, the interpretation of indefinite legal concepts) adds to the courts’ difficulty in handling the social stability exemption, for that “social stability” is precisely an indefinite concept. This section summarizes the mainstream doctrinal views and their influences on the SPC. To a large extent, the SPC’s position

\textsuperscript{64} The SPC had proposed stipulating in the judicial interpretations that “information should be exempt whenever its disclosure may endanger the three types of security and social stability.” See Zuigao Renmin Fayuan Guanyu Shenli Zhengfu Xinxi Gongkai Xingzheng Anjian Ruogan Wenti de Guiding (Zengqiu Yijian Gao) (最高人民法院关于审理政府信息公开行政案件若干问题的规定(征求意见稿)) [Provisions of the Supreme People’s Court on Several Issues relating to the Trial of Administrative Cases concerning Open Government Information (Draft for Soliciting Public Submissions)] art. 11(3), CHINACOURT (Oct. 11, 2009), available at http://www.chinacourt.org/html/article/200911/02/379436.shtml. However, the proposal was extensively criticized during the period of public comment, because it simply restated the provisions of the ROGI without providing any operable standards. The proposal was not adopted in the judicial interpretations that were finally promulgated. See Li Guangyu (李广宇), Zhengfu Xinxi Gongkai Sifa Jieshi Zhengqiu Yijian Gao ji ji Xugai Jiuchang Shaping (政府信息公开司法解释征求意见稿及修改建议概述) [Review of the Draft Judicial Interpretations on OGI and Relevant Public Submissions], 39 REFERENCE J.R. 97, 119-20 (2010); Zuigao Renmin Fayuan Guanyu Shenli Zhengfu Xinxi Gongkai Xingzheng Anjian Ruogan Wenti de Guiding (最高人民法院关于审理政府信息公开行政案件若干问题的规定) [Provisions on Several Issues Relating to the Trial of Administrative Cases Concerning Open Government Information] (promulgated by Sup. People’s Ct. July 29, 2011, effective Aug. 13, 2011) (Chinalawinfo) (hereinafter Judicial Interpretations on OGI).

\textsuperscript{65} Wang Zhenyu (王振宇), Xingzheng Cailiang jiqi Sifa Shencha (行政裁量及其司法审查) [Administrative Discretion and Judicial Review], 19 RENMIN SIFA YINGYONG (人民司法·应用) [JUDICATURE (PG)] 51 (2009). The author is an SPC justice.

\textsuperscript{66} Doctrine in this article refers to the systematic scholarly explanation of a field or issue of law, including concepts and principles thereof, and the general methods of legal argumentation and interpretation. For the import role played by doctrine in civil law countries, see JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 60-67 (3d ed. 2007).
on or inclination toward review approaches, as revealed in referential cases and other materials written by SPC justices, outlines the options for local courts in trials.

A. Administrative Discretion

Leading textbooks on Chinese administrative law usually briefly sketch the dichotomy between a “statutorily bound administrative act” (羁束行政行为, hereinafter bound act) and a “discretionary administrative act” (裁量行政行为, hereinafter discretionary act). As influenced by the European continental tradition, this dichotomy is based on the degree of restraint imposed on an agency by law and the corresponding scope of discretion that is retained. Agencies are said to be making bound acts when acting according to the scope, condition, standard, formality, and procedures prescribed by the law. In contrast, discretionary acts, or acts exercising administrative discretion, are actions that may be decided by an agency in accordance with what it believes to be appropriate in the absence of legal provisions concerning the condition, range, formality, etc., of those actions.

The ALL of 1989 does not provide any guidelines as to whether and how the courts are to scrutinize discretionary acts. However, under Article 54, “abuse of power” is one of the grounds for quashing a specific administrative act, and “manifest injustice” for altering an administrative punishment. These grounds are usually understood by scholars and SPC judges as the basis for reviewing discretionary acts. Although “manifest injustice” only applies to

67 For the evolution of this conceptual dichotomy in mainland China, see Zhongguo Xingzheng Faxue 20 Nian Yanjiu Baogao (中国行政法学20年研究报告) [Research Report on Two Decades of Administrative Law Study in China] 247-48 (Ying Songnian (应松年) & Yang Weidong (杨伟东) eds., 2008). For how it is influenced by the European continental tradition, see Xu Chen (徐晨), Quanli Jingzheng: Kongzhi Cailiangquan de Zhidu Xuanze (权力竞争:控制裁量权的制度选择) [Competition of Powers: Institutional Choice for the Control over Discretion] 10-12 (2007); Wang Guisong (王贵松), Xingzheng Cailiang: Jishu yu Ziyou de Misi (行政裁量: 羁束与自由的迷思) [Administrative Discretion: The Myth of Liberty and Being Bound], 4 XINGZHENG FAXUE YANJIU (行政法学研究) [ADMIN. L. J.] 47, 47-50 (2008).


69 Art. 54(2) of the ALL 1989 provides five grounds for quashing a specific administrative act:
(a) where the main evidence [in support of the act at issue] was insufficient;
(b) where laws and regulations were applied incorrectly;
(c) where statutory procedures were violated;
(d) where [the act] was performed in excess of authority; or
(e) where powers were abused.
Art. 54(4) provides the grounds for altering a specific administrative act “where an administrative punishment is manifestly unjust.” The ALL of 2014 adds “apparently inappropriate” as a new ground of judicial review.

70 See Xingzheng Shenpan yu Xingzheng Zhifa Shiwu Zhiyin (行政审判与行政执法实务指引) [Practical Guidance on Judicial Review and Administrative Enforcement of Law] 681-91 (Cai Xiaoxue
administrative punishments, “abuse of power” is applicable to a wider range of unreasonable specific administrative acts.\textsuperscript{71} According to academic writings by SPC justices, abuse of power incorporates several categories, based on judicial practice over the past decade.\textsuperscript{72} These are:

1. Improper purpose, where the administrative act violates or deviates from the purposes or principles of the law, or is based on an ulterior motive to serve individual or group interests of the internal personnel of the agency.

2. Inappropriate considerations, where in undertaking the act, the agency has taken into account factors against the common sense, or has failed to consider relevant factors that should ordinarily be considered.

3. Capriciousness, where the agency arrives at different decisions for cases that share the same characteristics without legitimate justification. It is often understood as inconsistency, or unequal treatment.

4. Violation of the principle of proportionality. This principle consists of three parts. Where an agency undertakes activities that affect individual interests, the activities should (a) be appropriate for the purpose of law enforcement, (b) cause minimum injuries, and (c) possess advantages for the public interest that clearly outweighs the adverse effects that might ensue on the individuals concerned.

The first three categories, focusing on the “process of discretion,” appear to correspond to the common law approach to controlling discretionary power,\textsuperscript{73} whereas the last resembles the German

\textsuperscript{71} Scholars and judges hold differing views on the definition of abuse of power, but agree on three essential elements: such abuse can occur in specific administrative acts that (1) are taken within the jurisdiction of the agency concerned, (2) relate only to the exercise of discretionary power, and (3) are against or deviate from the legislative intent or legal principles. See \textit{Practical Guidance on Judicial Review and Administrative Enforcement of Law}, supra note 70, at 681-84; \textit{Lin}, supra note 70, at 214.


\textsuperscript{73} See Yu Lingyun (余凌云), \textit{Dui Xingzheng Jiguan Lanyong Zhiquan de Sifa Shencha: cong Ruogan Pan’an Kan Fayuan Shenli de Pianhao Wenti} (对行政机关滥用职权的司法审查——从若干
doctrine of a “substantive review” in terms of scrutinizing the merits of administrative activities. These similarities reflect the influence of doctrinal studies of administrative law in the two major legal traditions on members of the supreme judiciary.

The SPC has since published a series of referential cases to establish these reinterpreted grounds as operable standards for local courts. *Wang Liping v. Transport Bureau of Zhongmou County* 74 illustrates that a failure to consider an individual’s security of property when adopting administrative coercive measures constitutes an abuse of power. *Huifeng Industrial Development Co. v. Planning Bureau of Ha'erbin City* 75 demonstrates SPC’s application of proportionality review in quashing the administrative punishment that resulted in more-than necessary injuries to the plaintiff. Finally, in *Yimin Co. v. People’s Government of Zhoukou City et al.*, 77 the SPC reviewed an administrative act that involved the exercise of discretionary power and applied a principle similar to legitimate expectations. 78

Although the SPC has taken a clear stand in scrutinizing gravely unreasonable discretionary acts and encouraged the lower courts to follow suit, local courts have exhibited hesitation in interfering with administrative discretion, especially given the lack of clear standards.

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75 Huifeng Shiye Fazhan Gongsi Su Haerbin Shi Guihuaaju (汇丰实业发展公司诉哈尔滨市规划局) [Huifeng Industrial Development Co. v. Planning Bureau of Ha'erbin City] Apr. 28, 2000 (Sup. People’s Ct.). This was the first judicial review case whose final judgment was published by the SPC on its official website. The original webpage is unavailable due to website reconstruction, but a copy of the judgment is available at http://www.110.com/panli/panli_47829.html (last visited Dec. 16). For analysis of the case, see Zhan Zhongle (湛中乐), *Xingzheng Fa shang de Bili Yuanze jiqi Sifa Yunyong: Huifeng Shiye Fazhan Youxian Gongsi Su Haerbin Shi Guihuaju An de Falü Fenxi* (《行政法上的比例原则及其司法运用——汇丰实业发展有限公司诉哈尔滨市规划局案的法律分析》) [The Proportionality Principle in Administrative Law and Its Judicial Application], 1 XINZHE FAXUE YANJU (行政法学研究) [ADMIN. L. J.] 69, 69-76 (2003).

76 In an attempt to develop a more authoritative system of referential cases, the Administrative Division of the SPC edits and publishes a series called *Chines Judicial Review Cases*. In the series’ first volume (which was slightly differently named as *Chinese Judicial Review Guiding Cases*), the principle of proportionality is explicitly relied on in two cases to review discretionary acts. See Zuiqiao Renmin Fayuan Xingzhengting (最高人民法院行政庭) [SPC Administrative Division], 1 Zhongguo Xingzheng Shenpan Zhidao Anli (《中国行政审判指导案例》) [Chinese Judicial Review Guiding Cases] 169-255 (2010).

77 Yimin Gongsi Su Henan Sheng Zhouchou Shi Renmin Zhengfu Deng (益民公司诉河南省周口市人民政府等) [Yimin Co. v. People’s Government of Zhoukou City et al.], SUP. PEOPLE’S CT. GAZ. (Sup, People’s Ct., Mar. 1, 2005).

78 For the case’s implications, see Zhou Youyong (周佑勇), Xingzheng Cailiang Zhili Yanju: Yizhong Gongneng Zhuyi de Lichang (《行政裁量治理研究——一种功能主义的立场》) [On the Governance of Administrative Discretion: A Functionalist Approach] 246-47 (2008). For the suggestion to use the protection of legitimate expectation to control administrative discretion, see SPC Administrative Division et al., supra note 72, 120-27, 132-36.
of review under the ALL. The phrase “administrative discretion,” seldom appeared in the judgments by local courts before 2000.\textsuperscript{79} Since then, local judges have begun to identify exercises of discretion as the issue, but have generally refrained from reviewing them nevertheless.\textsuperscript{80} Even when judges seemed to have wanted to quash manifestly unreasonable discretionary acts, many avoided applying the ground of “abuse of power.” Empirical studies indicate that in very few judicial review cases have the courts examined whether or not there had been an abuse of power.\textsuperscript{81} A key reason for the failure is that, unlike scholars who equate “abuse of power” with “abuse of discretion,” many judges tend to analogize abuse of power to the subjective faults of governmental officials in performing their duties,\textsuperscript{82} and, accordingly, find it extremely difficult to prove such faults.\textsuperscript{83} As an alternative to controlling administrative discretion, judges seem to prefer to resort to the more objective standards, such as the grounds of “excess of authority” and “violation of statutory procedures.”\textsuperscript{84} However, examining administrative discretion with these standards often serves to hide the genuine rationale of the judgment, leading to insufficient remedies.\textsuperscript{85}

\textsuperscript{79} \textit{Yang Weidong} (杨伟东), \textit{Xingzheng Sifa Xingwei Shencha Qiangdu Yanjiu} (行政行为司法审查强度研究) [\textit{A Study on Intensity of Judicial Review of Administrative Actions}] 203 (2003).

