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Law and Discretion in the Contemporary Chinese Courts

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LAW AND DISCRETION IN THE CONTEMPORARY CHINESE COURTS[†]

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Abstract: The last twenty years of Chinese legal reforms have been particularly interesting to scholars and activists alike. During this period, Chinese legal reforms have moved from purely substantive changes in economic laws to the realm of domestic structural reforms of the court system. Today, legal reformers are discussing the use of open trials, adversarial advocacy, and even judicial independence. This Article explores how far some of these reforms may go by considering the path of structural and procedural changes adopted by the Chinese courts in the past twenty years. It includes an analysis of the tension faced by all legal systems in balancing law and predictability with equity and discretion. It focuses on how the Chinese have utilized an ideology of supervision in maintaining this balance, and predicts the future course of legal reforms in China.

I. INTRODUCTION

Since initiating economic reforms in 1978, China has touted its commitment to becoming a state governed by law. The idea has been put forth that rules, instead of the arbitrary wishes of powerful individuals, will govern affairs in the country.[1] It is a movement toward the belief that rules, and legal rules in particular, will provide predictability and greater justice by ensuring that like cases are treated alike. This commitment has been tested in recent years as the problem of corruption and abuse of discretionary power by Communist Party and local officials has escalated alongside continuing economic reforms.

Interestingly, China's recent efforts to contain discretionary outcomes also reveal a philosophical ambivalence about the desirability of doing so. The Chinese government has enacted procedural laws to ensure certainty and stability in its legal processes, but these laws in many respects codify the

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[1] *See particularly Deng Xiaoping's Address*, BEIJING XINHUA, Sept. 1, 1982, *reprinted in* FOREIGN BROADCAST INFORMATION SERVICE, DAILY REPORT—CHINA ("FBIS-CHI"), Sept. 1, 1982, at K12. The idea of *yifa banshi* (to act according to law) is a consistent theme going back to the late 1970's. But whether this idea is equivalent to the rule of law (as discussed *infra*) is contested both within and outside of Chinese legal academic circles.

tradition of informality in adjudication. Anti-corruption regulations have been enacted, but judges are still free to base their decisions on sources outside the judicial record, including ex parte contacts. The country also has an elaborate procedural framework for supervising the work of its judges, but this framework functions to ensure ideologically correct results.

China's ambivalence about the rule of law may be an inevitable result of the inherent tension between rules and discretion present in any legal system. In part, however, it is also illustrative of how the Chinese government has weighed the balance between rules and discretion. In some circumstances, the Chinese legal system appears exceedingly rule-bound and discretion is tightly constrained, while in others, discretion reigns.

Overall, this balance reflects the evolving role of courts in contemporary Chinese society. That is, Chinese courts have operated primarily as "law-applying" institutions that resolve private disputes and maintain social order by discretionary adaptation of the law to particular circumstances and individual cases. Where adjudication is not viewed as a forum for making law, Chinese courts have served less as "law-making" institutions. Thus, although there are signs of change, courts have been more concerned with substantive justice than with ensuring uniformity of results or with developing general rules of application with each adjudication. Chinese courts have also been more constrained in challenging state infringements, particularly when such infringements are codified or enacted as statutes or regulations.[2]

This Article examines how the historic Chinese preference for discretion and informality in the administration of justice has been retained and reflected in the judicial decisionmaking process and in procedural codes. It focuses on how the Chinese ideology of *jiandu* (supervision) dominates individual judicial work and ensures ideologically correct results. In so doing, this Article seeks to identify some parameters of law and discretion within the Chinese construct of judicial work, the role of courts, and the Chinese vision of the rule of law.

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[2] *See, e.g.*, Zhonghua Renmin Gongheguo Xingzheng Susongfa [Administrative Litigation Law of the People's Republic of China] (adopted Apr. 4, 1990) [hereinafter Administrative Litigation Law], *reprinted and translated in* 1 CHINA L. REFERENCE SERVICE (ASIA L. & PRACTICE), Ref. No. 1100/89.04.04 (1996) [hereinafter 1 CHINA L. REFERENCE]. Article 2 of the Administrative Litigation Law specifies that courts review administrative decisions to ensure that they are "in accordance with law." *Id.* art. 2. The Administrative Litigation Law does not anticipate challenges to the law or regulations themselves. (People's courts are authorized to determine whether a challenged administrative decision is lawful and in accord with relevant laws and regulations.). *Id. See also* Pitman B. Potter, *The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform*, *in* DOMESTIC LAW REFORMS IN POST-MAO CHINA 270, 288 (Pitman B. Potter ed., 1994).

II. THE TENSION BETWEEN LAW AND DISCRETION

The term "rule of law" is not easy to define. Blackstone defines law as "a rule of action applied indiscriminately to all kinds of action."[3] According to John Rawls, rule of law is manifested in formal justice, or "the regular and impartial administration of public rules."[4] Under this concept of the rule of law, justice requires fair procedures and consistent enforcement of the law in the form of trials, hearings, rules of evidence, and due process. In part, strict procedure also requires decisionmakers to relinquish some of their human discretionary powers and "give up some of the decisional freedom we each have as persons when deciding what, all things considered, is best to do."[5] The rule of law thus implies formal rules and procedures, with the formal application of rules curbing human discretion.

By extension, curbing the discretionary actions of decisionmakers through law can also lead to what Albert Dicey calls the "supremacy or predominance of regular law as opposed to influence of arbitrary power," and general rules of constitutional law "resulting from the ordinary law of the land."[6] Law is held up as equally applicable to every individual in society, including government powerholders. In the Western tradition, rule of law also means legal limits on governmental powers. Rule of law has both a private and a public dimension—private in guaranteeing predictability for economic transactions and resolving private disputes, and public in restraining the powers of officials and regulating the transfer of political power.[7]

Substantively, rule of law is integral to the protection of individual liberty and dignity. In theory, strict procedures guarantee greater predictability, and greater predictability in turn increases one's options and, hence, one's individual liberties.[8] In sum, rule of law ensures that "government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[9]

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[3] THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 27 (Gareth Jones ed., 1973).

[4] JOHN RAWLS, A THEORY OF JUSTICE 235 (1st ed. 5th prtg. 1973).

[5] Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 318 (1985).

[6] ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202–03 (1959).

[7] KATHRYN HENDLEY, TRYING TO MAKE LAW MATTER 12 (1996).

[8] F.A. HAYEK, THE ROAD TO SERFDOM 72-73 (1944).

[9] *Id.* at 80.

Formal rules, however, are in tension with the concept of individualized justice. Discretion is necessary in handling the gap between rhetoric and reality in the legal system.[10] Max Weber identified the duality of formal rules and discretion as the tension between "order" and "justice," with the former implying consistency, certainty, and stability, and the latter implying fair treatment ascertained by a judgment of particular circumstances.[11] In Aristotle's view, the tension between formal law and personal discretion was to be reconciled by the fair-minded judge willing to go beyond the letter of the law to mete out justice.[12]

Every legal system must balance these two conflicting goals: the goal of certainty, which is guaranteed by formal rules, and the goal of individualized justice, which is provided for through the exercise of human discretion. Historically, in the Anglo-American legal tradition, this dichotomy was represented by a dual system of law courts and equity courts.[13] Until this century, when these two courts were merged, the law courts followed formalized writs and rules, while the equity courts operated under broader principles of right and justice and looser procedural rules.[14]

The tension between law and discretion is also felt in the Chinese legal system. In theory, this tension can be discerned from the ambiguity

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[10] Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science*, *in* THE USES OF DISCRETION 11, 37 (Keith Hawkins ed., 1992). According to Hawkins, the functional benefits of discretion can serve other functional benefits for the legal system, such as obscuring lack of consensus or ambiguities in policy and avoiding the use of costly formal procedures in the law.

[11] The values of order and justice are related to Weber's categories of formal and substantive legal rationality. Roger Cotterrell, *The Sociology of Max Weber*, *in* LEGALITY, IDEOLOGY AND THE STATE 69, 85 (David Sugarman ed., 1983).

[12] ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 146-47 (J.A.K. Thomson trans., 1953).

[13] Functioning side by side, and later as a single, merged court system, these two systems effected some balance between adherence to the rule of law and the exercise of discretion. The concept of equity developed both into a "series of technical remedies and substantive provisions and an equitable approach to law, making the world whole." PETER CHARLES HOFFER, THE LAW'S CONSCIENCE 21 (1990); *see generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspectives*, 135 U. PA. L. REV. 909 (1987).

[14] *See* Subrin, *supra* note 13. Of course, some Anglo-American legal scholars have argued that the application of all rules of law necessarily entails the application of human discretion. These scholars, such as Mary Jane Radin, have argued that "rules are neither formal in the traditional sense, nor eternal, nor existing independently of us; and so we know that every application of them is a reinterpretation." Thus, what is needed is a reinterpretation of "rule of law, not of individuals," because if "law cannot be formal rules, its people cannot be mere functionaries." Mary Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 819 (1989). Others, meanwhile, have noted the growth of judicial discretion in the American courts. Some have explained this movement as a general trend toward pragmatism as opposed to principles. *See* A.S. Atyah, *From Principles to Pragmatism: Changes in the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1249-72 (1981). Others, however, have argued that this growth is due to the rise in "public law" litigation—litigation that deals with complex public policy issues. *See* Carl E. Schneider, *Discretion and Rules: A Lawyer's View*, *in* THE USES OF DISCRETION, *supra* note 10, at 47, 58-59.

surrounding the meaning of the Chinese term *fazhi*, translated both as "rule of law" and as "rule by law." While rule *by* law is an instrumentalist view of law meaning to govern by the use of laws, rule *of* law means that people should obey the law and their actions should be guided by it. Similarly, the government should also be subject to law and its discretionary powers curbed by law.[15] The ambiguity around the term *fazhi* reflects a continuing reluctance in China to permit laws which curb the government's discretion.

The preference for human discretion and attention to individual circumstances is reflected philosophically by the fact that *fazhi* still appears to share importance with *renzhi* (rule by man) in China. Among three different schools of Chinese legal thought that address the dichotomy of *fazhi* and *renzhi*, none completely rejects the need for human discretion in law.[16] The reluctance to adopt rule of law may be grounded in a fear that law will become "omnipotent and a source of superstitious power."[17]

As we look more closely at the Chinese legal system, it is clear that discretion is an integral part of it. Indeed, some discretion exists in every legal system. But how is law and discretion balanced in the Chinese legal system, and what form does discretion take? In this Article, I will focus primarily on judicial discretion, that is, the discretion of judges as decisionmakers. As elaborated below, the concept of discretion is not monolithic, and any discussion of curbing discretion must differentiate between different types of discretion. In the Chinese context, recent efforts to constrain discretion through procedural codes and professionalization of the courts have nevertheless left room for discretion.

III. THREE TYPES OF JUDICIAL DISCRETION

Several types of discretion exist within any legal system, and the constraints on discretion may vary accordingly. The rigid application of

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[15] The value of the rule of law is its ability to restrain arbitrary power, that is, to prevent a government "from changing the law retroactively or abruptly or secretly whenever this suits its purposes." JOSEPH RAZ, THE AUTHORITY OF LAW 219 (1979). Individual freedom is thus secured as individuals have a stable framework for planning their lives and actions. HAYEK, *supra* note 8.

