State Power in Disguise—Addressing Catastrophic Mass Torts in the United States, China, and Taiwan

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The Gulf oil leak, Wenzhou High Speed Rail Crash, and Food Safety Scandals—these benchmark cases in the United States, China, and Taiwan have aroused attention relating to how these jurisdictions deal with catastrophic cases that involve immense private and public interests. This Article contends that, actually in many gigantic cases, the mechanism for resolving mass tort disputes has not been fully implemented and that some other procedures parallel to the court proceedings were adopted and even replaced traditional private litigation. If monumental cases with massive influence are often addressed with approaches distinct from general private litigation process, this indicates that private adjudication or the tort system may have limitations and that some other forces have driven the application in a different direction.

This Article not only explores the implications of such a phenomenon, but also investigates whether this is related to the rise and fall of different authorities or powers. It is argued in this Article that resolving monumental mass tort disputes commonly reflects the preference of lawmakers not only in the United States, but also in China and Taiwan. In all three jurisdictions, lawmakers and law enforcers, regardless of their form, tend to reserve power for threats to legal norms that they consider most important. This is evidenced by the transition in the means by which mass torts have been addressed after catastrophes.

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I. INTRODUCTION

An unexpected nationwide oil leak in the Gulf of Mexico drew the world's attention to this serious disaster because of its unprecedented scale.[1] While the way the United States and British Petroleum (BP) have handled this case has aroused extensive debate, on the other side of the Pacific Ocean, a serious high-speed train crash also caused numerous people grievances and caused public resentment because of the controversial approach by which China concluded the case.[2] This was quite similar to that of the earlier melamine milk powder case, in which a large number of children were sickened.[3] Within a close time frame, a series of extensive food safety cases broke out in Taiwan. The alteration of food and drinks created significant impacts on the general public not only in Taiwan, but also in the adjacent countries that import food from Taiwan. These benchmark cases have aroused attention relating to how these jurisdictions deal with catastrophic cases that involve immense private and public interests.

Addressing mass tort disputes has been a prominent academic interest and practice focus, where the features, pros, and cons have been extensively studied and discussed not only in the United States, but also in Chinese and Taiwanese literature. Resolving mass tort disputes involves complicated discussion about legal systems and institutions, and hence, such disputes have become highlighted issues in academic and legal practice discussions. A generally accepted approach to resolving mass tort or class disputes involves a representative plaintiff bringing an action to the court claiming on behalf of a group of people, in which the judgment will bind the group (res judicata).[4] The basic model of this type of action is essentially a private litigation without the involvement of government or public institutions. While there have been numerous discussions about the features, pros, and cons of such innovation in private class litigations, this Article further argues that in many gigantic cases, the aforementioned mechanism for resolving mass tort or class

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1. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., 808 F. Supp. 2d 943, 947 (E.D. La. 2011).

2. *Yongwenxian tebie zhongda tielu jiaotong shigu diaocha baogao*, *supra* note 60; *Shigu yuanyin han xingzhi ji shigu fangfan han zhenggai cuoshi jianyi* (事故原因和性质及事故防范和整改措施建议) [*The Cause and the Nature of the Accident and the Proposal for Improvement*], SINA.COM (Dec. 28, 2011), http://news.sina.com.cn/c/2011-12-28/201223711187_2.shtml.

3. *Chinese Brand Sanlu, Tainted by Milk Scandal, Brings 7.3 Mln Yuan at Auction*, XINHUA NET (May 12, 2009), http://news.xinhuanet.com/english/2009-05/12/content_11360451.htm.

4. *See* Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 334 (2003).

disputes has not been fully implemented and that some other procedures parallel to the court proceedings are adopted or even replaced traditional private litigations. That is, whether class action mechanisms have been applied in their original form in catastrophes is suspect.

If monumental cases with massive influence are often addressed with an approach distinct from the general procedures of class actions, this indicates that the tort system or the private litigation process has limitations and that some other forces have driven the application in a different direction. When such circumstances can be found in the United States in addition to other jurisdictions such as China and Taiwan, it further evidences a radical common issue that causes a departure from private law.[5] In addition, the reasons behind such trends are critical and worth further analysis. By conducting in-depth case studies of mass tort disputes and summarizing the major findings in three jurisdictions, this Article not only explores the implications of such a phenomenon, but also investigates whether the inclusion of additional features in similar cases implies the rise and fall of different authorities or powers.

While the United States has been renowned for the utilization of class actions, the rising power and the economic growth of East Asia have increased the likelihood of the occurrence of mass disputes. With collective disputes or mass torts arising in its industrialized society, China has adopted class action mechanisms to deal with the pressing need to solve class disputes, while simultaneously going through legal reforms on the basis of a mixture of Chinese legal tradition and socialist law. Taiwan, on the other hand, having transplanted a westernized civil law system through Japanese colonization that has been maintained by the later government of the Republic of China, offers a unique example of how mass tort resolution has evolved in a democratic version of the civil law system. With its special political and historical relationship with China, Taiwan provides an excellent basis for a comparison of how mass tort law and class action mechanisms function in civil law countries under complex mixtures of legal legacies.

This Article proceeds in five parts. The case facts are introduced in the beginning of each Part. In addition to the facts, Part I distinguishes the Gulf oil leak case from previous catastrophic cases in the United States, as well as relevant criticisms and concerns. Part II introduces the Wenzhou High Speed Rail (HSR) crash and another selected case, along with providing an analysis of the special Chinese political and judicial

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5. Jing-Huey Shao, *Class Action Mechanisms in Chinese and Taiwanese Contexts—A Mixture of Private and Public Law*, 28 EMORY INT'L L. REV. 237, 280-81 (2014).

backgrounds. Part III introduces a series of food safety cases and the legal system in Taiwan. Lastly, Part IV of this Article explores the implications of approaches to handling mass tort disputes and the rationale behind these cases that vary the actual application of class actions from the original design. By examining how the real application of catastrophic class actions has deviated from general cases in each jurisdiction, this Article aims to explain the reasons behind and to explore the implications of such phenomena. Also, by means of comparing the differences and similarities of representative cases, this Article argues that resolving gigantic mass tort disputes commonly reflects the preference of the lawmakers not only in the United States, but also in other jurisdictions such as China and Taiwan.

II. THE UNITED STATES

A. Gulf Oil Spill

The oil spill case in the Gulf of Mexico in April 2010 provides the most recent example by which to examine how the United States deals with catastrophes. The oil spill was caused by an explosion of the Transocean semisubmersible drilling unit, Deepwater Horizon, while the company was finishing a well for BP in the ocean, miles from southeast New Orleans and the Mississippi River Delta.[6] The explosion killed eleven platform workers and injured seventeen others, and the rig eventually sank in the ocean.[7] Although the leaking well is now capped, the spill's effects have been widespread and unprecedented, with oil reported to have come ashore in Louisiana, Mississippi, Alabama, Florida, and Texas.[8] It is reported to be the largest oil spill accident ever in U.S.-controlled waters, as well as the largest marine oil spill in the history of the petroleum industry.[9] The spill has caused extensive damage to the habitats of marine life and wildlife as well as the fishing and tourism industries in the adjacent areas.[10]

While the oil spill's impact on the lives and livelihoods of Americans who live in or near the Gulf of Mexico has not yet been

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6. *In re Oil Spill*, 808 F. Supp. 2d at 947.

7. RICHARD SYLVES, DISASTER POLICY AND POLITICS: EMERGENCY MANAGEMENT AND HOMELAND SECURITY 134 (2d ed. 2014).

8. *In re Oil Spill*, 808 F. Supp. 2d at 947.

9. *BP Leak the World's Worst Accidental Oil Spill*, TELEGRAPH (Aug. 3 2010), http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7924009/BP-leak-the-worlds-worst-accidental-oil-spill.html.

10. Laura Tangley, *Bird Habitats Threatened by Oil Spill*, NAT'L WILDLIFE FED'N (June 17, 2010), http://www.nwf.org/News-and-Magazines/National-Wildlife/Birds/Archives/2010/Oil-Spill-Birds.aspx.

determined, numerous lawsuits already have taken place. Lawsuits that shared the same factual issues concerning the Deepwater Horizon explosion were centralized to the Multidistrict Panel to the Eastern District of Louisiana (case number MDL-2179) as the most appropriate district, because it is geographically and psychologically the "center of gravity" of the case.[11] Soon after the Gulf oil spill, President Obama had a meeting with BP executives,[12] in which BP agreed to pay $20 billion into an escrow account to cover claims associated with the oil spill.[13] Under the agreement, BP will pay $5 billion annually over the next four years into an escrow account with an equivalent amount of U.S. assets as collateral.[14] The $20 billion fund, known as the Gulf Coast Claims Facility (GCCF),[15] is being administered by Kenneth Feinberg, whose heroic image has been established in the minds of the U.S. people since his administration of compensation plans in the Agent Orange and 9/11 cases.[16] The fund was opened to claimants wishing to file a claim for economic or property damages related to the Deepwater Horizon incident under the Oil Pollution Act of 1990 (OPA).[17] The GCCF operated parallel to court proceedings, in which claimants who accept final payments from the GCCF agreed not to pursue claims against BP and other potentially liable parties.[18] The Department of Justice (DOJ) has also worked closely with Feinberg on the case.