\textsuperscript{80} Wang, \textit{supra} note 65, at 50. For typical cases, see Xiang Xin (项新), \textit{Rongyu Buzuowei Ziyou Cailiang: Jianyu Yang Lixin Juanshou Shangque} (荣辱不作为自由裁量——兼与杨立新教授商榷) [\textit{Honour, Inaction and Discretion}], 8 \textit{FA XUE} (法学) [\textit{Law Science}] 1, 2 (2001); Yu, \textit{supra} note 73, at 32.

\textsuperscript{81} In 182 successful cases against the agencies adopted in Selected Cases of People’s Courts from 1992 to 1999, less than 5.49% were ruled on the ground of abuse of power. See Shen Kui (沈岿), \textit{Xingzheng Susong Queli “Cailiang Mingxian Budang” Biaozhun Zhiyi} (行政诉讼确立“裁量明显不当”标准之议) [\textit{On Establishing the Ground Of “manifestly Unreasonable Discretion” in Administrative Litigation}], 4 \textit{FASHIANG YANJU} (法商研究) [\textit{Studies in Law and Business}] 27, 31-32 (2004). In Taizhou, a city in Zhejiang Province, of 219 appeal cases adjudicated in 2004, none was ruled on the ground of abuse of power, and only 7 involved manifest injustice in administrative punishments. See Chunyan Zheng, Administrative Discretion Operating between Facts and Norms (2006) (unpublished PhD Thesis, Zhejiang University). Also, in recent years, there have been few rulings concerning abuse of power rendered by the Haidian District Court of Beijing. See Yu, \textit{supra} note 73, at 24.

\textsuperscript{82} In daily language, “abuse of power” often means an intentional violation of the law, and numerous laws and regulations use the term together with such terms as “bribe taking,” “dereliction of duty,” and “engagement in fraud.” See Yao Ruimin (姚锐敏), \textit{Guanyu Xingzheng Lanyong Zhiqian de Fanwei he Xingzhi de Tiantao} (关于行政滥用职权的范围和性质的探讨) [\textit{On the Scope and Nature of Abuse of Administrative Power}], 5 \textit{HUAZHONG SHIFAN DAXUE XUEBAO RENWEN SHEHUI KEXUEBAN} (华中师范大学学报(人文社会科学研究)) [\textit{Journal of Huazhong Normal University (Humanities and Social Sciences Edition)}] 113, 113-18 (2000).

\textsuperscript{83} See Jiang Bixin (江必新), Zhongguo Xingzheng Susong Zhidu de Wanshan Xingzheng Susongfa Xiugai Wenti Shiwu Yanjiu (中国行政诉讼制度的完善：行政诉讼法修改问题实务研究) [\textit{The Perfection of China’s Administrative Litigation System}] 208-81 (2005).

\textsuperscript{84} See Yu, \textit{supra} note 73, at 29-30.

\textsuperscript{85} For example, if the court quashes a discretionary decision on the ground of procedural impropriety without criticizing the manifest flaw in the exercise of discretion, the defendant can remake
B. Interpretation of Indefinite Legal Concepts

Judicial control of administrative discretion is further complicated by the lack of consensus on the relation between administrative discretion and the interpretation of indefinite legal concepts.

The debate originates from disagreements over the categorization of administrative discretion. Some scholars propose categorizing it according to the logical structure of legal norms. When a legal norm provides for both preconditions (if $T_1$ exists) and consequences (then measures of $R_1$, $R_2$ ... can be taken), administrative discretion may be divided into “discretion in consequence” (后果裁量) and “discretion in precondition” (要件裁量). The former means that when an agency finds the conditions required by law have been satisfied, it may choose whichever consequence allowed by the law, including whether to undertake action and the concrete form and content of the action. The latter phrase refers to an agency’s power to freely determine whether the precondition for the action it is to undertake is satisfied, particularly its power to determine the concrete content of the preconditions that contain concepts with indefinite meanings, such as “public interest” and “particularly serious circumstances.” If agencies enjoy unrestricted freedom in determining these preconditions, they can easily confer the power upon themselves. Hence, scholars have heatedly debated on whether agencies should have discretion in deciding preconditions and the extent to which those decisions can be scrutinized by the courts.

On the one hand, some scholars deny the existence of “discretion in precondition.” They contend that, although agencies enjoy a certain degree of latitude in defining unspecified preconditions, in doing so they are making judgments on legal concepts, which should ultimately have objective meanings. Therefore, the agencies are in fact applying the law rather than exercising discretion, and the correctness of that application of law should be determined by the courts. This view is heavily influenced by the orthodox doctrine in the same decision after going through the procedure. See SHEN KUI (沈岿), GONGFA BIANQIAN YU HEFAXING (公法变迁与合法性) [EVOLUTION OF PUBLIC LAW AND LEGITIMACY] 261 (2010).

See Yang Jianshun (杨建顺), Lun Xingzheng Cailiang yu Sifa Shencha: Jianji Xingzheng Ziwo Jushu Yuanze de Lilan Genju (论行政裁量与司法审查——兼及行政自我拘束原则的理论根据) [On Administrative Discretion and Judicial Review], 1 FASHANG YANJIU (法商研究) [STUDIES IN LAW AND BUSINESS] 63, 64-65 (2003); Liu Heng (刘恒) & Suo Jing (所静), Lundui Xingzheng Falü Guifan de Shiyongxing Shencha Zhidu (论对行政法律规范的适用性审查制度) [Studies of the J udgments Relating to the Application of Law in Administrative Acts] 155-56, 152-53 (2005). Prof. Lin Feng describes discretion in precondition as discretion in determining the essential legal elements”. See Lin, supra note 70, at 210. This division actually follows the mainstream schools of thought in Germany and Japan during the first half of the 20th century. For an introduction to these schools, see WANG GUISONG (王贵松), XINGZHENG CAILIANG DE NEIZAI GOUZAO (行政裁量的内在构造) [The Internal Structure of Administrative Discretion], 2 FAXUEJIA (法学家) [THE JURIST] 31, 32-33 (2009).

See ZHAO XIAOYUN (赵肖筠) & ZHANG JIANKANG (张建康), Lun Xingzheng Ziyou Cailiangquan de Sifa Kongzhi (论行政自由裁量权的司法控制) [On Judicial Control of Administrative Discretion], 4
contemporary German administrative law that confines “discretion” (erstmen) merely to the choice of legal consequence. The doctrine holds that when German administrative authorities decide on the meanings of “indefinite legal concepts” (unbestimmte rechtsbegriffe, 不确定法律概念) included in a precondition, their decisions should be under the full scrutiny of federal administrative courts, and only under very limited circumstances may the authorities enjoy the “margin of appreciation” (beurteilungsspielraum) that is subject to restricted judicial scrutiny. Some other scholars object the idea of administrative discretion in interpreting the law, but preferring to rely on the allegedly prevailing view in common law countries that discretion is the power to choose whether to act and how to act. They suggest learning and adopting the English approach to judicial control of “subjective language” in legislation, and regard Article 54(2)(b) of the ALL (i.e. “the correctness of application of law”) as the proper ground for reviewing interpretations of indefinite legal concepts.

On the other hand, there are other scholars who affirm the existence of discretion in precondition — or discretion in interpreting...
indefinite legal concepts. Some of them believe that discretion should penetrate each and every phase of the application process of legal norms, including the finding of facts, interpretation of the “constitutive preconditions” (构成要件) prescribed by law, subsumption of found facts to constitutive preconditions, and the choice and decision of legal consequences. Some have also pointed out that in the United States, interpretations of indefinite legal concepts by agencies are regarded as an exercise of discretionary power. It is suggested that Chinese judges should learn from the U.S. courts’ approach in scrutinizing such interpretations along with other kinds of discretion. Scholars who advocate for this view generally agree that discretion in interpretation of the law should be subject to judicial scrutiny.

In reality, it is overly simplistic to rely on the circumstance of a single country, whichever it may be, to produce a formula for controlling the pervasive use of administrative discretion in China. Although scholars differ in their preferences for the doctrines of these different countries, it is unanimously found that administrative applications of indefinite legal concepts are almost unrestricted in China, and thus should be subjected to more intense judicial review, regardless of whether those applications involve discretion. With regard to discretion in consequence, they largely agree that the intensity of judicial review should vary according to the subject matter and that a court should not substitute an agency’s decision for its own in cases concerning highly contentious political issues or

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94 The academic debates of mainland scholars sometimes over-stress the difference between the doctrines of various countries on judicial review of administrative discretion, but have not paid equal attention to the common features of these doctrines in terms of bringing administrative discretion under control to an extent that is required by the society. For a general comparative study of judicial control of the application of indefinite legal concepts under different legal traditions, see PAUL CRAIG, JUDICIAL REVIEW OF QUESTIONS OF LAW: A COMPARATIVE PERSPECTIVE, IN COMPARATIVE ADMINISTRATIVE LAW 449-65 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2011). The German approach to controlling the interpretation of indefinite legal concepts is considered to be stricter than the English approach. See Yang, supra note 79, at 164; Yutaka, supra note 88, at 161. A German scholar points out that English common law does not categorize discretion into different forms as German law does, but the German notion of an indefinite legal concept “is similar to a question of fact and degree” in English law. See MARTINA KUNNECKE, TRADITION AND CHANGE IN ADMINISTRATIVE LAW: AN ANGLO-GERMAN COMPARISON 83 (2007).
problems over which the agency in question has demonstrated technical expertise.

The SPC has not to date declared its position on whether administrative application of indefinite legal concepts constitutes a kind of exercise of discretion. Senior judges hold different views on the issue, but have reached the consensus that such application should be subject to judicial review. The intensity of that review should be restricted, and the court should accord substantial weight to the given agency’s opinion.

It is noteworthy that many local judges have hesitated to review any kind of legal interpretation made by government agencies, despite the fact that Article 54(2) of the ALL invests all courts with the power to review applications of the law by agencies. Research suggests that local courts usually only annul applications that are frankly against the unequivocal meaning of a legal norm. With regard to agencies’ interpretations of indefinite concepts in individual cases, they tend to be deferential most of the time. Even when local courts find such interpretations problematic, they generally choose to submit the concepts to the SPC for interpretation, as opposed to making their own judgments. This evasive stance is exemplified in a representative case where a court of second instance overruled an original judgment on the ground that the court of first instance had no power to interpret the “serious consequence”

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95 See Yang, supra note 87, at 67-69; Liu & Suo, supra note 86, at 144-45; Zhao & Zhang, supra note 87, at 4-5; Yu, supra note 73, at 30-31; Hu & Chen, supra note 92, at 59-60; Xu, supra note 67, at 159-62.