[16] One school argues for *fazhi*, but does not totally reject *renzhi* because law must be implemented by human beings. This school advocates a sound cadre system with qualified legal personnel and professionals. A second school argues for the rejection of *renzhi*, but only rejects *renzhi* with regard to those who abuse power, and not with regard to revolutionary leaders and the masses. A third school of thought rejects the focus on rule of law and rule of man and instead embraces a new category that would include the leadership of the Chinese Communist Party as necessary for ideological and ethical guidance. ZHONGGUO FAXUE XIN SIWEI [NEW THOUGHTS ON CHINESE JURISPRUDENCE] 29-31 (Yan Ganqiao ed., 1989).

[17] CARLOS LO, CHINA'S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S CHINA 48 (1995).

legal requirements can run counter to three different types of judicial discretion: (1) "fact-based" discretion, which is applied to tailor the result of a case to its individual facts and circumstances; (2) "self-interested" discretion, which is applied to suit the economic or relational interests of the judge deciding the case; and (3) "ideological" discretion, which is applied to achieve results consistent with a particular public policy or ideology.[18]

The first form of judicial discretion involves the relaxation of rigid rules of law to render individual justice in a particular situation.[19] The second involves the application of discretion by the judge in a personal or self-serving way.[20] By permitting the substitution of the decisionmaker's own personal standards for the public legal standards, this second type of discretion, the self-interested discretion, may be viewed as an abuse of discretion and is a window for judicial corruption. The third type of discretion is discretion applied to achieve a political or ideological end.[21] In the United States, such discretion is theoretically constrained by the Constitution. Just as arbitrary and intrusive actions by the state are to be constrained by the due process clause and the extensive jurisprudence on substantive due process, the political question doctrine also sets limits on what judges in the United States may do.

All three types of discretion are evident in the Chinese legal system. Individual judges in China, in deciding cases, appear not to be constrained rigidly by the four corners of black letter law. Their approach to judging reflects a blend of personal discretion designed to attain justice based on individual circumstance, self-interested discretion, and ideological discretion imposed by the state.

A. Seeking Truth from Facts: Fact-Based Discretion

Chinese judicial officers are guided in their work by the old adage of "seeking truth from facts, correcting error whenever discovered." In all cases, the emphasis is on facts and on assessing the correct outcome from

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[18] Hawkins, *supra* note 10. Various scholars have categorized discretion differently. For example, Sneider has identified four types of discretion: (1) "*khadi*" (or "*qadi*") discretion, under which decisions are based on an indiscriminate mixture of legal, ethical, emotional, and political considerations; (2) "rule-failure" discretion, which is applied when rules fail to cover all the circumstances the world presents; (3) "rule-building" discretion, which is exercised from a belief that better rules could be developed if decisionmakers were allowed some discretion to develop rules as they go along; and (4) "rule-compromise" discretion, which is discretion that is passed on to the decisionmaker when the rulemaking body cannot agree. Schneider, *supra* note 14, at 61–65.

[19] ARISTOTLE, *supra* note 12.

[20] HOFFER, *supra* note 13, at 19.

[21] *Id.*

the facts rather than on following the technicalities of law. Indeed, in a survey by Arthur Rosett and Lucie Cheng, judges expressed the view that their decisions should go beyond the technical aspects of law and should be reasonable and appropriate to the litigants' feelings and individual circumstances. In the interviews, economic and civil law judges expressed hesitation in making rigid zero-sum determinations for or against a party, for such determinations tend to be more disruptive and less harmonious.[22] These judges are avidly concerned with balancing legalism against social norms and maintaining harmonious relations and are more inclined to render results that preserve relations than to uphold the strict prescriptions of law.[23]

To some extent, this emphasis on the specific facts and equities of individual cases may be explained by the still inadequate legal training of Chinese judicial workers. For many years, judges were appointed from the ranks of the military and had little background in law or adjudication. In 1989, only ten percent of the judges and procurators at all levels had an education above college level, and in 1991, only sixty-five percent of all court personnel were college-educated.[24] Only recently have judges been required to pass a test that establishes a minimum level of competency in law, and only in 1995 did China enact the Judges Law, which specifies the educational and legal requirements for membership in the judiciary.[25] These recent efforts to develop a body of young legal professionals with a greater consciousness of law may help China establish a more law-oriented judiciary.[26]

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[22] Lucie Cheng & Arthur Rosett, Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1979-89, 5 J. CHINESE L. 143, 224–25 (1991); see also James V. Feinerman et al., Law, Contracts and Economics Modernization Lessons from the Recent Chinese Economic Rural Reform, 23 STAN. J. INT'L L. 319 (1987). Economic court judges cited the old adage heqing, heli, hefa (according to relationship, rightness, and the law) as their guideposts in decisionmaking. Cheng & Rossett, supra.

[23] Cheng & Rossett, *supra* note 22.

[24] Li Maoguan, *Why Laws Go Unenforced*, BEIJING REV., Sept. 18–24, 1989, at 17, 19. The goal was to have 70% of court personnel, 80% of all judges, and 90% of heads of courts be college educated by 1996. Liu Linshan, *Jianshe Gaosuzhi Zhuanyehua Faguan Ganbu Duiwu* [*Building a Team of High Quality and Professionalized Judicial Cadres*], FAZHI RIBAO [LEGAL SYS. DAILY], Aug. 27, 1990, at 1. In 1993, China had 30,401 full-time lawyers and 16,793 part-time lawyers. 1994 ZHONGGUO FALU NIANJIAN [1994 CHINA LAW YEARBOOK] 1085 (1994). China also hopes to increase the number of lawyers to 150,000 by the end of the century. *Legal System to See 'Major Reforms,'* BEIJING XINHUA, Oct. 15, 1993, *reprinted in* FBIS-CHI, Oct. 19, 1993, at 12.

[25] Zhonghua Renmin Gongheguo Faguanfa [Judges Law of the People's Republic of China] (adopted Feb. 28, 1995) [hereinafter Judges Law], *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1995 69-81 (1996) [hereinafter LAWS OF THE PRC, 1995].

[26] *Government to Promote Quality of Lawyers*, BEIJING XINHUA, *reprinted in* FBIS-CHI, May 22, 1991, at 40.

More fundamentally, however, the judicial emphasis on facts over the rigidity of law may never completely disappear in China because the preference for bending the rules to ensure a harmonious outcome can be traced to a historical preference for informality and the continuing belief in preserving harmony. This reluctance to follow formal laws has roots in traditional Chinese culture, where social pressure was preferred over the use of force by the state. Confucian morality, in particular, strongly emphasized maintaining social harmony through the preservation and regulation of personal relationships. Contrary to the universalism of formal law, Confucianism stressed particularism and personal treatment, and its "humanist universalism was always to be adapted to local circumstances and relational contexts."[27] This traditional preference for informality and particularism was later reinforced by Marxist-Leninist-Maoist thought, which emphasized a "mass line" approach to the administration of justice.[28] Hence, in the early years of the People's Republic of China ("PRC"), disputes were often resolved through mediation by local entities such as families, villages, and neighborhood committees.

Today, litigation in the public courts is still viewed with disfavor in China, as it represents a breakdown in relationships that should be avoided, or if at all possible, repaired. Good outcomes do not simply prohibit or mandate, but preserve order and harmony. It is expected, then, that judicial decisions will render individualized justice by tailoring outcomes to give something to everyone, rather than by uniformly applying the law. Judicial decisions adjust future human relations rather than simply allocate entitlements. As such, Chinese judges, similar to other socialist judges, are "social crisis managers rather than arbiters of private disputes."[29]

Perhaps more importantly, this preference for fact-based discretion may be attributable to the limited role that courts have played in China. Chinese judges apply rather than make law. Adjudication is not viewed as a site for lawmaking with decisions coming out of private disputes having broader institutional consequences. Unlike common law countries, where judicial interpretations and decisions are categorized and then applied in subsequent cases, each adjudication in the Chinese system stands apart and

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[27] Wm. Theodore DeBary, *The "Constitutional Tradition" in China*, 9 J. CHINESE L. 7, 10 (1995).

[28] For discussions of Mao's mass line approach to the administration of justice, *see generally* S. LENG & H. CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS (1985). Under the mass line approach to the administration of justice, the prescribed method is to seek the advice of the masses both prior to enacting a law and after a law is enacted. This method is called "from the masses and to the masses." Wu Jianwu, *Building New China's Legal System*, 22 COLUM. J. TRANSNAT'L. L. 1, 15 (1983).

[29] INGA MARKOVITZ, IMPERFECT JUSTICE 45 (1995).

on its own.[30] Although the Supreme People's Court (the highest court in the Chinese legal system) has the authority to interpret "questions concerning specific applications of laws and decrees"[31] and has handed down model decisions as well as official interpretations, there is as yet no systematic method to synthesize lower court decisions into general rules of application. Hence, lower Chinese judges may be more concerned with the immediate result before them, and less with the possibility that their actions may be part of a greater legal fabric. Chinese judges thus have a greater potential to render individualized justice and at the same time reach inconsistent results in different cases.

B. Self-Interested Discretion

Not only can individualized justice lead to nonuniformity and work against predictability, but it can also open the door to corruption, a darker side to judicial discretion. The preference for informality and the focus on personal relationships in the administration of justice has led to the opening of a "backdoor" in judicial decisionmaking. Through this backdoor system, personal appeals, which may include the payment of money, are used to obtain favorable judicial outcomes. This corruption may take the form of gifts or dinner invitations to judges or payments to a close relative of a judge as an appeal for a favorable outcome.[32] In the court system, cases resolved

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[30] However, the Supreme People's Court does guide lower courts by publishing opinions and interpretations in the Supreme People's Court Gazette, as well as by issuing internal instructions. The Supreme People's Court may also give its opinion on particular cases coming from the lower courts. *See* Article 33 of the Organic Law of the People's Courts, which stipulates that "[t]he Supreme People's Court gives interpretation on questions concerning specific application of laws and decrees in trial proceedings." Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhifa [Organic Law of the People's Courts of the People's Republic of China] (adopted July 1, 1979, amended Sept. 2, 1983) [hereinafter People's Courts Organic Law] art. 33, *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1983-1986 37-46 (1987) [hereinafter LAWS OF THE PRC, 1983-1986]. *See also* DR. NANPING LIU, OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA 74 (1997).

[31] People's Courts Organic Law, *supra* note 30.

[32] According to Cai Cheng, then Minister of Justice, corrupt practices of judicial personnel include using public funds for private purposes, accepting bribes, and using the power of their post for private gains. Cai Cheng, Minister of Justice, *Promote Incorruptibility Among Ranks of Judicial Administrative Personnel*, GUANGMING RIBAO [GUANGMING DAILY], May 9, 1991, at 1, *translated in Minister of Justice on Judicial Honesty*, FBIS-CHI, May 31, 1991, at 22–24; *see also Judicial Agencies Should Take the Lead in Fighting Corruption and Encouraging Clean Administration*, BEIJING FAZHI RIBAO [BEIJING LEGAL SYS. DAILY], Oct. 11, 1993, at 1, *translated in Commentator Stresses Judicial Role in Fighting Corruption*, FBIS-CHI, Oct. 25, 1993, at 21–22. That judges are part of this problem is clear from a 1991 amendment to the Civil Procedure Law, which specifically prohibits judges from accepting "dinner invitations or gifts from litigants or their legal representatives." Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law of the People's Republic of China] (adopted Apr. 9, 1991) [hereinafter Civil Procedure Law] art. 44, *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1990-1992 185-240 (1993).

through this "backdoor" are loosely referred to as *renqing an* (cases resolved by doing a favor) and *guanxi an* (cases resolved through personal relations).

