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China's Judiciary: An Instrument of Democratic Change?

Graig R. Avino*

I. Introduction

China's judiciary, although currently undergoing a process of reform, remains too much an arm of the Communist Party to affect any major democratic change in the immediate future. As a result of foreign investment and increasing economic interest within mainland China, the Communist Party has been forced to assemble a system of law to govern economic transactions.¹ Although the Chinese government has made tremendous progress in the realm of "economic law," the government has done little to improve judges' ability to protect the basic human rights of Chinese citizens.

This comment will first explore the roots of the Chinese approach to law and the judicial process. In doing so, the comment will discuss salient features of Confucianism and Legalism, two ancient ideologies which continue to resonate in Chinese society and government. The comment will then give a brief overview of the history of law in China during the imperial (up until 1911) and the post-imperial periods (1911-present).

The comment will then look to the structure of the present legal system that was established after Mao's death in 1976. An analysis of Chinese judges will follow, focusing on the judges' lack of independence from the Communist Party, their propensity for corruption and their lack of sufficient legal training. The comment then examines the Judges Law of 1995, its positive and negative aspects, and its effectiveness in reforming China's judges. The comment will close with a look at official pronouncements by the State advocating judicial reform and the

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1. DANIEL C. K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA: IN A NUTSHELL* 37 (2003).

recently implemented five-year reform plan.

Ultimately, even with the progress of the courts in the past twenty-five years, Chinese judges are still unable to affect major democratic change. As a result of judicial supervision and traditional Chinese suspicions about the adjudicative process, courts and judges must undergo further reform before they can exert independence from the Communist Party and function as an independent branch of government. While recent attempts to improve the judicial system appear promising, one can only hope that the suggested improvements materialize in the twenty-first century.

II. Historical Background

A. *Legalism and Confucianism*

Before the advent of China's first imperial dynasty, two schools dominated Chinese political, social, and legal thought: Legalism and Confucianism.² Although Confucianism became the norm in Chinese society and has greatly influenced culture and government, one cannot understand Chinese law as it exists today without an understanding of Legalism. Ultimately, the rejection of Legalism and the adoption of Confucianism by the Chinese dynasties explain the general lack of respect for courts and law in Chinese society.

The leading supporters of Legalism in ancient China were Shang Yang (390-338 B.C.) and Han Fei (280-233 B.C.).³ According to these men and their followers, Chinese society could flourish only through the universal application of penal laws that punished law-breakers with harsh sanctions.⁴ Legalists advocated the use of *fa* (law),⁵ which established clear rules applicable to all without consideration of social rank.⁶ The Legalists attempted to develop a system that would result in harmony,⁷ an idea central to traditional Chinese culture,⁸ by encouraging the people

2. *Id.* at 40.

3. ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 8 (1992).

4. Robb M. LaKritz, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT'L L. REV. 237, 245 (2000).

5. STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 15 (1999). Literally, the word *fa* means "laws and institutions" or "the legal system." Yuanyuan Shen, *Understanding the Complexity of Law Reform in Modern China*, in THE LIMITS OF THE RULE OF LAW IN CHINA 20, 24 (Karen G. Turner et al., eds. 2000).

6. CHEN, *supra* note 3, at 8.

7. LaKritz, *supra* note 4, at 245.

8. Bobby K.Y. Wong, *Chinese Law: Traditional Chinese Philosophy and Dispute Resolution*, 30 H.K.L.J. 304, 307 (2000).

to understand and observe the law.⁹ If this could be accomplished, law would become the “authoritative principle for and . . . the basis of government.”¹⁰ China’s first official dynasty, the Qin (221-206 B.C.), utilized Legalist ruling theories throughout its reign.¹¹ However, in 206 B.C., the Han dynasty seized power from the Qin, and the change in governance marked the end of Legalism’s primacy in China.¹²

With the end of Qin rule, the Han dynasty (206 B.C.-A.D. 220) adopted Confucianism as its official ideology.¹³ Confucianism stresses the importance of persuasion, education, and moral example in instructing individuals how to behave.¹⁴ The concept of *li* (ethical principles), which establishes a set of moral and social rules and customs, was pressed upon society so people behaved according to their conscience rather than out of fear of punishment.¹⁵ Central to Confucianism is the theory that realization of these core concepts would result in harmony, peace, and stability.¹⁶

Confucianism also posited the existence of a hierarchy throughout Chinese society, with the Emperor, or the monarch, at the top.¹⁷ In general, rights and obligations between people varied with each individual’s place in society, and *li* (ethical principles) determined the proper manner in which people were to treat each other.¹⁸ Relationships and obligations of family members were the basis of society, and the “same moral values and code of conduct prevailing in the family would extend to society and the nation as a whole.”¹⁹ In a sense, the nation was viewed as an extended family.

All key relationships within the family and society were those of

9. LaKritz, *supra* note 4, at 245.

10. *Id.* (quoting DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 19 (1967)).

11. LaKritz, *supra* note 4, at 245.

12. *See id.* at 245-46.

13. *Id.*

14. CHEN, *supra* note 3, at 8. Essentially, Confucianism acts as “a set of moral and ritualistic norms for the regulation of human relationships.” *Id.* at 9.

15. *Id.* Confucius contrasted the differences in his philosophy and the Legalist philosophy: “Lead the people with orders, keep them in line with penal laws, and they will avoid punishment but they will develop no sense of shame; lead them with virtue, keep them in line with propriety and they will not only have a sense of shame but will govern themselves.” CHOW, *supra* note 1, at 41.

16. CHEN, *supra* note 3, at 10. Other important concepts of the philosophy include *jen* (acting morally towards others) and *i* (understanding the existence of moral obligations). *Id.* at 9.

17. *See* LUBMAN, *supra* note 5, at 16 (explaining that such a hierarchy established a number of basic relationships—ruler/subject, parent/child, husband/wife, older brother/younger brother, and friend/friend—that governed Chinese society and reinforced the importance of concepts such as obedience and filial piety (devotion to the family)).

18. Wong, *supra* note 8, at 310.

19. CHOW, *supra* note 1, at 42.

“superior to inferior with a general duty of obedience owed by the inferior to the superior and a reciprocal duty of caring, support, and guidance owed by the superior to the inferior.”²⁰ Just as the concept of hierarchy governed the relationship between father and son within the family, the same concept governed the relationship between Emperor and subject within the political system.²¹ The Chinese people were expected to demonstrate absolute loyalty to their Emperor, and in turn, the Emperor was expected to “exercise his power benevolently and care for his people.”²² The effectiveness of an Emperor thus rested on his “ability to maintain, uphold, perpetuate and lead by virtue, morality and social values.”²³

In addition, Chinese society believed that the Emperor derived his authority from a divine source, known as the Mandate of Heaven.²⁴ As the “Son of Heaven,” the Emperor assumed a status above the law, and attempts at limiting the Emperor’s power were viewed as treason.²⁵ The Emperor had supreme legislative, judicial, and executive powers, and no system of checks and balances existed.²⁶ In such a system, the “rule of man” took priority over the “rule of law.”²⁷

In ancient China, *fa* (law) was a separate set of norms and inferior to the Confucian values discussed above.²⁸ *Li* (ethical principles) was the primary tool used in ruling society, and *fa* (law) was only “invoked when moral precepts could not sufficiently maintain social order.”²⁹ Ultimately, “law was not an independent specialty but a part of the tools of state administration in general.”³⁰ As a result of Confucianism, the primacy of law was never accepted in Chinese society.³¹

20. *Id.* at 43.