96 Justice Wang Zhenyu thinks that indefinite legal concepts leave space for the exercise of discretionary power. See Wang Zhenyu (王振宇), Xingzheng Cailiang yu Sifa Shengcha (行政裁量与司法审查) [Administrative Discretion and Judicial Review] in [Practices guide on German and Chinese administrative law and administrative litigation] 110-12 (SPC Administrative Division et al. eds., 2008). In contrast, Justices Jiang Bixin and Li Guangyu follow the German doctrine, which subjects indefinite legal concepts to complete judicial scrutiny. See Jiang Bixin (江必新) & Li Guangyu (李广宇), Zhengfu Xinxi Gongkai Xingzheng Susong Ruogan Wenti Tantao (政府信息公开行政诉讼若干问题探讨) [Discussions on Administrative Litigation Concerning Open Government Information], 3 FALÜ YU ZHENGZHI (法治与政治) [LAW AND POLITICS] 12, 26 (2009). Further, Justice Wang Yaqin of the National Judge College thinks that, although the application of indefinite legal concepts is not identical to discretion, it can overlap with it. See Wang Yaqin (王亚琴), Dui Xingzheng Jiguan Jieshi Shiyong Buquedao Falú Gainian de Sifa Shengcha (对行政机关解释适用不确定法律概念的司法审查) [Judicial Review of the Interpretations of Indefinite Legal Concepts by Administrative Organs], 7 RENMIN SIFA (人民司法) [PEOPLE’S JUDICATURE] 60, 62-63, 65 (2004).

97 Wang, supra note 96, at 137-38; Wang Yaqin, supra note 96, at 65.

98 Prof. Zhou Hanhua studies Selective Cases of People’s Courts and summarizes a number of typical cases that exemplify the judicial scrutiny of applications of legal concepts by agencies. However, all of the legal concepts mentioned in these cases have definite meanings. See Zhou Hanhua (周汉华), Xingzheng Susongfa de Xinfaizhan (行政诉讼法的新发展) [New Developments in Administrative Litigation] 109-10, 119 (Lü Yanbin (吕艳滨) ed., 2008).
prescribed by the Law on Punishments in Public Order and Security Administration. 99

In summary, mainstream administrative law doctrines acknowledge that administrative discretion, including interpretations of indefinite legal concepts (depending on which particular doctrine is applied), should be subject to judicial review, with the grounds of such review stipulated by the ALL. Although the SPC has expressed its endorsement of mainstream doctrine through the publication of referential cases, local courts have been rather reluctant to exert their review powers, demonstrating the backdrop against which local courts have since begun to examine the exercise of administrative discretion in the application of the social stability exemption clause under the ROGI.

IV. THE REAL PICTURE OF JUDICIAL SCRUTINY

Prior to 2008, Chinese administrative judges seldom examined claims of social stability, as they often regarded the issues to be incidental in respect to major issues of administrative disputes. The ROGI has rendered social stability as the major issue in many trials. In view of the widespread violation of rights committed in the name of stability maintenance, scholars have urged the judiciary to stay vigilant to such claims and to be prepared to intervene. 100 While judges do acknowledge stability maintenance as a valid cause to withhold information, many caution against the abuse of discretion in applying the social stability-based exemptions, and are active in academic discussions over the control of that discretion. 101

It should be noted that referential cases concerning the social stability exemption are appearing more frequently in SPC publications, compared to cases concerning any other single OGI issue. Given the lack of statutory procedures and general criteria for determining whether certain information endangers social stability, the SPC seems to have wanted to provide timely guidance on the standards of review to local courts. Despite the SPC’s efforts, ordinary cases from judgment databases and media reports reveal more diverse judicial approaches. In this section, the three referential cases published in five case collections will be analyzed in priority

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99 Yang, supra note 87, at 487. The appellate court declared that only “laws and regulations” can define the meaning of serious consequences, and, in the absence of those authorities, the court cannot make its own interpretations, including clarifications in the light of the concrete situation of the case.

100 See Zhan, supra note 75, at 43; Yang Xiaojun (杨小君), Zhengfu Xinxi Gongkai Fanwei Ruogan Falv Wenti (政府信息公开范围若干法律问题) [Several Legal Issues Concerning the Scope of Open Government Information], 4 JIANGSU XINGZHENG XUEYUAN XUEBAO (江苏行政学院学报) [JOURNAL OF JIANGSU ADMINISTRATION INSTITUTE] 108, 111-13 (2009).

101 For example, Justices Jiang and Li hold that the court should allow withholding “only when agencies give sufficient reasons.” See Jiang & Li, supra note 96, at 22.
given their significance, followed by an examination of cases from other sources that are indicative of the vast amount of cases that involve the social stability exemption.

A. Referential Cases

1. The Test of Likelihood of Prejudice

In essence, the social stability exemption in the ROGI applies when two conditions are met: (1) when “social stability” is involved; and (2) when this stability will be “endangered” by disclosure of information at issue. As regards the second condition, endangerment refers to the possibility of something being harmed, and the test of endangerment to social stability consists one of the likelihood of social stability being jeopardized. The test of likelihood was addressed in the referential case that first appeared in SPC publications. The case, adjudicated in 2008, was Wu Qiqun et al v. People’s Government of Hangzhou City (hereinafter Wu Qiqun). The plaintiffs were staff members of a state-owned enterprise in Hangzhou who participated in an early retirement scheme when the enterprise restructured in 2001. When they discovered signs of an asset drain during the restructuring process, and began to suspect that their pensions would be adversely affected, they petitioned the local authority overseeing the state-owned asset through the channel of letters and visits. In response, the Hangzhou City Government convened a meeting with various departments to discuss the welfare arrangements of the enterprise’s retirees. The plaintiffs then demanded access to the minutes of that meeting. The government refused, purporting that, inter alia, disclosure of the minutes “would

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102 Two cases were published on more than one SPC publications. The five publications are: Chinese Judicial Review Cases (hereinafter J.R. Cases), Reference for Administrative Enforcement of Law and Judicial Review (Reference J.R.), Selected Cases of People’s Courts (Selected Cases), Reports on Major Cases Adjudicated in China (MCAC Reports), and People’s Judicature (Case) (Judicature (C)). For details of each publication, see Appendix I.

103 Wu Qiqun Deng Siren Su Hangzhou Shi Renmin Zhengfu (吴啟群等诉杭州市人民政府) [Wu Qiqun et al. v. People’s Government of Hangzhou City], Dec. 23, 2008 (Hangzhou Interm. People’s Ct.). The case was reported in Selected Cases in 2009 and in Reference J.R. in 2010. See Ma Guoxian (马国贤) et al., WU Qiqun Deng Siren Su Hangzhou Shi Renminzhengfu Bu Lüxing Xinxi Gongkai Fading Zhize An (吴啟群等诉杭州市人民政府不履行信息公开法定职责案) [Wu Qiqun and Other Four Persons v. People’s Government of Hangzhou City (Re Failure to Perform Statutory Duty of Disclosing Information)], 4 SELECTED CASES 481, 481-88 (2009); Ma Guoxian (马国贤) & Ma Liangji (马良骥), Huiyi Jiyao de Xinfang Jizheng, Xingzheng Jiguan de Dafu ji Juzheng Yiwu: Wu Qiqun Deng Siren Su Hangzhou Shi Renmin Zhengfu Bu Lüxing Xinxi Gongkai Fading Zhize Yi An (会议纪要的信息特征、行政机关的答复及举证义务——吴啟群等四人诉杭州市人民政府不履行信息公开法定职责一案) [Features of Meeting Minutes and the Obligations for Administrative Organs to Reply and Provide Evidence], 40 REFERENCE J.R. 134, 134-39 (2010).

be detrimental to the maintenance of social stability and harmony.\textsuperscript{105} The court disapproved of that refusal for the reasons that: (1) the meeting’s decision was closely related to the plaintiffs’ immediate interests, and therefore the plaintiffs have a corresponding “right to know” the details, and (2) the content of the minutes had already been conveyed to the plaintiffs in the form of “reply to petition.” The second reason negated the argument of a correlation between the minutes’ disclosure and the purported consequence. As the information had already been revealed in another form without causing any subsequent discernible jeopardization to social stability, an alteration in the form of disclosure would be unlikely to cause any harm. The test applied in this case may be reasonably said as nothing more than intuitive reasoning.

A more significant test is found in a case adjudicated in 2010, \textit{Zhou Ruqian v. Human Resources and Social Security Bureau of Shanghai Municipality} (hereinafter \textit{Zhou Ruqian}).\textsuperscript{106} The defendant in this case was responsible as the authority for organizing and overseeing the evaluation of titles in various professions. Every year, it selected qualified experts to compose an “Annual Jury of Senior Medical Professional Titles.” A citizen (probably an applicant for a medical professional title) filed an OGI request for the name list of those serving on the jury in 2008. The defendant refused the request on the grounds of the social stability exemption, arguing that release of the list might result in retaliation against the jurors and affect the fairness of future title evaluations. The courts of both instances ruled against the authority. The court of first instance rejected the defendant’s first argument, holding that disclosure of the jurors’ names would not enable applicants to learn the assessments or voting records of individual jurors (whose confidentiality is mandated by law), and therefore that the defendant could not reasonably justify its claim that the jurors’ work and lives would be disturbed by rejected applicants. Agreeing with the court of first instance, the appellate court criticized the second argument offered by the defendant. According to the appellate court, because half the jurors were reappointed on an annual basis, applicants would not be able to ascertain the members of future juries simply by referring to the name list of jurors in 2008. In addition, because professional titles were granted by vote of an at least two-thirds majority, it was unlikely that future applicants would succeed in getting their applications approved by lobbying particular jurors. Both courts

\textsuperscript{105} The judgment did not record this argument, but, according to the case report written by the trial judges, the argument was put forward by the defendant and considered indeed by the court. See Ma, \textit{supra} note 103, at 487.

\textsuperscript{106} \textit{Zhou Ruqian Su Shanghai Shi Renliziyun he Shehui Baozhang Ju} (周如倩诉上海市人力资源和社会保障局) [Zhou Ruqian v. Human Resources and Social Security Bureau of Shanghai Municipality], Aug. 11, 2010 (Shanghai Second Intern. People’s People’s Ct.).
seem to have adopted a test of immediate likelihood regarding the alleged prejudice. The defendant in this case failed the test because the anticipated harm was unlikely to occur except in very special cases.

The appellate court’s reasoning was endorsed by the SPC Administrative Division (i.e., the division for administrative litigation; hereinafter SPCAD), which adopted Zhou Ruqian in its publication series J.R. CASES and framed the test as “[to consider] the danger in causing adverse effects by disclosure.” Since 2010, the SPCAD has compiled this series as an “authoritative professional guide,” publishing typical cases adjudicated by local courts and extracting from them guiding principles on a particular issue of application or interpretation of the law that it hopes local courts will refer to when trying similar cases. Thus, the comments on Zhou Ruqian in this compilation reflect the SPCAD’s semi-official position on reviewing the social stability exemption.

The test of the likelihood of prejudice is a procedure-oriented, value-neutral method of scrutiny. Such a test is compatible with the Chinese courts’ routine method of reviewing discretionary acts, which focuses on “objective defects” in the decision-making process. However, problems with the application of the exemption lie not only in the failure to prove endangerment, but also in the undue expansion of the meaning of social stability. The latter issue entails more intense judicial scrutiny, as hinted in the case reports of Wu Qiqun and addressed in the Zhou Ruqian judgment.