The court administering the case later entered an order creating a process to facilitate the transition from the GCCF to a settlement program and appointed a transition coordinator and a claims administra-

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11. *Description of MDL No. 2179 In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, U.S. DISTRICT CT. E. DISTRICT LA., http://www.laed.uscourts.gov/OilSpill/Intro.htm (last visited Nov. 3, 2015).

12. Scott Wilson & Joel Achenbach, *BP Agrees to $20 Billion Fund for Gulf Oil Spill Claims*, WASH. POST (June 17, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/16/AR2010061602614.html.

13. Jesse Lee, *A New Process and a New Escrow Account for Gulf Oil Spill Claims from BP*, WHITE HOUSE BLOG (June 17, 2010), http://www.whitehouse.gov/blog/2010/06/17/a-new-process-and-a-new-escrow-account-gulf-oil-spill-claims-bp.

14. *Id.*

15. *Important Announcement*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/ (last visited Nov. 3, 2015).

16. *But see* Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 831-66 (2011) (indicating that there have been controversies relating to the vagueness and murky role of Feinberg in the Gulf oil spill).

17. *Claims Information*, BP, http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/claims-information.html (last visited Nov. 13, 2015).

18. John C.P. Goldberg, *The BP Gulf Oil Spill and the Quest for Complete Justice: Doing Justice in the Face of a Disaster*, 45 AKRON L. REV. 583, 586-87 (2011).

tor.[19] After BP and the Plaintiffs' Steering Committee entered into the court-approved Economic and Property Damage Class Action Settlement Agreement (Settlement Agreement), the GCCF finally was renamed the Court Supervised Settlement Program (Settlement Program) and began to accept claims on June 4, 2012.[20] There are two separate legal settlements available for individuals or businesses harmed by the oil spill to get payments and other benefits: one for economic and property damage claims as aforementioned and another for medical claims.[21] Both agreements have been certified and finally approved pursuant to Federal Rule 23(a) and (b)(3) for settlement purposes only.[22] The putative class consists of private individuals and businesses defined by geographic bounds and the nature of their loss or damage.[23] The Settlement Program calculates awards using public, transparent frameworks that apply standardized formulas derived from generally accepted and common methodologies.[24] These two court-supervised settlement programs, together with other compensation programs provided by BP, are options by which claimants can receive compensation without a lengthy adjudication process.

B. Features of U.S. Class Action Mechanisms

To examine how mass tort disputes are resolved in the United States, it is necessary to look into class action mechanisms. U.S. class actions have become of great interest since 1966, when the law was revised from a situation in which individuals seeking money damages with a class action lawsuit needed to sign on affirmatively (opt in) to a situation in which plaintiffs claimed to represent would be deemed part of the lawsuit unless they explicitly withdrew (opt out).[25] This revision tremendously enlarged the scope of money damage lawsuits, as well as the financial

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19. *FAQs*, DEEPWATER HORIZON CLAIMS CTR. ECON. & PROP. DAMAGE CLAIMS, https://cert.gardencitygroup.com/dwh/fs/faq?.delloginType=faqs (last visited Nov. 13, 2015) [hereinafter DEEPWATER HORIZON ECONOMIC & PROPERTY CLAIMS].

20. *Id.*

21. DEEPWATER HORIZON MED. BENEFIT CLAIMS ADMINISTRATOR, https://deepwaterhorizonmedicalsettlement.com/ (last visited Nov. 13, 2015) ("[The Medical Benefits Settlement] offers benefits to qualifying people who resided in the United States as of April 16, 2012, who were either Deepwater Horizon oil spill Clean-Up Workers or who were residents in certain defined beachfront areas and wetlands ('Zones') during certain time periods in 2010.").

22. DEEPWATER HORIZON ECONOMIC & PROPERTY DAMAGE CLAIMS, *supra* note 19.

23. *FAQs*, *supra* note 19.

24. *Id.*

25. DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15 (2000).

exposure of the defendants.[26] The special opt-out design together with the flexible contingency fee arrangement encourages attorneys in the United States to bring class suits for huge financial incentives.[27] On the other hand, the court's decision to certify a class has enormous practical consequences and hence becomes a decisive ruling in many cases.[28] It not only determines the leverage of the parties, but also potential interests, costs, and publicity.[29]

While U.S. class action mechanisms have been highly utilized, critics have been numerous, especially after opt-out design and contingency fee arrangements were adopted. One of the most common comments among these critics is that huge attorney's fees and expenses greatly shrink the reward gained from class action litigation or settlements.[30] On the other hand, costs that should be borne by culpable defendants have been externalized to insurers or consumers.[31] Other identified criticisms are related to unmeritorious claims eliciting settlements (which are usually referred to as "legal blackmail"), agency problems between lawyers and the class,[32] and the disproportionate number of frivolous actions reducing the average welfare of customers or shareholders in general.[33]

To tackle the perceived abuses, there have been retractions of class action mechanisms. Because most of the said problems mainly have resulted from inconsistencies in the interests between the class action attorneys and the actual interested parties,[34] the reform has been partially related to the allying of the interests of the two. The Private Securities Litigation Reform Act (PSLRA) is an example in the securities law area. In order to sufficiently motivate the lead plaintiffs to exercise greater supervision over the class counsel, the lead plaintiff is determined with reference to the financial interest at stake in the litigation.[35] The class

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26. *Id.*

27. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASE AND MATERIALS 694 (9th ed. 2008).

28. *See* JAY TIDMARSH & ROGER H. TRANGSRUD, MODERN COMPLEX LITIGATION 341 (2d ed. 2010).

29. *Id.* at 342.

30. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1534 (2006).

31. *Id.* at 1546.

32. Wallace Wen-Yeu Wang & Chen Jian-Lin, *Reforming China's Securities Civil Actions: Lessons from PSLRA Reform in the U.S. and Government-Sanctioned Non-Profit Enforcement in Taiwan*, 21 COLUM. J. ASIAN L. 115, 134 (2008).

33. *Id.* at 118.

34. *Id.* at 134.

35. Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1507 (2006).

action process is subject to closer judicial scrutiny, including deciding whether sanctions should be imposed for bringing frivolous claims and incorporating reviews of attorney's fees.[36] After the implementation of the PSLRA, the total settlement value increased because institutional investors had been empowered.[37] Institutional investors are also more likely to engage in meaningful negotiations over attorney's fees compared to other lead plaintiffs.[38] The Class Action Fairness Act of 2005 (CAFA)[39] is another successful attempt[40] that further "ensures fairer outcomes for the parties."[41] It requires stringent judicial scrutiny for coupon settlements when involving nonmonetary benefits or resulting in a net loss[42] as well as specifying that the contingency fees in coupon settlements shall be based on the value of the actual redeemed coupons, rather than the face value of such coupons.[43]

Even though the class action mechanism has been implemented and reformed for many years, it can still be troublesome to handle cases that have more extensive influence across a nation by numerous class litigations in different forums. Hence, the Judicial Panel on Multidistrict Litigation (MDL) has become one of the crucial tools developed by the federal system to process complex litigation in multiple jurisdictions. By setting a specified threshold criteria, the MDL Panel aggregates cases from multiple federal districts to a single district through motions to transfer on a national and case-by-case basis.[44] Even though the MDL only provides consolidation for pretrial purposes rather than a comprehensive solution for complex litigation problems, the function of centralization still serves judicial economy and prevents inconsistent rulings by avoiding repetitive procedures.[45] The MDL has successfully handled cases such as asbestos class disputes.[46]

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36. *Id.*

37. *Id.* at 1499, 1506 (arguing that this could be due to more effective monitoring of litigation or institutional investors' cherry-picking cases); *see* Wang & Chen, *supra* note 32, at 115.

38. Sandra K. McCandless et al., *Report on Contingent Fees in Class Action Litigation*, 25 REV. LITIG. 459, 478 (2006).

39. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

40. Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385 (2005).

41. *See* Class Action Fairness Act of 2005 pmbl.

42. 28 U.S.C. §§ 1712(e)-1713 (2012).

43. *Id.* § 1712(d).

44. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.4 (2004).

45. *See* TIDMARSH & TRANGSRUD, *supra* note 28.

46. *Asbestos Litigation Costs, Compensation and Alternatives*, RAND INST. FOR CIV. JUST., http://www.rand.org/pubs/research_briefs/RB9155/index1.html (last visited Nov. 13, 2015).

