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## What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China

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# WHAT HAVE WE LEARNED ABOUT LAW AND DEVELOPMENT? DESCRIBING, PREDICTING, AND ASSESSING LEGAL REFORMS IN CHINA

*Randall Peerenboom\**

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In the last 20 years, legal reforms and the establishment of rule of law have once again taken center stage as part of the new law and development movement.<sup>1</sup> Yet the results are, according to critics, much the same as in the past: poor.<sup>2</sup> Is the well-intentioned epistemic community

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1. See generally, David M. Trubek, *Law and Development: Then and Now*, 90 AM. SOC'Y INT'L L. PROC. 223 (1996); Julio Faundez, *Legal Technical Assistance*, in GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN THE THIRD WORLD I (Julio Faundez ed., 1997); Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Response*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 336, 344-48 (Erik G. Jensen & Thomas C. Heller eds., 2003) (distinguishing between five waves of legal reforms).

2. See, e.g., Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* (Carnegie Endowment for Int'l Peace, Rule of Law Series, Carnegie Paper No. 34, 2003) (discussing problems in conception, operation, and evaluation of efforts to export the rule of law and claiming that many of the lessons from prior experiences with law and development are superficial and often not acted on); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275, 2280 (2003) ("Despite billions of aid dollars, programs to promote the rule of law have been disappointing."); Tim Lindsey, *Preface to LAW REFORMS IN DEVELOPING AND TRANSITIONAL STATES*

of comparative law scholars, international NGOs, and multilateral and bilateral development agencies doomed to repeat the same mistakes forever? Has there been any advancement in our understanding of the relationship between law and development?

This Article applies existing conceptual tools for describing, predicting, and assessing legal reforms to the efforts to establish rule of law in China, in the process shedding light on the various pathways and methodologies of reform so as to facilitate assessment of competing reform strategies. While drawing on China for concrete examples, the discussion involves issues that are generally applicable to comparative law and the new law and development movement, and thus it addresses the broader issue of what we know and do not know about legal reforms.

In the descriptive dimension, scholars often portray legal reforms in China and other developing states *horizontally* in terms of “transplants,” or various other metaphors that emphasize the foreign or domestic source of reforms, and *vertically* in terms of a top-down versus bottom-up or inductive versus deductive process.

The second dimension is predictive: what determines whether a foreign or homegrown model will be adopted, or explains how, why, and the extent to which a foreign model will be adapted to local circumstances? Similarly, what explains the choice of a top-down or deductive approach as opposed to a bottom-up or inductive approach?

The third dimension is normative: how do we assess reforms? What counts as a successful reform? Is “mere” compliance with rules necessary or sufficient? Should we assess reforms in terms of other standards such as effectiveness, efficiency, justice, or human rights?

After a brief discussion of these three categories, I then apply them to a range of legal reforms. The most general of these reforms is the move away from a Mao-era style of governance to a socialist rule of law. I then turn to more specific developments in criminal law and judicial independence that distinguish different conceptions of rule of law—while showing that China’s legal system faces the familiar challenge of meeting the often conflicting requirements of efficiency and justice, procedural and substantive justice, and judicial independence and accountability. On the criminal side, I examine the move away from an inquisitorial system to a more adversarial system, the introduction of summary and simplified procedures similar to plea bargaining in other states, and the evolution of administrative detention. With respect to judicial independence, I focus on the

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(Tim Lindsey ed., forthcoming 2006) (claiming a consensus that many if not most legal reform projects in developing states have failed); YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 3–4 (2002) (noting many reform projects have failed to deliver the anticipated results).

unique role of the adjudicative committee and China's novel system of individual case supervision.

Part III then concludes with remarks concerning what these case studies reveal about our current conceptual tools for describing, predicting, and evaluating legal reforms; offers suggestions on how this line of research may be extended; and argues in favor of a pragmatic approach to reforms.

## I. DESCRIPTION, PREDICTION, AND EVALUATION

### A. Describing Reforms: Horizontal Metaphors

The dominant trope in law and development has been the "legal transplant."<sup>3</sup> Dissatisfied with some of the connotations of transplants, commentators have offered a host of alternative metaphors and catchy phrases, including legal irritant,<sup>4</sup> legal translation,<sup>5</sup> legal transformation,<sup>6</sup> legal transposition,<sup>7</sup> convergence/divergence/differentiation,<sup>8</sup> selective adaptation,<sup>9</sup> and institutional monocropping.<sup>10</sup> Not to be outdone, Chinese scholars have their own rich metaphorical lexicon: *bentu ziyuan* (native resources)<sup>11</sup> and the ever-popular X (e.g., rule of law, human rights, criminal law, judicial independence, discovery rules) with Chinese characteristics, which echoes the turn of the century motto of *Chinese substance/essence, Western means (zhongti, xiyong)*—itself an

3. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993). The Chinese Academy of Social Sciences recently devoted a special issue to yet another round on legal transplants. See *Special Issue: Legal Transplantation in Contemporary China*, SOC. SCI. IN CHINA, Fall 2004, at 108.

4. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

5. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004).

6. Xu Zhangrun, *Western Law in China: Transplantation or Transformation—Four Cases and Liang Shuming's Responses*, SOC. SCI. IN CHINA, Fall 2004, at 134.

7. Esin Örüçü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205 (2002).

8. KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960–1995* (1999).

9. Pitman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 LAW & SOC. INQUIRY 465 (2004).

10. Peter Evans, *Development as Institutional Change: The Pitfalls of Monocropping and the Potentials of Deliberation*, STUD. COMP. INT'L DEV., Winter 2004, at 30, 31 (describing institutional monocropping as the imposition on developing states of idealized versions of Anglo-American institutions, which are presumed to transcend national circumstances, level of development, position in the global economy, and culture, and claiming that the processes have produced "profoundly disappointing results").

11. Su Li, *Bianfa, Fazhi Jianshe ji qi Bentu Ziyuan* [Change of Law, Establishment of the Rule of Law and its Native Resources], 5 ZHONGWAI FAXUE 1 (1995).

echo of the Confucian notion of *harmony but not identity* (*he er bu tong*).<sup>12</sup>

Each phrase has advantages and disadvantages. In general, they differ primarily with respect to the degree of change in the target state's legal system, the amount of target state agency, and the open-endedness of reform as compared to an evolutionary procession toward a predetermined end.

Taken as a botanical metaphor, *legal transplant* suggests a teleological development toward a fixed endpoint—legal systems will mature into liberal democratic rule of law just as Aristotle's tiny acorn will one day become a sturdy oak tree. Of course, some transplants may not survive, given the different soil and weather conditions. Similarly, some legal systems may fail to grow into a full-fledged liberal democratic rule of law. The risk of incompatibility is even clearer when *legal transplant* is understood as a medical rather than botanical metaphor. Just as some recipients of organ transplants may reject incompatible tissue, so too some systems may reject liberal democratic rule of law or more particular institutional reforms or practices.

The medical interpretation suggests the transplant will lead to discrete changes—replacement of one organ—without any overall systemic change; the recipient is still the same person. The botanical reading suggests the possibility of fundamental system alteration, although more discrete changes are also possible: a change in the rules for mortgages based on common law practices, for instance, need not lead to the replacement of a civil law tradition with common law, much less to a fundamental change in the conception of rule of law. In contrast, *legal irritant* captures the way a new rule or practice may disrupt the existing legal culture and current legal practices, sometimes in unexpected and far-reaching ways.

The *legal translation* metaphor highlights the diversity in how donors and recipients may understand and interpret a rule. Broad principles such as “presumption of innocence” or “due process” have been construed very differently in different legal systems—and over time within the same legal system. Even more specific statements or terms are often indeterminate in important ways and thus may give rise to different interpretations and applications, as critical legal scholars and postmodern devotees have labored to explain. Simply copying legal codes, without any understanding of how subsequent interpretations may have twisted

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12. ANALECTS OF CONFUCIUS 244 (Cai Xiqin & Lai Bo trans., 1994). “Harmony but not identity” is often associated with cultural assimilation and the relationship between Chinese and non-Chinese. It is equally applicable, however, to legal reforms that involve some element of assimilation of foreign models.

“the plain meaning” beyond all recognition for laypeople, suggests that much will be left out in translation unless the translator is deeply familiar with the actual practice in the source state. Conversely, on the recipient side, deeply ingrained beliefs may lead to misunderstandings or creative misinterpretation, much as the transmission of Buddhism to China imparted a Daoist flavor to key Buddhist concepts.<sup>13</sup>

Whereas the processes of legal transplantation and translation are primarily unidirectional, the triad of *convergence/divergence/differentiation* opens up the possibility that all legal systems may be changing and that change may occur in multiple directions. For instance, globalization has caused changes to legal systems in traditional exporter states in Euro-America as well as in the developing states that are normally importers. Moreover, the process can be interactive, as in the “race to the bottom,” which occurs as states change their tax codes, labor rules, and social security policies to attract and retain foreign investment.

*Legal transformation, legal transposition, and selective adaptation* also highlight that institutions, rules, and practices may change in the process of adoption. Selective adaptation, however, places more emphasis on target-state agency. Rather than merely being passive recipients, legal actors in the target state actively choose elements and reject others, interpret terms consistent with local perceptions and understandings, and modify or rework institutions, rules, or practices in light of domestic circumstances.

*X with Chinese characteristics* also suggests agency adaptation, while *Chinese as substance, Western as means* suggests the degree of localization will be significant, with primarily domestic concerns driving legal reforms.<sup>14</sup> The latter also suggests (incorrectly in my view) that China’s leaders view legal reforms as an instrumental fix for some technical problems but do not recognize that the transition to rule of law will fundamentally change the nature of the political order.<sup>15</sup>

13. The metaphor of legal translations leads into the murky waters of postmodernism on the one hand and the analytic philosophy of language, including discussions of incommensurability and holistic systems of meaning, on the other.

14. Turn of the century legal and political reforms were often described in terms of an “impact-response” model, which is similar to legal transplants in emphasizing the Western origins of legal reforms and in being unidirectional. Just as the notion that contemporary legal reforms are simply imported from abroad fails to capture the complexity of the dynamics of reform today, so too the notion that China’s turn of the century reforms were driven by the sudden realization that China lagged behind Western states in technical, military, and legal-political matters was too simple. For a critique of the impact-response model, see Paul A. Cohen, *Ch’ing China: Confrontation with the West, 1850–1900*, in *MODERN EAST ASIA: ESSAYS IN INTERPRETATION* 29 (James B. Crowley ed., 1970).

15. One view is that Western reformers have duped Chinese leaders into accepting a Trojan horse by characterizing potentially disruptive political-legal reforms as merely technical changes. A more common and well-supported view is that leaders are aware of the

While useful in some respects, all of these metaphors share three common shortcomings. First, as illustrated below, they tend to oversimplify the reform process.

Second, all allow for some degree of change in the process of transmission but do not specify or quantify the amount of change beyond which the original becomes something new and different. Take, for instance, the triad of *convergence/divergence/differentiation*. These distinctions are always a matter of degree, particularly in a state as large as China. Depending on one's focus, it is possible to describe the overall trajectory of change in China's legal system and changes in particular institutions, rules, or practices in terms of all three categories. There has been some movement in the direction of rule of law, even a liberal democratic rule of law (and "constitutionalism"),<sup>16</sup> and yet at the same time one could find evidence of divergence and differentiation. Similarly, there seems no way in principle to distinguish between, for example, a transplant that has been selectively adapted and a new hybrid or between a new interpretation of a translated rule and a new and different rule. At some point of specificity, every system is unique: *X with Chinese characteristics* is banal unless one specifies the meaningful differences between X and its counterparts in other states.<sup>17</sup> Whether the differences are meaningful will depend on one's purpose in comparing the systems. As there are many reasons to compare legal systems, there will be no single standard.

Third, and perhaps most importantly, these metaphors, while useful in describing legal reforms, do not help predict or explain which foreign models are likely to be adopted and why; which transplanted institutions, rules, or practices will take hold and which will fail; or which native resources or Chinese characteristics will become part of the legal system in China. The predictive project requires further specification and testing of a range of variables, as will be discussed shortly. First, however, a few words on vertical metaphors.

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potential of rule of law reforms to lead to fundamental political change. They fully appreciate the danger that institutional-strengthening reforms may create a momentum that exceeds the state's capacity to control. State leaders, however, have decided to embark on reforms for a variety of reasons, including realization of the ruling party's own goals. RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (2002) [hereinafter *CHINA'S LONG MARCH*].

16. See Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1 (2002).

17. This same criticism applies generally to the notion of mixed legal systems. On the growing use of "mixed systems" as a descriptive category in comparative law, see Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5 (2003).

### B. Describing Reforms: Vertical Metaphors

While the previous metaphors emphasized a horizontal relationship between a source state and recipient, metaphors such as top-down versus bottom-up or deductive versus inductive invoke a vertical dimension. Many commentators have argued that legal reforms in China have been top-down—orchestrated by the central government and Party leaders—with some commentators praising this approach and other criticizing it. Clearly, central authorities have played a key role in setting the direction for reform and approving major policy changes such as the shift to a more law-based order. In practice, however, many if not most specific reform initiatives originate at lower levels as judges, prosecutors, lawyers, and officials working in the system attempt to solve problems they encounter in carrying out their duties.<sup>18</sup> Increasingly, civil society, the media, and legal academics are also providing the impetus for change by monitoring and criticizing the legal system.

Whereas a deductive approach to regulation attempts to derive appropriate rules, practices, or institutions from a pre-given set of general principles or models, an inductive approach identifies a problem, examines the various solutions to the problem to identify patterns and general principles, and then tests the principles by applying them in different contexts and observing the results or consequences.<sup>19</sup> Thus, in one version of the inductive model, the first step is to identify the problem. The next task is benchmarking, which entails surveying promising ways of solving the problem that are superior to those currently used yet within the existing (local) system's capacity to emulate and eventually surpass. After that comes simultaneous engineering, where interested parties propose changes to the provisional design or solution based on their own experiences and needs. The final component is error correction and learning by monitoring: participants and independent actors monitor progress by pooling information from their own experiments with information from other localities about the results of their approaches to similar problems.<sup>20</sup>

In general, deduction is associated with foreign models transplanted to China and implemented in a top-down fashion. In this approach, foreign governments, foreign legal experts, and international development

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18. See generally CHINA'S LONG MARCH, *supra* note 15, at 153–56.