21. *Id.*

22. *Id.* at 44.

23. LaKritz, *supra* note 4, at 244. The Emperor was expected to set a good moral example for his subjects to follow. CHEN, *supra* note 3, at 11.

24. CHOW, *supra* note 1, at 45.

25. *Id.* at 46.

26. *Id.*

27. CHEN, *supra* note 3, at 11. Although the concept of the mandate of heaven disappeared at the beginning of the 20th century, the author of this comment asserts that the “rule of man” did not disappear with the ascendancy of the Communists, as exemplified by the arbitrary rule of Mao Zedong.

28. LUBMAN, *supra* note 5, at 14.

29. CHOW, *supra* note 1, at 49. In some periods of Chinese history, officials decided cases in accordance with Confucian principles, and simply overlooked statutory laws. *Id.*

30. *Id.* at 50.

31. LUBMAN, *supra* note 5, at 14. This differs markedly from western society, where law is viewed as the primary tool in ruling the populace.

B. Imperial History

For the remainder of China's imperial history, the concepts of *li* (ethical principles) and *fa* (law) survived, but the importance of the latter was significantly limited. As time went on, Chinese ruling dynasties realized the practical need for a system of *fa* (law), but they did so only because they realized that the Confucian principle of moral guidance could not alone produce good behavior.³² Ruling dynasties took the view that "law, while necessary, should principally be used to supplement and reinforce the lessons to be obtained from the [Confucian] teachings and guidance."³³

Although both the Qin and Han dynasties had comprehensive legal codes, the oldest surviving code is that of the Tang dynasty (618-706 A.D.).³⁴ The Tang code acted as a model for subsequent codes of the Song (960-1269), Yuan (1271-1368), Ming (1368-1644) and Qing (1644-1911) dynasties.³⁵ The codes were premised on the ideas that all people were not equal and that law was to maintain the traditional social order as dictated by Confucianism.³⁶ Such codes acted as penal codes that were principally concerned with punishment of wrongdoing.³⁷

Although law in imperial China was inferior to Confucian principles, courts still existed to punish those who violated the penal codes and to deal with civil disputes.³⁸ Basic political subdivisions, known as counties, were governed by magistrates, imperial officials who acted as judges³⁹ and who were responsible for overseeing prosecutions and litigation.⁴⁰ These officials also acted as the region's chief administrator and highest police official.⁴¹ Due to the intermingling of the magistrates' roles, "there was no formal separation of judicial powers from other powers, and no developed doctrine of judicial independence."⁴² With no concept of an independent judiciary, high-

32. Wong, *supra* note 8, at 308 (quoting G. MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 7 (1996)).

33. *Id.*

34. CHEN, *supra* note 3, at 12.

35. *Id.*

36. LaKritz, *supra* note 4, at 246.

37. LUBMAN, *supra* note 5, at 23.

38. See CHOW, *supra* note 1, at 50-51.

39. *Id.* at 13. Similar to judges in present-day China, magistrates had no special legal training, and became judges by virtue of "their general duties to govern on behalf of the emperor." LUBMAN, *supra* note 5, at 23.

40. *Id.*

41. *Id.* "The county magistrate would simultaneously exercise administrative, police and judicial powers over the locality and the same structure combining all these powers was true for magistrates at the higher levels of the prefecture, province, and the capital." CHOW, *supra* note 1, at 50.

42. *Id.*

ranking officials in the imperial system were not only encouraged to supervise the magistrates, but were directed to exert pressure to force them to decide cases in certain ways, oftentimes regardless of the penal codes.⁴³

Aside from the courts' lack of independence, traditional Chinese litigation was described as "time-consuming, costly, and degrading."⁴⁴ Magistrates were often corrupt, cruel, and lazy, and relied on their clerks and underlings to handle the bulk of litigation.⁴⁵ Trials were expensive and humiliating to participants, and parties and witnesses were tortured in the hope of forcing confessions.⁴⁶ Pursuing formal litigation in imperial China was unpromising, as exemplified by the Chinese saying: "to enter a court of justice is to enter a tiger's mouth."⁴⁷

"The perils of litigation, widely publicized in popular lore, undoubtedly restrained many persons from bringing suit" before the magistrate.⁴⁸ As a result, the majority of disputes were resolved through informal mediation conducted by the leaders of clans, villages, and guilds.⁴⁹ Mediation proceedings were conducted "in accordance with customary rules and prevailing notions of morality, which stressed harmony."⁵⁰ Ultimately, these proceedings were so favored by the populace (over litigation) that local village leaders often required parties to "exhaust their remedies within the group" before going to the magistrate.⁵¹

In addition to the practical problems associated with litigation, Chinese society disfavored litigation because it was in conflict with the basic Confucian precept that disputes should be avoided at all costs.⁵² Confucian principles asserted that disputes violated the harmonious social order believed to exist in Chinese society.⁵³ As a result, when disputes arose, the Chinese ignored vindicating their rights,⁵⁴ and instead focused on saving face (i.e. preserving one's integrity and dignity) and

43. CHOW, *supra* note 1, at 50.

44. LUBMAN, *supra* note 5, at 24.

45. *Id.* at 23. Further, litigants were often exploited by these underlings, who obtained their incomes by charging fees to those who decided to resolve disputes through litigation. Wong, *supra* note 8, at 306.