Given the features identified above, however, in cases as immense as the Gulf oil spill, it is perplexing that the United States has not implemented class actions in the way they were originally designed. Certain features and methods of addressing the cases have been different. In the Gulf oil spill case, government involvement may be shown from Obama's meeting with BP and from the Department of Justice's engagement in the resolution processes. Before the case entered into any resolution process, the use of administrative power is obvious, which is not one of the features or required processes in traditional mass tort litigations. Eventually, a preliminary but crucial agreement was reached, even though the following processes have still been led by judicial institutions. This critical agreement of the $20 billion fund was reached before the judicial institutions were involved. Interestingly, besides the agreement was reached with the help of governmental influence, the U.S. government also exerted its power to ensure the fulfillment of the payment by BP. By imposing a ban on BP after the Gulf oil spill, the government prevented BP from bidding for U.S. government contracts. The ban was lifted in March 2014[47] after BP paid out a substantial amount of compensation under the approved Settlement Program.[48]

Fund usage is not novel in recent U.S. history. Similar approaches were adopted in the 9/11 and Agent Orange cases. The justification of introducing such fund plans has created debates. While 9/11 is a public compensation plan established by statute and funded by tax payers,[49] the GCCF is modeled after the 9/11 fund and is literally based on political consensus,[50] which is significantly different from a public plan for a national tragedy in the form of a private settlement fund for corporate negligence.[51]

This makes commentators wonder: if tort systems may not provide the best means of compensation in unusual situations, could this

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The RAND Institute for Civil Justice began studying asbestos litigation in the early 1980s. This study provides a comprehensive description of the litigation through 2002 to evaluate how well the tort system is resolving asbestos claims and to describe some alternative strategies. *See also In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

47. *US Lifts BP Government Contract Ban*, BBC (Mar. 14, 2014), http://www.bbc.com/news/business-26571478; *see also* Mark Mcsherry & Tom Bawden, *BP Taken Off Gulf of Mexico Blacklist After Deal with US*, INDEPENDENT (Mar. 14, 2014), http://www.independent.co.uk/news/business/news/bp-taken-off-gulf-of-mexico-blacklist-after-deal-with-us-9191277.html.

48. *Gulf of Mexico Oil Spill and Other Payments Public Report*, BP (Feb. 13, 2015), http://www.bp.com/content/dam/bp-country/en_us/PDF/GOM/Public-Report-July-2015.pdf.

49. Myriam Gilles, *Public-Private Approaches to Mass Tort Victim Compensation: Some Thoughts on the Gulf Coast Claims Facility*, 61 DEPAUL L. REV. 419, 419 (2012).

50. Kenneth R. Feinberg, *The BP Gulf Oil Spill and the Quest for Complete Justice: Unconventional Responses to Unique Catastrophes*, 45 AKRON L. REV. 575, 577 (2012).

51. Gilles, *supra* note 49.

approach serve as a precedent for future alternative dispute resolving systems? Governmental intervention makes the Gulf oil spill case distinct from ordinary mass tort cases to the extent that it can no longer be explained by traditional private litigation features. The court and the administrative agencies involved have shown a positive attitude and have provided support toward the fulfillment of the compensation agreements. While scholars suggest that class actions could be substantially improved if judges were to supervise class litigation more actively[52] and that supporting judges and empowering them to take more responsibility for class action cases could potentially help such mechanisms achieve a better balance between public goals and private interests,[53] this Article specifies that the resolution of mass tort disputes in gigantic cases has gone further and beyond the stipulated law and the suggestions and criticisms referenced above.

Because the GCCF has not been subject to broad authorization by federal statutes creating the facility, nor has it received authorization by way of an Executive Order,[54] Mynam Gilles cautions against hurried creation of private, administrative solutions that do not incorporate the protections or transparency of public enforcement.[55] In addition, while Feinberg pointed out that "[m]ass disasters sometimes require creative remedies," he also warned that "creative alternatives to the tort system are the exception."[56] Even though the litigation system has limitations to address and resolve mass claims in a timely and fair fashion, the criticisms remind people of risks of utilizing fund plans with administrative power but without protections or transparency.[57] The use of compensation plans, such as the Settlement Agreement adopted in the Gulf oil spill, not only presents the apotheosis of this paradigm shift away from tort and toward an administrative solution, but also shows the relationship between lawmaking and state power that this Article intends to investigate.

III. CHINA

A. Wenzhou HSR Crash

Another disaster occurred on the other side of the globe. Two high-speed trains collided and derailed each other in the suburbs of Wenzhou,

52. *See* HENSLER ET AL., *supra* note 25, at 31-33.
53. *Id.* at 25.
54. Mullenix, *supra* note 16, at 820.
55. Gilles, *supra* note 49, at 420.
56. Feinberg, *supra* note 50, at 576-77.
57. Mullenix, *supra* note 16, at 859.

Zhejiang province, China in July 2011.[58] According to the authorities, 40 people were killed and at least 192 were injured in this rear-end crash.[59] This case caught the public's attention not only because it was the first fatal crash involving the high-speed rail (HSR) in China,[60] but also because of the way Chinese government handled the incident.[61] The accident rescue was hastily concluded, and the authorities ordered the burial of the derailed cars, which elicited criticism from the Chinese media and online communities.[62]

The accident had a profound impact on China's reputation related to high-speed technology, specifically in regard to the development of the high-speed rail, as well as on public confidence. In response to such concerns,[63] the government announced a comprehensive railway safety review.[64] The investigation, completed in December 2011, blamed faulty signal systems caused by lightning, which failed to warn the second train of the stationary first train on the same track, along with a series of management failures, which resulted in this deadly crash.[65]

In order to quickly resolve the potential claims and unrest, a compensation scheme was introduced.[66] After Premier Wen Jiabao's visit to the crash scene, Zhejiang Governor Lu Zushang asked the province's

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58. *Yongwenxian*, *supra* note 2.

59. *Id.*

60. *First Fatal Crash on Chinese High Speed Line*, RAILWAY GAZETTE (July 25, 2011), http://www.railwaygazette.com/news/single-view/view/first-fatal-crash-on-chinese-high-speed-line.html.

61. Tania Branigan, *Chinese Anger over Alleged Cover-Up of High-Speed Rail Crash*, GUARDIAN (July 25, 2011), http://www.theguardian.com/world/2011/jul/25/chinese-rail-crash-cover-up-claims.

62. *Id.*

63. Chen Qianqian (陈倩倩) & Shen Yuping (沈余平), *Wenzhou dongche tuogui shigu yinfa minzhong dui gaotie anquan danyou* (温州动车脱轨事故引发民众对高铁安全担忧) [Wenzhou Train Crash Causes Public Concern About the Safety of HSR], FENGHUANG WAN (凤凰网首页) [PHOENIX NET] (July 24, 2011), http://news.ifeng.com/mainland/special/wzdongchetuogui/content-3/detail_2011_07/24/7907034_0.shtml.

64. *China Orders Safety Review After High-Speed Rail Crash*, BBC (July 26, 2011), http://www.bbc.co.uk/news/world-asia-pacific-14289033.

65. *Yongwenxian tebie zhongda tielu jiaotong shigu diaocha baogao*, *supra* note 60; *Shigu yuanyin han xingzhi ji shigu fangfan han zhenggai cuoshi jianyi* (事故原因和性质及事故防范和整改措施建议) [*The Cause and the Nature of the Accident and the Proposal for Improvement*], SINA.COM (Dec. 28, 2011), http://news.sina.com.cn/c/2011-12-28/201223711187_2.shtml.

66. Fauna, *Wenzhou Train Crash Compensation & Rail Official Takes Plane*, CHINASMACK (July 27, 2011), http://www.chinasmack.com/2011/stories/wenzhou-train-crash-compensation-announced-rail-official-takes-plane.html.

People's High Court to rework compensation proposals.[67] Through the initial agreement between government representatives, a Railway Ministry representative service group, and the family members of one of the victims, the compensation amount was set at 500,000 yuan (US$80,850) at first, and was later elevated to 915,000 yuan (US$147,956).[68] One of the controversies over the agreements was that the agreements specified that people who accepted negotiations and signed agreements early may be given additional several tens of thousands of yuan as "a reward."[69] The above expenses, apart from the reward, would be paid by the government of the victim's household registration, with the rest paid by the Railway Ministry, in cash or charge card, but principally with charge cards.[70] This compensation scheme is actually quite similar to that utilized in the melamine milk powder case in 2008, where victims' families were persuaded to take a compensation plan offered by the government and Sanlu before any lawsuits could be accepted by the courts.[71]

B. Implications of Resolving Mass Tort Cases in China

In China, there have been governing laws and relevant interpretations available for mass tort disputes. Article 55 of the Civil Procedure Law of the People's Republic of China (CPL) stipulates that when a case has numerous litigants and the subject matter of an action is under the same category, the court may issue a public notice for those interested persons to register their rights with the People's Court.[72]

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67. *The Wenzhou Crash Compensation Formula*, WANT CHINA TIMES (Aug. 17, 2011), http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20110817000010&cid=1103.