19. Michael W. Dowdle, *Visibilizing the Invisible Hand*, in PUBLIC ACCOUNTABILITY: LAW, CULTURE AND EXPERIENCE (Michael W. Dowdle ed., forthcoming 2006).

20. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). Developing their regulatory theory in the context of a liberal democracy, Dorf and Sabel refer to their approach as a directly deliberative polyarchy based on democratic experimentalism. For a discussion of the applicability and limits of this approach for China, see CHINA'S LONG MARCH, *supra* note 15, at 424–31.



agencies are likely to play a significant role in the reform process, as they are most familiar with the foreign model. One example of this method would be the attempts of international actors to promote a highly particularistic liberal democratic conception of rule of law in China based on the legal systems of northern Europe and the United States. A more specific example would be the calls by United Nations organs and international nongovernmental organizations (NGOs) to eliminate all forms of administrative detention—based on assumptions about criminal law and the protection of individual rights derived from the experiences of other states, which are then applied to China without further consideration of the actual costs and benefits of eliminating detention.<sup>21</sup>

In contrast, induction shares greater affinities with a bottom-up approach that gives a more prominent role to local actors in recognizing problems and devising solutions. As discussed below, China has developed a number of institutions and practices to overcome the problem of judicial corruption and the inadequate competence of some judges, including reliance on an adjudicative committee of senior judges to review cases and individual case supervision by the procuracy, people's congress, and the judiciary itself.

It is possible to mix and match some of these elements and thus produce different strategies for reform (and most likely considerable confusion in terminology in the absence of concrete examples). Domestic concerns might, largely if not exclusively, dictate the reform agenda of some states, and it might be top-down or bottom-up, deductive or inductive (or both). Similarly, foreign actors might advocate an inductive approach by emphasizing local knowledge and local participation in agenda setting and implementation.

### C. Prediction

While descriptive metaphors continue to proliferate, there has been less progress in identifying the factors that lead to successful transplants or to convergence rather than divergence, or in testing the factors that might favor deductive approaches rather than inductive approaches (or vice versa).<sup>22</sup> Nevertheless, empirical studies in other areas have made

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21. See Randall Peerenboom, *Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate Administrative Detention in China*, 98 Nw. U. L. REV. 991 (2004) [hereinafter *Out of the Pan*].

22. For an early attempt to predict success or failure of transplants, see Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) (emphasizing political factors including interest group politics over social, economic, and cultural factors). See also Ronald J. Daniels & Michael J. Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. OF INT'L L. 99 (2004) (grouping obstacles to rule of law into three general categories—resource and institutional capacity shortcomings;

some progress in sorting out key components behind social, legal, and political change.<sup>23</sup> These studies as well as past experience suggest several important elements.<sup>24</sup>

One factor in the adoption of a model is the *prestige, power, and normative appeal of the exporter or promoter*. The United States, the European Union, and individual European states often advocate their own models for capital markets, corporate governance, criminal law, and so on. Although the European Union has dedicated more funds to rule of law programs in China than the U.S. government, U.S.-based models have an advantage in that many Chinese legal scholars study in the United States and hence are most familiar with the U.S. system. Moreover, the literature on the United States is easily accessible and in English. The United States also exercises influence indirectly through international development agencies such as the International Monetary Fund (IMF) and World Bank, through international legal regimes such as the World Trade Organization and the UN human rights system, and through NGOs.

Domestically, the *prestige, power, and normative appeal of the local promoters* who back the import or a local alternative may also play a role, especially when there is division among the ruling elite as to which path to take. More generally, the lack of local ownership is one of the main reasons for the failure of legal reform projects sponsored by the international community.

*Interest group politics*—who will benefit and who will be harmed—will also help explain the adoption or rejection of some reforms and why some foreign models are adapted in particular ways in China. Opposition may come from actors within the legal system, such as the bar

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social-cultural-historical problems; and political-economy barriers—and arguing that political-economy obstacles, including opposition by key interest groups, have been the biggest barriers in Latin America and Central and Eastern Europe).

23. There are vast literatures containing numerous empirical studies on transition to and consolidation of democracy, the relationship between law and development, and factors affecting the implementation of human rights. *See, e.g.*, UNDERSTANDING HUMAN RIGHTS VIOLATIONS (Sabine C. Carey & Steven C. Poe eds., 2004). There is also a growing empirical literature on the establishment and implementation of rule of law, with “rule of law” taken as the dependent variable. In addition, several systematic empirical studies look at particular features of the legal system in relation to economic development and the protection of rights. *See generally* Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, 36 GEO. J. INT’L L. 809 (2005) (summarizing empirical studies of the relationship between rule of law and economic growth, human rights, and democracy); *see also* Jensen, *supra* note 1, at 336.

24. For a case study that examines different factors that might explain the similarities and differences in the development of the judicial system in the socialist states of Vietnam and Russia, see Penelope Nicholson, *Comparative Law and Legal Transplants between Socialist States: An Historical Perspective*, in LAW REFORMS IN DEVELOPING AND TRANSITIONAL STATES (Tim Lindsey ed., forthcoming 2006).

association or senior members of the judiciary, who benefit from the current system, however inefficient or corrupt.

A related issue is the nature of the advantages for those who will benefit from the reforms: does the reform make the system more transparent and fair, reduce costs, increase the ability of the central government to control local state actors, or enhance the legitimacy of the government? The timing of the benefits may also be relevant: will the reforms produce short-term results or will benefits accrue only in the long run? Producing quick results may be particularly important in states where there is deep suspicion about the value of law—as in less economically developed states with strong traditional systems of norms—or in authoritarian or post-authoritarian states where the public may fear law as a tool of repression or the political elite.

The nature and relative robustness of *civil society* is another factor. In some cases, reformers will be able to mobilize civil society to overcome the lack of political will at the state level or elite opposition to reforms. In other cases, civil society may be weak or divided over particular measures or the merits of legal reform in general. Bottom-up approaches often rely on greater participation by citizens, NGOs, and civil society. Part of the problem with exporting bottom-up approaches based on deliberative democracy is they assume civil society in developing states will be equally robust and play the same role as in Western liberal states. This will often not be the case.<sup>25</sup> In China, many reform measures come from those working within the system and thus continue to privilege elite technocrats.

*Economic factors* (GDP per capita, growth rates, amounts of foreign direct investment) affect the demand for rule of law and the ability of a state to afford reforms and operate an efficient legal system staffed by well-trained and well-paid professionals immune from corruption. Apart from GDP levels, a state's distribution of wealth, its degree of marketization, and whether wealth is generated from broad-based market activities

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25. See Randall Peerenboom, *Social Networks, Civil Society, Democracy and Rule of Law: A New Conceptual Framework*, in *THE POLITICS OF AFFECTIVE RELATIONS: EAST ASIA AND BEYOND* 249 (Hahm Chaihark et al. eds., 2004). See also David K. Linnan, *Like a Fish Needs a Bicycle: Public Law Theory, Civil Society and Governance Reform in Indonesia*, in *LAW REFORMS IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed., forthcoming 2006) (observing that the international donor community has assumed a similar conception of the state and civil society as in developed Western states—a largely secular, limited neutral state and liberal society in opposition to the state—and suggesting that donors may be unwilling to accept non-Western conceptions of the state and civil society, as in Indonesia where Islam, communitarianism, and a post-colonial concern with nationalism play a more important role).

or is “easy” money derived from the sale of oil or other natural resources may also be factors.<sup>26</sup>

The *nature of the political regime* is another factor, as is the level of sophistication of political institutions. Some institutions and practices that work well in a liberal democracy may not work so well or may not be feasible in China; conversely, some institutions or practices that work well in China would not be acceptable in a liberal democracy.

Even when there is no ideological barrier to transplantation, local institutions may lack the *institutional capacity* to implement reforms. China has had to rebuild virtually from scratch key institutions such as the courts, procuracy, law schools, and the legal profession, all of which were weakened or destroyed during the Cultural Revolution. Nevertheless, legal reformers in China still enjoyed the benefit of a relatively strong state and political stability. Reformers in failed states or transitional states undergoing regime change as a result of war face even greater challenges. As in Iraq, leaders of a new government will be preoccupied with simply restoring law and order and thus may be diverted from focusing on economic, political, and legal reforms.

A related issue is *institutional culture* and the *compatibility of reforms* with institutional norms and practices. China’s civil and criminal law systems were based on an amalgam of civil, socialist, and traditional law. Efforts to introduce elements of a common law system have challenged the theoretical underpinning and normative assumptions of the existing system and required judges, prosecutors, and lawyers to adopt different roles. Similarity in legal systems facilitates understanding between external and internal actors, reduces system friction, and decreases the likelihood of unexpected consequences. At a minimum, reforms are likely to be more effective when relevant actors are familiar with the laws, practices, or institutions being adopted. Fortunately, in this era of mixed legal systems, many key actors will be aware of the general features of other systems.<sup>27</sup>

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26. See SAMANTHA F. RAVICH, *MARKETIZATION AND DEMOCRACY: EAST ASIAN EXPERIENCES* (2000) (arguing that marketization leads to the development of civil society and a process of democratic learning on the part of citizens that is crucial for legal and political reforms); FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 138 (2003) (attributing problems in the development of rule of law and establishment of democracy in the Middle East in part to a business class and citizenry dependent on easy money from oil). Easy money tends to produce corporatist or clientelist relationships between the elite and the government and allows the government to buy off the populace and delay political reforms.

27. See, e.g., Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 *EUR. ECON. REV.* 165 (2003) (using data from 49 states, the authors argue that states with developed legal orders and a population familiar with basic principles of the transplanted law were more successful at incorporating the transplanted law than those without and that differences in legal families were less important.).

Some factors will play a greater role in some areas of law than in others. For instance, *population size*, *ethnic diversity*, and *cultural factors* (including religious beliefs) influence efforts to improve human rights. As the case studies below illustrate, many other issue-specific factors could be added to the list, including unforeseeable events like a particularly egregious case of injustice that results in a public clamor for change.

#### *D. Appraisal and Evaluation: The Normative Dimension*

In the end, how we describe reforms or whether this process is one of induction or deduction—i.e., “how we get there”—may not matter as much as the results. While in some cases the results may be clearly preferable, in other cases they may be more difficult to assess. What counts as a successful transplant or a successful instance of regulatory innovation? Is it enough that people comply with the new regulations or institutions? (People can, of course, comply with bad rules or bad systems: think of apartheid in South Africa.)

To be sure, compliance is not always a minimal accomplishment—surely government leaders in China would appreciate greater compliance with tax payment rules and less tax avoidance. On the other hand, low compliance does not necessarily mean a law is not effective. There is very little compliance with speed limits on U.S. highways, for example, but the laws are still effective, in that most people do not exceed the speed limit by more than 5/mph (depending on the strictness of enforcement). Conversely, a high level of compliance may not mean a law is effective, as compliance might be the result of a low standard that did not require a change in behavior.<sup>28</sup>

The passing of a law may also serve a variety of functions, some of which may have little to do with either compliance or effectiveness in the sense of behavioral change. For instance, many states sign human rights treaties with no intention of complying or changing behavior.<sup>29</sup> The costs of ratifying the treaties are low, and the states may be able to avoid censure while sending a signal that they are becoming good members of the international community. The annual vote in Geneva to censure China for human rights violations (more accurately, civil and political rights violations) and China's bid to hold the Olympics in 2008

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28. See Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2000).

29. See generally Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941, 1978 (2002) (ratification of treaties does not translate into better protection for human rights and may even have a negative effect, at least in the short term).

both influenced the timing of its signature of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Similarly, in 2004, China passed a redundant regulation against soccer hooliganism, presumably to assure foreign critics, upset by the anti-Japanese behavior of Chinese fans during the final of the Asia Cup in Beijing, that China could manage the Olympics.

Legal reforms may also be assessed in terms of economic efficiency and wealth maximization. Few if any reforms will ever benefit everyone, however, even if they increase the efficiency of the system as a whole or contribute to greater wealth. Should reforms be judged against a Pareto or Kaldor-Hicks efficiency standard?<sup>30</sup> Even highly technical reforms have a political dimension, as they produce winners and losers in terms of distribution of economic resources, distribution of power among state organs, or the strengthening of some legal actors at the expense of others—favoring criminals and the defense bar over members of the general public who assign a higher priority to social order, for example. If the discussion below demonstrates anything, it is that the legal reform process in China has entered a complicated and intensely political phase.

Should reforms be judged against a standard of equity or justice reflecting current human rights standards? Should this assessment treat all rights in the ever-expanding corpus of rights treaties equally? Should it privilege civil and political rights over social and economic rights, as has long been and continues to be the case, or vice versa? Widely reported cases of China's egregious violations of civil and political rights often overshadow its tremendous progress in rebuilding the legal system and its performance on other indicators of human wellbeing, where it outperforms the average state in its lower-middle income class.<sup>31</sup>

A second concern in assessing reforms is whether to employ an absolute or relative standard. Rule of law and other good governance indicators are highly correlated with wealth, as are civil and political rights and social and economic rights.<sup>32</sup> This suggests China's performance in these areas should be judged against the performance of other

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30. A change that can make at least one individual better off without making any other individual worse off is a Pareto improvement: an allocation of resources is Pareto efficient when no further Pareto improvements can be made. An outcome is Kaldor-Hicks efficient if those that are made better off could *in theory* compensate those that are made worse off and produce a Pareto optimal outcome. Kaldor-Hicks, however, does not require that those made worse off are in fact compensated and thus may lead to negative distributional consequences.

31. See Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 71 (2005) [hereinafter *Assessing Human Rights in China*] (arguing that China is subject to a double standard on rights issues in part because of the privileging of civil and political rights and the bias against non-democratic regimes).

32. See Randall Peerenboom, *Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia*, 15 DUKE INT'L L.J. 75 (2005).

states at its income level, not against the performance of much wealthier states—much less against the aspirations of human rights groups.