46. CHEN, *supra* note 3, at 14. Those who attempted to appeal a ruling often had to undergo beatings before their case was heard. *Id.*

47. LUBMAN, *supra* note 5, at 24.

48. *Id.*

49. CHEN, *supra* note 3, at 12.

50. *Id.*

51. LUBMAN, *supra* note 5, at 25.

52. Wong, *supra* note 8, at 306.

53. *Id.*

54. *See id.* at 310.

resolving the dispute quickly through mediation.⁵⁵ Two proverbs further illustrate this disrespect for litigation: "It is better to die of starvation than to become a thief; it is better to be vexed to death than bring a lawsuit;" and "Those who live do not want to go to court; those who are dead do not want to go to hell."⁵⁶

Chinese law and government remained in this form, with minor variations as new dynasties assumed power, until the end of the 19th century. However, events such as the Taiping Rebellion of 1851-1864, the Sino-Japanese War of 1895, the Boxer Rebellion of 1900 and the western powers' intrusion into China influenced the then-reigning Qing dynasty to pursue reforms in law and government.⁵⁷ In 1902, the Empress Dowager decreed that two of her ministers should undertake the task of reforming China's law codes "to bring them into accord with the conditions resulting from international commercial negotiations."⁵⁸ However, such reform efforts were cut short when the Qing were overthrown in 1911 by the Chinese Nationalists (KMT) who went on to establish the Chinese Republic.⁵⁹

C. *Post-Imperial History*

In the period from 1911-1949, the KMT that ruled China attempted to westernize the nation's laws.⁶⁰ Although China adopted new law codes and established a western based bar and court system, most individuals in the vast Chinese countryside were unaffected by the changes.⁶¹ After Japan's invasion of China in 1937, the KMT's reform

55. LUBMAN, *supra* note 5, at 26.

56. Wong, *supra* note 8, at 306.

57. See JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 17-18 (1999).

58. *Id.* at 18. In order to undertake such reform, the Empress Dowager's ministers established a Law Codification Commission in 1904 and considered establishing a constitutional monarchy modeled after Japan's system. *Id.* It is interesting to note that at the turn of the 20th century, Chinese imperial officials were most concerned with bringing the country's legal system into conformance with standard commercial practices. Oddly enough, Communist officials in China today appear to be interested in the same issue at the turn of the 21st century. In both instances, officials failed to stress the importance of changing laws to assure basic human rights to the populace.

59. CHEN, *supra* note 3, at 21.

60. LUBMAN, *supra* note 5, at 31. However, China was not nominally unified under the KMT until 1928, so it was only after this date that official efforts were taken to rewrite and reorganize China's laws. *Id.*

61. *Id.* at 32. Reasons for the failure can be traced to the fact that most Chinese counties had no courts or could not understand how to implement such changes. *Id.* Chinese judges were sparse and poorly educated, and corruption and favoritism was as wide spread as it had been in imperial times. *Id.* Thus, while this period at least may demonstrate an evolution in Chinese ideas about law, little was done to implement the reforms in reality. See *id.*

efforts were forgotten as they united with the Chinese Communists and focused on ousting the Japanese invaders.⁶² Before proceeding any further, a brief introduction to the Chinese Communists is appropriate.

The Communist Party of China (CPC) was founded in 1921 and began to attract new members throughout the decade.⁶³ In 1931, the Party instituted the Chinese Soviet Republic in Jiangxi province and promulgated the Constitutional Program of the Chinese Soviet Republic.⁶⁴ At this time, the Marxist concept of using law as a tool to remold society, to suppress class enemies and to enforce party policy rather than to protect individual rights became doctrine.⁶⁵ Justice was politicized, class distinctions were made in enforcing justice and mass trials for political indoctrination were introduced.⁶⁶ Such features became an important part of the "lawless" Communist system that existed under the rule of Mao Zedong from 1949-1976.

After the joint efforts of the KMT and CPC ousted the Japanese invaders from the mainland, China became embroiled in a civil war, which ended with the CPC defeat of the KMT in 1949.⁶⁷ In February of 1949, the Communists abolished the laws of the KMT regime and on October 1, 1949, Mao Zedong, the Chairman and leader of the CPC, announced the formation of the People's Republic of China (PRC).⁶⁸ In 1954, the National People's Congress (the legislature of the Republic, a puppet of the CPC) drafted and passed the nation's first official constitution.⁶⁹ Further, courts and procuratorates were set up throughout China, and in 1956, Liu Shaoqi, President of the Republic (his power was nominal, Mao had complete control), noted the necessity of establishing a "complete legal system."⁷⁰

After these "golden years" of law reform, the rule of law was replaced by the rule of man as Mao began to monopolize his control over the country. In 1956, the Party announced the policy of "letting a hundred flowers bloom and a hundred schools of thought contend," which encouraged the Chinese people to express their opinions on

62. CHEN, *supra* note 57, at 33.

63. CHEN, *supra* note 3, at 22.

64. CHEN, *supra* note 57, at 32-33. Most provisions of the document were copied from the 1918 Constitution of the Russian Socialist Federated Soviet Republic, and it laid out the basic state power structure which was to be the basis for later Chinese Constitutions. *Id.* at 33.

65. *Id.* at 34.

66. *Id.*

67. *Id.* at 35.

68. CHEN, *supra* note 3, at 24.

69. *Id.* at 26.

70. CHEN, *supra* note 57, at 38, (quoting the SELECTED WORKS OF LIU SHAOQI 253 (1985); Liu's speech is entitled "The Political Report of the Central Committee of the CPC to the Eight National Congress of the Party").

Communist rule.⁷¹ After receiving strong criticism from intellectuals, the Party ended the policy, and launched the Anti-Rightist Campaign that attacked these vocal critics.⁷²

The campaign greatly damaged the developing concepts of legality in China, and after 1957, the prestige of legal institutions fell, law schools taught politics rather than law and many courts were merged with the police or prosecutorial organs of Chinese society.⁷³ During the Great Leap Forward of 1958-1961, China's leadership attempted to modernize the country through radical economic reform, industrialization and the implementation of Soviet farming techniques.⁷⁴ At the same time, the Party leadership emphasized that concepts such as legality, judicial independence, and equality of citizens before the law were bourgeois and of no use to a proletarian nation.⁷⁵

However, the Great Leap Forward failed, and China briefly embraced rational economic reform, during which time the Communist Party advocated the need for law and social order.⁷⁶ However, all such hopes were abandoned in 1966 when Chairman Mao proclaimed the beginning of the "Great Proletarian Cultural Revolution."⁷⁷ Although the precise reasons for this movement are unclear, it appears to have resulted from a power struggle in the Communist Party's leadership between such pragmatists as Liu Shaoqi and the ideological Mao.⁷⁸ By appealing to a cult of personality, Mao mobilized the support of China's youth behind him and eliminated his opponents.⁷⁹ From 1966-1969, the country was in a state of civil chaos, as officials and cadres of the Party were branded as counterrevolutionaries and persecuted by Red Guards, Chinese youths

71. CHEN, *supra* note 3, at 28.

72. *Id.* During the campaign, over one hundred thousand Chinese were branded as Rightists and sent to farms in the countryside to undergo reeducation through labor. *Id.* Many jurists, lawyers and judges, who had been some of the most outspoken critics of Communist rule, were among the first victims of the Anti-Rightist campaign. *Id.* The Party leadership accused these individuals of using the law to oppose the Party or of opposing the Party by stressing the independence of the judiciary. *Id.* at 29.

73. *Id.* at 29.

74. CHOW, *supra* note 1, at 15-16. The implementation of Soviet farming techniques and problems associated with it led directly to a famine which resulted in the death of some 20 to 30 million Chinese. *See id.* at 15.