Corruption was one of the principal complaints made by students in the pro-democracy movement of 1989. The growth of corruption has even been recognized officially, and the government has agreed that, unless brought under control, corruption will pose a threat to national reforms.[33] The government has attempted to address such self-serving discretion through legal sanctions as well as through Party discipline. Hence, the 1979 Criminal Code (amended in 1996), as well as supplementary regulations, specifically impose penalties for corruption. Yet, growing materialism and new opportunities provided by the reformed political-economic structure have only added to the momentum of corrupt practices.[34]

In an effort to stem the phenomena of *renqing an* and *guanxi an*, procedural codes and directives have been issued to prohibit judicial personnel from working on cases in which they have personal interests. For example, several provinces and cities have issued new directives that prohibit former judicial personnel from appearing as legal representatives in a court at which they were originally employed and close relatives of cadres of the court from appearing as legal representatives in the court.[35] Court employees are officially prohibited from accepting or soliciting bribes, being involved in business, stealing public property, or letting nepotism or personal ties influence their decisions.[36] To avoid compromising their judgments, members of investigating teams are not permitted to stay in luxury hotels, accept food, drink, or gifts, or buy goods that are in short supply on their tours of duty.[37]

It is unclear, however, whether these directives will have any long-term effects in curbing corruption. At least one former judge confided

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The law also authorizes the procuracy to lodge a protest where "the judge is found to have taken bribes, conducted malpractice out of personal considerations, or misused the law in rendering judgments during the trial of the case." *Id.* art. 185(4). *See also* Article 179(4), which authorizes the people's courts to conduct a trial de novo in instances of such violations. *Id.* art. 179(4).

[33] The disagreement is not over the presence but rather the source of corruption (within the reforms or within socialism) and over the form of remedy (expansion of reform or transformation of the regime). For an interesting analysis of different Chinese views on corruption (i.e., official, pro-democracy, reformist, and conservative views), *see generally* Richard Levy, *Corruption, Economic Crime and Social Transformation Since the Reforms: The Debate in China*, 33 AUSTRALIAN J. CHINESE AFF. 1 (1995). Reform advocates argue for a system of law that would outline legitimate and illegitimate practices. *Id.*

[34] JULIA KWONG, THE POLITICAL ECONOMY OF CORRUPTION IN CHINA 119-36 (1997).

[35] *Huibi Renqing* [*Withdraw from Personal Favors*], FAZHI RIBAO [LEGAL DAILY], May 7, 1995, at 5.

[36] Id.

[37] *Wo Guo Shenji Duiwu Zhongyu Zhishou Lianjie Fenggong* [*My Country's Auditing Teams Are True, Upright, and Honest in Performing Their Official Duties*], RENMIN RIBAO [PEOPLE'S DAILY], July 23, 1988, at 1.

that litigants in close to sixty percent of the cases she handled in the late 1980s approached her with some kind of money or gift.[38] Legal newspapers in China are replete with accounts of the *qingguan* (honest judge) in an effort to promote the value of judicial honesty in popular culture. According to one profile of an "honest" judge that was published in the Shanghai Legal Systems News, one hardworking judge refused gifts and money worth 20,000 yuan in 1995 alone.[39]

Self-interested discretion also takes the form of local protectionism (*difang baohu zhuyi*). Local protectionism is a serious problem in all Chinese courts, and is a particular problem in the economic courts, which are responsible for handling economic disputes involving the state. Local protectionism occurs when a court refuses to accept or delays a case brought by a party from outside the area, competes with other courts for jurisdiction over cases, or favors local parties in adjudication, mediation, and the enforcement of judgments.[40] This problem arises because judges are typically drawn from the area in which they reside and is exacerbated by the fact that the budget for each court is determined by the local government where the court sits.[41] Local allocation of funds for judicial services has led to inconsistent levels of service from province to province and has also rendered courts dependent on the whims of local ties and relationships. Hence, it is in the self-interest of a judge to protect local litigants by either taking jurisdiction over such cases and issuing rulings favorable to local litigants or refusing to enforce unfavorable rulings rendered by other courts against local litigants.[42] The most recent efforts to combat local protectionism, such as those in Shanghai, boast of cooperative agreements (similar to treaties) between courts to assist each other in cross-jurisdictional investigation and enforcement.[43]

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[38] Personal interview of a former judge in Boston, Mass. in Fall 1997. Judge's name and court withheld by request.

[39] Ji Fang, *Hao Yi Ge Qing Guan* [*What an Honest Judge*], SHANGHAI FAZHIBAO [SHANGHAI LEGAL SYS. DAILY], Dec. 25, 1997, at 2.

[40] ZHONGGUO FAXUE XIN SIWEI, *supra* note 16 at 257; Cong Yi, *Fandui Jingji Shenpan Zhong De Difang Baohuzhuyi* [*Oppose Local Protectionism in the Adjudication of Economic Cases*], MINZHU YU FAZHI [LAW & DEMOCRACY], no. 6 (1990), at 2; Zhang Youyu, *Fandui Jingji Zhifa Zhong de Difang Baohuzhuyi* [*Oppose Local Protectionism in the Enforcement of Economic Law*] MINZHU YU FAZHI [LAW & DEMOCRACY], no. 1 (1991), at 14-15.

[41] For example, judges' salaries are in part determined by the local government. Judges Law, *supra* note 25, art. 36. *See* Jerome Cohen, *Reforming China's Civil Procedure*, 45 AM. J. COMP. L. 793-804 (1997).

[42] Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM J. ASIAN L. 1, 41-49 (1996).

[43] Wang Huangmei, *Yong Sifa Xiezhu Wang, Po Difang Baohu Shan* [*Using the Legal Contract Net to Pierce the Umbrella of Legal Protectionism*], SHANGHAI FAZHIBAO [SHANGHAI LEGAL SYS. DAILY], May 5, 1997, at 1.

C. *Ideological Discretion*

The third type of judicial discretion in China may be termed "ideological discretion"—that is, discretion applied by judges to achieve politically and ideologically correct results as defined by the state. By definition, judicial decisionmaking in China entails application of both law and changing Communist Party policy. Indeed, this philosophy of judicial work is mandated by the 1982 PRC Constitution, which provides that all legal work must be guided by four fundamental principles: "the leadership of the Communist Party of China, . . . the guidance of Marxism-Leninism and Mao Zedong Thought, . . . adhere[nce] to the people's democratic dictatorship and [adherence to] the socialist road."[44] Thus, not only is the substance of law determined by Party policy,[45] but the interpretation and application of law remains subject to changes in Party policy. At least one Chinese scholar has noted that when there is no applicable law or when the Party's policy is better fitted to a case, the courts will enforce the Party's current policy.[46] Even the Supreme People's Court, in its interpretation of law, apparently retains the flexibility to change its position should Party policy so require.[47]

In a more invidious way, Party influence can lead to ideological interference in the judicial resolution of individual cases. In the early years of the PRC legal system, the decision in every case had to be discussed with the secretary of the local political legal affairs committee (*zhengfa weiyuanhui*), in a practice called *shuji pi'an* (review by Party secretary). Although this practice is discouraged today and there is no statutory authority for it, the Party itself has continued to intervene whenever it finds a case to be important or difficult or to have socially significant implications.

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[44] Zhonghua Renmin Gongheguo Xianfa [Constitution of the People's Republic of China] (adopted Dec. 4, 1982) [hereinafter 1982 PRC Constitution], Preamble, *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982 4 (1987) [hereinafter LAWS OF THE PRC, 1979-1982]; *see also* Chang Gong, *Renmin Sifa Gongzuo De Hao Zhang* [*A Fine Statute on the People's Judicature*] FAXUE YANJIU [STUD. IN L.], no. 4 (1979), at 35-36; Zhang Jinqing & Xie Bongyu, *Duli Shenpan Yu Dang De Lingdao* [*Independent Adjudication and the Party's Guidance*], FAXUE YANJIU [STUD. IN L.], no. 2 (1980), at 27-28.

[45] As a practical matter, legislation originates from the Chinese Communist Party ("CCP") and must be approved by the CCP leadership before its promulgation by the NPC. Increasingly, however, Chinese lawmaking is a "multi-arena" process, with drafts passing through the CCP, the State Council, and the NPC system. Murray Scot Tanner, *Organizations and Politics in China's Post-Mao Law-Making System*, *in* DOMESTIC LAW REFORMS IN POST-MAO CHINA, *supra* note 2, at 56, 57.

[46] Liu Nanping, *"Judicial Review" in China: A Comparative Perspective*, 14 REV. SOCIALIST L. 241, 249 (1988).

[47] Liu Nanping, *An Ignored Source of Chinese Law: The Gazette of the Supreme People's Court*, 5 CONN. J. INT'L. L. 271, 312 (1989).

The ability of the Party or state to guide outcomes in individual cases is ensured, as a practical matter, by the authority of the Ministry of Justice (and, de facto, the Party) to dismiss judicial workers. The Ministry of Justice has the power to transfer or discharge judges and has apparently used this power against judges who have decided cases contrary to the dictates of the Ministry of Justice or Party policy.[48] Similarly, it has also been reported that Party officials have discharged or transferred judges who have decided cases contrary to Party dictates.[49]

IV. THE ROLE OF PROCEDURE TO CONSTRAIN JUDICIAL DISCRETION

According to Philip Selznick, rule of law "has to do mainly with how policies and rules are made and applied rather than with their content."[50] Fair and predictable rules make it "possible to foresee with fair certainty how the authority will use its coercive powers in a given circumstance."[51] In the context of adjudication, formal procedure can empower the aggrieved individual to bring suit in court. When its ideal function is realized, formal procedure can serve the values of equality, access, autonomy, and openness as a check on the abuse of discretion in a legal system.[52]

Since 1978, the Chinese government has taken a number of steps to bolster procedural regularity as well as substantive rules of law. The last fifteen years witnessed the promulgation of China's Criminal Procedure Law, which was adopted in 1979 and amended in 1996, the Civil Procedure Law, which was adopted for trial implementation in 1982 and revised and finalized in 1991, and the Administrative Litigation Law, which was adopted in 1989.[53] While civil and criminal procedures regulate the manner in which

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[48] ZHONGGUO FAXUE XIN SIWEI, *supra* note 40.

[49] *Id.* at 248.

[50] PHILIP SELZNICK, LAW, SOCIETY & INDUSTRIAL JUSTICE 11 (1969).

[51] HAYEK, *supra* note 8, at 72. By contrast, legal realists and critical legal studies scholars believe that legal rules and principles are merely words used to rationalize decisions that have already been reached for other reasons.