Moreover, regulatory reforms may require time to take hold. What may seem like a terrible mistake may prove successful with the passing of time. Some reforms may also set the stage for further development. Intermediate benchmarks are necessary to avoid unduly dismissive assessments because of disappointing progress on long term goals.<sup>33</sup>

## II. CASE STUDIES OF LEGAL REFORMS

### A. Rule of Law

One of the biggest regulatory innovations in China in the last 25 years has been the transition to rule of law (the only other comparable change being the transition to a market economy, which entails certain modalities of regulation, including rule of law, in a state the size of China with a reasonably developed economy). Some may doubt the transition to rule of law is an innovation, even allowing that the move toward a more law-based regulatory system represents a drastic change from Mao-era governance. Indeed, many commentators describe China's efforts to implement rule of law in terms of a transplant deduced from a predetermined foreign model and implemented in top-down fashion by the central government. The assumption is often that China is moving toward a liberal democratic conception of rule of law. This assumption is unfounded, at least for the short term (and, I have argued, for the medium and long terms as well), and misses the innovative quality of rule of law in China.<sup>34</sup> China has not attempted to mimic some ideal Western legal order, much less import wholesale a liberal democratic rule of law.<sup>35</sup> The first hint that something might be awry with the standard as-

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33. LINN HAMMERGREN, INSTITUTIONAL STRENGTHENING AND JUSTICE REFORM 1 (U.S. Agency for Int'l Dev., PC-ACD-020, 1998), available at <http://www1.worldbank.org/publicsector/legal/Institutional%20Strengthening.pdf>.

34. One common view among Western commentators is that China *should* be moving toward liberal democratic rule of law and that, ultimately, economic reforms, greater wealth, and the rise of a middle class seeking to protect their property interests will lead to demands for democracy and liberal rights. As a normative matter, democracy and liberalism are contested in China, the latter more than the former. As an empirical matter, other states have become wealthy and resisted democratization for years, and even after democratization they have not become liberal democracies in the sense that the outcome on many rights issues is more communitarian or collectivist than liberal. See CHINA'S LONG MARCH, *supra* note 15 (distinguishing between four thick conceptions of rule of law, including liberal democratic, statist socialist, neoauthoritarian, and communitarian, and arguing that China is not likely to embrace liberal democracy or liberal democratic rule of law).

35. Donald C. Clarke, *Alternative Approaches to Chinese Law: Beyond the "Rule of Law" Paradigm*, 2 WASEDA PROC. OF COMP. L. 49 (1998–1999) (cautioning against the teleo-

sumption/description is the government's declaration, now incorporated into the Chinese constitution, that China is in the process of establishing a *socialist rule of law state*. To be sure, there are competing conceptions of rule of law in China, as there are elsewhere.<sup>36</sup> In addition to the government's statist socialist version of rule of law, there is support in China for neo-authoritarian, communitarian, and even liberal democratic varieties.

The complexity of the process of implementing rule of law in China illustrates the previously discussed shortcomings in commonly used metaphors. The process has involved much more innovation from the bottom than usually suggested. At minimum, it is fair to say the process has been both top-down and bottom-up. Nor does the deductive/inductive distinction seem very useful when applied to the question of why Chinese leaders endorsed rule of law after Mao. Chinese leaders faced a lack of economic growth, a history of arbitrary rule in the hands of a single person, and flagging legitimacy, among other problems. They may have induced from the examples of other states that rule of law might be a solution to these problems. Or perhaps they deduced this conclusion from the general principle (itself derived from empirical studies and case studies) that rule of law contributes to economic growth, limits government arbitrariness, and enhances legitimacy.

Horizontal metaphors are equally problematic, highlighting the Western origin of rule of law despite the fact that China embarked on legal reforms for its own purposes, driven primarily by domestic concerns. Even allowing that reformers have looked to foreign legal systems for guidance, the conception and implementation of rule of law in China—as reflected in current institutions, rules and practices—are significantly different from any existing legal system in the West or any paradigmatic “Western rule of law ideal.” Describing China's rule of law as a transplant or translation of an original Western prototype fails to capture its significant indigenous contribution to a new and unique model: socialist rule of law.

Of course, many will question whether a socialist rule of law is truly rule of law, especially given the many imperfections in the Chinese legal system and China's well-documented human rights abuses.<sup>37</sup> This concern

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logical assumption that the end state of legal reform is meant to be, or likely to be, the “Western rule of law ideal”).

36. CHINA'S LONG MARCH, *supra* note 15, at 55; *see also* ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.A. (Randall Peerenboom ed., 2004) [hereinafter ASIAN DISCOURSES OF RULE OF LAW].

37. *See* Clarke, *supra* note 35 (questioning whether China has a legal system); *see also* STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORMS IN CHINA AFTER MAO 3 (1999) (also questioning whether China has a legal system).



reflects a second shortcoming with horizontal metaphors mentioned earlier: they offer little guidance in telling us whether changes amount to a odd-looking transplant, a hybrid, or a new species altogether.<sup>38</sup>

Nor do horizontal metaphors shed much light on why some features of reforms are adopted and others rejected. Defenders of rule of law with “Chinese characteristics” or “native resources” provide precious little guidance regarding which characteristics will or should become part of rule of law. In the end, these slogans serve mainly to caution that imported ideas, rules, and practices will be adapted in light of local circumstances. This is true, of course. But which factors will determine the fate of foreign or indigenous elements? What influences will decide whether attempts to implement rule of law fail or succeed?

The factors affecting the implementation of rule of law in China are likely similar to those affecting the implementation of rule of law elsewhere. Among these, the nature of *the political system* has received the most attention in China, with many commentators arguing that rule of law is incompatible with single party socialism.<sup>39</sup> Empirical studies have shown that democracy and rule of law tend to be reinforcing, albeit weakly.<sup>40</sup> Democracy, however, is neither necessary nor sufficient for rule of law.<sup>41</sup>

For instance, despite the Singaporean government’s many limitations on the democratic process, its use of the legal system to suppress opposition, and its nonliberal interpretation of many rights issues, Singapore’s

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38. For a response to Clarke and Lubman’s claims that China lacks a legal system and an attempt to sort out different approaches to defining the minimal requirements of rule of law and answer the question of whether we will know rule of law when we see it, see CHINA’S LONG MARCH, *supra* note 15, at 130–41. Briefly stated, the argument is that there is considerable agreement about the elements of a thin (or procedural) rule of law. There is, however, considerable disagreement about thick (or substantive) conceptions of rule of law in China and elsewhere.

39. Here I only discuss regime type. Many other political factors might be considered. Democracy, for example, could be broken down into constitutive elements and each element tested. See Gerardo L. Munck & Jay Verkuilen, *Conceptualizing and Measuring Democracy: Evaluating Alternative Indices*, 35 COMP. POL. STUD. 5 (2002); Bruce Bueno de Mesquita et al., *Thinking Inside the Box: A Closer Look at Democracy and Human Rights*, 49 INT’L STUD. Q. 439 (2005), available at [http://www.nyu.edu/gsas/dept/politics/phd\\_hire/cherif\\_2.pdf](http://www.nyu.edu/gsas/dept/politics/phd_hire/cherif_2.pdf).

40. Roberto Rigobon & Dani Rodrik, *Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships* 5 (Nat’l Bureau of Econ. Res., Working Paper No. W10750, 2004), available at <http://ssrn.com/abstract=590745>.

41. What constitutes a democracy is also subject to debate. In the United Kingdom, only 1.8% of the adult population was eligible to vote as of 1832 and only 12.1% as of 1884, with women receiving the right to vote only in 1930. In the United States, only 5% of adults were eligible to vote in 1824, with blacks obtaining the right to vote only in 1870 and women following in 1920. ZAKARIA, *supra* note 26, at 50–51.

legal system ranks as one of the best in the world.<sup>42</sup> Like Singapore, Hong Kong has a well-developed legal system that is largely the product of British colonialism. Until the handover to the PRC in 1997, the system was widely considered an exemplar of rule of law, notwithstanding its lack of democracy and the restricted scope of individual rights under British rule. After the handover, the legal system continues to score high on the World Bank's Rule of Law Index, with only a slight drop from 90.4 in 1996 to 86.6 in 2002.<sup>43</sup> Among Middle Eastern countries, Oman, Qatar, Bahrain, Kuwait, and the United Arab Emirates are in the top quartile on the World Bank rule of law index but have a zero ranking on the 0–10 point Polity IV Index.<sup>44</sup>

Conversely, just as non-democracies may have strong rule of law-compliant legal systems, democracies may have legal systems that fall far short of rule of law. Guatemala, Kenya, and Papua New Guinea, for example, all score highly on democracy (8–10 on the Polity IV Index) and yet score poorly on rule of law (below the 25th percentile on the World Bank rule of law index).<sup>45</sup>

In short, regime type will influence the contours of rule of law in China and may place some constraints on its implementation, particularly with respect to cases involving political issues that threaten the rule of the Party.<sup>46</sup> China clearly has made great strides in recent years toward

42. See Li-ann Thio, *Rule of Law within a Non-liberal "Communitarian" Democracy: the Singapore Experience*, in *ASIAN DISCOURSES OF RULE OF LAW* 183 (Randall Peerenboom ed., 2004).

43. Daniel Kaufmann et al., *Governance Matters III: Governance Indicators for 1996–2002* (World Bank Policy Research Working Paper 3106, 2003), available at <http://www.worldbank.org/wbi/governance/pdf/govmatters3.pdf>.

44. Monty G. Marshall & Keith Jagers, *Polity IV Country Reports* (2003), at <http://www.cidcm.umd.edu/inscr/polity/report.htm>

45. Eight other states receive an 8–10 score on the Polity IV index and yet score below the 50th percentile of states on rule of law: Bolivia, Peru, Jamaica, Macedonia, the Philippines, Moldova, Nicaragua, and Argentina. *Id.*

46. Only after democratization did the courts in Taiwan and South Korea emerge as independent and authoritative forces capable of handling even politically sensitive issues involving controversial constitutional amendments and the criminal liability of past presidents impartially. See generally Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y. J. 531 (2002) (observing that just a few years ago no one could imagine that the Council of Grand Justices would find newly-amended constitutional provisions unconstitutional); Hahm Chaihark, *Rule of Law in South Korea: Rhetoric and Implementation*, in *ASIAN DISCOURSES OF RULE OF LAW* 385 (Randall Peerenboom ed., 2004). Democratization in other states, however, has exacerbated or at least failed to resolve shortcomings in the legal system, including problems with the authority and independence of the judiciary. In Indonesia, corporatist and clientelist ties between judges and the political, military, and business elite have undermined the authority and independence of the judiciary. In the Philippines, the courts continue to be so heavily influenced by the politics of populist, people-power movements that basic rule of law principles are threatened. Howard Dick, *Why Law Reforms Fail: Indonesia's Anti-corruption Reforms*, in *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed.,

implementing a legal system that meets the requirements of a thin rule of law, and it may continue to do so for years to come before reaching its potential within the current political structure. On the other hand, China's political regime has created some institutions and practices, such as review by adjudicative committees and individual case supervision by the procuracy and people's congress, that would be difficult to reconcile with conceptions of judicial independence and separation of power principles in liberal democracies.

Commentators have also cited *cultural factors* to explain many of China's problems, with some arguing that the state's Confucian heritage, authoritarian past, and reliance on social networks may prevent or at least complicate the implementation of rule of law. When starkly stated, this view verges on Orientalism.<sup>47</sup> Clearly, other Asian states have implemented legal systems that score highly on rule of law indices. Cultural factors may nevertheless play a role in implementation of rule of law and in the adoption and operation of particular institutions or the application of particular rules.<sup>48</sup> For instance, Chinese citizens infrequently invoke administrative litigation in part because they are still adjusting to the idea of suing state officials. Differences in local customs and national laws may lead to implementation deviating from the law on the books, especially in criminal law and family law issues. Similarly, traditional attitudes toward substantive justice sometimes lead to inflated expectations of the legal system and frivolous or excessive litigation, in

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forthcoming 2006); Raul C. Pangalangan, *The Philippine "People Power" Constitution, Rule of Law, and the Limits of Liberal Constitutionalism*, in *ASIAN DISCOURSES OF RULE OF LAW*, *supra* note 36, at 371 (Randall Peerenboom ed., 2004).

47. See Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System,"* 2 WASH. U. GLOBAL STUD. L. REV. 37 (2003) (distinguishing between two kinds of Orientalism, one that denies China could ever establish rule of law given its cultural traditions and the other attempting to impose on China a particular thick conception of liberal democratic rule of law as the only appropriate model worth pursuing). See also Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002).

48. AMIR N. LICHT ET AL., *CULTURE RULES: THE FOUNDATIONS OF RULE OF LAW AND OTHER NORMS OF GOVERNANCE* (2004), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=314559](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=314559). The study found that states that emphasized autonomy and egalitarianism had higher levels of rule of law, accountability, and less corruption, whereas states that emphasized embeddedness and hierarchy had a lower level of rule of law, accountability, and worse corruption. In short, English-speaking areas and Western Europe scored significantly higher than other regions. The authors suggest that cultural orientation in East Asia may make it more difficult to implement rule of law, restrict corruption, and increase accountability or that "good governance" in Asia may differ in some respects from "good governance" in Western liberal democracies. Good governance in Asian states no doubt differs in significant respects from good governance in rich, liberal democratic Western states once one examines in more detail the broad variables of rule of law, accountability, and corruption. Nevertheless, Asian states have outperformed other regions in terms of rule of law on the same World Bank good governance scales used by the authors of the study, suggesting that culture may not be as important, at least in Asia, as the authors claim.

which parties ask the court to compensate for shortcomings in the welfare system or the lack of unemployment insurance—even if that entails setting aside the law and acting illegally in the name of equity or social justice.<sup>49</sup>

Culture, however, is not the main obstacle to the realization of rule of law in China. Many of the most serious impediments are *institutional*. Twenty-five years of reforms have greatly strengthened the courts, procuracy, police, legal profession, administrative law, and legislative systems. Nevertheless, much remains to be done.<sup>50</sup> In part, the weakness of these institutions is simply a function of time. It takes decades to create efficient, professional, and clean institutions. It also takes time to change institutional culture. There continues to be a heavy administrative flavor to Chinese courts, although recent reforms have begun to break down the internal administrative hierarchy by providing more internal independence and decision-making authority for judicial panels and by promoting presiding judges based on performance and ability. Administrative law reforms, including the passage of administrative litigation laws allowing citizens to challenge the decisions of government officials, conflicted with the longstanding belief that government officials had wide discretion and were accountable to those above but beyond direct challenge from those below. Government officials continue to come to grips with the change in institutional purpose. Whereas administration previously meant regulation and management, these goals must now compete with the need to facilitate (private) economic transactions and protect rights. This shift in institutional mission is reflected in the recent passage of the Administrative Licensing Law and attempts to reduce the number of approvals and licenses, as well as in the ongoing efforts to pass an Administrative Procedure Law that will open up the administrative rulemaking process to more participation by interested parties.