75. Wang Chenguang, *Introduction: An Emerging Legal System*, in INTRODUCTION TO CHINESE LAW 1, 11 (Wang Chenguang et al. eds., 1997).

76. CHEN, *supra* note 57, at 39. In fact, even Chairman Mao Zedong was reported as saying, "law was needed—not only a criminal code, but also a civil code." *Id.*, (quoting GU ANGRAN, SOCIALIST LEGAL SYSTEM AND LEGISLATIVE WORK 102 (1989)).

77. CHEN, *supra* note 3, at 29.

78. *Id.* at 29-30. The pragmatists wanted to modernize China through rational management while Mao advocated strict adherence to Communist ideology and continuing revolution in order to achieve a utopian classless society. *Id.*

79. *Id.* at 30.

who were utterly devoted to Mao.⁸⁰ Any remaining laws of the country were “literally abolished,” law schools were closed and Mao’s pronouncements were believed to be the only source of law.⁸¹

The horrors of the Cultural Revolution subsided after several years, but the general spirit of the rule of man persisted in China until Mao’s death in September 1976.⁸² After Mao’s death, however, Deng Xiaoping and other pragmatists seized power from the ideologues and implemented a program of reform.⁸³ Deng initiated his “Two-Hands” policy, in which Chinese society was urged to develop the economy on the one hand, and to strengthen the legal system on the other hand.⁸⁴ For the most part, China has followed this dictate, and although human rights violations are still commonplace, the nation now has a thriving economy open to foreign investment and a legal framework in which economic problems can be resolved.

As a result of history, China’s judiciary never developed as an independent and respected branch of government as in western nations. Due to Confucianism, the traditional Chinese fear of litigation, preference for mediation, and Mao’s destruction of the legal system, the idea of an independent and efficient judiciary is one that is entirely novel to most Chinese. As China becomes an integral part of the worldwide economic market and subject to stricter scrutiny by trading partners and members of the World Trade Organization (WTO), there is reason to believe that China will be forced to transform and modernize its judiciary. As will be demonstrated below, although such a process of reform has begun in the economic realm, there is reason to doubt the sincerity of such efforts in the human rights realm in light of the continued grip of the CPC on Chinese society.

80. *Id.* The Red Guards were primarily responsible for the chaotic state of China during the time of the Cultural Revolution. *Id.* Some scholars estimate that nearly 100 million people were subject to persecution at the hands of the Red Guards during this time. *Id.*

81. Chenguang, *supra* note 75, at 12. “The Chinese people were urged to be guided by Chairman Mao’s thought instead of law.” CHEN, *supra* note 1, at 32.

82. CHEN, *supra* note 3, at 33. The month following Mao’s death saw the arrest of the Gang of Four, ultra-leftists who had controlled China with Mao up until his death. *Id.*

83. *Id.* In fact, Deng is quoted as saying, “In order to safeguard people’s democracy, the legal system must be strengthened. Democracy needs to be institutionalised and legalised so that such a system and such laws would not change merely because of a change of leadership or a change in the leaders’ views and attention.” *Id.* (quoting DENG XIAOPING, COLLECTED WORKS OF DENG XIAOPING 136-37 (1983)).

84. CHEN, *supra* note 57, at 40.

III. The Judicial System of the People's Republic of China

A. *The Role and Structure of Courts in the PRC*

According to the latest Chinese Constitution, the people's courts are the judicial organs of the state.⁸⁵ Although such courts are to exercise judicial power independently, free from interference by "administrative organs, public organizations or individuals,"⁸⁶ in reality, the "people's courts are subordinate to the people's congresses at each level."⁸⁷ The people's courts have four levels: the Supreme People's Court at the national level, high courts at the provincial level, intermediate courts at the prefectural level, and basic courts at the local level (county and city).⁸⁸ These courts consist of criminal, civil, economic, or enforcement divisions.⁸⁹

The judges who staff these courts include the court's president and vice-presidents, while each division is comprised of a chief judge and associate chief judges.⁹⁰ Court presidents, vice-presidents, chief judges, and associate chief judges are appointed and removed by the people's congresses at the same jurisdictional level,⁹¹ and the standing committees of the corresponding people's congresses appoint other judges.⁹² Such an appointment process coincides with the Constitution's mandate that the courts are responsible to the people's congresses at the corresponding

85. P.R.C. CONST., ch. III, sec. 7, art. 123 (1982), <http://en.chinacourt.org/public/detail.php?id=2>. Another component of the judicial system are the people's procuratorates, the state organs for legal supervision, which approve arrests made by public security organs; directly investigate a number of criminal cases; exercise supervision over the courts in criminal cases by appealing their rulings; and supervise the legality of the actions of public security organs and prison authorities. CHEN, *supra* note 3, at 124-25.

86. P.R.C. CONST., *supra* note 85, at ch. III, sec. 7, art. 126. At the same time, however, Article 128 of the Constitution states that the Supreme People's Court "is responsible to and shall report on its work to the National People's Congress and its Standing Committee." CHOW, *supra* note 1, at 196.

87. CHOW, *supra* note 1, at 195.

88. Chenguang, *supra* note 75, at 23. Besides these courts of general jurisdiction, there are also "specialist courts," such as military courts, railway transport courts, and maritime courts. CHEN, *supra* note 3, at 108. There are about 30,000 people's tribunals in towns and villages (which are established by the basic people's courts to provide additional access to the court system); 3,000 basic people's courts at the county level; 390 intermediate people's courts in cities and prefectures within provinces; and 31 high level people's courts at the provincial level. CHOW, *supra* note 1, at 201.

89. Wang Guiguo, *The Legal System of China*, in CHINESE LAW 1, 15 (Wang Guiguo ed., 1999).

90. Chenguang, *supra* note 75, at 23.

91. CHOW, *supra* note 1, at 202.

92. CHEN, *supra* note 3, at 109.

level of jurisdiction.⁹³ Ultimately, judges in China are without the tenure enjoyed by United States judges and their terms of service do not differ markedly from other state officials.⁹⁴

A collegiate bench of three, five, or seven judges hears cases that go to trial, and membership on these collegiate benches fluctuates for each trial.⁹⁵ Although the judges on the bench deliberate and come to a decision, in certain situations their decision is not final until it has been reviewed and approved by the particular court's judicial committee.⁹⁶ This committee is generally composed of the court's president and other experienced judges, and its primary responsibilities are to discuss and decide important or difficult cases, to make decisions concerning other judicial matters and to review the experiences of judges.⁹⁷ If the members of the committee reach a different decision than the members of the collegiate bench, the members of the bench are bound by law to follow the decision of the judicial committee.⁹⁸