[52] GEOFFREY C. HAZARD & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION 214 (1993). In the Anglo-American system, these values are reflected in the procedural guarantees of ready and easy access to the courts, broad discovery to uncover evidence in the hands of indifferent or hostile organizations, and a jury trial by a group of fellow citizens. *Id.*

[53] Zhonghua Renmin Gongheguo Xingshi Susongfa [Criminal Procedure Law of the People's Republic of China] (adopted July 1, 1979, amended Mar. 17, 1996) [hereinafter Criminal Procedure Law], *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1996 63-114 (1997) [hereinafter LAWS OF THE PRC 1996]. The revised Criminal Procedure Law was adopted at the Fourth Session of the Eighth National People's Congress on March 17, 1996, and became effective on January 1, 1997. The Civil Procedure Law was issued for trial implementation in 1982 and was substantially revised in 1991 for formal promulgation. Zhonghua Renmin Gongheguo Minshi Susong Fa (Shixing) [Civil Procedure Law of the People's Republic of China (For Trial Implementation)] (adopted Mar. 8, 1982) [hereinafter Civil

civil and criminal cases proceed through the court system, the administrative litigation law is unique in providing judicial control over public agencies by allowing private citizens to challenge administrative actions in the courts. These laws were designed, in significant measure, to provide consistency and regularity where none had existed during the chaotic period of China's Cultural Revolution. As is true of the regular and impartial administration of public rules generally, these procedures were also designed to foster greater resort to the judicial process and greater acceptance of judicial results as well as to promote the legitimacy of the state.[54]

In a number of ways, these procedural laws remain a testament to the discretionary nature of the Chinese judicial system. These laws codify fact-based discretion and attempt to check self-interested discretion, but they also encourage ideological discretion. Thus, they codify discretion through vague terms that place greater powers in the hands of their judicial interpreters. These laws codify informality by removing some cases from the ambit of formal application of law to the more discretionary realm of mediation. Both the Civil Procedure Law and the Criminal Procedure Law formalize the "supervision" of judicial work through a procedure called adjudication supervision.[55] This procedure allows final decisions to be reopened by the courts, regardless of whether doing so benefits the parties. In sum, the procedural laws systemically favor alternative dispute resolution over adjudication, informal process over formal process, individualized justice over strict application of law, and open-endedness and reconsideration over finality and closure.[56]

A. Procedures Codifying Informality

Personal discretion and the emphasis on individual circumstance are retained in the Chinese procedural laws through the use of general terms. As

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Procedure Law, Trial Implementation], *translated in* LAWS OF THE PRC, 1979-1982, *supra* note 44, at 259-95. The 1991 revision clarified a number of issues, including the time period during which a case must be concluded, the conditions for prejudgment attachments, and the provisions on enforcement of judgments. Civil Procedure Law, *supra* note 32. The 1989 Administrative Litigation Law (also translated as Administrative Procedure Law) is the latest in the series. The Administrative Litigation Law expanded the role of judges by creating procedures through which administrative discretion can be challenged in the courts. Administrative Litigation Law, *supra* note 2.

[54] According to critics of rule of law, courts simply serve to "eliminate a political foe of the regime according to some prearranged rules." OTTO KRICHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS 6 (1961).

[55] Criminal Procedure Law, *supra* note 53, ch. 5; Civil Procedure Law, *supra* note 32, ch. 16.

[56] This is the converse of Harold Koh's description of U.S. procedure. *See* Harold Hongju Koh, *Three Cheers for Feminist Procedure*, 61 U. CIN. L. REV. 1139, 1201-03 (1993).

H.L.A. Hart points out, some "open texture" at the borderlines of legal rules is inevitable as "the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact."[57] Yet, the open texture found in the Chinese procedural laws is so consistently broad that one may conclude that discretion has been purposefully built into them.

Unlike the Anglo-American system's adherence to precedent, interpretation of statutes in China is done on a case-by-case basis, assisted by internal regulations, and recently by the public interpretations and opinions of the Supreme People's Court. While wide judicial discretion can assist in creatively adapting laws to achieve individualized justice, it can also lead to tremendous variations in the outcomes of similar cases, thereby undermining the concept of a predictable legal system.[58] This is particularly problematic in criminal cases in which individual liberties are at stake.

This is not to say that the importance of formal procedure is lost on the Chinese state.[59] Law reformers have argued successfully for greater formal procedural regularity, resulting in substantial revisions of the Civil Procedure Law in 1991 and the Criminal Procedure Law in 1996. These revisions, such as the provisions in the revised Criminal Procedure Law which delineate in greater detail the functions of lawyers, prosecutors, and judges, represent a major step in the direction of curbing discretion.[60] Yet, these laws still exhibit features of Maoist-socialist law—flexibility, generality, and preoccupation with substantive justice.

For example, under the 1996 Criminal Procedure Law, it is only with the permission of the presiding judge that defense lawyers may state their views on the evidence and the case.[61] While the length of time that a criminal defendant may be detained during investigation is limited to two months, an extension may be granted in "grave or complex" cases where the scope of the crime is broad and gathering evidence is difficult.[62] Although a suspect has a right to communicate with his family, this right may be

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[57] *See* H. HART, THE CONCEPT OF LAW 124-25 (1961); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 1, 359-60 (1975).

[58] The Anglo-American common law system uses the concept of precedent and *stare decisis* to adapt old laws to changing morals and to alleviate the problem of inconsistent outcomes that can result from judicial discretion in deciding cases that fall within the "open texture." According to the principle of *stare decisis*, a judicial decision stands afterwards as authority for an identical or similar case or a similar question of law. BLACK'S LAW DICTIONARY 1059 (5th ed. 1979).

[59] *See supra* notes 32, 53 and accompanying text.

[60] For a thorough critique of the 1979 Criminal Procedure Law, *see* TIMOTHY GELATT, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS (1993). For a thorough analysis of the revised 1996 Criminal Procedure Law, *see* TIMOTHY GELATT, OPENING TO REFORM? AN ANALYSIS OF CHINA'S CRIMINAL PROCEDURE LAW (1996) [hereinafter OPENING TO REFORM?].

[61] Criminal Procedure Law, *supra* note 53, art. 160.

[62] *Id.* arts. 124-26.

dispensed with if it would "hinder the investigation" or if there is "no way of notifying them."[63] In both civil and criminal cases, while the basic people's courts adjudicate ordinary cases of the first instance, the intermediate people's courts and the higher people's courts have original jurisdiction over "major cases" involving foreign parties and cases with "major impact."[64] Indeed, such open-textured terms have led to criticism that the Criminal Procedure Law still does not meet international standards of due process[65] or the requirement of rule of law that "all laws should be prospective, open, and clear."[66]

The procedural laws also preserve the Chinese preference for informality through the codification of mediation. In the PRC, mediation has historically been conducted outside of the judicial system through informal, discretionary tribunals. Grassroots organizations, such as the people's mediation and neighborhood residents' committees, as well as the public security office, mediate an estimated seven to eight million civil cases yearly.[67]

In the Maoist era, such informal mediation played a strong ideological role, serving to mobilize the masses through grassroots organizations.[68] Because of this history, informal mediation and the principle of "mediation first, litigation second" have recently been criticized as popular justice and as leftist and dangerous.[69] Others, however, view mediation as promoting the traditional values of harmony and social order,[70] and the legitimacy of mediation has been promoted by codifying mediation under the aegis of the courts.[71] Extrajudicial mediation has also been criticized because those involved in this type of mediation are often untrained and sometimes illiterate.

The Civil Procedure Law and, albeit in a more limited fashion, the Criminal Procedure Law and the Administrative Litigation Law, specifically provide for mediation as an important step prior to adjudication. The

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[63] *Id.* arts. 64, 71.

[64] Civil Procedure Law, *supra* note 32, arts. 19-20; Criminal Procedure Law, *supra* note 53, arts. 20-21.

[65] OPENING TO REFORM?, *supra* note 60, at 26-35.

[66] JOSEPH RAZ, *supra* note 15, at 214.

[67] *See, e.g.*, 1992 ZHONGGUO FALU NIANJIAN [1992 LAW YEARBOOK OF CHINA] 875 (1993).

[68] Fu Hualing, *Understanding People's Mediation in Post-Mao China*, 7 J. Chinese L. 211, 212-213 (1992).

[69] *Id.*

[70] *Id.* at 216.

[71] *See* Chapter VIII of the Civil Procedure Law, which contains an expanded procedure for formal mediation by the people's courts. Some scholars, such as Donald Clarke, argue that this institutionalization of mediation makes mediation an arm of the state. Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 295 (1991).

Criminal Procedure Law provides that certain minor offenses may be privately prosecuted (that is, the victim can serve as the prosecutor in bringing the accused to court) and mediated under the auspices of the court.[72] The Administrative Litigation Law provides for mediation in cases in which damages are sought but not in appeals of an administrative decision.[73] Most significant is the Civil Procedure Law, as amended in 1991, which includes an expanded chapter on mediation to encourage formal mediation under the auspice of the court for all civil and economic cases, even after a case has been filed.[74] Article 85 codifies the principle of individualized justice, providing that the people's court shall resolve cases through mediation by "distinguishing right from wrong on the basis of facts being clear."[75]

An example of this emphasis on mediation can be found in a recent breach of contract claim brought by a construction company against the Shagou County government.[76] The county government had signed a five-year lease with the construction company, but when faced with the prospect of leasing the space to the Agricultural Bank on more lucrative terms, it issued a notice to evict the construction company. The construction company sued the county government under the Administrative Litigation Law. While maintaining the illegality of the county government's actions, the Xuecheng District Court resolved the issue by taking an active role in mediating the dispute, and ultimately helped the Agricultural Bank find another site.

To be sure, the vagueness of the terminology in the procedural codes and the formalization of mediation encourage the continued use of fact-based discretion to provide individualized justice tailored to each case. While the procedural codes also require that the contents of a mediated agreement not violate the law, the process of mediation has no formalities and is to be conducted according to the judge's innate sense of right and

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[72] Criminal Procedure Law, *supra* note 53, art. 172. The revised Criminal Procedure Law limited mediation in minor cases by providing that mediation shall not be conducted in cases for which

> [T]he victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victim's personal or property rights, whereas the public security organs or the People's Procuratorate do not investigate or prosecute the criminal responsibility of the accused.

Id. arts. 170, 172.

[73] Administrative Litigation Law, *supra* note 2, arts. 50, 67.

[74] Civil Procedure Law, *supra* note 32, arts. 85–91.

[75] *Id.* art. 85.

[76] Li Jing, *Xuecheng Fayuan "Min Gao Guan" Anjian Gao Jili* [*The Immediate Resolution of the "Citizen Suing Official" Case in the Xuecheng District Court*], FAZHI RIBAO [LEGAL SYS. DAILY], Mar. 21, 1995, at 2.

wrong. Indeed, this procedure for mediation allows the courts to reach compromised and individualized, but not always consistent, decisions.