China's institutional problems, however, are also a function of *wealth*. Indeed, rule of law everywhere is largely a function of wealth.<sup>51</sup> At very low levels of development, the formal legal system may not play

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49. Randall Peerenboom, *Judicial Accountability and Judicial Independence: An Empirical Study of Individual Case Supervision in the People's Republic of China*, 55 CHINA JOURNAL (forthcoming 2006).

50. See generally, CHINA'S LONG MARCH, *supra* note 15.

51. See Peerenboom, *supra* note 23 (finding that the correlation between GDP and ranking on World Bank rule of law index for all states is  $r=.82$ ); Alberto Chong & César Calderón, *Causality and Feedback between Institutional Measures and Economic Growth*, 12 ECON. & POL. 69–81 (2000) (using time series data, the authors find that the causal relationship between institutions and economic growth runs in both directions but that the impact of greater growth on institutional development is stronger than the impact of institutions on growth); cf. Rigobon and Rodrik, *supra* note 40 (while democracy and rule of law are both related to higher GDP levels, the impact of rule of law is much stronger).

a great role in the economy, but the demand for an efficient and fair legal system rises as the economy develops. This leads to more investment in institutions, including higher salaries and more training, as well as the creation of mechanisms of accountability to ensure efficient and fair outcomes. These measures include anti-corruption commissions, internal review processes, and, in China, channels for individual case supervision by the procuracy and people's congress. The result is more professionalism and better performance. But such changes take time and resources. Developing states simply cannot afford some of the "solutions" to institutional problems available to richer states. For example, judges in many of the legal systems that score the highest on rule of law indices tend to be highly paid by developing state standards. Yet increasing salaries to the point where judges need not rely on corruption to live a decent life may not be possible in China given the other pressing financial demands on the government.<sup>52</sup> In response to the comment from a German lawyer at an international conference in Beijing that judicial corruption is not a major problem in Germany because judges are highly paid, a member of the PRC judiciary noted that some poor counties in western China often owe judges several months back pay.

How then do we assess efforts to implement rule of law in China? The assessment will differ depending on the timeframe. Taking a snapshot view, many problems remain. Individuals living and working in the system are likely to be frustrated by ongoing problems and highly critical of the implementation process. If one considers, however, that rule of law took centuries to establish in Western states, the progress in China in less than 30 years is remarkable.

Similarly, comparing China against the standards of legal systems in the United States or Europe, or worse yet against an idealized version of those legal systems or the utopian, perfectionist requirements of human rights activists, will result in bitter disappointment about "the lack of rule of law in China." But one cannot compare China's legal system against the standard of other developing states without feeling positive about Chinese accomplishments to date. The outcome of the rule of law assessment will also depend on which aspect of the legal system one focuses on. The quality of the judiciary varies by the level of the court, the division within the court, the region, and the type of case.<sup>53</sup> Many of the worst problems with judicial corruption and competence are in basic level courts. On the whole, courts in the more developed eastern region

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52. Of course, judicial corruption is not only a matter of low salaries. See CHINA'S LONG MARCH, *supra* note 15, at 280.

53. See Hualing Fu, *Putting China's Judiciary into Perspective: Is It Independent, Competent and Fair?*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 193 (Erik G. Jensen & Thomas C. Heller eds., 2003).

and in larger cities are more advanced than courts in the western or middle region and in small towns. Of course, a professional, competent, and honest judiciary is only one of the institutions required for a functional legal system: the legislature, police, and procuracy, as well as the legal, notary, and accounting professions, are all progressing at different rates and confronting their own set of sometimes overlapping issues.

In addition, different areas of law progress at different rates. The Chinese judicial system has particular problems with two types of cases. The first involves direct threats to the regime arising from political dissidents, potentially disruptive religious-based movements such as Falungong, labor activists, and minority rights activists, including Tibetans and Xinjiang Muslims claiming self-determination. These types of cases are problematic because they challenge the legitimacy of Party rule. They are also problematic because China *is* relatively unstable and thus the government must proceed with caution given the high potential for, and horrific consequences of, social chaos. Criminal law is the other main trouble spot for the legal system, but its complications arise for different reasons, as explained below.

Many reforms have increased the efficiency and the fairness of the Chinese legal system as a whole, as indicated in China's higher scores on the World Bank rule of law index, which largely reflects the elements of a thin or procedural rule of law. Evaluating the system in terms of broader standards such as justice or human rights is more controversial because justice means different things to different people and human rights are much contested, especially when moving beyond the broad wish list of abstract rights in international treaties to the interpretation and implementation of those broad provisions in practice. In China alone, liberals, communitarians, neo-authoritarians, and statist socialists are likely to disagree over many specific issues, from the proper balance to draw between national security and the freedoms of speech and association to the proper standards of judicial interpretation.<sup>54</sup>

With the exception of civil and political rights, China generally outperforms the average state in its income class on most major human rights and well-being indicators. To be sure, overall improvement is consistent with great regional variation and worsening conditions for some.<sup>55</sup> Yet such problems are generally beyond the power of the courts to resolve and thus require a political solution. Indeed, legal reform is an inherently political process. This is evident in the attempts to provide fairer trials in criminal cases by adopting a series of reforms aimed at producing a more adversarial system, as well as in the adoption of

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54. CHINA'S LONG MARCH, *supra* note 15, at 71–109.

55. See *Assessing Human Rights in China*, *supra* note 31.

simplified procedures and the debates over whether to eliminate administrative detention.

### B. *Criminal Law: A Rocky Road to an Adversarial System*

One of the most significant reforms in criminal law was the transition from an inquisitorial system to a more adversarial system in the mid-1990s. In an inquisitorial system, a judge or prosecutor carries out the pretrial investigation; detention periods tend to be long, with little role for the lawyer, who is often limited to brief visits with the accused after the initial questioning; at trial, the judge actively pursues the truth by questioning witnesses and overseeing the production of evidence. The process is structured as a search for truth conducted by impartial officers of the state. In contrast, in an adversarial system the process is structured as a contest between the parties. Judges are not involved in pretrial investigation; lawyers play a much larger role both before and during the trial; and the judge serves as a passive umpire during the proceedings.<sup>56</sup>

Thus, the move to an adversarial system in China radically altered the role of procuratorates, judges, and lawyers. The 1996 amendments also provided a number of rights to protect the accused, including earlier access to a lawyer, the right to review documents and call witnesses, the right to post bail, and limits on the length of detention.

The extent to which these changes were attributable to foreign pressure as opposed to domestic demands is difficult to determine, as China's criminal system was under attack both abroad and at home by those working within the legal system. Again, China did not simply attempt to import wholesale a particular foreign model—much to the dismay of foreign critics.<sup>57</sup> Nevertheless, the changes clearly reflected a shift from an inquisitorial system toward an adversarial one, and thus the new model could be considered more of an import than a homegrown product (although the inquisitorial model itself was an earlier import from Germany and Japan). The change reflected the increased familiarity of Chinese reformers with U.S. law and the prestige and power of the United States, which arguably has led to the Americanization of criminal

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56. See Langer, *supra* note 5, for a more extensive discussion of adversarial and inquisitorial systems.

57. For a discussion and critique of the amendments, see JONATHAN HECHT, LAWYERS COMMITTEE FOR HUMAN RIGHTS, *OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW 19-76* (1996); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL CODE 27-61* (1998).

law (as seen in the trend to interpret the rights provided in the ICCPR and other international treaties in terms of an adversarial model).<sup>58</sup>

The central authorities hailed the changes as a milestone on the road to rule of law and issued the usual notices to the relevant state actors, urgently encouraging them to faithfully implement the reforms. Unfortunately, implementation has proven exceedingly disappointing. Lawyers have been routinely denied access to their clients, prosecutors have refused to turn over exculpatory evidence or provide defense counsel access to all the information in the dossier, defense counsel have been unable to question key witnesses who fail to appear at court, the high rate of confessions has reduced the role of lawyers to the seeking of leniency, and allegations of torture remain common.<sup>59</sup>

What accounts for these difficulties? Are they the result of political ideology—the repressive authoritarian state out to persecute criminal defendants and repress political dissidents—as commonly suggested in Western news accounts? Political ideology is at best only a small factor. Most cases are run-of-the-mill criminal cases involving theft, murder, rape, drugs, and the like. While crime disrupts social order, criminals do not directly challenge the Party's right to rule. To be sure, the Chinese government has an interest in maintaining law and order, as do all governments. But what distinguishes criminal law from other areas of law is the lack of public support for criminal law reforms; the majority of the citizenry see such reforms as harming, rather than furthering, their interests. At the same time, there is little political support for criminals. The government has responded to the fears of the public by acceding to

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58. Wolfgang Wiegand, *Americanization of Law: Reception or Convergence*, in LEGAL CULTURE AND LEGAL PROFESSION 137 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996); see also Langer, *supra* note 5 (arguing that while U.S. influence may be producing deep changes in other legal systems, these systems may still diverge in important ways); Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 850 (2000) (noting reservations regarding the adoption of common law norms and practices with respect to the International Criminal Tribunal for Rwanda).

59. See HUMAN RIGHTS IN CHINA, EMPTY PROMISES: HUMAN RIGHTS PROTECTIONS AND CHINA'S CRIMINAL PROCEDURE LAW IN PRACTICE (2001); Ping Yu, *Glittery Promise vs. Dismal Reality: The Role of the Criminal Lawyer in the People's Republic of China After the 1996 Revision of the Criminal Procedure Law*, 35 VAND. J. TRANSNAT'L L. 827, 835 (2002); CONG.-EXECUTIVE COMM'N ON CHINA, 107TH CONG., ANNUAL REPORT (2002), available at <http://www.cecc.gov/pages/annualRpt/2002annRptEng.pdf> (claiming, *inter alia*, that the impact of reforms of the Criminal Procedure Law and Criminal Law has been minimal on the protection of criminal suspects and defendants; China's criminal justice system is subject to manipulation by authorities; torture remains widespread; and access to lawyers is often denied); CHEN WEIDONG, XINGSHI SUSONGFA SHISHI WENTI DIAOYAN BAOGAO [Survey Report on the Problems in Implementation of Criminal Procedure Law] (2001); Jerome Cohen, *The Plight of Criminal Defense Lawyers*, Statement at the Congressional-Executive Commission Roundtable Discussion on Challenges for Criminal Justice in China (July 26, 2002), available at <http://www.cecc.gov/pages/roundtables/072602/cohen.php>.



demands to crack down on crime. Thus, interest group politics explain much of China's harsh approach on crime, much as they account for the war on crime in other states.

The harsh treatment of criminals is also the result of *cultural factors*, including majoritarian preferences for social stability, a tendency to favor the interest of the group over the individual, and the lack of a strong tradition of individual rights. The traditional Chinese emphasis on substantive justice also makes it harder to take the procedural rights of criminals seriously.

*Economic factors* and *social change* also play an important role in undermining efforts at criminal reform. Industrialization, urbanization, and the transition to a market economy generally lead to rising crime rates, particularly when combined, as they usually are, with increased social and economic inequality. Indeed, in China market reforms have led to higher crime rates, reflecting the re-emergence of criminal activity such as violent crime, organized crime, drug-related crime, prostitution, and gambling.

The rise in crime as a result of economic transition has undermined efforts to implement liberal criminal law reforms in many states. Immediately after the fall of socialism, many of the former Soviet republics enacted liberal criminal laws that afforded suspected criminals the procedural safeguards lacking during the Soviet period. The rising crime rates that followed, however, resulted in a popular backlash that led to a rollback in the recently enacted rights for the accused.<sup>60</sup>

*Institutional factors* again play a significant role in this area. China's weak legal institutions have been unable to resist the combined pressure from an angry public demanding heavy punishments to deter criminals and a political regime seeking to shore up its legitimacy by pandering to the public's appetite for vengeance. Indeed, key institutions have not fully committed to reforms. Not surprisingly perhaps given their law and order orientation, the police and procuracy in particular have resisted many of the changes. Even the judiciary has been at best lukewarm.

The amendments fundamentally altered the roles of the police, prosecutors, judges, and defense bar, upsetting the balance of power among them and challenging longstanding institutional norms. The police and prosecutors, who stood to lose the most, have resisted yielding power to the courts and defense bar. The police and procuracy are in a difficult position. On the one hand, crime rates will inevitably rise given the larger trends of marketization, urbanization, and modernization. On

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60. Jacek Kurczewski & Barry Sullivan, *The Bill of Rights and the Emerging Democracies*, 65 LAW & CONTEMP. PROBS. 251, 281-82 (2002). Latin Americans have also reacted to increased crime by curtailing liberal reforms. See HAMMERGREN, *supra* note 33, at 10.

the other hand, the police, and procuracy have lost, and will inevitably continue to lose, power to the courts, defense bar, and the people's congresses as China moves toward a more law-based order. Accordingly, they have borne much of the blame for failing to curb crimes while simultaneously suffering diminished powers to fight the war. The result has been a series of petty but highly symbolic skirmishes over status, including debates on whether prosecutors must stand when judges enter the room and whether judges may sit at elevated podiums. More seriously, the procuracy has sought increased powers of supervision over individual court decisions and issued a series of interpretations restricting the rights the amendments provided. These interpretations are at odds with more accused-friendly interpretations from the Supreme People's Court or the even more expansive interpretations of the defense bar and some legal academics. Meanwhile, the police have opposed legislative changes that would restrict the Ministry of Public Security's rulemaking capacity, impose more procedural and substantive restraints on the exercise of police power, and subject police discretion to increased supervision.

Some of these problems are due to institutional inertia. For example, the Chinese criminal system has long emphasized confessions. Similarly, long periods of detention, lengthy interrogations, limited participation by legal counsel in the pretrial phase, less reliance on oral evidence at trial, brief trials before a judge without a jury, less concern for evidentiary rules (including greater reliance on hearsay evidence), and narrower exclusions of tainted evidence are all deeply embedded features of the civil law tradition.