2. Interpreting Elements of Social Stability

The judgment in Wu Qiqun did not explicitly indicate the court’s position concerning the indefinite concept of social stability, but, in case reports subsequently published in SELECTED CASES and REFERENCE J.R., the trial judge in the Hangzhou Intermediate Court and senior judges in the Zhejiang Provincial High Court commented on the interpretative approach to social stability. They particularly

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109 See “Editorial Statement”, in SPCAD, supra note 76.
pointed out that social stability is a general concept that needs careful consideration:

Social stability is the essential premise of smooth development of various undertakings relating to the cause of socialism in our country, the loss of which will lead to social unrest and disorder. The Party and the Government hence have long stressed that ‘stability overrides all’. In practice, however, maintaining social stability often becomes an excuse used by some agencies and government officials to violate the rights and interests of citizens. In fact, when citizens find their rights suppressed and remedies unavailable, discontent will arise and spread, eventually leading to more serious instability. Therefore, when judging whether disclosure of certain government information will endanger social stability, one should grasp well [the relation between] long-term public interest and short-term public interest as well as [the relation between] needs of the part and needs of the whole. A cautious balance is required.110

The discourse reflects the typical “dialectical mentality” often seen in Chinese political discourse that takes the opposite sides of an issue into account. Although the suggested interpretative approach remains fairly ambiguous, two points are clear. First, by stressing the significance of stability for the whole socialist cause, the reporting judges indicate that they perceive social stability from a holistic perspective. Second, they are fully aware of the abuse of the stability maintenance-based defense, and insist that the temporary stability achieved by violating citizens’ interests and restraining them from seeking remedy is not the genuine stability anticipated by the Party or central government. In other words, they imply a relatively strict interpretation of social stability, and propose the general rule that covering up rights violations committed by officials or withholding information with the consequence of obstructing access to remedy does not amount to the prevention of endangerment to social stability. Although these findings could be a sign that the trial judge considered the scope and purpose of social stability alleged by the defendant, it remains unclear to what extent that consideration led to the court’s ruling in Wu Qiqun.

It is Zhou Ruqian that suggests a more explicit shift toward a review of elements of social stability. According to the court of first instance, what the defendant sought to prevent, i.e., retaliation against jurors and hindrance of fair evaluation, is a professional risk

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110 See Ma, supra note 103, at 488; Ma & Ma, supra note 103, at 138-39. The two reports expressed the same viewpoint.
shared by the jurors with other practitioners, and that is a risk that has been progressively minimized through the establishment of criminal and administrative penalties against interference with title evaluations.\textsuperscript{111} The court thus implied that the defendant’s concerns did not fall within the scope of social stability. The appellate court further articulated its opposition to the defendant’s understanding of social stability, holding that: “Even [if] a certain applicant eventually [affects the results of future evaluation] through unfair means, this situation is not serious enough to be elevated to be an impact on social stability.”\textsuperscript{112}

Here the appellate court actually conducted a de novo review of the authority’s definition of social stability, and disregarded that definition when it saw that it did not match the court’s own understanding. Although the courts of both instances did not express their respective perceptions of social stability, they established, at the very least, a “prototype standard.” According to that standard, the object (a kind of interest or order) that an agency seeks to protect does not constitute a subcategory of social stability unless it bears a certain degree of significance in relation either to its importance to society as a whole or the scope of its beneficiary.

The interpretative approach to this concept was developed by the SPCAD, which comments on \textit{Zhou Ruqian} in \textit{J.R. CASES}. It lists four factors that local courts should take into account when reviewing the social stability exemption: (1) the scope of the consequences following from disclosure of the information concerned, (2) whether the disclosure will lead to social unrest, (3) the likelihood of consequences occurring, and (4) the legislative intent of the ROGI.\textsuperscript{113} Different from the judgments in \textit{Zhou Ruqian}, which adopted a “negative approach” to prescribe what is not social stability, the SPCAD here adopts a “positive approach” to prescribe the constitutive elements of social stability that it considers legitimate, i.e., factors (1) and (2).\textsuperscript{114} Concerning factor (1), the SPCAD requires agencies to prove that disclosure will affect “the whole society” rather than a limited domain such as “a certain industry or an area of small geographic scale.”\textsuperscript{115} It thus confirms both the holistic view of social stability expressed in the case reports on \textit{Wu Qiqun} and the strict construction of the scope of “social” given in the

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\begin{enumerate}
\item \textsuperscript{111} Zhou Ruqian, \textit{supra} note 106.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} Ma & Zhang, \textit{supra} note 108, at 222-23.
\item \textsuperscript{114} For detailed analysis of this shift in approach, see Jun Wang (王军), \textit{Xinxi Gongkai Zhong “Shehui Wending” de Sifa Rending: Jiya Xiangguan Panjue Shili de Fenxi} (信息公开中“社会稳定” 的司法认定——基于相关判决事例的分析) [Judicial Determination of “Social Stability” in Open Government Information], 1 \textit{XINGZHENG FAXUE YANJIU} (行政法学研究) [ADMIN. L. J.] 99, 101 (2015).
\item \textsuperscript{115} Ma & Zhang, \textit{supra} note 108, at 222.
\end{enumerate}
\end{footnotesize}
Zhou Ruqian judgment. Factor (2) relates to the severity of the adverse effects that can be considered to constitute “instability,” with the SPCAD setting a fairly high threshold. Accordingly, instances of instability do not cover the risks that a certain industry or profession could expect and that would not, if they became reality, lead to the massive disruption of social order.

The adoption and operation of this interpretative approach hinges on its doctrinal basis, i.e., how the court perceives the nature of the definition of social stability given by the agencies concerned. In commenting on Zhou Ruqian, the SPCAD categorized this definition as an exercise of discretion, and instructed local courts to examine whether the agency in question has abused its power of discretion.\(^{116}\) In this sense, the aforementioned elements of social stability are indicators of the abuse of such power. The extent to which the court can substitute the agency’s definition with its own depends on the intensity of the review that is suggested by the particular doctrine that the judge chooses. The SPCAD took the view that, although the court should show due deference to the definition given by the agency, it should accept only “reasonable explanations,” thus hinting at a degree of intensity no lower than that of a review pertaining to discretion in consequence (which is discussed in Section III). It therefore appears that in its comments on this case, the SPCAD is stressing the necessity of examining whether the authority’s definition meets the aforementioned elements of scope and severity, but probably agrees with the other elements put forward by the agencies.

In contrast to the SPCAD’s moderate position on the intensity of review, other case reports on Zhou Ruqian propose more stringent scrutiny. In their comment published in Selected Cases, the reporting judges similarly regard the social stability definition as resulting from administrative discretion, but argue that the court should increase the intensity of its review and engage in “strict scrutiny” of that definition.\(^{117}\) Also, in MCAC Reports, the trial judge in the case relies on the German doctrine, regarding the government agency’s definition as an interpretation of an indefinite legal concept rather than the result of administrative discretion. She argues that the court was able to fully review the defendant’s interpretation without according any margin of appreciation to it because the interpretation at issue did not involve any professional or technical knowledge that was exclusively grasped by the defendant.

\(^{116}\) Id. at 223.

and could thus be assessed by the court according to general knowledge and social experience shared by the citizenry.  

Despite their divergent opinions on the intensity of judicial review, various reporting judges share one conclusion from Zhou Ruqian that, as a rule, the court should take the initiative in scrutinizing the definition of social stability offered by agencies and insist upon the satisfaction of certain crucial elements. If this shared interpretative approach is to be framed in accordance with the mainstream doctrine of administrative discretion summarized in Section III, it can be understood as relying on the ground of abuse of power and focusing on the relevance of the particular agency’s considerations. Furthermore, the approach is also capable of covering other categories of abuse of power. For instance, the case report on Wu Qiqun embraces an interpretative approach to social stability that focuses on the purpose of the definition. Because covering up violations of rights cannot be the purpose reasonably contemplated by the legislators of the ROGI, any definition driven by this ulterior motive constitutes an abuse of power. The rejection of unreasonable explanations of social stability in the two referential cases discussed in this section demonstrates that the Chinese doctrine of judicial review of administrative discretion can be an effective tool for the courts in controlling this overly vague and broad exemption.

3. Another Approach: Procedural Impropropriety

Whereas the two aforementioned cases illustrate attempts to substantively define social stability, another approach concentrating on procedural aspects can be found in a case adjudicated in 2011, Shanghai Jingxie Asset Management Co., Ltd. v. People’s Government of Jiande City (hereinafter Jingxie Co.). The plaintiff in this case, Jingxie Co., alleged itself to be a shareholder of Jiande City Huadong Urban Construction Investment Group Ltd., an operator of an urban renewal project in Jiande City, a county-level city in Zhejiang Province. The project had attracted complaints from creditors to provincial authorities, and the Jiande City Government (the defendant) held a joint meeting with another city government involved in the project to address the creditors’ petitions. The plaintiff requested for the meeting minutes. The defendant claimed that the meeting was a joint effort by two city governments to resolve “outstanding issues” under the lead of the Zhejiang

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119 Shanghai Jingxie Zichan Jingying Youxian Gongsi Su Jiande Shi Renmin Zhengfu (上海经协资产经营有限公司诉建德市人民政府) [Shanghai Jingxie Asset Management Co., Ltd. v. People’s Government of Jiande City], June 6, 2012 (Zhejiang Provincial High People’s Ct.).
Provincial Office for Handling Major Petitions and Mass Incidents, and therefore that the minutes involved social stability and could not be disclosed according to Article 8. The court did not question how social stability was involved, but focused instead on whether the defendant had followed specific procedures before arriving at its conclusion. The court of first instance ruled that:

The General Office of the CCP’s Zhejiang Provincial Committee and the General Office of the People’s Government of Zhejiang Province have issued the Notice on Circulating the ‘Measures for Evaluating the Risks to Social Stability Posed by Major Matters at the County Level (for Trial Implementation)’, and [their counterparts in Hangzhou City] have issued the Notice on Circulating the ‘Provisional Measures for Evaluating Stability Risk Posed by Major Matters in Hangzhou City’. Both documents prescribe in detail the evaluation [of such risks] in respect of its scope, principles, content, responsible agencies, and procedures. If the defendant thinks disclosure of the minutes may endanger social stability, it should evaluate the relevant risks to social stability according to the aforementioned provisions, and ground its reply to the OGI request on the evaluation result. As the defendant [has failed] to prove it had carried out such an evaluation, [its decision that the requested information is exempted from disclosure under Article 8] is absent of evidence.

The appellate court confirmed the court of first instance’s interpretations and findings, commenting that the defendant’s hasty conclusion was against the spirit of the ROGI. Both courts seem to have construed the normative documents as imposing statutory procedures that the defendant should have followed.