B. Judges in the People's Republic of China

Since the late 1970s, Chinese judges have typically been drawn from a pool of retired military officers with no legal background,⁹⁹ so few lawyers or individuals with legal experience are judges today.¹⁰⁰ The reason for selecting judges from the military has been based on the fact that such judges do not exercise power independently,¹⁰¹ and they are prone to follow dictates from the CPC without question. In fact, Chinese judges are often praised for their devotion to the Party and their role in protecting the interests of the State.¹⁰² In a telling quote, a judge of peasant origin who had served in the People's Liberation Army (PLA)

93. P.R.C. CONST., *supra* note 85, at ch. III, sec. 7, art. 128.

94. CHEN, *supra* note 3, at 109.

95. Chenguang, *supra* note 75, at 24. A collegiate bench also may consist of judges and several people's assessors. *Id.* These assessors are regular Chinese citizens appointed or invited to participate in trials and who have the same functions and authority of judges when sitting on a collegiate panel. *Id.*

96. CHEN, *supra* note 3, at 111.

97. Chenguang, *supra* note 75, at 24. Members of this committee are appointed by the standing committees of the people's congresses at the corresponding level. *Id.*

98. *Id.*

99. Robert Marquand, *New for China's Courts: Trained Judges, Standard Rules*, CHRISTIAN SCI. MONITOR, Aug. 16, 2001, <http://www.csmonitor.com/2001/0816/p1s3-woap.html>.

100. LUBMAN, *supra* note 5, at 256.

101. *See* Marquand, *supra* note 99. Stanley Lubman concludes that such former military officers were "good candidates for judgeships because they, like police, had been engaged in enforcing proletarian dictatorship and possessed the appropriate ideological outlook on their work." LUBMAN, *supra* note 5, at 253.

102. LUBMAN, *supra* note 5, at 256.

and who became a judge upon demobilization noted, "I am a lucky fellow among tens of thousands of peasant children. I am grateful to the Party for its nurture and education, so I will never slacken my efforts in whatever work the Party assigns me to do."¹⁰³

Thus, although the Chinese Constitution notes that courts are to exercise judicial power independently, in practice, judges follow the dictates of the Party leadership.¹⁰⁴ One Chinese law professor has observed, "[the court] often reports . . . to the local Party Committee and solicits opinions for solution . . . and if contradictions arise among different judicial organs, the Party's political legal committee often steps forward to coordinate."¹⁰⁵ These political-legal committees, which are established by the CPC, exist at all levels within the PRC judicial system to ensure that courts and judges act in accordance with Party dictates.¹⁰⁶ Political-legal committees include the head of the public security organ, the president of the people's court, the president of the people's procuratorate, the head of the judicial administrative organs, and the head of the administrative organ for civil affairs at the provincial or local level.¹⁰⁷

Although these committees undoubtedly interfere with the work of judges, the degree of interference is uncertain. Although during the early years of the PRC judges would often ask the committees for instructions on how to rule in individual cases, one commentator suggests that "recent practice has been for the Party to set overall policy guidelines [through the committees] and to avoid direct involvement in the review of individual cases."¹⁰⁸ Whatever the degree of interference exercised by these committees, the Communist Party continues to exert influence in the judicial process, through the appointment of leading judicial officers and through the issuance of documents that become a part of the internal handbook of judges.¹⁰⁹

103. *Id.* at 257, (quoting He Weifang, *The Realization of Social Justice through Judicature: A Look at the Current Situation of Chinese Judges*, in TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA 209, 249 (Xia Yong, ed., 1995)).

104. Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 *Nw. J. INT'L L. & BUS.* 383, 394 (2000).

105. *Id.* at 395, (quoting He Weifang, *The Realization of Social Justice through Judicature: A Look at the Current Situation of Chinese Judges*, in TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA 209, 249 (Xia Yong, ed., 1995)).

106. CHOW, *supra* note 1, at 197-98. These political-legal committees are different from the judicial committees discussed above, although each body limits the independence of individual judges.

107. *Id.* at 198.

108. *Id.*

109. *Id.* at 199. A good illustration of the control of the Party on the judicial system

Judges are also constrained from acting independently because of an “ideology of supervision” which mandates that the Supreme People’s Court, upper-level judicial officers, the procuracy, the people’s congresses and the masses have the power to oversee the work of judges,¹¹⁰ and even reopen a final judgment if it is believed that some serious error was made.¹¹¹ In fact, such supervision is seen as vital in realizing the rule of law by ensuring fair legal judgments, checking corruption and punishing those judges who overstep their authority.¹¹² The concept of supervision is essential to an understanding that the courts’ role in China has traditionally been viewed as that of an administrative bureaucracy, which is expected to strictly enforce the law and not to meddle in the affairs of other branches of government.¹¹³ In addition, Chinese legal theory treats judges not as individuals with independent powers of final adjudication but as necessary components of the judicial system as a whole.¹¹⁴

Besides the grip of the Party on the courts and the concept of supervision, other reasons exist as to why Chinese judges do not exercise power independently. Most importantly, Chinese judges are often subject to bribery and other forms of corruption from local officials who control their appointment, salaries, and financial resources.¹¹⁵ Judges are subject to bribery from parties to litigation as well, who may offer lavish bribes or attempt to engage in *ex parte* communications with the judge who is to hear their case.¹¹⁶ One author has even reported that some judges collude with parties to “create fake cases involving fake plaintiffs, fake defendants, fake bids, fake evidence, fake legal representation and fake trials.”¹¹⁷ Part of the reason for such widespread corruption in the

is that when the president of the Supreme People’s Court speaks before the National People’s Congress, he acknowledges that his court “carries out its work under the leadership of the Party Central Committee.” *Id.* at 220-21.

110. Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 163, 178 (Karen G. Turner et al., eds. 2000).

111. CHOW, *supra* note 1, at 213.

112. *A Duty Delegated by People*, CHINA DAILY, Feb. 23, 2001, <http://www1.chinadaily.com.cn/news/cn/2001-2-23/html>. The article also asserts that the National People’s Congress and its local organizations should undertake the task of supervision seriously, strengthening their supervisory powers if necessary. *Id.* However, it should be noted that the China Daily Newspaper is put out by the Chinese government and printed in English. There is a chance that articles in the paper contain government propaganda.