68. *Id.*

69. *Wenzhou gaotie shigu peichang 50 wanzhong 5 wan shi jiangjin* (温州高铁事故赔偿50万中5万是奖金) [*Among the Five Hundred Thousand Dollars in Compensation of Wenzhou HSR Crash, Fifty Thousand Was a Reward*], RFI (July 27, 2011), http://cn.rfi.fr/%E4%B8%AD%E5%9B%BD/20110727-%E6%B8%A9%E5%B7%9E%E9%AB%98%E9%93%81%E4%BA%8B%E6%95%85%E8%B5%94%E5%81%BF50%E4%B8%87%E4%B8%AD5%E4%B8%87%E6%98%AF%E5%A5%96%E9%87%91.

70. Fauna, *supra* note 66.

71. Shao, *supra* note 5, at 242.

72. Civil Procedure Law of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, rev'd Aug. 31, 2012, effective Jan. 1, 2013), art. 54 (China):

> (Section 1) Where the subject matters of an action is under the same category and one of the parties has numerous litigants but the exact number of the litigants is uncertain when the lawsuit is filed, the people's court may issue a public notice to explain the nature of the case and the claims of the litigation and informing those interested persons who are entitled to the claim to register their rights with the people's court within a fixed period of time.

However, according to the empirical evidence, the laws have not been applied as stipulated, especially in the case of catastrophic cases that have extensive influence. There appears to be critical differences between the statutory framework and the real practice of mass tort resolution in China.

The 2008 melamine milk powder case after the Beijing Olympics offered another example of how China deals with disasters. This case involved a tragedy that caused six deaths and 300,000 children to contract diseases, including kidney stones and kidney failure,[73] after they consumed the products manufactured by Sanlu, the largest corporate milk powder group in China.[74] As parents pursued every means available to fight for their children,[75] this case was handled via another approach instead of class action. Lawsuits filed by the parents in the beginning were not accepted by the court.[76] Court officials declared that because the case was nationwide, conditions were unsuitable for them to accept the cases.[77] Similar to that of Wenzhou HSR crash, the Sanlu tainted milk powder and twenty-one other dairy companies proposed a fund plan of 1 million yuan by borrowing money.[78] The fund offered compensation to families whose children died and became seriously ill[79] and established a foundation intended to cover the future medical expenses of the victims.[80] After 90% of the victims' families had accepted this arrangement and had been compensated according to the China Dairy Industry Association,[81] Sanlu filed a bankruptcy petition[82] and was later

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There were two amendments to China's Civil Procedure Law in 2007 and 2012; the article number was changed to 54 in 2012. *See Civil Procedure Law of the People's Republic of China*, WIPO, http://www.wipo.int/wipolex/en/details.jsp?id=6033 (last visited Nov. 13, 2015).

73. *Chinese Brand Sanlu, Tainted by Milk Scandal, Brings 7.3 Mln Yuan at Auction*, XINHUA.NET (May 12, 2009), http://news.xinhuanet.com/english/2009-05/12/content_11360451.htm.

74. *Id.*

75. *See* Fang Yang, *China Court Accepts First Lawsuit over Melamine Tainted Milk*, XINHUA.NET (Mar. 25, 2009), http://news.xinhuanet.com/english/2009-03/25/content_11072195.htm.

76. *Id.*

77. *Id.*

78. Sun Yunlong, *Chinese Court to Sentence 21 Defendants over Tainted Milk Powder Scandal*, XINHUA.NET (Jan. 22, 2009), http://news.xinhuanet.com/english/2009-01/22/content_10700333.htm.

79. Yang, *supra* note 75.

80. *See* Lan Xinzhen, *Questioning Compensation: Transparent Management and Open Information Needed for the Fund Set Up to Compensate Victims of the 2008 Sanlu Milk Scandal*, BEIJING REV. (June 27, 2011), http://www.bjreview.com.cn/health/txt/2011-06/27/content_371892.htm#.

81. *China Dairy Association: 90% of Tainted Milk Victims Compensated*, XINHUA.NET (Jan. 24, 2009), http://news.xinhuanet.com/english/2009-01/24/content_10710906.htm.

82. Yunlong, *supra* note 78.

declared insolvent[83]. Hence, no more compensation can be obtained via lawsuits.

The approach used by the Chinese government and the Chinese courts to handle the Wenzhou HSR crash and the melamine milk powder cases may have confused the world, especially because China has a class action mechanism specified in its statutory law. Approaches other than the class action mechanism in the CPL, which are settlement plans, have been adopted in both cases.

Why is this the case? Analyzing general practices for resolving mass tort disputes in China would be helpful to draw a clearer picture. Generally speaking, in order to seek justice in China, both legal and political efforts would have to be exerted. Plaintiffs usually either request help through the courts or resort to government or party organizations to resolve disputes.[84] Historically, the courts have been minor actors in the Chinese state[85] and lack sufficient independence.[86] Judges traditionally have not been required to have any special training or educational qualifications.[87] Standards for new judges were raised after passing the Law on Judges in 1994 and a requirement for passing examinations started in 2002 for prospective judges, lawyers, and procurators.[88] According to scholars, court funding does not come mainly from budget allocations but from litigation fees, and courts and judges are rated for their performance and the number of cases processed.[89] This may cause risks of being influenced by other entities due to financial instability. In addition, court presidents are responsible for decisions in their courts, which creates the possibility for court presidents, who often have close ties to local officials, to intervene in cases in their own courts.[90]

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83. *Court Says China Firm in Milk Scare Files for Bankruptcy*, BAY LEDGER NEWS ZONE (Dec. 23, 2008, 7:00 PM), http://www.blnz.com/news/2008/12/24/Court_says_China_firm_milk_5853.html.

84. Shai Oster, *Major Lawsuit Won by Workers in Zhejiang*, CHINA LAB. BULL. (July 9, 2001), http://www.china-labour.org.hk/en/node/2968; *see also Laborer's Awarded Million in Court*, CHANNEL ENGLISH (Nov. 5, 2001), http://english.big5.enorth.com.cn/system/2001/11/05/000183228.shtml. Victims and their families in the silicon dioxide workers' compensation case visited the authorities of the city, province, and central government. A group of twenty workers took their plea for justice to Beijing-the traditional final resort for peasants seeking justice. Eventually, the court heard the case and ruled that farmers were eligible for compensation.

85. Donald C. Clarke, *Empirical Research into the Chinese Judicial System*, *in* BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 164, 172 (Erik G. Jensen & Thomas C. Heller eds., 2003).

86. Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 3-4 (2007).

87. Clarke, *supra* note 85, at 176.

88. *Id.*

89. *Id.* at 179.

90. Liebman, *supra* note 86, at 2.

With the rapid growth of the economy in China, the goal of achieving the establishment of a "socialist market economy" was declared in the Fourteenth Party Congress in 1992.[91] Because a stable economic environment relies on a legal society, the Fifteenth Congress of the Chinese Communist Party in 1997 embraced the notion of "rule of law."[92] According to this principle, the Supreme People's Court (SPC) issued its first five-year plan in 1999[93] and a second five-year plan in 2005[94] for the purpose of reforming China's courts. Both plans listed fifty goals intended to address problems in the courts, ranging from judicial training to regularity in court procedures, which have brought increased attention to court reform in China.[95] However, this was a top-down court reform for legal construction and modernization, the implementations of which are actually technical, such as improving judges' training, eliminating corruption, increasing efficiency, and closely overseeing judges.[96] Thus, it is not surprising that courts have difficulty being free from interference from other administrative actors; individual judges are also not expected to decide cases in isolation, just as they have always done.[97]

To further understand the Chinese legal system, knowledge of its political system is suggested; to analyze the political system, thinking in ways that Chinese officials talk about their system will be more critical

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91. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 57 (2008).

92. JAMES C.F. WANG, CONTEMPORARY CHINESE POLITICS: AN INTRODUCTION 157 (2002):

> There is a conceptual distinction between the terms *rule by law* and *rule of law. Rule by law* refers to the use of existing law by the state, whereas *rule of law* implies fairness and predictability against leftist extremism the rule by persons. Lawmaking in China in recent years does not follow the Western sense of protecting personal rights against the state or party, or ensuring judicial independence and integrity in the administration of justice. Law making in China may be seen simply as "a process of protecting voluntary economic arrangements" under "socialist market reform."

Id.