Indeed, the notices circulated by the provincial and prefectural authorities — the superiors of the Jiande City Government (a county-level government) — can be seen as guiding the government in identifying what kind of social stability is implicated and in justifying how that stability is endangered. For instance, the provincial notice stipulates that county-level governments should evaluate the risks to social stability that could be caused by the “major matters” they propose, and should consider the “legality, reasonableness, feasibility and controllability” of such matters. The

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120 Ma Weijing (马惟菁) & Ma Liangji (马良骥), Gongkai Zhengfu Xinxi Shifou Weiji Shehui Wending de Rending (公开政府信息是否危及社会稳定的认定) [Determination of Whether Open Government Information Would Endanger Social Stability], 6 RENMIN SIFA - ANLI (人民司法案例) [JUDICATURE (C)] 56, 57 (2012).
121 See case cited supra note 119.
122 Ma & Ma, supra note 120, at 59.
latter two elements include an examination of whether opinions have been solicited from the individuals affected, and assessment of whether the matters are likely to cause mass incidents or pose other potential dangers to stability. To implement such evaluation, the government should seek advice from relevant Party departments and government agencies (particularly stability-maintenance offices, disciplinary inspection and supervision organs, and legal affair offices), compile comprehensive analyses, forecast repercussions, and make recommendations for ways to handle the matters. It is nevertheless noteworthy that the “major matters” said to trigger the evaluation procedure refer primarily to important policies, major decisions, and key construction projects that affect the intermediate interests of the people, involve various stakeholders, and have a profound influence. In this regard, although the urban renewal project that Jingxie Co. wished to learn about may count as a major matter, disclosure of information on the project does not necessarily count as such. Under the terms of the provincial notice, the Jiande City Government can decide not to evaluate the stability risk of disclosing the requested information if it finds no need to do so. In other words, determination of whether to carry out such an evaluation was within the defendant’s discretion. It was thus reasonable to regard the notices’ provisions as relevant factors that the defendant should have taken into account when exercising its discretion, i.e., with regard to whether disclosure of the content of a meeting concerning a major matter constituted in itself a major matter and posed stability risks. By failing to consider these factors, rather than violating the evaluation procedures, the defendant abused its power of discretion. The courts were right to quash the defendant’s decision, but their reasoning is implicit and problematic. A question arises as to whether the courts have retreated from a more substantive scrutiny approach (e.g., reviewing the likelihood of prejudice) toward a more formal approach, particularly if we note that both the Wu Qiqun and Jingxie Co. cases were adjudicated by the Intermediate Court of Hangzhou City, with the same presiding judge sitting on the first-instance collegial panels and same senior judge of the Zhejiang Provincial High Court reporting on the cases in SPC publications. The normative documents invoked by the

123 Guanyu Yinfa Zhejiang Sheng Xianji Zhongda Shixiang Shehui Wending Fengxian Pinggu Banfa Shixing de Tongzhi (关于印发《浙江省县级重大事项社会稳定风险评估办法（试行）》的通知) [Notice on Circulating <Zhejiang Provincial Measures for Evaluating the Risks to Social Stability Posed by Major Issues at the County Level (for Trial Implementation)>] (promulgated by General office of People’s Government of Zhejiang Province, 2009, No.29, Point 3 (hereinafter Zhengjiang Measures)).
124 Zhejiang Measures, supra note 123, Point 5.
125 Id. at Point 1.
126 Id. at Point 1(6).
127 Cf. Ma, supra note 103, at 487; Ma & Ma, supra note 120, at 57.
ruling in Jingxie Co., handed down in 2011, were issued in 2009, several months after the Wu Qiqun ruling. Though the reasons for this possible shift in review approach remain unclear, it is possible that the court of first instance in Jingxie Co. considered documents regulating stability risk evaluation to be a suitable yardstick, better than standards created by the court itself, for assessing the government’s decision. After all, the two documents had been jointly promulgated by secretariats of the Party committee and the government at each local level. Invoking them was therefore likely to increase the political authoritativeness of the court’s ruling in the eyes of the defendant.

However, simple reliance on the aforementioned documents on stability risk evaluation cannot guarantee meaningful judicial scrutiny. First, the purpose of creating the documents was not to assess the impact on social stability of releasing information on major policies or projects, but rather to evaluate and prevent the impact on stability of their substance. The prescribed procedures and standards of evaluation were not designed for, and hence were unsuited to, assessing disclosure-related risks. In contrast, the very implementation of such evaluation either entails or facilitates the release of information on the matters being evaluated. Second, the standards for identifying social stability risks in these documents, as well as similar ones in many other regions of the country, remain too abstract to be operable, according to research commissioned by governments at different levels. Thirdly, the prevalent lack of independence and objectivity on the part of the evaluators often undermines the credibility of the evaluation results even in the eyes of higher-level governments. Overall, because of the inadequate relevance of these documents, the vagueness therein, and the absence of any mechanism to curtail bias, decisions on the stability impact of

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128 Promoting or controlling OGI work is not mentioned in the notices. For instance, the notice promulgated by the provincial authorities was “made according to the spirit of the Emergency Response Law and the Zhejiang Provincial Provisions on Preventing and Handling Mass Incidents.” See Zhejiang Measures, supra note 123.

129 Letting affected parties know about a project is prerequisite to soliciting their opinions about it and assessing its feasibility. Public disclosure about a major policy can help evaluators to observe the reactions of unintended third parties and forecast the policy’s controversy and “controllability.”


131 Id.
disclosure resulting from evaluations made on their basis are subject to no less abuse than those reached via other methods. If agencies invoke such documents in their OGI decisions, the courts should remain alert and refer to all grounds of judicial review pertaining to discretion.

B. Diversity in Other Cases

The Jiande Co. case illustrates the limitations of Chinese courts’ review approach, and yet it reflects the judiciary’s willingness to control use of the stability exemption, a willingness also seen in other referential cases. However, an investigation of still other cases on the ground — which are greater in number, albeit less noticeable — indicates a more diverse picture and more irresolute judicial stance.

Beginning with judgments retrieved from the two major legal databases described earlier in the paper, we can identify eight cases involving the social stability exemption. Six of them lack judicial review of the defendant’s claim that social stability would be harmed by disclosure. Green light was thus indiscriminately given to the withholding of a broad range of information on land taking and house demolition from the affected parties, including: the compensation for demolition made to affected households under an affordable housing project in Zhengzhou City (the capital of Henan Province), the evaluation reports of social stability risk in carrying out certain urban renewal projects in Shanghai, the planning permission for a rural development project that involved military forces quartered in Beijing, and the recommendations concerning the location of a regulating reservoir in rural Beijing (as part of the auxiliary works for the National Project of Transferring Water from South to North). In another case, a Beijing court pointed out that the defendant failed to justify that disclosure of the planning permission for the waterworks and water supply routes in Tongzhou...
would affect social stability, but upheld nevertheless the non-disclosure on the basis that the plaintiff had acquired the same information from channels other than OGI request.\(^{137}\)

The stability claim was questioned in only two cases, which were adjudicated in Guangdong Province. In a case related to housing demolition, the plaintiffs were discontented with the proposed compensation for their houses which were to be demolished by a district government in Foshan City, and had been invited to negotiate with the head of the Letters and Visits Office, the authority that hears petitions. Suspicious of the head’s competence to reach an enforceable agreement, the plaintiffs requested that the district government disclose all documents that could prove the government had entrusted the head to handle compensation issues.\(^{138}\) The court declared that the defendant, the district government, had wrongly invoked the social stability exemption, because it had failed to provide reasonable justifications for that exemption. The other case was related to a decision made by the Shenzhen government confirming the distribution of shares of a restructured incorporated company that concerned several parties including the plaintiff. The government refused to disclose the decision to the plaintiff by evoking the exemption of social stability, purporting that the confirmation was made for the purpose of preventing loss of state assets. The court ruled that the purported reason did not constitute an evidence for the existence of social stability threats.\(^{139}\) The judicial scrutiny in both of these cases was broadly consistent with the approach recommended by the SPCAD in Zhou Ruqian. Yet it is unclear whether the courts doubted the likelihood of damage or simply questioned the defendant’s definition of social stability.

As discussed earlier, the legal databases’ criteria for case selection are either unknown or biased. Hence, the divergence identified in the eight aforementioned cases may, merely and imperfectly, reflect a portion of trials taking place across the nation. It is thus necessary to turn toward a more representative sample of cases, those provided by media outlets at various levels and in different regions. Investigation of the 245 media-reported cases in 2008-2015 reveals similar judicial hesitance in examining stability claims. Although the media have covered a great number of instances in which government agencies had withheld information

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\(^{138}\) Dai Mou Deng v. Chancheng District People’s Government of Foshan (Dai X et al. v. Chancheng District People’s Government of Foshan), May 14, 2012 (Foshan Intern. People’s Ct.).

\(^{139}\) Shenzhen Oriental Art Society v. Shenzhen Government, June 5, 2015 (Guangdong Provincial Higher People’s Ct.).
out of social stability concerns, they have recorded only three cases in which the information requesters challenged application of the social stability exemption.

The first case, heard in 2008, was brought by a citizen against the National Audit Office, which had rejected his request for the results of an audit of the misappropriation of land sale income by the Beijing Municipal Government. The Beijing First Intermediate Court refused to admit the case without giving any reason (which itself is a violation of the mandatory procedures provided by the Judicial Interpretations of Administrative Litigation Law), thereby avoiding touching upon any substantive issue.

The same court also avoided addressing the social stability issue in the second media-reported case, but at the stage of substantive review instead of that of case acceptance. This case, Zhao Zhengjun v. Ministry of Health, involved another department of the central government. In 2012, the defendant received an OGI request from Zhao, a consumer rights activist, for the meeting minutes of the Review Committee on the National Standards for Raw Milk. Given that the new standards approved by the Ministry differed greatly from the previous standards in terms of reducing the protein content and significantly increasing the tolerable number of bacteria colonies, Zhao worried that the standard-setting process may have been unfairly influenced by large raw milk enterprises. He thus approached the defendant, the ministry that had organized the review committee, so as to examine which parties had been engaged in

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141 Zuigao Renmin Fayu an Guanyu Zhixing Zhonghua Renmin Gongheguo Xingzheng Susong Fa Ruogan Wenti de Jieshi (最高人民法院关于执行《中华人民共和国行政诉讼法》若干问题的解释) [Interpretations of the Supreme People’s Court on Several Issues Concerning the Implementation of the Administrative Litigation Law] (promulgated by Sup. People’s Ct on Nov. 24, 1999, effective Mar. 10, 2000).


143 Li Li (李丽) & Zhang Popo (张昢昢), Shengru Xin Guobiao Dingde Zheme Di, Laobaixing Neng Zhidao Juece Guocheng Ma (生乳新国标定得这么低,老百姓能知道决策过程吗) [As Regards the Low National Standards of Raw Milk, Can the Common People Know about the Decision-Making Process], ZHONGGUO QINGNIAN BAO (中国青年报), Oct. 24, 2012, at 7; Zhang Xiong (张雄) & Ma Xiaotian (马晓天), Zhao Zhengjun: Gaoying Weishengbu de Nongmin (赵正军: 告赢卫生部的农民) [Zhao Zhengjun: a Peasant Who Won the Litigation against Ministry of Health], NANFANG RENWU ZHOUKAN (南方人物周刊) [SOUTH PEOPLE WEEKLY], Nov. 2, 2012, no. 38.
drafting or advising on the standards and how objections to the draft had been handled in the review committee. At the time, memories of the melamine-tainted milk scandal of 2008 were still fresh in the public mind, and the public was thus deeply concerned that the new national standards might further undermine the safety of milk products. The media also paid close attention to the controversy. The defendant denied Zhao’s request for two reasons: first, that the minutes should be disclosed by the review committee rather than the Ministry of Health and, second, that releasing the minutes might endanger social stability and increase the Ministry’s administrative burden. According to news reports, the court articulated the view that the review committee was a constituent part of the Ministry of Health, and hence that the obligation of disclosure fell on the Ministry. On this ground, the court quashed the defendant’s decision with a remand, but did not discuss at all the second reason given by the defendant. It thus turned down the good chance of clarifying a question of great significance: whether social stability concern can justify withholding information on food safety that arouses great public concern and may fuel controversy over policy-making at the national level. By confining its scrutiny to a technical question (i.e. the relationship between the review committee and the Ministry), the court actually offered the Ministry a second opportunity to consider other reasons for withholding the same information, which unfortunately led to follow-up litigation. After the first case, the defendant re-handled Zhao’s request, and rejected it on other grounds, this time claiming that the minutes constituted information relating to the decision-making process, and thus should not be disclosed according to a circulation issued by the General Office of the State Council in 2010. When Zhao sought judicial review a second time, the court endorsed the defendant’s refusal, despite the invoked exception not being provided in the ROGI and being prima facie incompatible with it.