B. Constraints on Self-Serving Discretion

The vagueness of procedural terms and the opportunities for informal dispute resolution can provide an opening for self-serving discretion. The Chinese government has attempted to address such discretion with limited success. The government has promulgated regulations such as the Detailed Implementing Regulations for the Interim Provisions Relating to Administrative Sanctions for Corruption and Bribery by State Administrative Personnel, the Circular on the Deadline for Government Functionaries Who Are Guilty of Corruption and Bribery to Confess Their Crimes of Their Own Accord, and the Supplementary Regulations on Suppression of Corruption and Bribery.[77] While it is unclear how committed the leadership is to the enforcement of these measures,[78] recent campaigns have resulted in some highly publicized prosecutions. Thus, the Supreme People's Court boasted in 1997 that fifty judges were dealt with strictly and sentenced for violations of law and discipline.[79]

Within the laws on procedure, there have been several changes directed at curbing judicial corruption. The amended Civil Procedure Law is perhaps the best example of the effort in this area. It contained a new provision prohibiting judges from "accepting any treat or gift from the parties or their agents *ad litem*" and subjecting to criminal prosecution

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[77] Guojia Xingzheng Jiguan Gongzuo Renyuan Tanwu Huilu Xingzheng Chufen Zanxing Guiding Shishi Xize [Detailed Implementing Regulations for the Interim Provisions Relating to Administrative Sanctions for Corruption and Bribery by State Administrative Personnel] (issued Sept. 8, 1989), *reprinted in* RENMIN RIBAO [PEOPLE'S DAILY], Sept. 22, 1989, at 6; Guanyu You Tanwulu Xingwei de Guojia Xingzhen Jiguan Gongzuo Renyuan Bixu Zai Xianqinei Zhudong Jiaodai Wenti de Tonggao [Circular on the Deadline for Government Functionaries Who Are Guilty of Corruption and Bribery to Voluntarily Confess Their Crimes] (issued Aug. 19, 1989), *reprinted in* RENMIN RIBAO [PEOPLE'S DAILY], Aug. 20, 1989, at 2; Guanyu Chengzhi Zou Sifei de Buchong Guiding [Supplementary Regulations on Suppression of Corruption and Bribery] (adopted Jan. 21, 1988), *translated in* Chinalaw (visited Oct. 27, 1999) <http://www.qis.net/chinalaw/prclaw52.htm>.

[78] Supervisory organs have complained of insufficient means and outlays for handling corruption cases. Additionally, some leading cadres resist the fight against corruption and view running a clean government as inconsistent with economic construction and a hindrance to production. *Anticorruption Campaign Faces Many Difficulties*, MING PAO, Mar. 20, 1990, at 8, *translated in* FBIS-CHI, Mar. 22, 1990, at 24.

[79] *Report on the Work of the Supreme People's Court*, XINHUA DOMESTIC SERVICE, Mar. 20, 1997, *translated in* BRIT. BROADCASTING CORP. SUMMARY OF WORLD BROADCASTS, Apr. 16, 1997, *available in* LEXIS, BBCMIR File. In 1995, 61 judicial officers received criminal punishment for violations of discipline and law. *See Zuigao Renmin Fayuan Gongzuo Baogao* [*Supreme People's Court Work Report*] [hereinafter *1996 Supreme People's Court Work Report*] 49, *reprinted in* 1997 ZHONGUO FALU NIANJIAN [1997 CHINA LAW YEARBOOK] 44-50 (1997).

judges who take bribes, play favorites, or engage in fraudulent conduct.[80] This provision was later bolstered by the new Judges Law, which specifically prohibits judges from taking bribes or otherwise participating in corrupt activities and subjects violators to criminal sanctions as well as administrative warnings, demotions, and/or reductions of salary.[81] The Criminal Procedure Law, meanwhile, permits the reopening of a final judgment if the judge, in trying the case, committed "acts of embezzlement, bribery, or malpractices for personal gain, or bent the law in making the judgment."[82]

The Civil Procedure Law also contains provisions to clarify the jurisdictional power of local courts (particularly in contract actions) in an attempt to curb local protectionism.[83] It further strengthened the monitoring of judicial work by the procuracy through an enhanced trial supervision procedure.[84] As will be discussed in greater detail below, such adjudication supervision has functioned to increase judicial discretion as well as to curb it.

The concept and existence of "personal relations" between judges and litigants have not been eliminated. Recent reforms in civil and criminal trial procedure notwithstanding, Chinese judges have typically had broad responsibility for collecting evidence and investigating cases, thus leaving room for discretionary conduct tainted by self-interest. In particular, judges have not been constrained from going beyond the public record when making decisions. There are also no prohibitions against ex parte contacts with judges, meaning that one party may have full access to a judge without the other's knowledge. Consequently, ample opportunity remains for inappropriate information to influence the judge without an opportunity for rebuttal by the opposing side.

C. *Procedure Codifying Ideological Discretion*

One final example of the retention of discretion within the procedural framework may be found in the procedure of adjudication supervision (*shenpan jiandu*). Adjudication supervision, as provided for in the Civil Procedure Law, the Criminal Procedure Law, and the Administrative

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[80] Civil Procedure Law, *supra* note 32, art. 44.

[81] Judges Law, *supra* note 25, arts. 30-32.

[82] Criminal Procedure Law, *supra* note 53, art. 204.

[83] Civil Procedure Law, *supra* note 32, arts. 25–28; *see also Professor Explains Civil Procedure Law Revision*, BEIJING XINHUA, *available* in FBIS-CHI, Apr. 4, 1991, at 38.

[84] Civil Procedure Law, *supra* note 32, art. 185.

Litigation Law, allows for the discretionary reopening of final judgments by the courts, in some instances irrespective of the wishes of the parties.[85] The importance of adjudication supervision was reaffirmed in 1991 when thirteen articles on supervision procedures were added to three different chapters of the Civil Procedure Law.[86] Theoretically, supervisory review is justified by the need to monitor individual judicial work. As such, supervisory review could be, and indeed has been, used to ensure consistency and competency in judicial work by curbing personal discretion, checking local protectionism, and changing unjust decisions.[87]

However, adjudication supervision can also undermine the rule of law in a number of ways. First, supervisory review has few mechanisms to ensure consistency in the cases reopened from court to court. Second, by subjecting final decisions to discretionary reopenings, the procedure is in tension with the predictability and regularity afforded by closed and final judgments. Third, in allowing for liberal corrections of error, these codes also show a resilient protection of ideological discretion.

The procedure for adjudication supervision is, by its nature, quite discretionary. A party (or more problematically in a criminal case, the procurator, a victim, the victim's family, or any citizen) can petition for the reopening of a final decision.[88] Until they were recently amended, neither the civil nor the criminal procedure laws limited the grounds on which reopenings could be based. In recognition of this problem, Chinese legislators have attempted to limit the kinds of cases appropriate for reopening in the amended civil and criminal procedure laws.[89] Thus, for example, a people's court may retry a criminal case with a final judgment only if there is "new evidence," if the evidence on which the original judgment was based is "unreliable and insufficient," if the application of law in the original judgment is "incorrect," or if the judge, in trying the case, "committed acts of embezzlement bribery or malpractices for personal gain or bent the law in making judgment."[90]

The time period for reopening cases remains inconsistent. The Criminal Procedure Law provides no time limits within which a reopening

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[85] *See supra* note 55; Administrative Litigation Law, *supra* note 2, arts. 63-64.

[86] *Professor Explains Civil Procedure Law Revision*, *supra* note 83.

[87] *See generally* Margaret Y. K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMP. L. 95 (1991).

[88] Criminal Procedure Law, *supra* note 53, arts. 203-05; Civil Procedure Law, *supra* note 32, art. 178.

[89] These broad categories include cases with new evidence or insufficient evidence, erroneous applications of the law, violations of legal procedure, and judicial misconduct. Civil Procedure Law, *supra* note 32, arts. 179, 221.

[90] Criminal Procedure Law, *supra* note 53, art. 204.

may occur. In 1991, the Civil Procedure Law was amended to limit the time within which a civil litigant can seek adjudication supervision to two years from the date of the final judgment.[91] The procurator in a civil case, however, may invoke adjudication supervision at any future time.[92] Furthermore, while a petition by a citizen to reopen a case must be reviewed before the case can be reopened, a protest by the procurator's office automatically reopens a case.[93] The retrial is a complete re-adjudication of the facts and law by a new collegiate bench.[94]

The 1991 Civil Procedure Law also affirmed the supervisory role of procurators in civil cases, thus formally injecting state policy into private law and litigation.[95] The law added four provisions formalizing a procurator's right to seek the reopening of final civil judgments.[96] In particular, a procurator may seek review of a civil judgment whether or not the procuracy was originally a party to the case.[97] In all retrials, the procuracy must send its personnel to appear in court to oversee the process.[98] While supervisory review may limit the discretion of individual judges, it can also increase the discretion, and hence the power, of courts vis-à-vis the litigants. Notably, supervisory review gives courts the authority to reopen a case regardless of the wishes of the litigants or whether reopening is beneficial to the parties.

In stripping away the protections afforded by case closure, adjudication supervision also operates to further the ideological discretion of the courts. In particular, by rendering court decisions subject to change by the state at any future time for broad categories of error, adjudication supervision renders the work of the court subject to state involvement and changes in central policies. While the retroactive application of new laws is theoretically prohibited in China, retroactivity is the result when cases can

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[91] Civil Procedure Law, *supra* note 32, art. 182.

[92] *Id.* art. 222.

[93] *Id.* arts. 179, 186.

[94] Xu Yichu, *Lun Jianli Juyou Wo Guo Tedian de Xingshi Shenpan Jiandu Chengxu* [*On the Establishment of the Unique Chinese Procedure of Adjudication Supervision*], FAXUE YANJIU [STUD. IN L.], no. 4 (1986), at 75.

[95] Civil Procedure Law, *supra* note 32, art. 14. In 1991, the procuracy reportedly corrected 2,875 judicial decisions through adjudication supervision. 1991 ZHONGGUO JIANCHA NIANJIAN [1991 YEARBOOK OF THE CHINESE PROCURACY] 366 (1992).

[96] Civil Procedure Law, *supra* note 32, arts. 185–88; *see also Professor Explains Civil Procedure Law Revision, supra* note 83.

[97] Civil Procedure Law, *supra* note 32, arts. 185-88. *See also* Zhonghua Renmin Gongheguo Jianchaguanfa [Public Procurators Law of the People's Republic of China] (adopted Feb. 28, 1995) [hereinafter Procurators Law] art. 18, *translated in* LAWS OF THE PRC, 1995, *supra* note 25, at 85-98; Shen Jungui, *Shilun Xingshi Zaishen Falu Guanxi* [*Legal Relationships in a Criminal Retrial*], XIBEI ZHENGFA XUEYUAN XUEBAO [J. NW. INST. L. & POL.], no. 2 (1988), at 40.

[98] Procurators Law, *supra* note 97, art. 18.

be reopened at a later time and reviewed pursuant to new policies, albeit not pursuant to new laws. Thus, in 1988, the Supreme People's Court stated that supervisory review should be most effectively used to reverse the policies of the Cultural Revolution.[99] Since then, supervisory review has been called upon to serve another new policy of the state—to facilitate the reunification of Taiwan with the mainland. Thus, in 1991, the Supreme People's Court identified petitions for adjudication supervision by Taiwanese compatriots as a category of cases meriting special attention.[100]

Adjudication supervision has also begun to be used directly by the political organs of the state. In 1990, the Standing Committee of the Shanxi Provincial People's Congress, along with local governments, formed a subcommittee of 134 people to review cases adjudicated by the intermediate courts in the previous two years.[101] Four months after the review, the intermediate courts, using the procedures for adjudication supervision, corrected 28 of the 38 cases that the subcommittee had found to be incorrectly adjudicated.[102] If there is an increase in supervision of judicial work by the people's congresses in conjunction with adjudication supervision, the effect could be to further politicize judicial work in China.[103]

V. THE IDEOLOGY OF SUPERVISION

While Chinese judges seem to have broad procedural powers, their work and decisionmaking authority is not unconstrained. To understand the constraints on discretion in China's legal system, one must begin with an examination of the system's elaborate grid of internal and external supervision of individual judges. This elaborate supervisory structure

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[99] *1988 Nian Qi Yue Shiba Ri Zai Dishisi Ci Quanguo Fayuan Gongzuo Huiyi Shang de Baodao, Zuigao Renmin Fayuan Yuanzhang Ren Jianxin* [*Report of the President of the Supreme People's Court Ren Jianxin at the Fourteenth Judicial Work Conference in Beijing on July 18, 1988*] [hereinafter *Supreme People's Court Report*] 12, *reprinted in* ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO [GAZETTE OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA], no. 3 (1988), at 3-16; *see also* Woo, *supra* note 87.