In sum, notwithstanding the relatively short time frame and marginal improvements for some criminal suspects, the criminal reforms have largely been a failure at the basic level of compliance. Perhaps they were just too drastic, requiring a shift in power toward the courts and the defense bar when the former were relatively weak and the latter even weaker. Moreover, the reforms—although widely supported by legal academics, the defense bar, and foreign commentators—did not receive support from the general public. Indeed, it would be odd if the legal system were to actually provide criminal suspects all of the rights granted them under the laws. Given the shortcomings in the legal system as a whole in delivering on rights protection, criminals would then receive more protection than ordinary law-abiding citizens! One would not expect criminal law to be the leading force for legal reform or the cutting edge for taking rights seriously.

A useful thought experiment is to consider whether reformers would have been better off trying to build on and improve the inquisitorial

system and whether it would be better at this stage to revert back to this system. Most likely, any attempt to improve on the inquisitorial system would also have met, and would still meet, with limited success. An inquisitorial system requires impartial and professional prosecutors and judges committed to discovering the truth. At the time, there was little differentiation between the criminal system and the political system, and the level of professionalism was relatively low. Today, there is somewhat greater differentiation and a higher level of professionalism, although the feasibility of an impartial quest for the truth is debatable given the high importance China assigns to the war on crime.

Nevertheless, the inquisitorial system, with its longer detention periods that reduce threats to society at the expense of individual liberty, fits more readily with the public's desire for social stability. With its emphasis on truth, it also conforms more closely to the traditional Chinese emphasis on substantive justice than does the adversarial system, which stresses procedural justice and a fair fight between the parties. Skillful lawyers who exonerate their clients on a technicality are even less likely to be celebrated in China than elsewhere. Thus, an inquisitorial system might reduce the conflicts between the defense bar and the police, procuracy, and courts—conflicts which have resulted in the arrests of hundreds of lawyers for allegedly obstructing justice, inducing false testimony, or fabricating evidence. It is perhaps worth noting that some of the more successful criminal law systems in Asia (and indeed the world) are primarily inquisitorial, including the Japanese system.<sup>61</sup> Although

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61. Although Japan has adopted a more adversarial system since World War II, the system retains many of the features of an inquisitorial system, including the emphasis on the search for truth carried out by impartial and professional prosecutors, the distrust of defense counsel and the limits on counsel's ability to meet with the accused and conduct discovery, the long periods of detention during investigation, the limited access to bail for those who have not confessed, and the relaxed rules of evidence that allow for consideration of hearsay evidence and the introduction of illegally obtained evidence. While such features seem alien to a U.S. lawyer steeped in the adversarial tradition (with trial by a lay jury) and may in certain cases lead to abuse or miscarriages of justice, they must be viewed in terms of a highly professional procuracy that goes to great lengths to ensure that the facts of the case are clear, the punishment both fits the defendant and the crime, and the punishment is consistent with other similarly situated defendants whose circumstances are explored in great detail. Furthermore, the Japanese system seeks not only or even primarily punishment in most cases. Rather, the emphasis is on rehabilitation and reintegration of the accused into society. DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE* 74, 84 (2002) (noting that in Japan, "[l]awyers are not permitted to be present during interrogation;" suspects have the right to remain silent but may be and often are interrogated for hours at a time for up to 23 days; fewer than 10% of suspects secure the services of a lawyer during the investigative phase; prosecutors typically limit contact between the lawyer and the accused to three short visits of fifteen minutes each if the accused has not yet confessed; and "[p]rosecutors, police and prison guards may censor written communications between the accused and defense counsel"). Despite some areas of concern, Johnson concludes the "normative bottom line" is that "the Japanese way of justice is uncom-

Japan, Taiwan, and other states are under pressure from human rights critics to adopt a more liberal rights-based approach, whether such an approach would be successful is doubtful given public attitudes.<sup>62</sup> In sum, while all criminal justice systems suffer from serious flaws, an inquisitorial system might better suit China's current circumstances.<sup>63</sup>

### C. *The New Summary and Simplified Procedures: Balancing Justice and Efficiency*

In response to the rising number of criminal cases and the heavy burden imposed on criminal judges, the Supreme Court, Supreme Procuratorate, and the Ministry of Justice jointly issued regulations in early 2003 that provided for summary procedures in regular criminal cases.<sup>64</sup> *Summary procedures* are now an option in criminal cases in which the facts are clear, the defendant admits guilt, the evidence is sufficient, and the maximum potential punishment is less than three years in prison. A single judge oversees the trial, as opposed to the usual panel of three judges.<sup>65</sup> In keeping with the traditional Chinese emphasis on

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monly just," especially in comparison to the punitive and highly dysfunctional criminal justice system United States. *Id.* at 280.

62. See, e.g., Jeff Vize, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 UCLA PAC. BASIN L. J. 329 (2003). In recent years, the Constitutional Court in Taiwan has exercised its newfound authority by greatly expanding the rights of criminal suspects, notwithstanding similar views among the Taiwanese public, as in China, regarding the need to wage war on crime. In 1991, 58% of Taiwanese approved of executing criminals in public, 68% endorsed passing special laws to attack crime, and 59% believed that punishment was more important than compensation for the injured. In 1999, over two-thirds thought punishments were too lenient, while only 1% thought punishments were too harsh. Furthermore, over 42% believed that suspects could be detained, even if there was not sufficient evidence to prove them guilty of serious crime, as long as there was reasonable suspicion. See Tsung-fu Chen, *The Rule of Law in Taiwan: Culture, Ideology, and Social Change*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 374, 400 (Stephen C. Hsu ed., 2003) (arguing that without support for the protection of human rights, it is doubtful that rule of law can be realized in Taiwan—or at least the liberal democratic version of rule of law entailed by such rights).

63. There is little if any chance that China will revert back to an inquisitorial system: the global trend is toward an adversarial (if not American) model; human rights organizations would have a fit; domestic reformers and legal academics, many of them trained in the United States, would oppose the changes; and central authorities are unlikely to reverse themselves so soon after the decision in the mid-1990s to move toward an adversarial model.

64. ZUIGAO RENMIN FAYUAN GUANYU GUANYU SHIYONG JIANYI CHENGXU SHENLI GONGSU ANJIAN DE RUOGAN YIJIAN [Supreme People's Court's Several Opinions on Applying Summary Procedures to Try Cases of Public Prosecution] (2003).

65. Summary procedures are likely to give rise to additional cases of corruption and improper influence because it is easier to corrupt one judge than a panel of three. In most cases, however, judges will be wary about not convicting defendants if the judge has accepted bribes, since their actions are likely to be carefully scrutinized in light of the strike-hard campaign. In addition, the procuratorate has the right to challenge the decision through the *kangsu* procedure. Recently, the Supreme Court has also issued rules that hold individual judges accountable for mistaken decisions. See CHINA'S LONG MARCH, *supra* note 15, at 297–98. The

rehabilitation, judges are instructed to treat leniently those who voluntarily admit guilt.

At the same time, the Supreme Court, Supreme Procuratorate, and Ministry of Justice jointly issued regulations that streamlined the procedures in ordinary criminal cases.<sup>66</sup> The regulations apply to cases of first instance in which the defendant raises no objection to the basic facts and voluntarily admits guilt. In contrast to summary procedures, the case is still tried by a panel of three judges rather than a single judge.

The move toward simplified procedures began as an unapproved local experiment and thus is another example of a bottom-up innovation. Indeed, at the time, critics pointed out that the simplified procedures were at odds with the Criminal Procedure Law. The procedures resemble plea bargaining, which inquisitorial systems have traditionally shunned because it is inconsistent with their emphasis on impartial discovery of the truth. In recent years, however, Italy, France, Argentina, and other inquisitorial systems have adopted plea bargaining institutions, although they differ in important ways from the U.S. model.<sup>67</sup> Whether PRC advocates of summary and simplified procedures deduced or induced the new procedures in light of plea-bargaining models in other states—and thus whether the changes are to some extent a foreign transplant—is hard to say. Surely judges in China all have some familiarity with plea bargaining—at the very least from U.S. television and movies. Yet judges were also responding to local circumstances.

Again, the criminal reforms are not simply a matter of blindly copying a particular foreign model. The two regulations attempt to address efficiency problems without going so far as to accept a U.S.-style plea bargaining system. The summary procedures are limited to cases with a maximum potential sentence of three years, and the simplified procedures cannot be used in cases in which the death penalty is possible. In contrast, in the United States, even offenders charged with crimes subject to capital punishment may plea bargain. Both the summary and simplified procedures also differ from U.S.-style plea bargaining in that the defendant and procuratorate do not agree in advance to a (recommended) sentence or, in the case of charge-bargaining, to the charges. Rather, the judge or judicial panel has the final authority to set the sentence, subject to the proviso that those who voluntarily confess should be treated leniently. Given the wide range of possible sentences, and the

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rules have not been used much to date, in part because of the collective nature of judicial decisionmaking, which makes it difficult to hold individual judges accountable.

66. GUANYU SHIYONG PUTONG CHENGXU SHENLI “BEIGAO RENZUI ANJIAN” DE RUOGAN YIJIAN (SHJXING) [Several Opinions on Applying Ordinary Procedure to Try “Cases in Which the Defendant Pleaded Guilty” (Trial Implementation)] (2003).

67. See Langer, *supra* note 5.

inevitable vagueness in determining what counts as serious or aggravating circumstances, judges still retain considerable discretion in determining the sentence. On the other hand, the summary and simplified procedures are more oriented toward substantive justice and ascertaining the truth than U.S. plea bargaining. The judge must confirm that the defendant's acts do in fact constitute a crime and that the evidence is sufficient to support the charge. Thus, it is not possible, at least in theory, for the defendant to plead guilty to a lesser charge that clearly does not fit the facts in exchange for a lighter sentence, as happens in the U.S. system. The court must also verify that the defendant has voluntarily admitted guilt, thus giving defendants who wish to repudiate their confessions an opportunity to do so and to raise any claims of torture or coercion. Moreover, rather than giving up the right to trial completely, the defendant has the right to make a statement and present "a defense" in order to explain the situation and persuade the court to act leniently.<sup>68</sup>

Although the new rules are at odds with traditional inquisitorial processes, they are consistent with the longstanding tradition in China of emphasizing rehabilitation and confessions in exchange for leniency, which may explain their quick adoption. The procedures may also have benefited from the championing of the Haidian court in Beijing, which is known for its progressive nature and highly qualified judges (since many judges are willing to take lower positions than they might receive elsewhere to stay in Beijing). Perhaps more importantly, the changes enjoyed widespread support among key institutional players. Judges, prosecutors, and lawyers all benefit from a process to quickly resolve cases. Judges can avoid making tough calls and risking reversal on appeal. Prosecutors can meet their case quotas with less effort and ensure convictions. Lawyers, who can rarely charge high fees given the low economic status of most criminals, can rely on volume to generate income while still claiming success based on their ability to obtain a lenient sentence.

Even though the new procedures are too recent to assess empirically, the advantages and disadvantages of plea bargaining in general are well known.<sup>69</sup> While some scholars debate the need for plea bargaining, most

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68. The system is therefore similar to the German plea-bargaining system. *Id.*

69. For critical accounts, see Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992). For positive accounts, see Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992). For a thought-provoking description by a former public defender and prosecutor, see David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW & SOC. INQUIRY 115 (1994) (noting that in seven state counties in the United States, 100% of convictions

concede that legal systems could not function without it—at least without devoting considerably more resources to criminal cases than the public is likely to approve. Plea bargaining's main disadvantages are normative. Even supporters acknowledge that it deviates from the image of a criminal justice system that protects the rights of the accused through elaborate procedures culminating in a trial by a jury of one's peers:

The criminal process that law students study and television shows celebrate is formal, elaborate, and expensive. It involves detailed examination of witnesses and physical evidence, tough adversarial argument from attorneys for the government and defense, and fair-minded decision-making from an impartial judge and jury. For the vast majority of cases in the real world, the criminal process includes none of these things. Trials occur only occasionally—in some jurisdictions [in the United States], they amount to only one-fiftieth of total dispositions. Most cases are by means that seem scandalously casual: a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then "sold" to both the defendant and the judge. To a large extent, this kind of horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.<sup>70</sup>

Most significantly, the accused often have little choice but to accept whatever the prosecution offers, and some innocent people, particularly those who are risk-averse, will accept a plea bargain and admit guilt to avoid much heavier punishment. In China's case, the accused will likely feel even more constrained, given high Chinese conviction rates, the threat of a heavier punishment, and the practical obstacles to mounting an effective defense.

If the accused does accept a deal, a judge will then review the plea; as in other states the review will likely be formalistic and perfunctory. At the hearing, the accused will repeat the magical words, prescribed by his

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were obtained by guilty pleas without jury trials; some judges threatened—and imposed—draconian punishments for defendants who refused to plea bargain. Judges, prosecutors, and defense counsel favored plea bargains because jury trials were much more work and fraught with professional risk for the judge if the case was overturned on appeal, for the prosecutor if the defendant was acquitted, and for defense counsel if the defendant was found guilty and subject to a much heavier punishment. Meanwhile, prosecutors, far from agonizing over appropriate sentences, made snap decisions usually within three minutes for misdemeanors and ten minutes for serious felonies based on only a cursory knowledge of the facts of the case.).

70. Scott & Stuntz, *supra* note 69, at 1911–12.

lawyer or communicated by the police, regarding his guilt and the voluntariness of his plea. Nevertheless, in some cases the judge may examine the dossier and acquit if the facts or legal basis for conviction are obviously lacking. The hearing also provides an opportunity for the accused to allege torture or other police misconduct and to change his plea.

#### D. Administrative Detention: China's Second Line of Defense

Administrative detention refers to any arrangement whereby an administrative official, rather than a judge, decides to detain a person in physical custody under a process not governed by the Criminal Procedure Law. There are several different types of administrative detention, including: (i) administrative detention up to 15 days (*xingzheng juliu*) under the Security Administrative Punishments Regulations (SAPR); (ii) education through labor (ETL) (*laodong jiaoyang* or *laojiao* for short),<sup>71</sup> which has received most of the attention abroad and within China; (iii) detention for education (*shourong jiaoyu*); (iv) compulsory drug treatment (*qiangzhi jiedu*); (v) forced detention in psychiatric hospitals; (vi) detention of juveniles who commit criminal offenses in juvenile centers (*shourong jiaoyangsuo*) or juvenile ETL centers and detention of juvenile troublemakers whose actions do not amount to criminal offenses in work-study schools (*gongdu xuexiao*); and (vii) stop and question (*liuzhi panwen*), whereby suspects may be detained for up to 48 hours of questioning.