144 Sun Bin (孙斌), Weishengbu Bei Pauling Xiangqi Dafa Xinxi Shengqing (卫生部被判令限期答复信息申请) [Ministry of Health Ordered to Reply to Information Request within the Prescribed Period], DAHE BAO (大河报) [DAHE DAILY], Oct. 22, 2012, at A11.
145 Jian Guangzhou (简光洲), Naiye Biaozhun Muhou de Liyi Jiaoliang (奶业标准幕后的利益较量) [Contest of Interests behind Milk Industry Standards], DONGFANG ZAOBAO (东方早报) [ORIENTAL DAILY], May 29, 2012, at A18.
146 Li & Zhang, supra note 143.
148 An Jian (安健), Shengru Xin Guobiao Huiyi Jiyao Xinxi Gongkaian Xuanpan, Xiaofeizhe Qisu Yuan Weishengbu Bei Bohui (生乳新国标会议纪要信息公开案宣判, 消费者起诉原卫生部被驳回) [Judgment Was Pronounced on the OGI Case of Meeting Minutes about the New National Standards
The evasive judicial gesture underlying the *Zhao Zhengjun* case appeared as well in a media-reported case adjudicated in 2014 in Leshan City, Sichuan Province. This case was also related to information on food safety requested by an activist. More precisely, the information at issue was the results of all investigations of violations of food and drug regulations pursued by the defending food and drug agency since its establishment. The defendant alleged in its original OGI decision that disclosure of this information would endanger social stability, but, during the trial it added other justifications for that decision, including that the plaintiff’s request was not clear enough to meet the requirements prescribed by the General Office of the State Council regarding OGI request formalities. Instead of reviewing whether the defendant’s revocation of the social stability exemption was legal, the court chose to endorse the defendant’s finding with regard to the formality of the plaintiff’s request and uphold the non-disclosure decision. The ruling was clearly at odds with the ALL, which stipulates that the legality of an administrative decision can be judged only with reference to the justifications given by the agency when making its decision. As in the first media-reported case, the Leshan court dodged scrutiny of the stability claim by resorting to techniques disallowed by the law.

V. A More Active Role under Constraints

The cases analyzed in the foregoing section reveal the inconsistency of judicial review, as well as the courts’ ambivalence about upholding transparency in the face of “stability maintenance claims” made by government agencies. On the one hand, the findings on such cases challenge the stereotype that Chinese courts blindly defer to government decisions made in the name of maintaining social stability, and demonstrate instead their ability to *judicialize* the concept of social stability. On the other hand, they also run counter to the optimistic expectation that the courts would extend meaningful scrutiny to crucial aspects of the stability maintenance system. Further reflection on the findings sheds new light on the Chinese courts’ role in the dynamics of the implementation of Party-state policies that co-exist in tension. This section first summarizes the

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149 Li Meijia Su Leshang Shi Shipin Yaopin Jiandu Guanli Ju ([李枚加诉乐山市食品药品监督管理局], Dec. 17, 2013, at 3).

150 ALL 1989, art. 54.
legal and political breakthroughs achieved by the courts, and then points out the limitations of those breakthroughs before finally highlighting several persistent constraints upon the effective exercise of judicial review, particularly those deriving from the stability maintenance system itself.

A. Breakthroughs in Judicial Review and Their Political Implications

Beginning with the bright side of the story, the three referential cases detailed above (one case covered by databases) exhibit advances in judicial review standards and breakthroughs in the courts’ intervention in local governance.

A three-layer approach can be generalized from those cases, encompassing three degrees of review intensity concerning agency decisions determining that information disclosure would endanger social stability. At the bottom is the minimum scrutiny that looks into agencies’ compliance with the administrative procedures stipulated by upper-level authorities for evaluating stability risks. Such scrutiny is an application of the ground of procedural impropriety, and involves no assessment of substantive issues. In the middle is the intermediate scrutiny that tests the likelihood of endangerment to stability. It derives from the ground of abuse of power, and relies on a reasoning that is often content-neutral and unrelated to value judgments. At the top is the heightened, if not strict, scrutiny that examines whether agency interpretations of “social stability” contain the core elements that are imposed by the court. Such scrutiny is in essence a review of the merits, although only in relation to the limited aspects of the concept (the scope of “social” and “instability”).

This approach indicates positive judicial stances in sharp contrast to the general reluctance among local courts to interfere with administrative discretion (as discussed in Section II). If the courts’ minimum and intermediate scrutiny remain largely consistent with the prevalent mode of judicial review of discretion in common practice, their heightened scrutiny marks a breakthrough in establishing the primacy of judicial interpretations of indefinite legal concepts. The SPCAD elaborated upon this type of scrutiny in its comments on the Zhou Ruqian case. In this case, the SPCAD proclaimed its official position on the much debated nature of agency interpretations of indefinite legal concepts. According to the SPCAD, agency interpretation is an exercise of discretion and can be appraised by the court according to its own understanding of those concepts. This position departs from the traditional views among local judges (and some SPC justices) that scrutiny of discretionary decisions should be restricted and that the courts should not substitute their own judgments for those of the agencies concerned.
The three-layer approach is also original in the context of OGI disputes. Other research has documented the laxity in judicial review of agencies’ use of other exemptions under the ROGI, including those based on definite legal concepts, such as privacy or trade secrets exemptions, and those more closely related to political considerations, such as the state secrets exemption. By introducing different levels of scrutiny to the social stability exemption, the courts have demonstrated their ability to overcome the vagueness in the law concerning grounds of judicial review and to turn doctrines on the abuse of power into binding standards.

In addition to its doctrinal significance, the three-layer review approach has considerable practical and political implications. Firstly, it effectuates the judicialization of concepts that are usually laden with political considerations. Intermediate and heightened scrutiny, in particular, subject decisions concerning “endangerment to social stability” to legal reasoning. They force agencies to take into account not only factors that are emphasized by the government and/or the Party, such as administrative efficiency and political correctness, but also factors that derive from legal doctrines, such as imperatives of safeguarding individual rights and limits on administrative power.

Secondly, this judicialization opens up more opportunities for individuals to redress the adverse effects of stability maintenance. The findings of the authorities on social stability often serve as the basis for intrusive measures (such as information blockades and movement restrictions), but individuals were previously unable to litigate against such findings, owing to various legal obstacles. Now, however, when those findings are employed by agencies to justify the withholding of information, their legality can be challenged by individuals under the ROGI. In theory, once a finding has been excluded from the scope of social stability by the court in OGI litigation, it can hardly be accepted as a valid justification for

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152 In this regard, the review power of the Chinese judiciary is not rigidly confined as contended by some overgeneralized thinking on Chinese administrative law, but is flexible enough to accommodate the courts’ needs to tighten the constraints on certain government acts.

153 The obstacles include, for example, that the findings per se do not directly affect individuals’ rights, that the activities based on such findings are in preparation, or that the activities have been undertaken by authorities other than government agencies.
stability maintenance measures, which facilitates the checking of such measures in judicial or other remedial proceedings. For example, a court may declare that “the demand of victims of a fire accident for holding the business operator accountable for its negligence” does not undermine social stability. It would then be legally impossible for agencies to use social stability concerns to justify their problematic activities, such as denying the victims access to investigation records on the accident, or forcing them to accept a fixed amount of damages and renounce any subsequent claims. Furthermore, the judicialization of social stability affords leverage to people seeking redress from the petition channel (letters and visits). Petitions are widely considered by local authorities to be a source of instability, and disputes over government responses to petitions are regularly precluded from the purview of judicial review. When a court breaks the equation between a petition and a threat to stability, as implied in the cases of Wu Qiqun and Jingxie Co., it empowers petitioners to learn better about, and hence participate more effectively in, the decision-making process concerning their complaints. In short, judicialization strengthens the “auxiliary” function of the right to information in protecting individuals’ substantive rights, the very function that Chinese citizens have been widely exploring to exert pressure on and extract concessions from government agencies.

Thirdly, because of the exercise of heightened and intermediate scrutiny, the courts are actually intervening in the “politics of stability maintenance.” Their intervention is not only reactive, in the sense that it is triggered by individuals, but also proactive, in the sense that the courts are imposing their own understandings of social stability over those of the agencies (and choosing to exert scrutiny in the first place). The courts are thus exhibiting a certain degree of autonomy that observers rarely expect in relation to politically sensitive matters. They have thus become a policymaker in reconciling the legal regime of access to information with the

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156 For a comprehensive study of Chinese citizens’ strategic use of OGI request for various purposes, including defending their own rights and pursuing policy change, see Greg Distelhorst, The Power of Empty Promises: Quasi-Democratic Institutions and Activism in China, COMPARATIVE POLITICAL STUDIES 1, 1-35 (2015). Many high courts find this strategy has seriously increased the burden of the courts, and seek to inhibit it by raising the threshold of access to court. See the discussions below.
extra-legal system of stability maintenance, the latter being a mechanism of information control *par excellence*. Also, the fact that all three referential cases emphasize judicial scrutiny reveals the SPCAD’s aspiration to curb the abuse of social stability claims. To some extent, the three-layer review approach restores judicial authority, which is often belittled in administrative litigation concerning other kinds of administrative acts.

**B. Limited Impacts**

As significant as the three-layer approach is, however, it has not reached its full potential, and nor has it been applied to the greater part of OGI disputes. From a technical point of view, the conditions for the application of scrutiny at each level have not been elucidated by the local courts that devised them or by the SPCAD, which affects the operability of the approach. More importantly, judicial scrutiny is absent from most of the non-referential cases. The role of the courts remains limited in exerting real impacts, particularly with respect to supporting the major values that underpin the right to information, including the instrumental value of complementing the protection of the requester’s other substantive rights, and the values of political liberalization, that are, expanding public participation in decision-making, and generally enhancing government accountability.\(^{157}\) In the cases in which the courts have displayed indifference to such values, several patterns can be discerned.

Using requested information to assert one’s personal or property rights is the most salient purpose of filing an OGI request in China. However, judicial intervention pertaining to information on such rights tends to be inconsistent. Although the court applied intermediate scrutiny in the *Wu Qiqun* case, which concerned the socioeconomic rights of the requesters (i.e., the pensions of retired workers), the same court retreated to minimum scrutiny in the *Jingxie Co.* case. The latter involved the property rights of a company carrying out urban renewal projects for the local government. With regard to information on housing demolitions – which concerns the most important property right of ordinary citizens – the courts failed to conduct any review in three out of four cases. What is common to these three cases and *Jingxie Co.* is that the information at issue concerned land sale or housing development projects to which the local authorities attached strong importance because such projects are critical sources of local revenue and GDP growth. Also, the implementation of such “redevelopment” projects invariably affects the rights and interests of multiple residents and other parties, and may easily spur collective disputes and protests.

\(^{157}\) Ackerman & Sandoval-Ballesteros, *supra* note 1, at 85-93; Mendel, *supra* note 1, at 4-5.
Judicial inactivism is more obvious when the “liberalization” values of transparency come into play. In the case concerning the lowering of national standards for raw milk, the court deliberately avoided examining stability claims, ignoring the benefits of disclosure in effectuating a public debate for sounder policymaking on a critical issue with which the government had repeatedly failed to cope. With regard to information on large-scale violations of the law (e.g., misappropriation of land sale income) by agencies or on agency inaction (e.g., in investigating food safety), the courts even resorted to means at odds with the ALL to dodge their review obligations. It appears that the courts in these three media-reported cases refrained from supporting disclosure that, although it might enhance public scrutiny of agency performance, might also fuel public anxiety or resentment over the poor quality of governance, thereby undermining the Party’s authority.