[100] *Supreme People's Court Report*, *supra* note 99. *See also CPC Central Committee's Proposal for Ten Year Development Programme and 8th Five Year Plan*, BEIJING REV., Feb. 20, 1988, at 21, 27.

[101] Wang Shengming, *Weile Wanshan Fazhi Xitong Gongcheng* [*To Complete the Workings of Law*], FAZHI RIBAO [LEGAL SYS. DAILY], Oct. 15, 1990, at 2.

[102] Satisfied with the success of this effort, the Shanxi People's Congress anticipates another review of the court's work in the near future. *Id.*

[103] Some scholars, however, have recently argued that the people's congresses may emerge as an alternative source of power apart from the Party. *See generally* KEVIN O'BRIEN, REFORM WITHOUT LIBERALIZATION: CHINA'S NATIONAL PEOPLE'S CONGRESS AND THE POLITICS OF INSTITUTIONAL CHANGE (1990). For a more cautious note, *see* Tanner, *supra* note 45, at 87-88.

reflects a traditional Chinese penchant for bureaucracy and also may be seen as the embodiment of what can be called an "ideology of supervision." The structure is perhaps most notable for what it does and does not constrain.

The concept of supervision, or *jiandu*, is one of the primary principles the Chinese government has invoked to strengthen the legal system.[104] This principle of supervision of public officials has antecedents in Chinese history. In particular, the Chinese censure system was established to supervise the imperial bureaucracy.[105] Modern day supervision is also traceable to the Committee of People's Supervision, which was established in the early years of the PRC and patterned after a Soviet prototype.[106] As Charles Hucker pointed out in his early analysis of the Committee of People's Supervision, modern day supervision contains an element of ideological control that was not present under the traditional system.[107] In the contemporary setting, supervision in China has encompassed supervision by administrative superiors, by Party elders, and by the Chinese People's Political Consultative Conference.[108]

According to Wang Shuwen, vice-chairman of the law committee of the National People's Congress ("NPC"), supervision of law enforcement includes supervision by people's congresses (which have the authority to supervise administrative, judicial, and procuratorial organs at the corresponding levels), administrative supervision by upper-level administrative organs over lower ones, and judicial supervision.[109] Within the context of judicial supervision, the principle of supervision supplies authority to numerous actors—the Supreme People's Court, upper-level judicial officers, the procuracy, the people's congresses, and the masses—to

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[104] Chinese commentators have identified a problem they term "*youfa buyi, jiandu fali*" (have law but no compliance, supervision is weak). One perceived solution is strengthening supervision. As the report of the Fourteenth Communist Party Congress pointed out, China "must complete the supervisory structure and subject each administrative organ and government worker to effective supervision." Zhao Shengyin, *Fanfu Erti* [*Two Topics in Combating Corruption*], MINZHU YU FAZHI [LAW & DEMONCRACY], no. 3 (1994), at 6.

[105] *See generally* Charles O. Hucker, *The Traditional Chinese Censorate and the New Peking Regime*, 45 AM. POL. SCI. REV. 1041 (1951).

[106] *Id.* at 1054-55.

[107] *Id.* at 1056-57.

[108] *Four Law Specialists Make Appeals—The Situation Whereby Laws Are Not Effectively Enforced Badly Needs to Be Changed*, BEIJING LIAOWANG [BEIJING OUTLOOK], *translated in Specialists Discuss Effective Law Enforcement*, FBIS-CHI, Oct. 19, 1993, at 13.

[109] According to Wang, supervision by the people's congresses includes supervision of administrative organs, judicial organs, and procuratorial organs. Upper-level administrative organs have supervisory authority over lower-level ones and specific supervisory departments have authority over state administrative organs. The Supreme People's Court, meanwhile, has supervisory authority over all levels of courts, and higher people's courts have supervisory authority over lower people's courts. The people's procuracy has a unique role in supervising all legal work. Finally, supervision is also carried out by Party organizations, the Chinese People's Political Consultative Conference, and the masses. *Id.*

challenge a judicial officer's decision. Interestingly, this principle of supervision, while touted as a measure curbing self-interested discretion, also has the inverse effect of facilitating ideological discretion.

The first line of supervision is, of course, the appeals process and the four-tiered appellate structure that the Chinese share with courts in many other countries. This structure includes a trial court, an intermediate court, a higher people's court, and the Supreme People's Court. In recent years, the Supreme People's Court has developed greater responsibility in guiding lower court decisions by issuing a variety of official opinions (*yijian*), explanations (*jieda*), answers (*pifu*), and notices (*tongzhi*). But supervision in the Chinese legal system goes beyond the four-tiered appellate structure. Closer examination reveals differences that give the Chinese judiciary an interesting blend of limited authority but substantial discretion.

Chinese judges have less authority than their counterparts in Western countries. Under the concept of *youti zhengti* (court as an organic whole), the Chinese legal system treats the individual judge less as an individual entity empowered to adjudicate and more as one component of the judicial system.[110] Indeed, according to Chinese legal theory, judicial independence refers to independent adjudication by the court as a whole, not by the individual judge.[111] The supervision of individual Chinese judges takes several forms. For example, except for minor cases, judges preside not alone, but in collegiate panels. Generally, judges follow the lead of the presiding judge of the collegiate panel. All important judicial decisions must also be examined and approved by the court president, the administrative head of the court.[112]

More significantly, individual judges are subject to the supervision of the adjudication committee (also translated as judicial committee). The

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[110] MINSHI SUSONG SHIYONG DAQUAN [COLLECTION OF CIVIL PROCEDURE LAWS] 249 (Liang Shuwen ed., 1993)

[111] While judicial independence in Western nations means that a judge administers justice independently, subject to no outside interference, the Chinese concept is one of "the people's courts administering justice independently, subject only to the law." People's Courts Organic Law, *supra* note 30, art. 4. *See also* MINSHI SUSONG SHIYONG DAQUAN, *supra* note 110; Liao Guangsheng, *"Independent Administration of Justice" and the PRC Legal System*, CHINESE L. & GOV'T, Summer-Fall 1983, at 123, 146-49.

[112] Liao Guangshen, *supra* note 111, at 48 (citing *Is it a Violation of the Law for the Court President of Presiding Judge to Examine and Approve the Verdicts?*, ZHONGGUO FAZHI BAO [CHINESE LEGAL SYS. DAILY], Apr. 24, 1981); *see also* Liu Chunmao, *Fayuanzhang, Tingzhang Shenpi Anjian de Zhidu Yingdang Quxiao [The System of Requiring the Court President or Presiding Judge to Examine and Approve Verdicts Should Be Abolished]*, MINZHU YU FAZHI [LAW & DEMOCRACY], no. 1 (1981), at 30. This system of approval and examination of cases by court presidents has caused judges to seek approval prior to trial, thus creating a situation of *xianpian houshen* (first decide, then try). Hikota Koguchi, *Judicial Independence in Post Mao China*, 7 B.C. THIRD WORLD L.J. 195, 205 (1987). This was also confirmed in interviews conducted by the author in 1998 and 1999.

function of the adjudication committee is to "sum up judicial experience and to discuss difficult and important cases and other issues relating to judicial work."[113] Hence, the adjudication committee, not the panel that actually presides at trial, discusses and decides all "difficult and important" cases. This procedure is said to result in the phenomenon of "verdict first, trial second."[114] Moreover, in difficult cases the adjudication committee may even solicit the opinion of the higher court, thereby negating an aggrieved party's opportunity to obtain unbiased review upon appeal.[115]

Perhaps most significant is that court presidents and vice-presidents who sit on the adjudication committee are generally Party members. In "difficult" cases or cases with "policy" implications, adjudication committees have even been known to solicit the advice of the local political-legal committee of the Party and to follow Party recommendations. Although today theoretically the Party cannot single out individual cases, in practice it does not have to since most judges (as Party members) are habitually sensitive to changing Party policies.[116] Party interests can thus be institutionally represented in the judicial decisionmaking process through the window of supervision.

Beyond these layers of internal court supervision, the ideology of supervision operates to subject the judiciary to the external legal supervision of the procuracy, the people's congress at the corresponding level, and finally, the "masses."[117] The procuracy, an institution imported from the Soviet Union, represents the state and is primarily responsible not only for investigating and prosecuting crimes, but also for supervising the administration of justice.[118] In its supervisory role, the procuracy exercises

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[113] People's Courts Organic Law, *supra* note 30, art. 11. The adjudication committee is comprised of the president and the vice-presidents of the court, the chief judge and associate chief judges of each division of the court, and the chief procurator, who is a nonvoting member.

[114] The deliberations of the adjudication committee are not made public or revealed to the parties. Decisions of the adjudication committee are reached by a majority vote of its members. ZHONGHUA RENMIN GONGHEGUO XINGSHI SUSONGFA JIANMING JIAOCHENG [TEACHING MATERIAL FOR PRC CRIMINAL PROCEDURES] 269 (1987).

[115] The process of "*tung qi*," or "to clear the air," takes the form of lower court judges asking for guidance from higher court judges. *See* SUN FEI, WOGUO XINGSHI SUSONG DIER SHENCHENG XULUN [TREATISE ON OUR COUNTRY'S CRIMINAL APPELLATE PROCEDURE] 48-49 (1986); *see also* Margaret Y.K. Woo, *The Right to a Criminal Appeal in the People's Republic of China*, 14 YALE J. INT'L L. 118, 148 (1989).

[116] Cohen, *supra* note 41, at 794.

[117] 1982 PRC Constitution, *supra* note 44, art. 129.

[118] Article 1 of the Organic Law of the People's Procuratorates defines the procuracy as the "state organ of legal supervision." Zhonghua Renmin Gongheguo Renmin Jianchayuan Zuzhifa [Organic Law of the People's Procuratorates of the People's Republic of China] (adopted July 1, 1979) [hereinafter the People's Procuratorate Organic Law] art. 1, *translated in* LAWS OF THE PRC, 1979-1982, *supra* note 44, at 80-86.

authority over the investigatory activities of the public security organs—over the activities of prisons, detention houses, and the agencies in charge of reform through labor, and over the judicial activities of the courts and the execution of judgments.[119] The scope and role of the procurator in "supervising" judicial activities of the court, however, are much debated and remain unclear.

In the early years of the PRC, legal supervision by the procuracy entailed the review of judicial decisions, as well as of resolutions and decrees of administrative bodies, to ensure that they conformed to the law. However, this broad authorization was soon found to be too burdensome and impractical in the complex Chinese bureaucracy.[120] During the Cultural Revolution, the procuracy, like the court system, was abolished.[121] It reemerged in the 1978 Constitution adopted by the Fifth National People's Congress and today has an uneasy relationship with the courts.[122] For instance, the procuracy shares with the courts the responsibility of interpreting law.[123] The Supreme People's Procuratorate, not the Supreme People's Court, is empowered to interpret the specific application of laws and decrees in the work of the procuracy.[124] Where the work of the procuracy includes legal supervision of trial activities, the authority of the procuracy to interpret laws relating to procuratorial work arguably places the procuracy above the judiciary.