For present purposes, the first salient point is that the mix of types of administration detention has changed over time. Revisions to the Criminal Procedure Law in 1996 eliminated one of the more well-known forms of detention—detention/shelter and investigation (*shourong shencha*)—while essentially incorporating its central aspects. In June 2003, the State Council repealed the 1982 regulation regarding detention for repatriation (*shourong qiansong* or DR), which mainly targeted migrant workers, and issued new regulations that maintained the social welfare function but removed the compulsory detention component.<sup>72</sup> The new provisional rules require authorities to inform migrant workers, homeless people, beggars, and others without means of support about relief centers. These centers provide food and shelter to those in need, send them to hospitals for medical treatment if necessary, contact their relatives, and arrange for transportation back to their homes.

71. This is often referred to as “re-education through labor” or RTL, but I shall use the more direct translation of “education through labor.”

72. See State Council Administrative Measures for Assistance to Indigent Vagrants and Beggars in Urban Areas (2003); Ministry of Civil Affairs Detailed Implementing Rules for the Administrative Measures for Assistance to Indigent Vagrants and Beggars in Urban Areas (2003).



Administrative detention of prostitutes and drug users was eliminated and then reinstated when prostitution and drug use arose again in the reform era.

The second important point is that the purpose and application of administrative detention has changed as well. Whereas in the past administrative detention was a way of dealing with political offenses, administrative detention today mainly deals with petty criminals. The main purpose is still to rehabilitate, retrain, and find employment for minor offenders, encourage prostitutes to look for other ways to earn a living, and treat drug addicts.<sup>73</sup> Although administrative detention now also serves more punitive and deterrent ends, it is meant to be a lesser form of punishment than that of the decidedly harsh criminal law system, which historically was reserved for enemies of the state and hardcore recidivists who resisted efforts to transform them into productive members of society. Financially desperate migrants unable to find a job or to obtain payment of their salaries and youths with too much time of their hands and an increasing taste for the material offerings available as a result of economic reforms are the biggest offenders. Administrative detention is therefore an intermediate line of defense between persuasion by family, friends, and neighbors and hard time in prisons.

Administrative detention is clearly not a transplant from contemporary Western liberal democracies. In fact, human rights organizations have demanded elimination of all forms of administrative detention, particularly education through labor. Yet the Chinese government has resisted international and domestic pressure. Reforms to the system have largely been the result of changing internal conditions. The State Council, for example, had been considering reform of DR for some time, in part because of widespread abuses of migrant workers while in custody. What ultimately tipped the scales, however, was the public uproar over the tragic death of college graduate Sun Zhigang while in detention. His death led to large demonstrations in Guangdong and unprecedented petitions by legal scholars challenging the legality of DR and calling for its abolishment. The conversion of DR from a coercive mechanism for addressing surging crime and social problems caused by the influx of over 100 million migrant workers into a means of humanitarian relief was also the result of a change in leadership. The new Hu-Wen government sought to garner public support by presenting a humane face and to differentiate itself from the Jiang regime by assigning a higher priority to

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73. Chen Ruihua, *Laodong Jiaoyang de Lishi Kaocha yu Fansi* [Survey of and Reflections on the History of ETL], in LIXING YU ZHIZU: ZHONGGUO LAODONG JIAOYANG ZHIDU YANJIU [Rationality and Order: Research on China's Education Through Labor System] 1, 9, 13 (Chu Huaizhi et al. eds., 2002).

social justice issues and the protection of those left behind by China's economic reforms.

The future of administrative detention is difficult to predict. In general, there are three main schools of thought. One group, consisting primarily of liberal academics and rights activists, believes that at least ETL and perhaps all forms of administrative detention should be eliminated.<sup>74</sup> Some in this group would incorporate some or all of the current minor offenses handled through administrative means into the Criminal Law but decrease the possible punishments and rely more heavily on noncustodial sanctions such as fines, community service, and probation. Still others would completely depenalize some offenses.

The second group, consisting mainly of government officials from the Ministry of Justice, the Ministry of Public Security, and the police, favor maintaining ETL and other forms of administrative detention, albeit with minor reforms. They insist administrative detention is necessary to maintain law and order given the increase in crime and its changing nature. They also resist attempts to subject administrative detention to further judicial review.

The third, and by far the largest, group would retain ETL and other forms of detention but subject them to major reforms, including national-level legislation (a NPC law) to shore up their legal basis, clarify the scope of offenses, and provide additional procedural constraints and safeguards. Some in this group may prefer more drastic reforms or even the elimination of administrative detention, particularly ETL, but they believe abolishment is not presently possible given strong resistance among the general public and lack of political will from the top, where central leaders repeatedly emphasize the need to strike hard at crime. Thus, they see major reform as a politically necessary compromise. Others in this group, including even some liberal, reform-minded legal scholars, believe the rise in crime and the need to ensure social stability create a legitimate need for ETL and other forms of administrative detention while China negotiates its way through a difficult period of economic, political, and social transition.

In terms of assessment, administrative detention is no doubt subject to abuse and in need of reforms. As already noted, however, the formal criminal system is no better and is worse in many ways. Eliminating all forms of detention will likely hurt the vast majority of those the reformers are seeking to help. Abolishing administrative detention will push many marginal offenders into the harsh and decidedly unfriendly penal system, force them to live with hardened criminals, and result in their permanent stigmatization as convicts.

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74. This group is relatively small, at least with respect to ETL. *Id.* at 1.

Moreover, those subject to the formal criminal law will likely receive much longer sentences.<sup>75</sup> Non-custodial sanctions will not be appropriate for many of the migrant workers, prostitutes, drug users, or youths who make up the majority of detainees. For instance, fines only work if people have the money to pay them or at least have a job so they can earn the money to pay them. But the unemployed youths or migrant workers who do not find a job or do not make enough to live on as it is do not have the means to pay fines. Nor would fines necessarily be desirable in the case of prostitutes and drug addicts. To pay the fines, prostitutes presumably would have to go back to prostituting, and drug addicts might have to resume stealing or selling drugs.

A much more likely result than greater reliance on non-custodial sanctions or depenalization is the creation of new ways to criminalize behavior. This is in effect what happened when the government eliminated Shelter and Investigation as a form of administrative detention but then largely incorporated it into the criminal law and compensated through greater reliance on DR. Similarly, the elimination of DR has begun to give rise to new ways of handling social problems caused by the influx of migrant workers.<sup>76</sup> Noting that the repeal of DR led to increased crime and abuse of relief centers by non-indigent individuals, the Ministry of Public Security issued the "Notice Regarding the Strengthening of Current Social Order Management in Accordance with Law." The Notice calls on public security to redouble its efforts in attacking a variety of deviant behavior, including interfering with traffic when begging, disturbing the public order by aggressive begging in public places, soliciting for prostitution in public places, and interfering with government activities when petitioning officials for relief.<sup>77</sup> Clearly worried

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75. See *Out of the Pan and into the Fire*, *supra* note 21.

76. In Jiangxi, several vagrants were rounded up and left in a remote area in freezing temperatures as part of a city "beautification" campaign. Local government officials claimed they lacked the funds for welfare centers. *To Improve the City, Seven Patients Were Abandoned to the Wilderness*, CHINA YOUTH DAILY, June 7, 2005, available at [http://zqb.cyol.com/gb/zqb/2005-06/07/content\\_14928.htm](http://zqb.cyol.com/gb/zqb/2005-06/07/content_14928.htm) (last visited Mar. 10, 2006). Begging has become much more prevalent in many cities. Newspapers regularly carry stories about "professional beggars" who make huge sums faking illness and exploiting children to evoke pity. Public Security officials in Guangzhou claim that 80% of the city's beggars are not genuinely indigent. Erik Moberg, *Virtual Vagabonds*, ASIA TIMES ON-LINE, Jan 14, 2006. Dalian has passed anti-begging regulations. Critics charged that the regulations are unconstitutional because only the NPC can restrict personal freedom. See *Legitimacy of Local Rules*, CHINA DAILY, May 18, 2005, available at [http://www.chinadaily.com.cn/english/doc/2005-05/18/content\\_443240.htm](http://www.chinadaily.com.cn/english/doc/2005-05/18/content_443240.htm) (last visited Mar. 10, 2006); *Begging Bans Reveal Intolerant Society*, CHINA DAILY, May 23, 2005, available at [http://www.chinadaily.com.cn/english/doc/2005-05/23/content\\_444691.htm](http://www.chinadaily.com.cn/english/doc/2005-05/23/content_444691.htm) (last visited Mar. 10, 2006).

77. Ministry of Public Security, *Notice Regarding the Strengthening of Current Social Order Management in Accordance with the Law*, Doc. No. 52. The Notice also calls on public security officers to punish activities of hooliganism that disrupt public order, such as panhan-

about the financial and social order impact of the national regulations, several local governments have also rushed to pass regulations that attempt to shift some of the financial burden to others and clarify many of the difficult operational issues resulting from the new policy.<sup>78</sup> In some cases, the local provisions allow authorities to take certain individuals to relief centers or compel them to receive medical treatment, thus creating exceptions to the general principle of voluntariness.<sup>79</sup>

Finally, summary procedures were in response to an increase in caseloads; the number of criminal cases in China has risen rapidly to over 500,000 today.<sup>80</sup> There are also more than three million minor cases

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dling, camping in the open, provoking disturbances, and inciting crowds to fight in or around such public places as offices, schools, hospitals, public squares, movie theaters, and famous scenic spots.

78. For instance, Inner Mongolian regulations emphasized that the problems of migrancy and vagrancy could only be addressed through the combined efforts of government, society, and families. The regulations require local governments to pick up the tab for return transportation and to help solve the economic difficulties of migrants so they do not head back to the cities. In addition, the regulations call for the education of families regarding their responsibility to look after vagrants. They also ominously, if vaguely, warn that those who fail to provide support will be "strictly dealt with according to law." The Mongolian government also emphasized that the relief centers were only for the temporary assistance of those in dire circumstances who lacked the ability to meet basic living needs. The vast majority of those who come to centers will still be sent back to their homes. In addition to reiterating that the maximum stay is ten days unless the next higher-level government department approves an extension, the regulations limit vagrants to two stays within a six-month period. If vagrants refuse to leave after their time is up, relief services will be terminated. If the relief centers cannot track down the families of minors, seniors, handicapped people, and the mentally impaired, after 15 days the center staff is to contact the same level government to arrange for their relocation. The regulation is silent as to where they will be relocated. The centers may also deny services to anyone who refuses to provide accurate information about their identity, residence, and financial resources. See Inner Mongolian Autonomous Region Government, *Notice To Carry Out Well the Relief Management Work for Urban Indigent Vagrants and Beggars* (Aug. 15, 2003).

79. Although the Inner Mongolian regulations state that relief services are offered on a voluntary basis, the regulations also require public security and other government officials to take the initiative in leading minors, seniors, physically handicapped, and mentally impaired persons without civil capacity or with limited capacity to the relief centers for supervision. Minors are to be sent to youth centers. The mentally ill, those with contagious diseases, and seriously ill people should first be sent to hospitals for treatment. The cost for medical treatment is to be borne by relatives, employers, or the government where the person resides. Once in the center, vagrants are not allowed to leave during the day. The regulations also call for educational activities to help vagrants overcome their difficulties. *Id.* The Yunnan Provincial Government also passed local regulations that allow the authorities to escort handicapped, minors, seniors, and vagrants who refuse to change their behavior to relief centers. In addition, whereas in the past local regulations allowed the authorities to send people who refused to leave after petitioning the government to DR centers, the revised regulations simply state that such people will be dealt with according to law. See Decision of the Yunnan Provincial Government Regarding the Amendment of Two Regulations Relating to Detention and Repatriation (Sept. 10, 2003).

80. See Fu, *supra* note 53, at 194–95.

handled by the police every year.<sup>81</sup> The elimination of administrative detention will inevitably result in greater reliance on summary and simplified procedures, with all the difficulties for the protection of the rights of the accused attendant to resolving cases through plea bargaining.

The complexity of the issues thus complicates the task of predicting the path of reforms. Determining whether administrative detention should be eliminated or, if retained, how the various types of detention should be reformed involves numerous judgments about contested empirical and normative issues and competing institutional interests. These are at once both technical and political issues. The same is true for the next two innovations: adjudicative committees and individual case supervision.

#### E. *Judicial Independence: Adjudicative Committees*

The adjudicative committee consists of senior judges within each court. The committee hears cases that are difficult, controversial, or important for social, economic, or political reasons.

PRC legal scholars have debated the advantages and disadvantages of the adjudicative committee system for more than a decade. Supporters argue that review by more senior judges is necessary in light of the low level of competence of many jurists. They also suggest the system reduces corruption. Some claim the system enhances the independence of the judiciary in that the adjudicative committee, which includes the president and other high-ranking Party members within the court, may be better able to resist outside influences than more junior judges. Zhu Suli, Dean of Peking Law School, has supported the adjudicative committee as an example of a native resource that contributes to rule of law with Chinese characteristics.

On the other hand, the vast majority of PRC legal scholars and most international commentators oppose the system and advocate the abolishment of the adjudicative committee. Under the current system, the judges who decide a case are not those who hear it. Accordingly, the judges who do hear the case feel they have no power. Nor do they feel responsible for the judgment, even when it is issued in their names. Further, critics claim judges hearing the cases become timid and are quick to hand over tough cases to the adjudicative committee rather than working through the issues themselves, even though doing so may result in delays. In addition, the system places considerable power in the hands of the president and vice president of the court, who have acted as gate-

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81. *Id.*

keepers for the adjudicative committee in the past. It may also increase the opportunities for corruption, as disgruntled parties may persuade senior judges to intervene on their behalf. At minimum, these scholars conclude, the system has not been an effective means of reducing judicial corruption. Others counter the assertion that the system increases independence by claiming the adjudicative committee is susceptible to Party influence and likely to uphold the Party line.

Objections of legal scholars notwithstanding, the likelihood of abolishing the adjudicative committee in the near future is low. Thus, some scholars argue that rather than tilting at windmills, reformers should focus their energies on reducing the role of the adjudicative committee and implementing procedural reforms to the way the committee operates.