93. The Supreme People's Court serves as the highest court and also manages the court bureaucracy. More than three hundred judges work at the court, although not all hear cases. *Zuigao Renmin Fayuan de zhize quanxian yu gongzuo yuanze* (最高人民法院的职责权限与工作原则) [*The Supreme People's Court Power and Working Principle*], XINHUA NET, http://news.xinhuanet.com/ziliao/2003-08/13/content_1024700.htm (last visited Nov. 5, 2015).

94. Renmin fayuan dierge wunian gaige gangyao (2004-2008) (法规标题 人民法院第二个五年改革纲要 (2004－2008)) [The Second Five-Year Reform Plan of the People's Courts (2004-2008)] (promulgated by the Sup. People's Ct., Oct. 26, 2005) (China), *translated in Second Five-Year Reform Program for the People's Courts*, CONG. EXEC. COMM. ON CHINA (CECC) (Oct. 26, 2005), http://www.cecc.gov/resources/legal-provisions/second-five-year-reform-program-for-the-peoples-courts-2004-2008-cecc.

95. Liebman, *supra* note 86, at 11.

96. *Id.* at 2.

97. *Id.* at 17.

than looking into official organizational charts.[98] While the Chinese Constitution stipulates that "no organization or individual may enjoy the privilege of being above the Constitution and the law," the Communist Party in reality still dominates the country's judiciary through various mechanisms.[99] The key concepts concerning the organization of power are the *xitong* (meaning "system," led by small leadership groups).[100] The Political and Legal *Xitong* was established in the 1950s and is one of the most important, wide-ranging, and powerful xitongs.[101] It runs the court system, the prosecutors, the prisons, and the uniformed and secret police.[102] The most powerful mechanism that enables the Party-state to dominate all legal affairs in the Political and Legal *Xitong* is the Central Political and Legal Committee (CPLC), which is a specialized organ within the Party in charge of political and legal work.[103] The goal of CPLC is to guarantee Party leadership over political and legal work.[104] By linking the Party center to the political and legal front line (the courts), CPLC carries out the Party's policy and coordinates among political and legal organs.[105] Therefore, class actions, mediations, or settlements that can avoid lengthy judicial proceedings are usually more welcomed because mediation or settlement is more efficient from a managerial perspective.

In addressing mass tort disputes or any sensitive cases, "social stability" has been emphasized as the first priority.[106] Based on the observation of recent cases, social stability seems to be highly related to the court's or the government's ability to control a case. If large claims are extensive or complicated, they are generally not accepted or heard by the courts.[107] Instead, cases that would not harm social stability are more likely to be handled via the judicial system. This subject becomes more

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98. KENNETH G. LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 215 (2d ed. 2004).

99. ZHENG YONGNIAN, THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR: CULTURE, REPRODUCTION, AND TRANSFORMATION 98-123 (2009).

100. LIEBERTHAL, *supra* note 98, at 215-18. Six xitongs have been particularly important for concrete management of the country: Party Affairs, Organization and Personnel, Propaganda and Education, Political and Legal Affairs, Finance and Economics, and the Military.

101. YONGNIAN, *supra* note 99.

102. LIEBERTHAL, *supra* note 98, at 224.

103. YONGNIAN, *supra* note 99.

104. *Id.*

105. *Id.*

106. *Zhong gong zhong yiang guan yu jia chiang dang zhi zheng nueng li jian xe de jue ding* (中共中央关于加强党的执政能力建设的决定) [*The Decision of Central Authority About Enhancing the Ruling Party's Power*], PEOPLE.CN (Nov. 17, 2004), http://www.people.com.cn/GB/40531/40746/2994977.html.

107. Liebman, *supra* note 86, at 28.

critical when taking mass tort disputes into consideration. Having such a different approach and attitude toward mass tort disputes likely arises from the Chinese government's desire for control with the goal of preserving social stability under Chinese socialism.[108] The purpose of mass tort resolution in China is actually more of a way of defusing potential unrest to avoid social disorder, rather than a legal mechanism generally accessible to the Chinese people to call for individual or collective justice.[109]

Another reason for China to prefer utilizing settlement or fund arrangements to resolve gigantic disputes is due to the informal handling of deviance by guerillas rooted in Chinese traditions.[110] The traditional settlement of disputes was one of informality and compromise. In China today, we see similar mediation roles assigned to organizations.[111] A large percentage of both civil and criminal cases are settled in China by this type of informal method, without going through a court trial.[112] In the aforementioned court reform led by the SPC, one of the emphases has also been on the mediation and settlement.[113]

Compared to the conservative and cautious attitude of the courts in the adjudication of cases, Chinese lawyers have played a comparatively creative role in promoting the application of law in China. It was not until very recently that a lawyer's position in China changed from what it was in the past.[114] The role of Chinese lawyers has undergone major changes as the demand for their services has increased since the economic reform and the increased flow of foreign investment.[115] Previously, lawyers in China were organized to practice law collectively and used to work for state-supported legal advisory offices that would assign cases to them.[116] They could not engage in private practice.[117] The role of these legal advisors was rather limited because they were not advocates or adversaries in the Western sense.[118] In the mid-1980s, lawyers could be seen setting up street corner stands in major cities to answer questions about minor civil disputes.[119] In 1996, the first law for

108. Shao, *supra* note 5, at 254-55.
109. *Id.* at 260.
110. WANG, *supra* note 92, at 152.
111. *Id.*
112. *Id.*
113. Liebman, *supra* note 86, at 12-16.
114. WANG, *supra* note 92, at 148.
115. *Id.* at 149.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*

lawyers was finally passed, allowing lawyers to represent citizens and corporations in civil and criminal cases or to act as agents in mediations and arbitrations, as well as granting the formation of law partnerships and law firms.[120] While there have been new laws regarding legal procedures, the laws still do not apply systematically because judges or police officers may refuse to allow lawyers to see their clients or deny hearings for a trial.[121] However, in some cases, lawyers still try their best to help their clients and to promote the application of stipulated laws with a slight detour. For example, in some mass tort disputes, if the cases have not been accepted as class actions by the courts, lawyers have creatively helped the claimants file joinder claims and have been in charge of issuing notices to potential claimants.[122] In other situations, where the courts have indicated that only separate claims would be accepted, some lawyers have filed claims one by one in an attempt to seek justice for their clients.[123]

It has been considered inappropriate to compare the Chinese legal system with Western models or assumptions. The Chinese legal system does not intend to function the same way as that of the United States or other western countries. The Chinese courts are more similar to "state bureaucracies with the power to resolve disputes."[124] Instead of waiting for parties to bring cases to them, Chinese courts can decide to undertake a case that has not come before them by way of a party's complaint and can also refuse cases that have come before them.[125] The purpose of the legal system is to ensure social and political order, rather than ensuring that every claimant's rights are protected.[126] The role of courts in mass tort disputes does not come into play until they obtain support or instructions from the Party-state. While the Chinese state has emphasized the ideology of legality, the evolving role of law and the legal system in China is still a topic of sharp debate.

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120. *Id.* at 150.

121. *Id.*

122. *YanTai Dongfang DianZiXinXiChanYe gufenyouxiangongsi zhongda susong shijian jingzhan gonggao* (烟台东方电子信息产业股份有限公司重大诉讼事件进展公告) [*Yantai Donfang Electronics Corporation Public Notice of Litigation*], CNINFO (May 21, 2009), http://www.cninfo.com.cn/finalpage/2009-05-26/52849572.PDF.

123. *Cika yonghu shi zhan dao di Zhongguodianxin jiang bei gao ji bai hui* (磁卡用户誓战到底 中国电信奖被告几百回) [*Consumers Determined To Continue Fight For Their Rights; China Telecom Will Be Sued Hundreds of Times*], LIAOHAI.NET (Sept. 6, 2001), http://www.liaohai.com.cn/liaohai/chinese/04/show.asp?t=219.