In a criminal case, the procuracy's participation is more clearly defined and accepted. The procuracy can initiate cases, appeal erroneous judgments, and seek the reopening of final judgments it deems incorrect.[125]

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[119] *Id.* art. 5.

[120] Xu Yichu, *Lun Quanmian Chongfen Fahui Jiancha Jiguan Falu Jiandu de Zuoyong* [*Discussion of How to Fully Utilize the Procuracy's Legal Supervision Powers*], ZHONGGUO FAXUE [CHINA LEGAL STUD.], no. 4 (1987), at 43.

[121] *See generally* S. LENG & H. CHIU, *supra* note 28, at 68-72.

[122] *Id. See also* Ke Lanming, Qian Yi Jiancha Jiguan Jiandu Minshi Songsu Shidu [To Discuss the Role of the Procuracy in Supervising Civil Adjudication], FAZHI RIBAO [LEGAL SYS. DAILY], Oct. 1, 1990, at 2.

[123] Quanguo Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falu Jiesan Gongzuo de Jueding [Resolution of the Standing Committee of the National People's Congress on Providing an Improved Interpretation of the Law] (adopted June 10, 1981), *reprinted in* ZHONGHUA RENMIN GONGHEGUO QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUANHUI GONGBAO [GAZETTE OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA], July 6, 1981, at 21-22; *see also* Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 164-65 (1993).

[124] Resolution of the Standing Committee of the National People's Congress on Providing an Improved Interpretation of the Law, *supra* note 123.

[125] *See, e.g.*, Civil Procedure Law, *supra* note 32, art. 184. Article 184 states that "the Supreme People's Procuratorate shall lodge a protest against the legally effective judgment or ruling rendered by a people's court at any level, and a superior people's procuratorate against the legally effective judgment or ruling rendered by a subordinate people's court according to the procedure of judicial supervision . . . ." *Id.*

While the procurator representing the state is an indispensable party in a criminal case, the same is not necessarily true in a civil case between two private parties. Thus, in the last ten years, while the procuracy has had "the right of legal supervision over judicial work," it has not fully exercised this authority in civil cases.[126] The role of the procuracy in civil cases continues to be debated. The prevailing sentiment appears to be that the procuracy can intervene, but that its intervention is limited to cases affecting state interests.[127] Of course, this principle is broad enough to include all civil cases, since Maoist socialist ideology defines the interests of the people and the interests of the state as one.[128]

Finally, the Chinese government also asserts the importance of supervision of judicial work by the "masses,"[129] and, most recently, by the people's congresses, as part and parcel of *minzhu jiandu* (democratic supervision).[130] Supervision by the masses takes the form of ordinary citizens writing letters, sending petitions, or making phone calls to supervisory organs.[131] Discussions regarding the establishment of a mass media law have also made the point that such media are an important arm of the "mass" supervision of legal work.[132]

The people's congresses—bodies of deputies elected (under Party supervision) from the local to the national levels—are the closest China comes to representative bodies. Peng Chong of the National People's Congress defined supervision by the people's congresses as follows: "In major cases, the people's congress may request a report from the people's procuracy and the courts, and also conduct its own investigation. If [the people's congress] finds error, it may ask the procuracy or the courts to

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[126] Ding Mouying & Yang Qiguo, *Jiancha Jiquan Shixing Minshi Susong Jiandu Jige Wenti de Tantao [Discussion of Several Questions Relating to the Procuracy's Role in Supervising Civil Cases]*, ZHONGGUO FAXUE [CHINA LEGAL STUD.], no. 5 (1988), at 77.

[127] *See id.*

[128] Thus, Mao wrote, "[T]he individual is an element of the collective. When collective interests are increased, personal interests will subsequently be improved." *See* A. Nathan, *Sources of Chinese Rights Thinking*, *in* HUMAN RIGHTS IN CONTEMPORARY CHINA, 123, 141 (R. Edwards et. al. eds., 1986) (citing *Miscellany of Mao Tse-tung Thought (1949-1968)*, Joint Publication Research Service, June 12, 1969, at 250.) The Chinese conception of rights and laws also emphasizes the idea that law is designed not simply to protect individual interests, but rather to enable individuals to meet their duties to the state. Qiu Ye, *Lun Falu Zuanli he Yiwu de Tongyi Xing [On the Unity of Rights and Duties in Law]*, FAXUE YANJIU [STUD. IN L.], no. 3 (1990), at 16; *see also,* Margaret Y. K. Woo, *Courts, Justice and Human Rights*, *in* CHINA BRIEFING 1992, at 95 (William A. Joseph ed., 1992).

[129] Judges Law, *supra* note 25, art. 7(7).

[130] Wu Naitao, Offence Reporting: An Important Channel of Mass Supervision, BEIJING REV., Jan. 15-21, 1990, at 26.

[131] *Id.*

[132] *Id.*

correct the case according to law."[133] China's 1982 Constitution provided for supervision of the courts by the people's congresses.[134] The provision, however, has been brought into active use only in the last few years and remains controversial.[135]

In the 1980s, deputies of the people's congress assigned to carry out supervision of the courts tended to be of much lower rank than the secretary of the political-legal committee to whom courts and procurators frequently reported. Thus, it was unclear whether their supervisory activities were particularly effective.[136] In recent years, efforts have been made to strengthen the authority of the people's congresses. As recently as May 1995, Hubei Province's highest court issued a directive on improving "acceptance of supervision by people's congresses."[137] This directive instructed lower courts to submit timely reports of all important cases, along with their decisions and "Party guidance," to the people's congresses for review.[138]

Like all other activities, inspection of the courts by the people's congresses must theoretically be carried out under the guidance of the Communist Party. Indeed, supervision by the people's congresses is often instigated by particular policy concerns of the central government. For example, in 1993, after the Political Bureau Standing Committee of the Chinese Communist Party issued instructions on the comprehensive management of public security, the NPC sent two inspection groups to four provinces and autonomous regions to examine the implementation of the Decision on Strengthening the Comprehensive Management of Public Security.[139] Similarly, in anticipation of the United Nations Fourth World

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[133] Hu Dezu, *Dui Renda Jiqi Changweihui Jige Jiandu Xingshi de Tantao* [*A Discussion of the Various Kinds of Supervision by the People's Congresses and the Standing Committees*], FAZHI RIBAO [LEGAL SYS. DAILY], Nov. 1, 1990, at 3.

[134] 1982 PRC Constitution, *supra* note 44, art. 3.

[135] Ding Mouying & Yang Qiguo, *supra* note 126.

[136] Kevin O'Brien, *Chinese People's Congresses and Legislative Embeddedness: Understanding Early Organizational Development*, 27 COMP. POL. STUD. 80, 92, 98 (1994). The 1992 Law Governing Deputies to the National People's Congresses and to the Local People's Congresses at Various Levels includes detailed articles on inspection and supervision by the people's congresses. *See generally* Quanguo Renmin Daibiao Dahui he Difang Geji Renmin Daibiao Dahui Daibiaofa [Law of the People's Republic of China on Deputies to the National People's Congresses and to the Local People's Congresses at Various Levels] (adopted Apr. 3, 1992), *translated in The Law Governing Deputies to the National People's Congress*, FBIS-CHI, Apr. 14, 1992, at 1-5.

[137] Feng Yunjiang, Jiandu Renda Jiandu Gaijin Fayuan Gongzuo [Accept People's Congress Supervision, Improve the Work of the Courts], FAZHI RIBAO [LEGAL SYS. DAILY], May 7, 1995, at 1.

[138] *Id.*

[139] Zhang Sutang & Wu Hengguan, *Ren Jianxin Addresses the 10th Plenary Session of the Central Committee for Comprehensive Management of Public Security and Stresses Severe Punishment for*

Conference on Women held in Beijing in September of 1995, the NPC Standing Committee organized four inspection groups and sent them to eight provinces to inspect the implementation of the Law on the Protection of Women's Rights and Interests.[140] Also in 1995, the NPC reported the work of five inspection task forces in the provinces of Guangdong, Zhejiang, Liaoning, Henan, and Fujian, which had been dispatched to examine problems identified by the masses in the areas of consumer protection, rural development, and local protectionism.[141]

There are, therefore, numerous actors in the Chinese system who have de jure responsibility to supervise the work of individual judges: the adjudication committee, the court president, the procuracy, the people's congresses, the masses, and, ultimately, the Communist Party. With supervision, the work of individual judges in China can be quite constrained. While there has been growing discussion in the academic community about allowing the individual judge to "administer justice independently according to law,"[142] many judges in China prefer to defer decisionmaking to adjudication committees, relegating themselves to simply an administrative role.[143]

The recent focus on promoting supervision of legal work demonstrates China's growing concern with law enforcement generally and, in particular, the need to balance individual discretion with procedural regularity in judicial decisionmaking. Yet, while supervision can restrict the personal discretion of an individual judge, it can also be a window for ideological discretion. In supporting the guidance of the Party and funneling judicial work to higher authorities who are usually Party members or even deputy Party secretaries, supervision can ensure greater ideological compliance. Thus, while the discretion of an individual judge may be constrained, the court as a whole retains broad ideological discretion.

The ideology of supervision embedded in this framework of supervision may be better understood in light of the principle of democratic centralism, which applies to the operation of all governmental units in the

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Criminals, RENMIN RIBAO [PEOPLE'S DAILY], Oct. 28, 1993, at 113, *translated in Ren Jianxin Urges Fighting Against Crime*, FBIS-CHI, Nov. 9, 1993, at 14–15.

[140] *NPC Standing Committee About to Inspect the Implementation of the Law on the Protection of Women's Rights and Interests*, RENMIN RIBAO [PEOPLE'S DAILY], overseas ed., Feb. 13, 1995, at 4.

[141] *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongzuo Baogao [The Work Report of the NPC Standing Committee]*, FAZHI RIBAO [LEGAL SYS. DAILY], Mar. 23, 1995, at 1.

[142] *See, e.g.*, Ye Qing, *Zhushen Faguan Zeren Zixi [Responsibility of the Principal Judge]*, FAXUE [LEGAL STUD.], no. 7 (1995), at 21–23; Li Jianming, *Xingshi Shenpan Chengxu Gaige De Jidian Shikao [Thinking About the Reform of Criminal Justice]*, FAXUE YANJIU [STUD. IN L.], no. 1 (1995), at 84, 87.

[143] Ka Changjiu, *Court Reform*, FAXUE [LEGAL STUD.], no. 1 (1990), at 147, 150.

PRC.[144] The principle of democratic centralism functions to ensure that the minority is subordinated to the majority, the lower to the higher, the individual to the organization, and the locality to the center.[145] Thus, for instance, within a collegiate panel of judges on a case, the principle of democratic centralism dictates that judges in the minority subordinate their views to those of the majority. Similarly, under the principle of democratic centralism, the collegiate panel of judges must subordinate its views to those of the adjudication committee[146] and submit itself to supervision by the procuracy and the people's congresses.

This elaborate supervisory system is indicative of the court's role in the Chinese political system as an administrative bureaucracy, subject to supervision, and not yet fully empowered to supervise other institutions. Indeed, while a court is expected to strictly enforce the law, its authority to be the final interpreter of substantive law is evolving, and courts generally have not been viewed as having the authority to make law.[147] To date, courts are not authorized to supervise lawmaking by challenging the validity or inconsistencies of laws that have been properly implemented. Perhaps what is needed is an extension of the ideology of "supervision."