Consistent with this strategy, the SPC's reforms to the presiding judge system gave individual judges and the collegiate panel more power to decide cases without the need to obtain the approval of the division chief, president, or the adjudicative committee. The SPC's second five-year agenda announced further reforms. The adjudicative committee is now to hear directly major or difficult cases or those with general applicability. The SPC also proposed that the court president or head of the division join the collegial panel. Still another change is to create separate committees for civil and criminal cases.

Foreign advisers who insist on elimination of adjudicative supervision committees as a way to conform the PRC legal system to the image of an independent judiciary in their own states are likely to miss opportunities for marginal improvement. On the other hand, few foreign advisers will have enough knowledge of the operation of the adjudicative committee to provide feasible reform recommendations. Even fewer will be aware of the ebb and flow of internal debates and thus which way the political wind is blowing. But even if they are aware of these factors, their ability to influence the outcome of this inherently domestic political process is usually limited.

#### *F. Individual Case Supervision: Balancing Judicial Independence and Judicial Accountability*

In China, legally effective "final" judicial decisions may be challenged through a process known as "individual case supervision" (*gean jian du* or ICS). This additional review procedure may be initiated by interested parties who petition the court, procuracy, or the people's congress to challenge a legally effective decision on their behalf; it may also

be initiated, in criminal, civil, and administrative cases, by people's congresses, the procuracy, or the court acting on their own.<sup>82</sup>

ICS is certainly innovative. Indeed, this type of review of individual cases by the legislature may be unique to China, and it would run afoul of separation of power principles in most legal systems.<sup>83</sup> Procuracy review of civil cases is also highly unusual, as is review by adjudicative committees after the appeal process has run its course.<sup>84</sup>

ICS began locally and is thus another example of a bottom-up reform. Although an attempt to pass a national law in 1996 died in committee, local governments have continued to experiment with ICS. The Supreme People's Court and Supreme People's Procuracy have issued notices and interpretations regarding various issues arising in conjunction with ICS, and local governments have passed many more regulations since 1996. In terms of the inductive, innovative process described above, the reforms encompassed problem-identification, benchmarking, simultaneous engineering, and some attempts at monitoring and assessment.

Assessing the system is difficult because there is some truth to both sides of the argument over ICS. Supporters argue it is necessary because of the low level of professional competence of some judges, the existence of judicial corruption, and the adverse influence of local and departmental protectionism. They claim supervision helps correct injustices, promotes the rule of law, and serves a deterrent function.

Opponents argue ICS impedes judicial independence, hinders the emergence of a more authoritative court, and leads to conflicts between the courts and other state organs. In addition, ICS undermines the fundamental rule of law principles of certainty and finality: cases drag on for years, without any procedural or time limits. As ICS often occurs before appeal, supervision also distorts the normal appeal process. Moreover, critics argue ICS is inefficient: a large amount of judicial resources are devoted to requests for retrial, while the number of cases in which the judgment actually changes on review is small. Furthermore, although intended to cure the evils of corruption and local protectionism, ICS is an ineffective solution for these systemic problems, which require

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82. For civil cases, see Minshi Susongfa [Civil Procedure Law] arts. 177–85 (1991); for criminal cases, see Xingshi Susongfa [Criminal Procedure Law] arts. 203–08 (1996); for administrative cases, see Xingzheng Susongfa [Administrative Litigation Law] arts. 62–64 (1989). The procedure is referred to as *kangsu*, or protest, when the challenge is brought by the procuracy.

83. The legislature in most legal systems may be able to pass new laws that would result in a different outcome on similar facts in future cases, but they do not have the power to alter the results for the parties in cases already decided by the court.

84. Some legal systems have three tiers of review as part of their normal appeal process, in comparison to the trial plus one-appeal system in China.

systemic solutions. Indeed, ICS itself may lead to outside influence, corruption, and local protectionism, raising the eternal question of who will supervise the supervisors.

In general, people's views of supervision are largely a function of their experiences and position in the system. The people's congress, as the representative of the people, cannot ignore pressure from constituents to address what are often legitimate complaints of horrible injustice. Procuratorates generally favor supervision because it provides another opportunity to prosecute the case and correct their own mistakes in the first trial. Certainly one can understand that prosecutors, who everywhere tend to be more law-and-order oriented than judges, would be upset when judges acquit defendants the prosecutors think are guilty or impose much lighter sentences than they believe criminals deserve. No doubt prosecutors feel the court should accept their interpretations of the laws and views of the facts. Moreover, as an institution, the procuracy is unlikely to cede power easily and accept the elimination or limitation of supervision.

Conversely, the courts are likely to resist supervision. Surely it must be frustrating for judges to appear before a panel of people's congress delegates to explain a decision, especially when many on the panel have not studied law and base their interpretation of the case on a one-sided presentation of the law and facts by one of the parties.

On the whole, parties support supervision when they win as a result of it and oppose it when they lose. As for the public more generally, it is doubtful that many citizens hold an accurate view of the costs and benefits of supervision, the number of supervised cases, the number of reversals, and so on. Supervision will thus likely be an ineffective way to restore confidence and trust in the court. The tendency of the media is to report on cases in which there has been some wrongdoing rather than cases in which the verdict is upheld. The public is therefore likely to obtain a false impression of the number of reversals after supervision and perhaps draw the conclusion that additional ICS would reveal a similarly high percentage of mistaken cases.

The Party and central government have no obvious stake in either side of the argument. From their perspective, the goal is a legal system that can issue fair and impartial judgments in most cases and thus satisfy the need of economic actors for efficient and predictable results and the desire of citizens for equity and just outcomes. ICS is one way to overcome incompetence and corruption, even if at the cost of efficiency.

The number of supervised cases resulting in a change of verdict on retrial would seem to suggest courts incorrectly decide only a small percentage of cases, whether because of judicial incompetence, corruption,



local protectionism, or other reasons. Very few cases are supervised, and even fewer result in a changed verdict.<sup>85</sup> On the other hand, the relatively high rate of reversals, remands, and mediated settlements of the cases actually supervised might suggest that more cases should be supervised.<sup>86</sup> At minimum, it means that eliminating ICS would result in tens of thousands of parties every year being forced to live with unjust decisions. Elimination of ICS on efficiency grounds therefore runs directly up against support of ICS on justice grounds, raising perennial questions about the value of justice.

In my view, ICS is necessary at present. There are still too many cases in which individuals are denied justice to do away with ICS. While some may disagree about the wisdom of retaining ICS, all will agree that significant reforms are necessary to make the process more transparent, fair, and efficient. As these reforms address the issues of judicial competence and corruption, the costs and benefits of ICS will change, as will the balance between judicial independence and judicial accountability, equity and efficiency, and substantive justice and procedural justice. Thus, the desirability of ICS and its operation will need to be revisited in light of changing circumstances.

### III. CONCLUSION

What, then, does this selective survey of legal reforms tell us? First, our descriptive metaphors are of limited utility. In some cases it is possible to describe a particular institution, rule, or practice as a foreign transplant or the result of a top-down/deductive or bottom-up/inductive process. In most cases, however, these metaphors fail to capture the complexity of the situation. Indeed, most reforms will involve a mixture of foreign and domestic inputs that interact in complicated ways, as well

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85. Each year, the courts handle approximately 6 million cases, of which less than 2% end up being retried. 1998 ZHONGGUO FALÜ NIANJIAN 137 [LAW YEARBOOK OF CHINA] [hereinafter LAW Y.B.]; 1999 LAW Y.B. 121; 2000 LAW Y.B. 131; 2001 LAW Y.B. 165; 2002 LAW Y.B. 157; 2003 LAW Y.B. 150. Only a minuscule fraction—between 0.3% and 0.4% of all cases handled by the courts—result in a changed verdict. 1998 LAW Y.B. 1241; 1999 LAW Y.B. 1023; 2000 LAW Y.B. 1211; 2001 LAW Y.B. 1258; 2002 LAW Y.B. 1240; 2003 LAW Y.B. 1322.

86. The ratio of cases reversed to those supervised is, in the aggregate, rather high, although it varies by type of supervision, type of case, and from place to place. For example, in 2001, the courts completed 21,098 cases in which the procuracy protested. Of those, the court reversed its decision in 4697 cases, the court upheld the decision in 7440 cases, the procuracy withdrew the protest in 1055 cases, the court remanded the case in 1538 cases because of new evidence or the facts were unclear, and the parties successfully mediated or reached agreement in 6368 cases. SUPREME PEOPLE'S COURT, 2002 ZUIGAO RENMIN FAYUAN GONGZUO BAOGAO [Supreme People's Court 2002 Work Report], at <http://www.court.gov.cn/work/200302120016.htm>.

as attempts to deduce successful approaches from both general principles and local circumstances and induce possible solutions from experiments, pilot studies, and experiences both in China and abroad.<sup>87</sup> Metaphors such as selective adaptation or “X with Chinese characteristics” are better suited to capturing the complexity of reforms, but they fail to provide much guidance regarding the degree of change involved or the factors explaining the outcome of reforms.

Second, efforts to explain or predict which reforms will be successful are just beginning. Political ideology, level of economic development, position in the global economy, institutional capacity, cultural differences, colonial history, and interest group politics are all key factors. The relevance of the factors will vary in different regions, different states within the region, different types of legal systems, and different areas of law within a given legal system, and will be more or less significant at different stages in the reform process.

Scholars must complement studies relying on abstract variables like rule of law with specific studies that break these variables down into more discrete institutions and practices.<sup>88</sup> Separate studies should focus on each of the major actors: the judiciary, prosecutors, police and correctional officers, and other legal professions. These studies should also take into account the development of other roles and institutions that perform law-related services. Similarly, scholars should pay more attention to the different pace and trajectory of development in various areas of law and explore the mechanisms by which reforms in one area may have spillover effects in other areas.

Additional multistate empirical studies will likely shed further light on some of the main factors that determine success or failure in legal reforms.<sup>89</sup> Such studies, however, cannot explain all of the institutional

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87. This is not surprising, at least for reforms introduced via laws, as the NPC lawmaking process typically involves both domestic and foreign input. Drafters will usually collect relevant laws from many different states for reference. A drafting committee will then tour China to get a sense of the problems people working in the system are facing and their proposed solutions. A drafting group, often headed by a legal scholar or at least involving academics, will then prepare a draft for discussion. The draft will then be circulated to relevant departments and interested parties, including, in some cases, foreign businesses or their representatives such as the U.S. Chamber of Commerce. Drafts of important laws such as the Marriage Law are also made available for public comment. See generally Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 J. ASIAN L. 1 (1997).

88. For a variety of criticisms of current measures of rule of law, including the argument that many of the measures are too abstract to provide specific guidance to policymakers, see Kevin Davis, *What Can the Rule of Law Variable Tell us About Rule of Law Reforms?*, 26 MICH. J. INT'L L. 141 (2004).

89. CHRISTINA BIEBESHEIMER & J. MARK PAYNE, *IDB EXPERIENCE IN JUSTICE REFORM: LESSONS LEARNED AND ELEMENTS OF POLICY FORMULATION 10* (2001), available at <http://www.iadb.org/sds/doc/sgc-IDBExperiences-E.pdf> (noting problems with available

variation or the results in particular states. The outcomes of specific reforms such as individual case supervision or administrative detention will likely be the product of a complex interplay of factors, including a highly contested domestic political process.

Thus, broad empirical studies must be complemented by in-depth case studies that shed light on the local political process and other local factors. In-depth studies may capture factors, such as a change in leadership, that might explain particular reforms—as in the case of the elimination of DR, which stemmed in part from the desire of the new Hu-Wen government to gain public support and differentiate itself from the Jiang regime.

Many commentators have observed that efforts to export rule of law have been unsuccessful.<sup>90</sup> Some attribute this largely to cultural differences,<sup>91</sup> while others point to political factors, such as lack of political participation and local ownership in determining the reform agenda,<sup>92</sup> or economic<sup>93</sup> or institutional factors. Yet reforms have succeeded in many cases, especially in East Asia, where the legal systems of Japan, South Korea, and Singapore are all ranked among the best in the world.

In China's case, reforms have been relatively successful, although there remains much to be improved. While most commentators portray political ideology as the main obstacle to establishing rule of law in China, the biggest obstacles at present are systemic in nature and involve the lack of institutional capacity. In the future, economic factors, the interests of key institutional and social actors, and ultimately political

quantitative data, including that measuring instruments are too general to be of much use); Veronica Taylor, *The Law Reform Olympics: Measuring the Effects of Law Reform in Transition Economies*, in *LAW REFORMS IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed., forthcoming 2006) (discussing and evaluating four popular measures for evaluating legal systems and legal reforms); Carothers, *supra* note 2 (noting that the lack of systematic empirical studies has hindered development of our knowledge base but also suggesting that the complexity of the task of promoting rule of law and particularities of legal systems undermines efforts to develop better theories).

90. See Carothers, *supra* note 2; see also Brooks, *supra* note 2; see also Lindsey, *supra* note 2; see also DEZALAY & GARTH, *supra* note 2.

91. Brooks, *supra* note 2; PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999); Licht et al., *supra* note 49; Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969) (emphasizing the need for legal development reform programs to pay more attention to legal culture); LEGAL CULTURE IN THE AGE OF GLOBALIZATION—LATIN AMERICA AND LATIN EUROPE (Lawrence M. Friedman & Rogelio Perez-Perdomo eds., 2003); cf. Robert Cooter, *The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1996, 191–218 (emphasizing the importance of law complying with efficient social norms), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1090&context=robert\\_cooter](http://works.bepress.com/cgi/viewcontent.cgi?article=1090&context=robert_cooter).

92. See Daniels & Trebilcock, *supra* note 22 (emphasizing political-economy based obstacles over resource or cultural factors in Latin America and Russia).

93. ZAKARIA, *supra* note 26.

ideology (if China remains a single-party socialist state) are likely to exert the most influence on legal reforms and their likelihood of success. This suggests that when political will for change is present, reforms aimed at improving institutional capacity will likely prove beneficial. Reforms, however, must be sequenced to avoid overtaxing the existing institutions.

China's relative success in carrying out legal change to date is partly attributable to strong domestic support for the reforms—reforms which in many cases have deviated from the international community's models. Although the reform process in China falls far short of the deliberative democracy ideal (or even the highly compromised version that exists even in advanced Western liberal democracies), it generally involves a lengthy deliberative process that brings together legislators, academic experts, representatives from key sectors affected by the changes, and foreign consultants. With the passage of the Law on Legislation and experiments in administrative rulemaking, the public has a greater opportunity to participate in lawmaking and rulemaking processes through public hearings and other avenues for comment. Nevertheless, the reform process has been primarily a technocratic one driven by experts and elites inside and outside the government.