113. Woo, *supra* note 110, at 182.

114. *Id.* at 179. “Indeed, according to Chinese legal theory, judicial independence refers to the independent adjudication of the court as a whole, not of the individual judge.” *Id.*

115. LUBMAN, *supra* note 5, at 278.

116. CHOW, *supra* note 1, at 222.

117. Xin Chunying, *What Kind of Judicial Power Does China Need?* 1 I.CON 58, 61

past had been the lack of a comprehensive code of judicial ethics, and although the Supreme People's Court issued such a code last year,¹¹⁸ enforcement in many areas of China is impossible.¹¹⁹

Corruption also abounds because Chinese society and Confucianism demand that harmony be achieved through the maintenance of proper relations.¹²⁰ Thus, it is common for Chinese judges to accommodate their decisions in cases "to maintain good relationships with powerful persons, institutions or companies."¹²¹ The use of such relationships (or *guangxi*) to influence judicial outcomes is so common that Chinese judges often refer to cases whose results were influenced by a relationship as "*guangxi* cases."¹²²

Most Chinese judges lack legal training, and most were appointed for political reasons.¹²³ As a result, many judges lack confidence in their abilities and prefer to decide cases through mediation in order to avoid reversal by a higher court.¹²⁴ Consultation among Chinese judges is common, and judges only decide cases on their own when the cases are of little or no significance.¹²⁵ As noted above, a judicial committee of senior judges often decides difficult or important cases, and lower courts sometimes request instructions from higher courts on how to rule.¹²⁶ Thus, the general lack of legal education of Chinese judges leaves many of them without the ability or confidence to make rulings that affect major democratic change. The situation led the current president of the Supreme People's Court, Xiao Yang, to note that "[c]ourts have often been taken as branches of the government, and judges viewed as civil servants who have to follow orders from superiors, which prevents them from exercising mandated legal duties like other members of the judiciary."¹²⁷

(2003).

118. CHOW, *supra* note 1, at 202.

119. See LUBMAN, *supra* note 5, at 279.

120. *Id.*

121. *Id.* (quoting Susan Finder, *Inside the People's Courts: China's Litigation System and the Resolution of Commercial Disputes*, in DISPUTE RESOLUTION IN THE PRC: A PRACTICAL GUIDE TO LITIGATION AND ARBITRATION IN CHINA 63, 69 (Asia Law and Practice, 1992)).

122. Lubman, *supra* note 104, at 396.

123. *China Vows to Overhaul Courts*, BBC NEWS, July 8, 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/2115571.stm>. Chinese media has reported that more than two thirds of Chinese judges do not have a college degree. *Id.* Also, former military officers were generally instructed only in "basic legal knowledge" and "legal practice" in spare time training courses instituted by the individual courts. LUBMAN, *supra* note 5, at 253.

124. Lubman, *supra* note 104, at 397.

125. *Id.*

126. *Id.*

127. *China Vows to Overhaul Courts*, *supra* note 123.

Finally, most judges enter the profession by passing a qualifying examination, and if the judges are not selected from the military, they are still recent graduates of college or law school who can be easily influenced to implement the Party's wishes.¹²⁸ The inexperience of judges, and the fact that they are viewed as administrators in a legal system where the National People's Congress and its Standing Committee enact *and* interpret laws, hampers their independence and prestige.¹²⁹ Even today, the role of judges has been limited to "the straightforward and mechanical application of the law to identify the correct solution," which involves little legal reasoning or judicial discretion.¹³⁰ Judges are not paid well either, as they only make about U.S. \$240 per month, which is equivalent to the salary of civil servants and mid-level bureaucrats.¹³¹

C. *The Judges Law*

In 1995, China issued a Judges Law, which, for the first time, established minimum, uniform qualifications for judges.¹³² While China's judiciary is subject to many of the shortcomings described above, this new law, and other efforts at reform may indicate that there are attempts being made to establish an independent and modern judiciary. Although enforcement of all provisions of the law remains a problem¹³³ and the law itself contains negative aspects, *in the future*, this law may become the means for judges to assert a level of independence and begin to effect changes in Chinese law and society.

Chapter I, Article I of the Judges Law notes that the law was enacted to enhance the quality of judges, to ensure that courts exercise their judicial power independently and to ensure that judges perform their functions in accordance with the law.¹³⁴ Chapter II, Article 7 lists the obligations and rights of judges, stating that judges must observe the Constitution and laws; decide cases impartially based on the facts and the law; safeguard the lawful rights and interests of the citizens; abide by discipline; and avoid corruption.¹³⁵ Article 8 of the same chapter reiterates the constitutional mandate that judges are to be free from interference from "administrative organs, public organizations or

128. See CHOW, *supra* note 1, at 203.

129. *Id.* at 204.

130. *Id.*

131. *Id.*

132. LUBMAN, *supra* note 5, at 254.

133. See *id.* at 256.

134. JUDGES LAW OF THE PEOPLE'S REPUBLIC OF CHINA, ch. I, art. I (P.R.C.), <http://en.chinacourt.org/public/detail.php?id=102>.

135. *Id.* at ch. III, art. 7.

individuals” and are required to receive training.¹³⁶

Chapter IV of the Judges Law establishes minimum qualifications for becoming a judge in the PRC.¹³⁷ As mentioned above, such a provision is of great importance because qualifications for judges had never been previously established in China.¹³⁸ Article 9 of Chapter IV requires that judges must be of Chinese nationality; must have reached the age of 23; must endorse the Constitution of the PRC; must have “fine political and professional quality and [] be in good conduct;” must be in good health; and must have an advanced degree specializing in law or must have worked for one or more years if they have a college degree.¹³⁹ In addition, the law requires all judges who do not possess the above qualifications to receive training to attain those qualifications within a specified period of time.¹⁴⁰

For the first time ever, there are minimum requirements of education and expertise in order to rise to the level of judge in China. Besides improving the skill of judges, the existence of qualifications may ensure that, in the future, judges will no longer be selected from the military on the basis of their loyalty to the CPC. Further, the fact that judges now are required to have a legal education may result in increased respect from the public and a view that courts are not administrative bodies, but, as noted by the Constitution and Judges Law, independent and separate branches of China's government.¹⁴¹ Along with increased respect, judges may be less prone to corruption and the local influences that have traditionally hampered their functions and legitimacy.

136. *Id.* at ch. III, art. 8.

137. *Id.* at ch. IV. Stanley Lubman notes that formal training programs for judges (of one to three years) have been established at Beijing University and People's University by the Supreme People's Court. In addition, a Judicial Training College was established in Beijing in 1997. LUBMAN, *supra* note 5, at 253.

138. “Prior to 1983, the only qualification for being a judge at any level was that the person must have reached the age of twenty-three, must be eligible to vote, must be able to stand for election to public office, and must not have been previously deprived of any political rights.” CHOW, *supra* note 1, at 203. In 1983, China added the requirement that judges needed to have some “professional legal knowledge.” *Id.*

139. JUDGES LAW OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 134, at ch. IV, art. 9. Chapter V, Article 12 notes that “[p]ersons to be appointed judges or assistant judges for the first time shall be selected through public examination and strict appraisal, from among the best qualified for the post, and in accordance with the standards of having both ability and political integrity.” *Id.* at ch. V, art. 12. The law also notes that those who have a Master's Degree of Law or Doctor's Degree of Law may not be subject to the requirements regarding the number of years worked. *Id.* at ch. IV, art. 9.