124. Liebman, *supra* note 86, at 3–4.

125. Clarke, *supra* note 85, at 172.

126. Liebman, *supra* note 86, at 24.

IV. TAIWAN

A. *Food Safety Crisis*

In Taiwan from 2011 to 2014, a series of food safety incidents occurred. Illegal additives were added into food products like cooking oil, vitamins, alcoholic beverages, milk, and rice, resulting in widespread recalls that affected the local and export food market. The first incident occurred when the industrial plasticizer diethylhexylphthalate (DEHP) was found in a variety of food and drink items in May 2011.[127] The inclusion of DEHP was due to unscrupulous manufacturers adding a cheap substitute for palm oil in a wide variety of products.[128] This scare was soon elevated to an extensive food scandal after the discovery of many products, such as candies, juice products, and health supplements, were found to contain containing DEHP or similar chemicals.[129]

The food scare led to a ban on the circulation and recall of the contaminated products, as well as the imprisonment of the owner of the company that manufactured the plasticizers.[130] However, with respect to civil compensation, the handling of the class action for the damage or losses incurred by the general public who had consumed these products was full of obstacles. In Taiwan, most consumer litigation was handled by consumer advocate groups. According to the Consumer Foundation, Chinese Taipei (CFCT), the government provided limited help with regard to consumer claims.[131] It was not until almost one year after the scandal, with the help of pro bono lawyers, that a class action was filed.[132] The CFCT sued food producers on behalf of the 568 consumers who registered their rights with the CFCT for NTD$7.8 billion (US$264 million) in compensation. This is reportedly the largest class action claim in the history of the CFCT.[133]

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127. Huang Yijing (黃以敬), *Suhuaji shijian shimo* (塑化劑事件始末) [*The Whole Story of the Plasticizer Case*], ZIYOU SHIBAO [LIBERTY TIMES NET] (Oct. 18, 2013), http://www.libertytimes.com.tw/2013/new/oct/18/today-fo6-2.htm; Sun Luxi (孫璐西), *Suhuaji DEHP bi sanjuqingan du 20 bei* (塑化劑 DEHP 比三聚氰胺毒 20 倍) [*Plasticizer Is Twenty Times More Toxic Than Melamine*], NOW NEWS (May 30, 2011), http://www.nownews.com/n/2011/05/30/521241.

128. Grace Kuo, *Taiwan Ups Consumer Rights Protection in Wake of DEHP Scare*, TAIWAN TODAY (June 10, 2011), http://taiwantoday.tw/ct.asp?xItem=167291&CtNode=1766.

129. *Id.*

130. Wang Chao-Yu & Jeffrey Wu, *Consumer Group To Appeal Food Scandal Ruling*, FOCUS TAIWAN NEWS CHANNEL (Oct. 17, 2013), http://focustaiwan.tw/news/asoc/201310170022.aspx.

131. Telephone Interview with Zhou Han-Wei, Attorney at Law, LAF (May 18, 2010).

132. *Id.*

133. *Taiwan Consumers Foundation To Sue Food Groups over Plasticizer Scandal*, TAIWAN NEWS (Mar. 15, 2012), http://www.taiwannews.com.tw/etn/news_content.php?id=1869365.

People's confidence in food safety had not yet recovered when, in October 2013, the public was shocked to learn that Chang Chi Foodstuff Factory Company (Chang Chi) had altered its popular Tatung cooking oil brand.[134] Chang Chi had not only sold 100% pure premium olive and grapeseed oils that were actually mixed with less expensive cottonseed oil, but had also used copper chlorophyllin, an illegal coloring agent, in the oil.[135] A few days later, Flavor Full Food Inc. was also accused of blending cheaper cottonseed oil into more expensive cooking oils in order to increase their profits.[136] President Ma Ying-Jeou pledged to punish food and beverage manufacturers severely amid this scare over adulterated cooking oils and also vowed to improve food inspection guidelines.[137] Chang Chi was shut down and fined NTD$28 million (US$924,000) by the government in accordance with the Act Governing Food Sanitation.[138] In December 2013, the chairman of Chang Chi was sentenced to sixteen years in prison for his role in the scandal.[139] The company was also mandated to pay a further NTD$50 million (US$16,666) in fines.[140]

While Chang Chi was being severely punished with huge penalties, the court decision on the plasticizer case came out. To the public's disappointment, the New Taipei District Court ruled that the other defendant companies should only pay NT$1.27 million (US$41,910) in compensation to the hundreds of plaintiffs, which was well below the expectations of those involved.[141] The reasons provided in the decision included the justification that it would be unreasonable to ask downstream food distributors to bear full responsibility for the food contamination because they were not aware of the two manufacturers of

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134. Queena, Yen, *Recalled Tatung Oil To Be Destroyed; FDA Updates List of Illegal Imports*, CHINA POST (Jan. 3, 2014, 12:02 AM), http://www.chinapost.com.tw/taiwan/national/national-news/2014/01/03/397463/Recalled-Tatung.htm.

135. Wu Tse-Hao & Jay Chen, *Businessman Gets 16-Year Sentence in Edible Oil Scandal*, FOCUS TAIWAN NEWS CHANNEL (Dec. 16, 2013), http://focustaiwan.tw/news/asoc/201312160014.aspx.

136. Lu Hsin-Hui & Scully Hsiao, *Singaporean Importers of Taiwanese Oil Barred from Shipping*, FOCUS TAIWAN NEWS CHANNEL (Oct. 22, 2013), http://focustaiwan.tw/news/aeco/201310220020.aspx.

137. Mo Yan-Chih & Shih Hsiu-Chuan, *Ma Vows Tougher Food Inspections*, TAIPEI TIMES (Oct. 24, 2013), http://www.taipeitimes.com/News/taiwan/archives/2013/10/24/2003575261.

138. *Id.*

139. Tse-Hao & Chen, *supra* note 135.

140. *Id.* The fine was later revoked because the authorities asserted that criminal procedure is already in the process and will impose a penalty.

141. Alison Hsiao, *Court's Plasticizer Ruling Not Enough: Opposition*, TAIPEI TIMES (Oct. 11, 2013), http://www.taipeitimes.com/News/taiwan/archives/2013/10/22/2003575111.

the additives using toxic plasticizers in their products.[142] Also, the court quoted the information from the health manual published by Ministry of Health and Welfare (MHW) and decided that the plasticizers DEHP and DINP could be excreted from the human body through metabolism and therefore would not negatively impact immune, nervous, and endocrine systems unless ingested long-term in large quantities.[143] Experts criticized the ruling, stating that it was "against the professionalism of toxicology."[144] The MHW also indicated that the court might have misinterpreted the information in the health manual and supported the belief that the CFCT should appeal.[145] This case is now under appeal.[146]

The series of food safety cases rose to a peak in October 2014 when Wei Chuan, a unit of food giant Ting Hsin International Group, was accused of selling for human consumption sixty types of lard, cooking oil, margarine, and related products intended only for animal feed.[147] The scare gripped Taiwan and triggered public outrage against the company.[148] Wei Ying-Chung, the ex-chairman of the Wei Chuan Foods Corporation, stepped down and was taken into custody after massive product recalls and boycotts.[149] The backlash against Ting Hsin also led Wei Ying-Chiao, one of the four brothers who led the group, to resign as CEO and vice chairman of Taipei 101.[150]

President Ma again made a public statement that the oil scandal happened because of lax inspection of food manufacturing factories by local governments and urged local municipalities to strengthen checks on

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142. Chao-Yu & Wu, *supra* note 130.

143. Hsiao, *supra* note 141; *Professor Slams Court's Interpretation of His Health Manual in Plasticizer Ruling*, FORMOSA NEWS (Dec. 18, 2013), http://englishnews.ftv.com.tw/read.aspx?sno=C069A48366291FD0DE7F8A1797D3CC8F.

144. *Id.*

145. Qiu Yijun (邱宜君), *Wenxuan cheng panjue guanjian weifubu jipieqing* (文宣成判決關鍵 衛福部急撇清) [*Health Manual Becomes the Critical Issue of the Court Decision*], ZIYOU SHIBAO [LIBERTY TIMES NET] (Oct. 18, 2013), http://news.ltn.com.tw/news/focus/paper/722937.

146. Jian Yixin (簡怡欣), *Yezhe huopan shangyi minzhong na lingtou? Xiaojihui ti suhuaji tuansong shangsu* (業者獲判上億、民眾拿零頭) [*The Business Was Awarded Billons While General Public Only Gets Remnants*], NOW NEWS (Nov. 15, 2013), http://www.nownews.com/n/2013/11/15/1020843.

147. Aries Poon, *Former Ting Hsin Executives Indicted Amid Cooking Oil Scandal: Company Allegedly Sold Cooking Oil Tainted with Animal Feed*, WALL STREET J. (Oct. 30, 2017, 8:07 AM), http://www.wsj.com/articles/former-ting-hsin-executives-indicted-amid-cooking-oil-scandal-1414670839.

148. *Tycoon Gives Up on Ting Hsin Food Safety Foundation*, TAIWAN NEWS (Nov. 15, 2014), http://www.taiwannews.com.tw/etn/news_content.php?id=2620207.

149. *Taiwan Tycoon Detained over Food Safety Scandal*, YAHOO! (Oct. 17, 2014), http://news/yahoo.com/taiwan-tycoon-detained-over-food-safety-scandal-114607319.html.

150. *Tycoon Gives Up on Ting Hsin Food Safety Foundation*, *supra* note 148.

such facilities.[151] Premier Jiang Yi-Huah also demanded that Yuan officials ensure that food products containing the adulterated cooking oil be removed from store shelves and sealed.[152] He also vowed to punish severely those who were involved in the making of the recycled oils, even though they had met food safety standards.[153] The Department of Health of Kaohsiung City Government fined the Chang Guann Company, one of the suppliers of Ting Hsin, NT$50 million (US$16,666), the highest fine that can be imposed on violators under article 15-1 of the Act Governing Food Safety and Sanitation.