C. Persistent Constraints

The similarities in the cases from which judicial scrutiny is missing can be traced to two major concerns: containing collective mobilization in various forms (grouped under the umbrella term “mass incidents”), and inhibiting the expression of general mistrust in the government and the Party. These concerns are precisely those that underlie the common practice of stability maintenance. They remind us that the courts’ latitude in handling the social stability exemption is constrained by the very system of stability maintenance in addition to the regular structural factors that undermine judicial independence in all kinds of administrative litigation.158

The most prominent constraint on the courts lies in the Party’s instructions concerning “mass incidents.” These instructions have de facto binding forces on the courts because of both the bureaucratization of the stability maintenance mechanism and the SPC’s internal rule-making. As a routinized practice, local Party committees establish leading groups on stability maintenance or hold inter-departmental meetings to steer the handling of mass incidents and address the triggering or aggravating factors. Local courts are the participating organs in such ad-hoc institutions, and receive

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158 Existent literature has extensively discussed the structural factors that affect Chinese courts’ adjudicative function concerning all disputes. They include, for example, financial dependence on the government at the same local level, control of judge appointment by the local congress composed mainly by government officials, and the Party’s overriding authority in guiding the work of the judiciary. See generally Albert Hung-Yee Chen, Introduction to the Legal System of the People’s Republic of China 200-211 (2011). On the impacts of such factors over land disputes which almost always involve social stability concerns, see Cheng Jie, The Judicial Role in Land-Taking Cases, in Resolving Land Disputes in East Asia: Exploring the Limits of Law 86, 104-11 (Hualing Fu & John Gillespie eds., 2014).
In parallel, the SPC has stressed on various occasions since 2005 that local courts should communicate with Party committees at the same level concerning any cases that may affect social stability and intensify contradictions. In particular, the SPC explicitly requires in its internal rules that local courts should remain alert to "mass administrative disputes" (群体性行政争议) evoked by such hot-button social issues as "rural land expropriation, urban housing demolition, enterprise restructuring, labor and social security, [and] environmental protection of resources, etc." According to the “Notice on Handling Appropriately Mass Administrative Cases” issued by the SPC in 2006, for political and policy-oriented disputes that are difficult to resolve by means of administrative litigation, the courts should handle them through the unified coordination of local Party committees and governments. For those cases that are significant, complex, and influential, and have been accepted, the courts should proactively report them to local Party committees and adjudicate them under the latter’s leadership.

The formalization of Party intervention offers an explanation for the judicial inactivism that prevails in cases deemed to be entangled with mass incidents. OGI disputes are likely to become mass administrative disputes if disclosure of the requested information prompts other individuals in a similar situation to defend their rights. In land grabs and housing demolitions, the information requested by affected residents relates primarily to the alleged illegality of appropriation or the unfair compensation, as exhibited in the cases analyzed in this paper. When the disclosure of such information risks substantiating the allegations, and hence induces multiple affected parties to resort to collective action, a local Party committee will probably intervene and guide resolution of the dispute according to its own policy priority, which usually supports appropriations.

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159 See Xiao, supra note 4, at 146; Xie, supra note 3, at 260-64.
161 SPC Notice on Mass Administrative Cases, supra note 160.
162 Id. at Point 2.
163 Id. at Point 7.
because of their important economic implications. It may well consider stability maintenance to be a viable reason for withholding the information. In these circumstances, the court will have to cease its review and uphold the agency’s non-disclosure decision, as the decision is politically consistent with Party instructions. Indeed, some judges have expressly advocated that the courts refrain from “mechanically adjudicating” OGI disputes involving mass incidents and that they communicate with the relevant departments (including the Party) to avoid intensifying conflicts. Although Party committees may not interfere with every OGI case involving appropriations, the courts’ hands are bound once the committees choose to step in.

The breakthroughs identified in the referential cases are broadly compatible with the “mass incident constraint.” In the Zhou Ruqian case, which underwent heightened scrutiny of the social stability exemption, the information at issue did not relate to any class action, being a matter of concern only to an individual applicant for a professional title. The court was thus free from any concern over a mass incident. The Wu Qiqun case comes nearer to a mass administrative dispute, as it involved four plaintiffs. However, the requested information pertained only to the pensions of workers in a small state-owned enterprise and had already been disclosed through the petition channel without intensifying conflict. Hence, the substantive dispute that the OGI request sought to address, was controllable and did not necessitate the intervention of stability-maintenance measures. The court may thus have felt comfortable with exerting intermediate scrutiny that focused exclusively on the risk of endangerment to social stability. As for the Jingxie Co. case, it touched upon an urban renewal project that involved two local governments, but it concerned only one plaintiff (who was not an affected resident, unlike ordinary OGI cases involving land takings). As it was difficult for the court to assess this case’s risk of igniting a mass incident, it probably felt that it was safer to avoid making any substantive judgment, and hence adopted minimal scrutiny, i.e., simply referred the agency to the procedures imposed by the local Party committee for evaluating stability risks. In other words, the intensity of judicial scrutiny showcased in the referential cases can be explained as having been influenced by political concerns over the possibility of mass incidents.

Besides repressing mass incidents, stability maintenance measures also strive to prevent the spread of information whose revelation, and subsequent discussion in the public sphere would

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erode public trust in the Party-state’s ability to protect the fundamental interests of citizens. The underlying concern is that such an erosion of public trust would not only nourish future collective protests, but also pose a serious challenge to the legitimacy of Party rule – a consequence that the entire state apparatus is instructed to try to prevent. The judicial review of OGI cases is by no means immune to these concerns, as suggested by the two OGI cases relating to food safety information. The Chinese public has long been discontented with the government’s failure to ensure food and drug safety nationwide. The reemergence of melamine-tainted milk products on several occasions in the aftermath of the 2008 milk scandal undoubtedly bred such dissatisfaction. Against this background, any revelation of government connivance in food safety violations or declining milk standards would attract media reports, aggravate public resentment over systematic regulatory failures, and stimulate irreversible mistrust in the government at least among certain members of society. The courts may thus feel obliged to endorse the withholding of such information regardless of whether the agency concerned had properly evoked the social stability exemption. In fact, this stance is consistent with the conservative judicial interpretations of “special needs” provided under Article 13 of the ROGI. A recent study revealed that the courts generally hold the requester to lack special needs if the requested information relates to large-scale maladministration but does not directly involve the requester’s personal rights.\textsuperscript{165} It can hardly be a coincidence that judicial control of the social stability exemption and the needs test are both prone to denying “watchdog OGI requests.” A likely explanation is that the courts are captive to the call to inhibit public criticism of profound governance defects.

In addition to constraints on the courts’ scrutiny approaches, there are also obstacles that bar disputes from even entering the substantive review stage. Chinese courts often respond to thorny socioeconomic and administrative disputes by limiting access to court and by imposing informal settlements.\textsuperscript{166} The same techniques are applied to OGI cases as well.


\textsuperscript{166} On the use of these techniques in land, environmental and labor disputes, see Changdong Zhang & Christopher Heurlin, Power and Rule by Law in Rural China: State-Initiated Mediation in Land Disputes, in RESOLVING LAND DISPUTES IN EAST ASIA: EXPLORING THE LIMITS OF LAW 258-60 (Hualing Fu & John Gillespie eds., 2014); The Politics of Law and Stability in China, supra note 9, at 8-10; Biddulph, supra note 9, passim. On the use in administrative disputes, see He Haibo, Litigations without a Ruling: The Predicament of Administrative Law in China, 3 TSINGHUA CHINA L. REV. 257 (2011); Michael Palmer, Mediating State and Society: Social Stability and Administrative Suits, in THE POLITICS OF LAW AND STABILITY IN CHINA 107, 107-44 (Susan Trevaskes et al. eds., 2014).
It is common for local courts to reduce the scope of disputes accepted for trial that is allowed by the ALL.\(^\text{167}\) The high courts in some provinces have even issued circulars instructing lower-level courts not to register cases that fall into specific categories.\(^\text{168}\) With regard to OGI disputes, it is found that many courts choose to accept only OGI disputes related to the personal or property rights of the requesters, setting such a relation as a precondition for standing to sue.\(^\text{169}\) Although the SPC issued judicial interpretations in 2011 mandating acceptance of all challenges to OGI request rejections,\(^\text{170}\) some courts have turned to the needs test to filter out sensitive requests.\(^\text{171}\) Further, according to a prevailing viewpoint in the high courts, even if an OGI dispute does indeed relate to the requester’s substantive rights, the courts should not accept it if the requester is found to actually be seeking to collect new evidence and to reopen an already decided case concerning such rights that he or she is dissatisfied with. Judges regard litigation such as this as an attempt to undermine the goal of “ending the case with the dispute resolved” (案结事了, a judicial policy to implement the Party’s policy of building a harmonious society)\(^\text{172}\) or simply label it an “abuse of the right of action.”\(^\text{173}\) Accordingly, a low rate of OGI case acceptance has been

\(^{167}\) See Wang, supra note 7, at 119-60; Ying Xing (应星) & Xu Yan (徐胤), “Li’an Zhengzhixue” yu Xingzheng Susongli de Paihuai: Huabei Liangshi Jiceng Fayuan de Duibi Yanjiu (“立案政治学”与行政诉讼率的徘徊——华北市基层法院的对比研究) [“The Politics of Case Acceptance” and the Hovering Rate of Administrative Litigation], 6 ZHENGFA LUNTAN (政法论坛) [TRIBUNE OF POLITICAL SCIENCE AND LAW] 111, 117-20 (2009).

\(^{168}\) Guangxi Zhuangzu Zizhiqu Gaoji Renmin Fayuan Guanyu Dangqian Zanshi Bushouli Jilei Guangxi Zhuangzu Zizhiqu Gaoji Renmin Fayuan Guanyu wei Tongzhi (广西壮族自治区高级人民法院关于当前暂时不受理几类案件的通知) [Notice of the Guangxi Zhuang Autonomous Region High People’s Court on Several Categories of Cases that Should Not Be Accepted for the Time Being] (issued on Sept. 1, 2003).


\(^{170}\) Judicial Interpretations on OGI, art. 1.

\(^{171}\) Chen, The Paradox of Access to Information in a Closed Regime, supra note 165, at 275-76.


\(^{173}\) See Shanghai Shi Jing’an Qu Renmin Fayuan Fenxi Qisu Zhengfu Xinxi Gongkai Xingzheng Anjian Cunzai Lanyong Suquan Xianshang (上海市静安区人民法院分析起诉政府信息公开行政案件
documented in some provinces. The aforementioned media-reported case concerning the audit results of the misappropriation of land sale revenue vividly exemplifies the use of this technique.

The courts are also strongly encouraged to mediate the resolution of administrative disputes, which is another important policy set by the SPC to embody the harmonious society-building agenda. Through these means, the courts avoid overt criticism of the apparently illegal decisions of agencies and partly appease the plaintiffs. However, the demands of aggrieved individuals are not satisfied according to statutory rules or legal doctrines, making it difficult for observers to evaluate the adequacy of redress. The withdrawal rate in OGI litigation tends to be even higher than that in other types of administrative litigation. Some courts have even admitted that most of the redrawn cases involved illegal non-disclosure.