China and other East Asian states such as Singapore, South Korea, and Taiwan have implemented reforms, including institution-building measures and investment in education and human resources, that have benefited the broad populace.<sup>94</sup> In contrast, Latin American and African reform efforts have suffered from patronage systems in which government leaders divert state assets into the hands of a few and elites block reform efforts aimed at benefiting the majority of citizens. The problems have continued even after democratization. The public good nature of legal reforms is a barrier to reforms in democracies, in that even though reforms would be welfare-enhancing overall, the benefits may be widely dispersed, leading to collective action problems.<sup>95</sup> Individual beneficiaries of reforms may not have the incentive to become politically active, while those with a vested interest in maintaining the status quo inside or outside the government will be motivated to block reforms or undermine them at the implementation stage.

In China, the government has been able to push through welfare-enhancing legal reforms despite opposition from certain sectors. To be

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94. The correlation between wealth and civil and political rights, economic rights, rule of law and other good governance indicators is lower in Latin America and Africa than in East Asia, indicating that government leaders in Latin America and Africa are not utilizing economic resources for the benefit of the broad public to the same extent as in East Asia. See Peerenboom, *supra* note 32.

95. Cf. Daniels & Trebilcock, *supra* note 22.

sure, even in China, the policy-making process is contested and compromises are frequently required to pass reforms. Nevertheless, the Party generally retains the authority to resolve disputes between different state organs when necessary.

When there is considerable political opposition to reforms among key actors, the options are more limited. Reformers may try to persuade opponents as to the merits of reforms or cajole them into accepting changes that may be at odds with their immediate or long-term interests. Alternatively, they may try to circumvent the opposition by building broad-based support. When the opposition stems from elites seeking to protect their entrenched interests, reformers may turn toward bottom-up approaches. In many cases, however, such efforts will not be sufficient. Reformers may need to co-opt or buy out opponents, sometimes by packaging controversial measures with other reforms attractive to the opposition.

Compromises—the nitty-gritty of everyday politics—are often necessary. But a compromise acceptable to all parties may not always be possible. In such cases, reformers may have to relegate their major proposals to the “too hard” basket, to address later when conditions change. In the meantime, they should focus on smaller, more technical changes. Although reformers should not waste resources on projects that cannot be implemented,<sup>96</sup> they should resist the temptation to walk away when the political will for fundamental change is absent.

This survey of legal reforms also demonstrates many of the difficulties in appraising legal reforms. In particular, assessment or evaluation raises issues about the proper timeframe and standard. Too often, foreign commentators jump to negative conclusions about legal reforms in China and elsewhere because they have not produced miraculous changes overnight. There is a danger of repeating the mistakes of the earlier law and development movement, when some of the movement’s leaders abandoned ship at the first sight of troubled waters. As other commentators pointed out, however, people living in developing states had no choice but to push on with reforms. As a result, many states made progress in improving their legal systems, and reformers learned valuable lessons from both their successes and failures.<sup>97</sup>

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96. Jeffrey A. Clark et al., *The Collapse of the World Bank's Judicial Reform Project in Peru*, in *LAW REFORMS IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed., forthcoming 2006) (criticizing the World Bank for pressing on with a project aimed at judicial independence despite numerous warning signs that the Fujimori regime was opposed to meaningful judicial independence).

97. Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 *AM. J. INT'L L.* 470, 474 (1995) (book review) (noting that practitioners in many developing states had no choice but to carry on with reforms even when U.S. academics lost faith in the earlier law and development movement). For a number of reports summarizing lessons learned from recent

In some cases, things may have to get worse before they can get better. Some of the changes to the Chinese legal system in recent years have placed China's criminal and civil law halfway between a civil system and a common law system. For instance, the transition to an adversarial system in the 1990s made lawyers largely responsible for presenting their client's case in civil litigation. Yet the reforms did not include changes to the rules regarding discovery, thus forcing lawyers to go to court with inadequate information to effectively argue their cases. Once the problems became apparent, the SPC issued rules to strengthen discovery rights.

Moreover, many reforms serve as second-best solutions to short-term problems of weak institutions, corruption, and insufficient judicial training. Once these problems are addressed, there will be less need for an adjudicative committee to review cases or for individual supervision by the legislature or procuracy. More fundamentally, the judiciary will be able to assume greater independence once judges are more competent and judicial corruption is less prevalent. While judicial independence is high on the list of the international community and many domestic reformers, providing greater independence to incompetent or corrupt judges makes little sense.<sup>98</sup> The need to pace reforms will require accepting second-best solutions that significant political factions will inevitably criticize.

Legal reforms may be evaluated according to a range of very different standards, producing very different conclusions about their success. The high correlation between GDP and rule of law suggests that judging a state according to the relevant standard of the average states in its income class will often produce more useful results than comparing it against the standards of legal systems in wealthy states, which inevitably leads to the preordained and all too often condescending conclusion that legal systems in developing states are deficient or primitive. The patronizing conclusion that these legal systems are backward then leads to well-intentioned efforts to export models not appropriate for the context, or less well-intentioned neoimperialistic attempts to impose one's own contested normative values on others and force them to adopt institutions that serve one's own economic and political interests.

Many current reform projects aim to increase the efficiency of the Chinese legal system. While efficiency is important, assessing legal reforms in terms of efficiency standards alone is insufficient. Whatever the

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efforts at legal reform, see The World Bank, *Reform Strategies: What Works What Hasn't*, available at <http://www1.worldbank.org/publicsector/legal/reform.htm>.

98. For a proposal to increase the independence and authority of judges in stages, by level of court and by issue, see CHINA'S LONG MARCH, *supra* note 15.

utility of Pareto and Kaldor-Hicks standards for assessing economic reforms, legal reforms help some individuals and hurt others; even when there is a potential for the losers to be compensated, they often are not.

Assessment of legal reforms will involve controversial normative issues about the proper distribution of resources and the proper balance between efficiency and justice, social stability and individual rights, and substantive justice and procedural justice. The majority of citizens in different societies may come to different conclusions on such issues. As is true elsewhere, conflicting ethical views and competing conceptions of justice and rule of law within China ensure continued disagreement about the normative merits of specific reforms.

The task of balancing the costs and benefits of reforms is usually best left to the domestic political process. Of course, limits on political participation and other shortcomings may cause the process to fall far short of the type of idealistic deliberative democracy envisioned by some theorists. Yet there are benefits to allowing states to make their own decisions, learn from their mistakes, and make adjustments accordingly. The resulting rules are likely to enjoy greater legitimacy, and the process itself is likely to contribute to democratic learning and the maturation of political institutions and civil society.

Finally, what this survey demonstrates most of all is the need for pragmatism regarding legal reforms. We should avoid the Arthurian quest for the holy grail: a single, comprehensive, unified theory able to predict both macro and micro legal system reforms in all states. There may be more than one model of development. A model of development that works in one region may not work in another.

Attempts to impose too specific a model will likely fail, as repeated attempts to force a liberal democratic model of rule of law on other states have shown. Similarly, an attempt to transplant institutions or practices that may work in wealthy states to poor states is likely to fail. Successful reforms require greater appreciation of differences in local circumstances, including levels of wealth, popular attitudes, and existing political institutions and cultures. A pragmatic reformer should be wary of one-size-fits-all solutions and instead choose between foreign or homegrown models and inductive or deductive approaches on a case-by-case basis.

Critics complain that general lessons about law and development are superficial and abstract.<sup>99</sup> Yet in many cases, reports by practitioners include a plethora of more specific proposals and suggestions derived from in-depth case studies. The problem with these context-specific sugges-

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99. See, e.g., Carothers, *supra* note 2.

tions is that they shift the focus away from generalist foreign advisors toward those with greater local knowledge.

Although many international participants in the new law and development movement claim to have learned the lesson that there is no single blueprint, they often react negatively to any attempt by local governments to deviate from model laws or to experiment with innovative institutional arrangements. The international community has been extremely hostile to several regulatory innovations in China, including administrative detention, adjudicative supervision committees, and individual case supervision. Knee-jerk proposals to simply eliminate these institutions typically fail to consider the negative consequences that would likely result from their elimination. A human rights commissioner from a European state once acknowledged in conversation that eliminating administrative detention would most likely make things worse for most of those now subject to such detention, but he then noted that it would be politically impossible for him given his position and constituency to support a more nuanced approach to China that would allow for the continuation of some form of this system. Doing so would undermine the apparent universality of the right of habeas corpus and the ultimately illusory consensus on the right to be free from "arbitrary detention."

A pragmatic approach will require that states be afforded a wider margin of appreciation on contested rights issues and be given greater leeway to deviate from neoliberal economic policies in order to reduce social tensions. Adhering strictly to the IMF's structural adjustment policies and other neoliberal economic dogma has exacerbated ethnic tensions and fueled popular uprisings, often leading to government repression.<sup>100</sup> The repression of political dissent has in turn undermined the legitimacy of newly established democratic governments. Some governments have reverted to autocracy, while others have become one of the many nonliberal democracies that now constitute almost half of all the democracies in the world.

The conflict between general neoliberal prescriptions and social stability issues arose in the context of China's draft Bankruptcy Law. Worried about the social unrest that could result from massive lay-offs of employees, the drafters of the law struggled over treatment of state-owned enterprises and whether they should set aside funds for retraining

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100. Linda Camp Keith & Steven Poe, *The U.S., the I.M.F., and Human Rights*, in *THE UNITED STATES AND HUMAN RIGHTS: LOOKING INWARD AND OUTWARD* (David P. Forsythe ed., 2000) (weak short term increase in level of repression following receipt IMF loan); M. Rodwan Abouharb & David L. Cingranelli, *Money Talks? The Impact of World Bank Structural Adjustment Lending on Government Respect for Human Rights 1981–2000*, Presented at the American Political Science Association 2003 Annual Meeting (August 2003) (finding there was a significant increase in the probability of torture, extra-judicial killing, and political disappearances in the three years following a Structural Adjustment Agreement).



and resettlement of workers before using them to offset the claims of secured creditors. The political compromise was to carve out an exception for certain, presumably large, state-owned enterprises, with the exception to be phased out over time. In addition, the draft law requires payment of employee salaries, social insurance fees, and other compensation as provided by laws and regulations, which arguably includes retraining and resettlement costs, prior to payment to secured creditors. Foreign commentators and representatives from international financial institutions (IFIs), as expected, dutifully expressed concerns about these deviations from international norms and best practices, all the while repeating the mantra that there is no single approach or universal solution to bankruptcy issues. Some even acknowledged, when commenting in their personal capacity rather than as a representative of IFIs or their foreign investor clients, that these compromises did seem to be reasonable adjustments to local circumstances. In any event, given the complexity of the issues and the less than stellar results from relying on foreign experts in other states, China should be allowed to experiment on what are essentially domestic political issues, albeit with international economic components, and make its own mistakes.<sup>101</sup> One can hardly imagine the leaders from the G-7 states deferentially acceding to advice from IFIs on such contested domestic political issues as bankruptcy reforms, tax rules, or social welfare policies, although the political uproar that would surely ensue is easy to imagine.

China has, for the most part, been able to resist international pressure to conform to a particular legal paradigm, partly because of its size and geopolitical importance<sup>102</sup> and partly because its leadership remains fundamentally pragmatic. While commentators often cite the scientific background of Chinese state leaders as a negative, such a background fosters a pragmatic, problem-solving outlook that depends more on consequences than ideology, the latest theory of development, or the latest

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101. See William A.W. Nielson, *Competition Laws for Asian Transitional Economies: Adaptation to Local Legal Cultures in Vietnam and Indonesia*, in *LAW REFORMS IN DEVELOPING AND TRANSITIONAL STATES*, (Tim Lindsey ed., forthcoming 2006) (noting that bankruptcy laws pushed by the international community in Indonesia have not been implemented due to limited state and public sector capacity, opposition by local stakeholders, and a ideological concerns about the negative consequences of neoliberal economic policies, many of which were forced upon Indonesia as conditions for economic aid during the Asian financial crisis); Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, in *LAW REFORMS IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed., forthcoming 2006) (noting that the remarkable consensus of the international community on tax reforms ignores local politics, emphasizes efficiency over equity and the distributional effects of tax rules, and has failed to produce the expected results in many states).

102. Unlike many small states, China is generally able to avoid most of the conditions imposed by the Asian Development Bank or IMF on smaller, developing states that need financial assistance. Vietnam, which often follows China's lead, has also adopted an incremental, pragmatic approach to reforms.

version of the Washington Consensus.<sup>103</sup> Much as China's leaders resisted the advice of international experts to go for "big bang" economic reforms in favor of a more gradual approach, so have they resisted efforts to blindly ape a liberal democratic rule of law. And just as the slower approach to economic reforms resulted in impressive economic growth without many of the severe negative consequences of the big bang strategy, so has the contextualized approach to legal reforms resulted in steady progress.

To be sure, critics would argue that the slow pace of reforms has delayed the day of reckoning and increased the ultimate costs of more fundamental reforms. Which side will have the better of the argument remains to be seen and hinges on the ability of Chinese reformers to continue to improve the legal system and ultimately address the political obstacles blocking the full realization of rule of law. There is a real danger government leaders will move too slowly on political reforms and fail to implement in a timely way deep institutional reforms of the legal system, including greater independence and authority for the judiciary.

Pragmatism has always entailed the application of creativity and intelligence to contemporary problems in order to devise novel and ameliorative solutions—which themselves will lead to further problems and the continuing need to experiment with an open mind. Open-minded reformers cannot afford to look only West or only East, only up or only down, only to culture, politics, or economics. A more context-sensitive approach is necessary. Fortunately, no one seriously engaged in legal reforms in China seems to think there is any other alternative.

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103. An experimental approach is consistent with a deep streak of pragmatism running through Chinese political philosophy and culture. See DAVID L. HALL & ROGER T. AMES, *DEMOCRACY OF THE DEAD: DEWEY, CONFUCIUS AND THE HOPE FOR DEMOCRACY IN CHINA* (1999); see also DAVID L. HALL & ROGER T. AMES, *THINKING THROUGH CONFUCIUS* (1987).