After being condemned by the government, Ting Hsin, Wei Chuan's largest shareholder and owner of the instant noodle brand Master Kong, which is popular in both China and Taiwan, said that it would donate NT$3 billion (US$100 million) to the Taiwanese government or approved foundations.[154] This was seen by the public as trying to avert a consumer boycott of its products by making the promise to donate money to improve food safety. As a result, Samuel Yin, the Ruentex Group chairman, accepted the task of establishing a new foundation to promote food safety,[155] but the check written by Ting Hsin has not been honored and has been postponed over time, and Samuel Yin changed his attitude regarding establishing a foundation. Instead, he asserted that Ting Hsin should donate to the government, i.e., MHW, directly.[156] After recent reports criticized the group for having not honored its promise,[157] Ting Hsin finally contributed NTD$3 billion (US$100 million) to a trust at Taishin Bank for the purpose of promoting food safety.[158] As of this writing, the manager of the fund has not yet been appointed.[159]

B. Addressing Mass Tort Disputes in Taiwan

In order to resolve the increasing number of mass disputes over the last two decades, Taiwan has introduced and implemented class action

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151. Claudia Liu & Evelyn Kao, *Local Governments Must Strengthen Food Checks: President*, FOCUS TAIWAN (Sept. 9, 2014), http://focustaiwan.tw/news/asoc/201409090033.aspx.

152. Tang Pei-Chun et al., *Premier Vows To Get Tough on Recycled Waste Oil Providers*, FOCUS TAIWAN (Sept. 8, 2014), http://focustaiwan.tw/news/aipl/201409080015.aspx.

153. *Id.*

154. *Tycoon Gives Up on Ting Hsin Food Safety Foundation*, *supra* note 148.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Ting Hsin 30 yi shi an ji jin queding ruzhang* (頂新 30 億食安基金 確定入帳) [*Ting Hsin 3 Billion Food Safety Fund Has Been Credited to the Account*], CNA (Jan. 23, 2015), http://www.cna.com.tw/news/firstnews/201501235012-1.aspx.

159. *Id.*

mechanisms, which have been stipulated not only in general civil procedural laws but also in special laws. Taiwan has opted for an opt-in design with a variation between two types of initiation methods for the procedure. The first type is where multiple claimants whose claims have "arisen from the same public nuisance, traffic accident, product defect, or the same transaction or occurrence of any kind" are allowed to appoint, with the court's approval, one or more representatives among themselves.[160] After approval, the court issues a public notice for potential claimants that allegedly have the same claim under the same underlying facts to join the action.[161] The second type of initiation occurs when charitable associations or government-sanctioned organizations (GSOs) bring lawsuits on behalf of potential claimants.[162]

Even though the mechanism of resolving mass tort claims has been carefully designed, the number of cases has been few. The reasons for the paucity of class actions can be summarized as follows. First, the compensation is modest. In most civil law countries, the purpose of civil litigation is compensation only. Even if the recent inclusion of punitive damage in some special law areas seems to somewhat relax the compensation-only theory,[163] punitive damage in Taiwan is still computed

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160. Taiwan Code of Civil Procedure art. 44-2, JUD. YUAN REPUBLIC CHINA (June 25, 2003), http://jirs.judicial.gov.tw/eng/FLAW/FLAWDAT01.asp?lsid=FL001362 (Taiwan).

> When multiple parties, whose common interests have arisen from the same public nuisance, traffic accident, product defect, or the same transaction or occurrence of any kind, appoint one or more persons from themselves in accordance with the provision of Article 41 to sue for the same category of legal claims, the court may, with the consent of the appointed party, or upon the original appointed party's motion which the court considers appropriate, publish a notice to the effect that other persons with the same common interests may join the action by filing a pleading within a designated period of time. . . . Those persons so joining shall be deemed to have made the same appointment in accordance with the provisions to Article 41.

Id.

161. *Id.*

162. *See id.* art. 44-1 ("Multiple parties with common interests who are members of the same incorporated charitable association may, to the extent permitted by said association's purpose as prescribed in its bylaws, appoint such association as an appointed party to sue on behalf of them."); *see also* Consumer Protection Law art. 50, LAWS & REG. DATABASE REPUBLIC CHINA (June 17, 2015), http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?pcode=J0170001 (Taiwan).

> (Section 1) Where numerous consumers are injured as the result of the same incident, a consumer protection group may take assignment of the rights of claims from 20 or more consumers and bring litigation in its own name. Consumers may revoke such assignment of the rights of claims before the close of oral arguments, in which case they shall notify the court.

163. *See, e.g.*, *id.* art. 51:

> In a litigation brought in accordance with this law, the required consumer may claim for punitive damages up to 3 times the amount of actual damages as a result of injuries

with a fixed multiple (usually below two or three) specified in the laws and hence capped.[164] This shows that the concept of deterrence is still relatively conservative in Taiwan.

Second, there have been minimum incentives for lawyers to initiate class actions. Although contingency fee arrangements are allowed in most civil cases, attorney fee arrangements are generally restricted by bar associations in Taiwan by means of capping the total fees that attorneys can charge per case.[165] Also, due to cultural backgrounds, when encountering disputes, Taiwanese claimants have been inclined to seek help from organizations sanctioned by the government.[166] For example, being the pioneer of class action initiators with a charitable image in Taiwan for many years, the CFCT bears high expectations from society. However, it can only accept cases involving personal injuries or important interests that society wishes to address because of insufficient financial and governmental support.[167] Without staff attorneys or in-house lawyers, the CFCT has to rely on support from pro bono lawyers and can only spend resources on serious mass tort cases rather than on small consumer class actions.[168] For cases that do not have extensive influence or do not involve personal injuries or death, the CFCT usually only provides counseling or assists consumers in filing claims on their own, rather than filing lawsuits on their behalf.[169]

The GSOs hold prosecutorial discretion and control in initiating class actions in legal areas that lawmakers consider important, such as investor and consumer protection. However, actual implementation has been challenging. Without government support, GSOs do not have

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caused by the willful act of misconduct of business operators; however, if such injuries are caused by negligence, a punitive damage up to one time the amount of the actual damages may be claimed.

164. *See id.*

165. *Taipei lu shi luen li gui fan* (律師倫理規範) [*Taipei Bar Association Professional Legal Ethics*], TAIPEI BAR ASS'N, http://www.tba.org.tw/about.asp?id=67&class=39&classname=%E5%85%AC%E6%9C%83%E8%A6%8F%E7%AB%A0 (last visited Nov. 13, 2015) ("The Taipei Bar Association capped the total fees that attorneys can charge per case, which substantially limits the revenue of attorneys who represent class actions.") (author's translation); *see also Taipei lu shi gong hui zhang cheng* (公會章程) [*Charter of the Taipei Bas Association*], TAIPEI BAR ASS'N art. 29, http://www.tba.org.tw/about.asp?id=66&class=39&classname=%E5%85%AC%E6%9C%83%E8%A6%8F%E7%AB%A0 (last visited Nov. 13, 2015) ("Even though contingency fee arrangements are allowed in most civil cases, the Taipei Bar Association capped the total fees that attorneys can charge per case, which substantially limits the revenue of attorneys who represent class actions.

166. *See* Shao, *supra* note 5.

167. *Id.* at 275.

168. E-mail from Ou Yang Li, Exec. Sec., CFCT, to author (May 7, 2010, 16:32 CST) (on file with author).

169. *Id.*

sufficient resources to pursue justice for the general public. It has been an efficiency issue because mass tort disputes are only taken care of when they become likely to result in serious social problems or major social concerns that draw the attention of authorities. The establishment of the Securities Investor and Futures Trader Protection Center (IPC) was the product of such a rationale. The objective of the IPC is for the stability of a country's financial environment[170] by filing class actions on behalf of diffuse investors to correct wrongdoings in the securities law area. Outside the securities law area, there have not been enough mechanisms to safeguard people's rights.

Because there are still issues of undercompensation, insufficient incentives, and funding issues in class action mechanisms, especially when the cases are extensive, the involvement of governmental agencies is necessary. The plasticizer and cooking oil cases provide the most representative examples. As compared to the unsatisfying judgment award in the plasticizer case, administrative and criminal sanctions by government agencies in the cooking oil case showed a far more efficient deterrence function than that of mass tort claims in civil courts.