These two techniques, refusing to accept cases and pressing for the withdrawal of litigation, give the courts a great latitude in the non-enforcement of the right to information that could otherwise be lawfully asserted by activists for the purpose of monitoring and criticizing government performance rather than protecting their own personal or property rights. The cases that eventually land in the substantive trial phase, as observed in this study, probably cover a limited proportion of the total number of OGI disputes. Insofar as not-so-sensitive OGI cases are accepted, the courts are more comfortable with choosing whether and how to scrutinize non-disclosure. In this regard, it is understandable that the courts show limited deference to agency decisions based exclusively on stability maintenance concerns. On the one hand, the justifications for such decisions are far from self-evident, and are usually weaker than the justifications for those evoking exemptions with definite legal concepts. On the other hand, the courts are willing to maintain an image of impartiality among the public and to curb the abuse of administrative power, as long as the overriding political concerns

存在滥用诉权现象) [Shanghai Jing’an District People’s Court Analyzes the Abuse of Right of Action in Administrative Cases of Open Government Information], 32 REFERENCE J.R. 1084 (2008).

174 Jiangsu High People’s Court, supra note 172, at 98; Beijing High People’s Court Administrative Division, supra note 172, at 121.

175 Whiting & Shao, supra note 10, at 229-35. See also SPC Opinions on Harmonious Society, Point 20.

176 The withdrawal rate of OGI cases was as high as 94.6% in the period from 2008 to March 2012 in Henan, a central and populous province, and was 74.1% in 2011 in Jiangsu, an eastern coastal province. See Wang Fengqiang (王凤强) et al., Henan Sheng Xinxin Gongkai Xingzheng Anjian Diaocha (河南省信息公开行政案件调查) [Investigation on Administrative Cases of Open Information in Henan Province], 51 REFERENCE J.R. 107, 109 (2012); Jiangsu High People’s Court, supra note 172, at 100.

177 Jiangsu High People’s Court, supra note 172, at 100.
over mass incidents and attacks on Party-state legitimacy do not figure in. In short, while appreciating the breakthroughs in the review approach to the social stability exemption, we should not overlook the extra-legal obstacles that bar from the forum of adjudication a large proportion of non-disclosure decisions made in the name of stability maintenance.

VI. CONCLUSION

This study reveals the new role played by the Chinese courts in discriminatively enforcing the right to information and, correspondingly, in slightly adjusting the operation of stability maintenance without affecting its core political goals. The revelation is based on the careful collection and examination of representative judicial review cases and the critical assessment of the courts’ legal reasoning therein.

From the legal perspective, the courts have assumed this new role primarily because the ROGI created a peculiar social stability exemption to the right to information. Despite the highly discretionary nature of the concept of social stability and uncertainties in the grounds of judicial review of administrative discretion, the courts have remarkably managed to develop three levels of scrutiny and to uphold disclosure in certain cases. Heightened scrutiny was innovatively applied to a non-sensitive case concerning an individual’s professional entitlement, accompanied by unprecedented judicial prescriptions on the core elements of social stability. Scrutiny was also extended to procedural improprieties and to the likelihood of the endangerment to stability in the cases concerning relatively sensitive issues, including petitions over socioeconomic rights and urban renewal projects implicating developers’ rights, which are often kept away from judicial review. The significance of these breakthroughs in the review approach is severely undermined, however, by the judicial inaction or the undue deference seen in the majority of the cases studied herein, particularly in fields in which transparency is greatly needed in the fight against injustice, corruption, and incompetence. The courts endorsed stability claims that denied affected residents’ access to information on land takings and housing demolitions, thereby inhibiting the right to information’s function in protecting the vital property rights of ordinary citizens. The courts have further evaded their review duties in cases involving records whose disclosure could subject large-scale malfeasance to public criticism or effectuate better public participation in policymaking. Consequently, this allowed stability concerns to override the accountability-enhancing values of the ROGI. The asymmetric review of administrative discretion in OGI cases of different categories is likely to have been
affected by two political concerns, i.e., containing mass incidents and preventing the accumulation of public mistrust in the government and the Party. Accordingly, the legal regime of transparency has been almost denuded of its democratic values in fostering public scrutiny of the Party-state. With few exceptions, the right to information has gained judicial support only when disclosure serves private interests without stepping over the red line drawn by the political authorities.

Given that information control is an inherent part of stability maintenance, by handling OGI disputes, the courts have intervened in the politics of such maintenance. This study rejects the stereotype of courts being obedient concerning agency findings on threats to social stability. Judges have expressed concern that violating citizens’ rights and hindering their access to judicial remedy could lead to instability in the long term, and have negated agency claims in certain non-trivial cases. By publishing these cases for the reference of local courts, the SPCAD seems to be expressing a general wish to curb agency impulses toward stretching the concept of social stability and taking aggressive action before any risk of instability is seen. The scale of judicial intervention is nevertheless restricted. The courts have abandoned their attempts at judicialization, when disputes have given rise to the two aforementioned political concerns that are the precise rationales for the extra-legal system of stability maintenance. The fragile autonomy of legal reasoning in judicial review is captive to institutionalized Party intervention in “mass administrative disputes,” as well as to the judiciary’s own vigilance against disclosure that risks undermining the legitimacy of Party rule. The extra-legal techniques of ending litigation without conducting any substantive review for the sake of superficial stability, i.e., obstructing access to court and imposing mediation, are applied to OGI litigation as well, further reducing the courts’ influence on the government. Insofar as judicial review fails to address agency conduct that blatantly violates or ignores fundamental personal and property rights and causes popular resentment, the judges’ efforts to separate “legitimate” claims of stability from unwarranted ones are peripheral, both legally and politically. Instead of de-politicizing the stability maintenance system by bringing it within legal confines, the courts have, at best, rationalized its operation in the sense of restricting measures that counteract the system’s policy thrust and overseeing compliance with procedures issued by the political authorities.

The foregoing discussion further sheds light on the Chinese courts’ inconspicuous – but increasingly important – role in diverting legal reforms from the course of political liberalization, i.e., the course of improving the government’s accountability and responsiveness to the general public. First, the courts have indeed
acquired the power to weigh up contradictory political goals because certain legal reforms channel to the courts a growing number of disputes concerning new statutory rights with rich implications for liberalization, such as the right to information and the right to hearing in legislation and public policymaking. To ensure the viability of such legal reforms, the corresponding legislation may accommodate the prevalent political goals of the time by creating exemptions to the new rights. Those exemptions thus become a focal point of clashes between the more liberal goals and the existing ones. Second, as a result of gradual developments in legal doctrines and judicial policies, the courts have cultivated the ability to overcome vagueness in the law and to turn doctrines into binding standards of judicial review. They are thus increasingly capable of judicializing political concepts for the purpose of resolving disputes. These two points challenge the conventional wisdom that the Chinese courts have little ability to address political questions in administrative litigation because they lack legislative authorization and/or judicial review skills. Third, the persistent lack of an institutional guarantee of judicial autonomy and the formalization of Party intervention, particularly in cases involving concerns prioritized by the Party, make the courts highly sensitive to the adverse impacts of the new rights on those prioritized concerns. As long as the liberal goals embodied in those rights entail such impacts, and the status quo-preserving goals embodied in the exemptions overlap with such concerns, the courts are likely to choose not to uphold the liberal goals. Although they show latitude in ignoring peripheral non-liberal goals that are arbitrarily pursued by government agencies (e.g., the categorical suppression of petitions, or prevention of criticism against sectoral policies), they refrain from impinging on the core interests that are unilaterally determined by the Party. Thus, the liberal dimensions of the new rights are removed bit by bit through judicial decision-making, and the ostensibly promising legal reforms are assimilated into the Party-state’s rigid political order. Finally, when mitigating the adverse political impacts of those rights, the courts either use extra-legal means or abandon the relatively autonomous legal reasoning that they would otherwise follow in cases which are free of such impacts. This violation of the law, or at the very least the breaking of the predictability of the law, not only undermines the legitimacy of the judiciary, but also destroys the credibility of legal reforms. The selective judicial enforcement of rights will eventually neutralize the Party-state’s strategy of introducing the legal reforms of liberalization to resist societal demand for structural political reforms. These thoughts invite researchers in the China studies and the studies of law and society to pay greater attention to the interplay among the courts, legal doctrines, and politico-legal reforms in Party-states.
## APPENDIX I: COLLECTIONS OF JUDICIAL REVIEW CASES

<table>
<thead>
<tr>
<th>ABBREVIATION</th>
<th>TITLE</th>
<th>DESCRIPTION</th>
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<tbody>
<tr>
<td>SUP. PEOPLE’S CT. GAZ.</td>
<td>Zuigao Renmin Fayuan Gongbao (最高人民法院公报) [The Gazette of the Supreme People’s Court]</td>
<td>Published monthly. The section headed “Selected Judgments” publishes judgments awarded by the SPC, whereas the section headed “Cases” reports cases adjudicated by local courts, with each report comprising four parts: abstracts of the judgments, facts, major issues of the case, and the courts’ reasoning and holdings.</td>
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<tr>
<td>SELECTED CASES</td>
<td>Renmin Fayuan Anli Xuan (人民法院案例选) [Selected Cases of People’s Courts]</td>
<td>A selection of case reports compiled by the China Institute of Applied Jurisprudence (affiliated with the SPC) and published quarterly by the People’s Court Press. Each report has four segments: facts and arguments of the parties, reasoning and holdings of the courts, detailed commentaries, and essential rules extracted from the case.</td>
</tr>
<tr>
<td>JUDICATURE (C)</td>
<td>Renmin Sifa - Anli (人民司法·案例) [People’s Judicature (Case)]</td>
<td>A monthly journal published by the SPC with a “Case Reference” or “Case Study” section, in which each case report has the same four segments as Selected Cases.</td>
</tr>
<tr>
<td>COURT NEWS</td>
<td>Renmin Fayuan Bao (人民法院报) [People’s Court News]</td>
<td>The daily organ of the SPC, with a “Case Guide” section reporting on significant cases. Each case report has four brief segments: facts, holdings, commentaries, and essential rules extracted from the case.</td>
</tr>
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<td>REFERENCE J.R.</td>
<td>Xingzheng Zhifa Yu Xingzheng Shenpan (行政执法与行政审判) [Reference for Administrative Enforcement of Law and Judicial Review]</td>
<td>A bimonthly journal compiled by the SPCAD, with a “Commentaries on Difficult Cases” section, in which each case report has the same four segments as Selected Cases.</td>
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<tr>
<td>J.R. CASES</td>
<td>Zhongguo Xingzheng Shenpan Anli (中国行政审判案例) [Chinese Judicial Review Cases]</td>
<td>A selection of judicial review case reports compiled by</td>
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</tbody>
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the SPCAD and published annually by the China Legal Publishing House. Each report has the same four segments as *Selected Cases*.

**MCAC REPORTS**  *Zhongguo Shenpan Anli Yaolan* (中国审判案例要览) [*Reports on Major Cases Adjudicated in China*]

- A selection of cases compiled by the National Judges College together with the Renmin University of China and published annually by the China Renmin University Press. Each case report contains most of the content of judgments and consists of three parts: facts and arguments of the parties, the court’s consideration of the evidence and rulings, and commentaries.
# Appendix II: Media Outlets as Sources of OGI Cases

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<tr>
<th>Source</th>
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<td>Party Organs, including:</td>
<td></td>
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<td>Central Organs</td>
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<td>Provincial Organs</td>
<td>32</td>
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<tr>
<td>Prefectural Organs</td>
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<tr>
<td>Evening Papers and Metropolitan Papers</td>
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<td>Provincial Comprehensive Newspapers</td>
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<tr>
<td>Legal Newspapers</td>
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<tr>
<td>Economic and Business Newspapers</td>
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<td>Newspapers Targeted at a Certain Class of People</td>
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<tr>
<td>Popular News Magazines</td>
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<tr>
<td>Official Magazines concerning Political Affairs</td>
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<td><strong>News Websites</strong></td>
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<tr>
<td>Non-Profit Portal on Transparency in China</td>
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