140. *Id.*

141. *See Rule of Law Progresses Steadily in China*, CHINA DAILY, Nov. 12, 2002, <http://www1.chinadaily.com.cn/news/cn/2002-11-12/html>. The article quotes Vice-President of the Supreme People's Court, Cao Jianming, as stating that judicial departments are playing an increasingly important role in China and are becoming a focus of the public. *Id.*

At the present time however, little has been done to appoint judges with the minimum qualifications described above. Although the public emphasis on recruiting former military officials as judges declined with the enactment of the Judges Law in 1995, one Chinese scholar complained in 1998 about the “persistence of placing demobilized soldiers in the courts as judges.”¹⁴² Further, “demobilized soldiers are singled out for commendation in performance of judicial duties, when compared with university and college graduates, and their accomplishments are often described using militaristic imagery. When judges with formal education are commended, they [are] praised for ‘work-style’ and dedication rather than for . . . experience or legal knowledge.”¹⁴³ Ultimately, although Chinese judges continue to be selected from the military after passage of the Judges Law, one can only hope that further interaction with western nations will force the Chinese government to appoint qualified judges in accordance with the law in the future.

Chapter III of the law urges judges to rule in accordance with law and to protect the rights of citizens. At the same time, Chapter III, Article 7 codifies the concept of judicial supervision by other judicial bodies and the masses.¹⁴⁴ Article 7 encourages judges to “keep State secrets and the secrets of judicial work,” and to safeguard the interests of the State.¹⁴⁵ In fact, Chapter X, Article 28 of the law rewards judges for safeguarding the interests of the State and for protecting State secrets.¹⁴⁶

Codification of such principles is a danger to the court system, as it forces judges to accept supervision and to maintain the secrecy of an authoritarian state. Such provisions illustrate the fear of the CPC in allowing judges to gain independence from the Party, and tend to dampen the positive aspects of the Judges Law. Such provisions illustrate the traditional Chinese distrust of judges and the public litigation process in general. Ultimately, such provisions placed between those guaranteeing judicial independence and impartiality of judges leads one to question the value of the Judges Law, and to consider whether the law is “window dressing designed to keep investment levels high and to satisfy World Trade Organization” observers.¹⁴⁷

Another section of the Judges Law that deserves consideration is

142. LUBMAN, *supra* note 5, at 257. (quoting He Weifang, Fuzhuan junren (newspaper article)).

143. LUBMAN, *supra* note 5, at 256.

144. JUDGES LAW OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 134, at ch. III, art. 7.

145. *Id.*

146. *Id.* at ch. X, art. 28.

147. Marquand, *supra* note 99.

Chapter VIII. In general, the section asserts that judges shall be appraised annually and impartially by the masses and by the leaders of the judges' courts.¹⁴⁸ The appraisal is based primarily on the judges' achievements in judicial work, but also on their ideological levels, their legal and judicial competence and the manner in which they conduct themselves on the bench.¹⁴⁹ The appraisal will result in a grade of excellent, competent, or incompetent, and will be the basis for award, punishment, promotion, or dismissal.¹⁵⁰

Such an appraisal system has both positive and negative implications for China's judiciary. First, because China's judiciary is developing, one could argue it is necessary to have such a system of review to assess the progress of judges and to determine whether further reforms need to be implemented in order to achieve an independent and modern judiciary. In addition, the appraisals themselves force the judges to follow the mandates of the Judges Law and to work hard, as a poor appraisal rating can result in dismissal and a high appraisal rating can result in promotion. In this sense, the appraisal system is a necessary component of a law meant to enhance the quality of judges.

At the same time, however, the appraisal system has negative implications. First, it should be noted that judges are appraised partially on the basis of their ideological level. One can safely assume that, in this context, ideological level means adherence or agreement with the policies of the CPC. By making this concept one of the bases of evaluation, the CPC has forced judges to comply with its dictates in order to receive a high appraisal rating. If a judge decides to assert a level of independence and promote democratic concepts, he could be ridiculed or given a poor appraisal rating.

The appraisal system is also suspect because it is undertaken by other members of the judge's court and the ordinary citizens of the locality. While other judges may be competent to appraise judges on the basis of their achievements in judicial work, it is absurd to believe that the mostly uneducated peasantry of China could undertake a competent review of judicial work (or be given the opportunity to do so). Even if the people of the locality are indeed given a chance to appraise judges, many may base their appraisal of judges on personal factors and Confucian ideals, resulting in unfair appraisals. Also, because the appraisal is undertaken by local, rather than national officials, the bribery and corruption the law claims to curtail may become evident.

148. JUDGES LAW OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 134, at ch. VIII, art. 20.

149. *Id.* at ch. VIII, art. 21.

150. *Id.* at ch. VIII, art. 22.

Finally, Chapter XI, Article 30 of the Judges Law deserves mention in that it outlaws particular actions judges may undertake. Under the law, judges are prohibited from spreading “statements damaging the prestige of the State” and from “taking part in such activities as assembly, procession and demonstration against the State.”¹⁵¹ Such a provision impedes a judge’s ability to issue rulings that contradict the dictates of the CPC or promote democratic ideals, as such rulings could be interpreted as damaging the prestige of the State. This provision highlights another way in which the Party exerts control over the actions of their cadres.

The Judges Law is positive in that it establishes a uniform law to govern the behavior and qualifications of judges. However, such positive provisions are overshadowed by negative provisions which stress that judges are “soldiers of the state” and must decide cases in accordance with the dictates of superiors. The negative aspects may lead one to the troubling conclusion that the law itself is a sham established in order to allow China to enter the WTO and to trade freely with western, democratic nations.

Whatever the case, one can conclude that at least some progress has been made, since a Judges Law would have been unthinkable under the arbitrary rule of Mao. Even if the Party leaders passed the law to appease foreign observers and it remains under-enforced for the next several years, it still exists.¹⁵² Such provisions as those requiring qualifications for judges may actually result in an educated judiciary that may be willing to take chances and ignore the dictates of the Party.¹⁵³ Although a conflict with the Party would certainly result in dismissal of the judge in today’s China, in the future, judges may accumulate enough prestige and power to butt heads with the Party leaders. While the Judges Law may have positive implications for the future, at present, little has been done by judges to assert their independence and avoid the control of the Party.

D. Further Examples of Judicial Reform

In recent years, Chinese government officials have begun to speak publicly about the need for reform of China’s courts and judges.¹⁵⁴ At

151. *Id.* at ch. XI, art. 30.

152. Chunying alleges: “China is a country that worships theory, and laying the theoretical and conceptual groundwork of reform has been a major step.” Chunying, *supra* note 117, at 62.

153. In fact, Chunying has suggested that China’s judiciary has embraced reform efforts, “eager to improve its public image and credibility and meet new social demands.” Chunying, *supra* note 117, at 60.