V. LAWMAKERS AND LAW ENFORCERS

> By the last half of the twentieth century, particularly in the U.S., the functional distinction between private and public law became increasingly untenable as the expanding public law dimension of private law made it an integral component of state control.[171]

John Haley has observed the power shift from private law, to public law, and further to state control in recent U.S. history.[172] The practice of addressing mass tort disputes to some extent evidenced such phenomena. Even in the case of the United States, which is renowned for its advocacy characteristics in private law enforcement, such private law features still diminish in class action cases. Does this phenomenon still make solving mass tort disputes occur within a pure private law regime or does it actually become something "out of the box"? By adopting Haley's definitions of "lawmaking" and "law enforcement," this Article reasons the relationship between state control and class actions. According to Haley, the precondition of law is that it emanates from political authority,

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170. Securities Investor and Futures Tracker Protection Act, art. 1, LAWS & REG. DATABASE REPUBLIC (MAY 20, 2009), http://law.fsc.gov.tw/law/EngLawContent.aspx?Type=E&id=1380 (Taiwan).

171. John O. Haley, *Mixed Reception: Culture, International Norms, and Legal Change in East Asia: Comment: Law and Culture in China and Japan: A Framework for Analysis*, 27 MICH. J. INT'L L. 895, 909 (2006).

172. *Id.*

and its validity depends on the rules of recognition.[173] The recognition of legal norms (lawmaking) and their enforcement (law enforcing) connect norms and sanctions.[174] In the processes of lawmaking or law enforcement, some sort of political rule or governance comprising actors and institutions and exercises of political authority or power are involved.[175] The lawmaker, which we refer to as the authority who establishes the recognition of norms, confers power to legislative departments such as parliaments. Legislative authorities set strict laws for mass tort resolution in order to reserve control and sanctions and "leave little room for judicial discretion in procedural matters."[176]

By resolving numerous claims at one time, class action mechanisms have been one of the most creative innovations in civil procedure law, not only in the United States but also in other countries that have adopted such mechanisms. While class action mechanisms are embedded with more flexibility, at the same time, more oversight is required. U.S. courts are conferred with greater authority to oversee the certification, attorney's fees, and settlements of class actions. On the other hand, the courts or the GSOs in China and Taiwan also have the discretion to decide whether a class action can be filed or admitted. By obtaining power from the state, courts and GSOs are politically and legally authorized state actors or agents, and their authority and discretion over class actions implies the state's control over such procedures. The formation of the class action is predominately overseen or controlled by the courts in all three jurisdictions. In addition, in the United States, claimants can no longer simply end the process by withdrawing their complaints or reaching a settlement among themselves because courts are responsible for certification and approval of settlements. The Chinese and Taiwanese courts can also decide whether there is "common interest" in order to utilize class action mechanisms for other potential plaintiffs to join. Although the role of the courts seems to be limited in China and Taiwan compared to that of the United States, the GSOs in Taiwan control the initiation of class actions, which still implies a certain extent of the state's control.

Given such modifications in private law, the application of law still varies in regard to catastrophes. Class action mechanisms seem to be limited when dealing with gigantic mass tort cases. Even though courts have been conferred with more power, in large cases with extensive

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173. *Id.* at 899-900.
174. *Id.*
175. *Id.*
176. *See* Gidi, *supra* note 4, at 318.

influence, the approach seems inadequate for the states. Thus, the involvement of other authorities has occurred.

The method of handling mass tort disputes further varies from traditional adjudication and is mixed with other features such as direct governmental intervention. This reveals the state's desire to protect legal norms or interests that are considered important via the exercise of governmental power. Such power can be regarded as a product of state protection of its own interest, and recent catastrophic cases provide an excellent basis by which to discuss how laws are made, how these cases were handled and enforced, and how the state exerted its power.

In China, although class action mechanisms have been adopted through statutory laws, the actual implementation is still contingent upon the government's attitude toward specific cases, especially where huge public interest and social stability are involved. There is not much room for lawyers when the case is too sensitive because the authority (the lawmaker) does not like intervention with its control of incidents. The Chinese Party-state has regarded social stability as a requirement for a "harmonious society" in Chinese socialism[177] to maintain economic growth and political control. This echoes Haley's viewpoint: "It is axiomatic that most of these orders establish norms designed to protect vested interests, especially the interests of those who rule and make the norms."[178] The introduction of the class action mechanism originally was intended to resolve class disputes efficiently and to counteract possible social disorder.[179] After the Chinese people learned that this mechanism could be used as a means to assert their rights, the government became concerned about the application of this mechanism because it has the potential to create disturbances.[180] Therefore, most class actions in recent years have not been encouraged. Claims that are eventually accepted or heard are done so as joinder claims, or the party's or governmental agencies' support must be enlisted.[181] When a class action mechanism of an adjudicatory nature cannot fully or efficiently accomplish the settlement of a dispute or quell the associated unrest, government intervention becomes an obvious choice to deter unwanted disruptions. Because China recently made efforts toward promoting legal reform, one needs to bear in mind that legal reform should continue as long as it does

177. Zhong gong zhong yiang guan yu jia chiang dang zhi zheng nueng li jian xe de jue ding, *supra* note 106.

178. Haley, *supra* note 171, at 898-99.

179. Shao, *supra* note 5, at 255-61.

180. *Id.*

181. *Id.*

not threaten the party's authority or create political stability.[182] "Rule of law," or court reform, in China in recent years does not equate to the Western sense of protecting personal rights against the state or party or the ensuring of judicial independence. Lawmaking in China may be seen simply as "a process of protecting voluntary economic arrangements" under socialist market reform.[183]

With respect to how class actions are handled, Taiwan's case is similar to that of China in terms of governmental intervention in benchmark cases. Because the overall design of the class action mechanism does not provide lawyers with enough incentive to engage in cases, the initiation of class actions must rely on GSO or government involvement. The choice of GSOs as class action initiators is a cultural preference influenced by legal tradition.[184] Sanctioned by the government, the GSOs are authorized state actors. Allowing GSOs to bring class action lawsuits conforms with the intention of lawmakers in Taiwan because they are to some extent controllable by the state, even though sometimes their titles include "nonprofit" or "nongovernmental." However, due to the nonprofit features of most of these types of GSOs, they oftentimes lack sufficient funding. There have been comparatively few class action cases except for the securities class actions initiated by the government-funded IPC. When there are no powerful GSOs to initiate class lawsuits on behalf of claimants, obtaining governmental attention and support is the key to receiving favorable results.

On the other hand, in the United States, although the nominal legislative authority is also parliamentary, the most influential laws are created by courts and lawyers through advocates and trials on a case-by-case basis. In class actions, the judicial role transforms from purely arbitral to more managerial.[185] The duties of judges nowadays are no longer limited to determination between the proof and legal theories offered by the parties involved; they are also expected to manage large-scale litigations.[186] With a goal toward achieving broad social purposes, judges are supposed to "allocate judicial resources, develop legal rules that advance sound public policy, . . . and consider the social and political implications of settlements."[187] Furthermore, U.S. lawyers not only participate significantly in the case formation process, they actually

182. WANG, *supra* note 92, at 157.
183. *Id.*
184. Shao, *supra* note 5, at 280.
185. PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 12 (1987).
186. *Id.*
187. *Id.*

constitute a highly influential group with regard to relevant judicial and policy reforms with a number far more than any other country in the world.[188] Therefore, it is not without grounds that lawyers are regarded as the participants in lawmaking and as law enforcing parties similar to judges. This explains the reasons that the U.S. class action mechanism has been criticized for benefiting lawyers instead of class members, and the reforms with regard to the fee structure and other relevant deficiencies inherent in this system are still limited.

In all three jurisdictions, lawmakers and law enforcers, regardless of their form, tend to "reserve the most severe sanctions for threats to legal norms they consider most important."[189] The transition of the operation of class actions in catastrophes further reinforces such theory. Hence, in monumental cases that involve massive personal injuries or significant damage to human health, lawmakers have revealed the reluctance of the "rulers" to give up control over such cases, even if those cases are originally designed to be addressed in the private law regime. Therefore, in cases that involve significant interests, those with the highest authority are the ones who actually control and influence the handling of the cases. The participation of courts, other legal professionals, or institutions will depend on the influence they can exert in the lawmaking and law enforcement process.

In conclusion, addressing mass tort disputes in the United States, China, and Taiwan shows a trend toward either favoring lawmakers or becoming increasingly more compatible with the goals of lawmakers. This conclusion is supported by empirical evidence in each jurisdiction comprised of the implementation of class dispute resolution and representative cases. Class actions have been a prominent research topic, and with the rapid changes currently occurring in societies, it will continue to be a highlighted subject that is worthy of special attention for future study.

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188. Drew Combs, *The Global Legal Market: By the Numbers*, AM. LAW. (Oct. 23, 2014), http://www.americanlawyer.com/id=1202671042330/The-Global-Legal-Market-By-the-Numbers?slreturn=20151013105151.

189. Haley, *supra* note 171, at 899.