154. See Marquand, *supra* note 99 (explaining that in 2000, “for the first time, a

the fifteenth national Congress of the Chinese Communist Party in 1997, then-president Jiang Zemin noted the need for “judicial reform and providing systematic guarantees for the judicial organs to exercise power independently and openly.”¹⁵⁵ Jiang’s statement was the first time in PRC history that the Communist party explicitly advocated judicial reform in official documents.¹⁵⁶

In October of 1999, the Supreme People’s Court formulated an outline of reform designed to bring about a fair, clean, and efficient judicial system, known as the Five-year Plan.¹⁵⁷ One of the focuses of the plan is to decrease the authority of the judicial committees and increase the independence of judges.¹⁵⁸ According to the plan, except for very important and difficult cases that should be submitted to the judicial committees, the collegiate bench and independent judges should decide all cases, without influence or advice from the presidents of the people’s courts.¹⁵⁹ Although this is a step in the right direction, it is still the judicial committee that has the power to decide which cases are important or difficult, and in those cases, “the judicial committee can still decide the judgments behind closed door[s].”¹⁶⁰ Further, the political-legal committees still exist, and continue to exert influence over how courts make decisions. Thus, although the plan promises to increase the independent power of adjudication of judges, it has only done so in a limited sense.

In addition, the plan requires people’s courts to institute a judges’ selection system which will select judges of higher courts from the “most-qualified judges of lower courts, or high-performance lawyers, or

lawyer was appointed chief justice [president] of the Chinese Supreme People’s Court, China’s highest court).

155. Chunying, *supra* note 117, at 59.

156. *Id.*

157. Wong Kai Shing, *CHINA: Reforming China’s Judiciary*, August 17, 2001, <http://www.ahrchk.net/hrsolid/mainfile.php/2001vol110no06/555/>. The Supreme People’s Court Outline states:

[O]ptimizing the organizational structure of the people’s courts by closely focusing on the need to develop a socialist market economy and build a socialist rule-of-law country, and by following the basic principles stipulated by the Constitution and other laws; further improving the independent, just, open, effective, clean, and well-operating adjudication mechanism; creating a contingent of high-quality judges under a scientific management system; establishing a budget management system that can fully ensure the fulfillment of the adjudication function of the people’s courts; and truly building up a socialist judicial system with Chinese characteristics.

Chunying, *supra* note 117, at 63.

158. *Id.*

159. *Id.*

160. *Id.*

other high-level professionals.”¹⁶¹ The plan also notes that newly recruited judges should gain experience in intermediate people’s courts or basic people’s courts before moving on to higher positions.¹⁶² However, the plan makes no mention of removing the external influence over courts exerted by local governments or of more thorough reforms to secure the right to a fair trial.¹⁶³ Thus, just as with the Judges Law, although the Five-year Plan encourages the formation of an independent judiciary, in reality, the reforms proposed by the plan are minimal at best.

On January 31, 2000, the Supreme People’s Court issued a regulation meant to eliminate instances in which judges would face a conflict of interest.¹⁶⁴ Such a regulation is consistent with statements made by government officials noting the Party’s intent to crackdown on corruption and other of the aforementioned *guangxi* problems that hamper China’s judges. This is most aptly illustrated by a statement made by Xiao Yang, president of the Supreme People’s Court, who in March of 2000 told the Third Session of the National People’s Congress that the Chinese government was attempting to crackdown on the corruption that is evident in China’s courts.¹⁶⁵ The attempt to crackdown on corruption intensified after that statement, when in 2001, the Supreme People’s Court enacted the Basic Code of Professional and Ethical Conduct for Judges.¹⁶⁶ At the time of the publication of this comment, it is unclear exactly how effective such attempts have been.

Finally, in a move that appears to be an attempt at improving the prestige of judges both in the eyes of the Chinese public and the international community, certain judges now have been given new titles.¹⁶⁷ Under the new system, the president of the Supreme People’s

161. *Id.* Related to this reform effort is the Provisional Measures for Selecting the Presiding Judges of People’s Courts, promulgated by the Supreme People’s Court in July 2000. Chunying, *supra* note 117, at 67. “The goal of the Measures is to improve the status of judges and generally synchronize their powers and duties.” *Id.*

162. *See* Shing, *supra* note 157.

163. *Id.* The author suggests, as a way of decreasing local influence and Party control over judges, vesting the appointment power in an independent judicial service commission; guaranteeing tenure to judges; and abolishing the judicial committees.

164. *Id.*

165. *Fair, Efficient Justice Promised*, CHINA DAILY, Mar. 11, 2000, <http://www1.chinadaily.com.cn/news/cn/2000-3-11/html>. In his speech, Xiao asserted that corrupt judges, who have been bribed or who have embezzled public funds, will not be spared. *Id.* In fact, Chow reports that “[a]ccording to the Supreme People’s Court, law enforcement officials investigated and punished 995 judges and judicial personnel for corruption in 2001.” CHOW, *supra* note 1, at 222.

166. CHOW, *supra* note 1, at 222.

167. *Judicial Independence Bolstered by China’s Grand Justice System*, THE PEOPLE’S DAILY, Mar. 23, 2002, http://fpeng.peopledaily.com.cn/200203/22/eng20020322_92618.shtml.

Court is now referred to as chief grand justice, while vice-presidents and members of the judicial committee of the Supreme People's Court and presidents of provincial-level higher people's courts will be given the title of grand justice after appointment by the Supreme People's Court.¹⁶⁸ Grand Justice Shan Deyong, vice-president of the Supreme People's Court, stated: "Compared with the [administrative] titles of president or vice-president of a people's court, the new honor stresses the pursuit of judicial equity, neutrality, equality, independence and probity of judges."¹⁶⁹ Ultimately, the government claims that the move is intended to bring Chinese courts closer to international practices, and in turn, closer to an independent judiciary.¹⁷⁰ However, it is hard to believe that the Party's alleged goals can be accomplished by simply referring to the judges with new titles.

China's sincerity in attempting to reform its judiciary through official statements and regulations must be questioned. At this moment, it is clear that the government has established a court system that can effectively resolve economic disputes, but the government has done little in practice to improve the judiciary's ability to ensure justice to China's citizens. However, just as with the Judges Law, at least reform efforts appear to have begun in a limited sense, and this may open the door for true and effective reforms in the future. However, at present, the CPC does not appear willing to allow for the establishment of an independent and modern judiciary.

IV. Conclusion

What can be concluded from the foregoing discussion is that although China is moving down the right path in modernizing and educating its judiciary, the movement is still fairly new and needs time to truly take root in society. Passage of the Judges Law and official statements about improving the judiciary and implementing the rule of law are encouraging, but the reform movement must overcome significant barriers in both Chinese society and government to be truly successful. These barriers include the traditional Chinese fear of litigation, the lack of a history of judicial independence, the lack of respect for law as a result of Confucianism and the rule of Mao Zedong, and an authoritarian government and Communist Party attempting to resist democratic change. Thus, while China is proceeding down the right path, the judiciary is still too much an arm of the CPC to effectuate any major change in the near future. What happens beyond that future,

168. *Id.*

169. *Id.*

170. *Id.*

however, is still to be seen.