VI. EXTENSION OF THE IDEOLOGY OF "SUPERVISION"

As demonstrated in the discussion above, human discretion and the arbitrary state seep into the judicial process to shape China's formal procedural rules. The result is a set of procedures that provides ample opportunities to change, or, in the parlance of Chinese ideology, to "supervise," judicial decisions. This ideology of supervision and its attendant procedures reflect the dominance of the state, which supports procedural regularity only to the extent of curbing personal abuses, and not to the extent of curbing the arbitrary powers of the central government. Missing from the system are ways to challenge unjust laws themselves.

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[144] Article 3 of the PRC Constitution provides: "The state organs of the PRC apply the principle of democratic centralism." 1982 PRC Constitution, *supra* note 44, art. 3.

[145] Liao Guangshen, *supra* note 111, at 147.

[146] Article 11 of the People's Court Organic Law states, "[p]eople's courts at all levels shall set up judicial committees which shall practice democratic centralism." People's Court Organic Law, *supra* note 30, art. 11. *See also* THE GENERAL OFFICE OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, A BRIEF INTRODUCTION TO THE PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA (1988). This volume specifies that "the determinations of the judicial committee must be implemented by the collegiate panel." *Id.* at 8.

[147] *Ren Jianxin Discusses Law on Judges,* BEIJING XINHUA, Mar. 1, 1995, *translated in* FBIS-CHI, Mar. 21, 1995, at 24-26.

While individuals can challenge discretionary decisions in China, they can challenge those decisions only on the grounds that they are "not in accordance with the law."[148] For example, the Administrative Litigation Law provides for challenges to administrative abuses and the correction of cases "according to law."[149] To prevail, a complainant in an administrative litigation must show a violation of a specific administrative rule.[150] The problem, however, is that the laws themselves (as well as their interpretation) are subject to wide swings in Party policy.

When China has launched national campaigns to combat crime in the past, some of the procedural protections guaranteed by the Criminal Procedure Law have not been honored in practice. This has meant ignoring procedural protections completely, or, increasingly, changing and reinterpreting procedural rules to meet the needs of the campaign. During the 1983 anti-crime campaign, emergency measures such as shortened time periods for delivery to defendants of bills of prosecution and summons and notice, as well as abbreviated trials and appeals, were adopted for the purpose of "quickly and severely punish[ing] criminals who seriously endanger public security."[151] During this period, the appeals procedure was amended so that the approval of only a provincial higher people's court was required for death sentences in cases of murder, robbery, rape, bombing, arson, and sabotage.[152]

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[148] *See, e.g.*, Administrative Litigation Law, *supra* note 2, art. 5; Xingzheng Fuyi Tiaoli [Regulations on Administrative Reconsideration] (issued Dec. 24, 1990, amended Oct. 24, 1994) [hereinafter Regulations on Administrative Consideration] arts. 1-2, *reprinted in* ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [GAZETTE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA], Oct. 24, 1994, 982-990. The recently adopted Administrative Supervision Law of the PRC, however, provides for the possibility of more liberal challenges to administrative acts. Zhonghua Renmin Gongheguo Xingzheng Jianchafa [Administrative Supervision Law of the People's Republic of China] (adopted May 9, 1997) [hereinafter Administrative Supervision Law], *available in* ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [GAZETTE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA], May 15, 1997, 665-672. Article 23(3) provides that supervisory organs may recommend supervision in situations of "infringements upon state and collective interests and legitimate interests of citizens that require remedial measures." *Id.* art. 23.

[149] Administrative Litigation Law, *supra* note 2, art. 5.

[150] *Id.* arts. 3, 5.

[151] Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Yancheng Yanzong Weihai Shehui Anding de Fanzui Fenzi de Jueding [Decision of the Standing Committee of the National People's Congress Regarding the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security] (issued Sept. 2, 1983), *translated in* LAWS OF THE PRC, 1983-1986, *supra* note 30, at 32-34. Defendants who were considered to seriously endanger public security and whose alleged crimes could be punished by death could be quickly brought to trial. *Id.* The restrictions regarding the time limit for delivery to the defendant of the bill of prosecution and the summons and notices were overstepped. *Id.* The ten-day period for appeal was shortened to three days. *Id.*

[152] Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sixing Anjian Hezhun Wenti de Jueding [Decision of the Standing Committee of the National People's Congress Regarding Approval of

Similarly, after the 1989 pro-democracy movement, the Chinese government again emphasized the need "to deal severely with crime" and instituted an "anti-crime campaign against the six vices": gambling, prostitution, pornography, trafficking of women and children, the sale and abuse of drugs, and the use of feudal superstition to defraud.[153] As a result of this emphasis on the prosecution of crimes, the people's courts passed judgment on 482,658 accused people, a significant increase from the previous year.[154] Again, for some of the people prosecuted as part of this crackdown, including many of the pro-democracy movement participants, some of the procedural protections guaranteed by the Chinese legal codes were ignored.[155]

The concept of "rule of law" requires restraint on arbitrariness not only in the application of law, but also in the making of law. While there are limited circumstances in which administrative rulings may be nullified for inconsistency with statutes,[156] there are no procedures through which a citizen can challenge the validity of a formally enacted statute. Without such a mechanism, there is no process through which to challenge legal procedures such as the "emergency" criminal procedures adopted during the anti-crime campaigns. In recent years, some Chinese scholars have argued for (and there have been some efforts toward) the establishment of a

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Cases Involving the Death Sentence] (issued June 10, 1981), *translated in* LAWS OF THE PRC, 1979–1982, *supra* note 44, at 250.

[153] Jiao Qingle, *Bushu Guichu, Maiyin, Piaochang Deng "Liu Hai" Gongzuo* [*On the Work of Eliminating the "Six Vices"*], FAZHI RIBAO [LEGAL SYS. DAILY], Nov. 14, 1989, at 1.

[154] *1989 Niande Shenpan Gongzuo* [*1989 Report on Judicial Work*], 1990 ZHONGGUO FALU NIANJIAN [1990 CHINA LAW YEARBOOK] 39 (1990). By contrast, the number of people convicted in 1988 was 368,790. *1988 Niande Shenpan Gongzuo* [*1988 Report on Judicial Work*], 1989 ZHONGGUO FALU NIANJIAN [1989 CHINA LAW YEARBOOK] 8 (1989).

[155] Immediately after the June 4, 1989 movement, there were a number of legislative responses which were designed to keep closer track of citizens and restrict the manner in which social and political activities take place. *See generally* Margaret Y. K. Woo, *Legal Reforms in the Aftermath of Tiananmen Square*, 17 REV. SOCIALIST L. 51 (1991).

[156] Article 23 of the Administrative Supervision Law, promulgated in 1997, provides for supervisory review of "decisions, orders, and directives issued by departments of people's governments," which can be "corrected or withdrawn for contradicting laws, regulations, or state policies." Administrative Supervision Law, *supra* note 148, art. 23. Similarly, Article 43 of the Regulations on Administrative Reconsideration, as amended in 1994, provides for reconsideration of "rules, decisions, and orders with general binding force" if they are in conflict with "laws and regulations or other rules, decisions, or orders with general binding force." Regulations on Administrative Reconsideration, *supra* note 148, art. 43. While these enactments may seem to open the door to challenges to "laws and regulations" themselves, neither actually goes that far. In fact, Article 10 of the Regulations on Administrative Reconsideration specifically prohibits challenges to regulations by providing that "citizens, legal persons, or other organizations shall not file an application for reconsideration in accordance with these regulations if they are not satisfied with . . . administrative regulations, rules, decisions, and orders with a general binding force." *Id.* art. 10.

legislative procedure to curb when and how laws may be changed.[157] More interestingly, there has also been discussion of extending the ideology of supervision to encompass constitutional supervision, that is, the enforcement of the PRC Constitution as a higher law that could serve as a check on the discretion of the national government and, more importantly, the Party.[158]

There is a kernel of the concept of constitutional supervision in the increased role of the legislature and the Supreme People's Court in the interpretation of law. However, there has been no movement to formally empower the court or another body, such as a legislative council, to review legislation to ensure its constitutionality or to decide political disputes among the branches and levels of the government.

The one potential mechanism for constitutional challenge currently contained in the PRC Constitution is a provision which permits individuals to submit *shensu* petitions.[159] A *shensu* petition is a letter of complaint that an individual may submit to challenge the abuse of official power. In recent years, thousands of *shensu* petitions have been submitted challenging judicial decisions in criminal cases.[160] Yet, while the PRC Constitution allows aggrieved parties to register petitions, there is at present neither a constitutional court to hear these petitions nor any method to separate constitutional claims of procedural violations from nonconstitutional claims. At present, therefore, *shensu* petitions are viewed as a burden on the legal system.[161] There is no jurisprudence by which unjust laws can be challenged other than by appeals to the "mandate of heaven."

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[157] The NPC is currently debating a draft of the Legislation Law which, if passed, will regulate and guide the process of lawmaking. *Chinese Parliament Standing Committee Studies Draft to Ensure Rule of Law*, XINHUA, Oct. 29, 1999, *reprinted in* BRIT. BROADCASTING CORP. MONITORING ASIA PACIFIC-POLITICAL, Oct. 30, 1999, *available in* LEXIS, News Library, Asia Pacific News File.

[158] *See* Zhen Yunsheng, *Tizhi Gaige Yu Xianfa Shenpian* [*System Reform and Constitutional Supervision*], FAXUE YANJIU [STUD. IN L.], no. 9 (1988), at 5–11.

[159] 1982 PRC Constitution, *supra* note 44, art. 41.

[160] In 1988, the petitions court handled 3,570,685 letters and 4,175,204 visits. *Shensu* petitions constitute about 75.6% of this number. *1988 Nian de Shenpan Gongzuo* [*Judicial Work Report of 1988*], *reprinted in* 1989 ZHONGGUO FALU NIANJIN [1989 LAW YEARBOOK OF CHINA] 10 (1989). In 1995, the people's courts handled a total of 6.36 million visits and letters from the masses. Of this number, 640,000 presented petitions. *1996 Supreme People's Court Work Report*, *supra* note 79, at 49.

[161] The Supreme People's Court has issued regulations that encourage courts to educate and "persuade" persistent petitioners to withdraw their petitions. Zuigao Renmin Fayuan Guanyu Geji Renmin Fayuan Chuli Xingshi Anjian Shensu de Zanxing Guiding [Provisional Stipulation of the Supreme People's Court on the Handling of Petitions in Criminal Cases] (issued Oct. 10, 1989) art. 15, *reprinted in* FAZHI RIBAO [LEGAL SYS. DAILY], Oct. 25, 1989, at 2; Zuigao Renmin Fayuan Guanyu Geji Renmin Fayuan Chuli Minshi he Jingji Jiufen Anjian Shensu de Zanxing Guiding [Provisional Stipulation of the Supreme People's Court on the Handling of Petitions in Civil Cases] (issued July 12, 1989), *reprinted in* FAZHI RIBAO [LEGAL SYS. DAILY], Aug. 26, 1989, at 2.

VII. CONCLUSION

China today remains ambivalent about formal legal rules and the rule of law. This ambivalence was aptly depicted in a recent film, *The Story of Qiu Ju*.[162] In the film, the heroine Qiu Ju seeks justice for her husband, who has been wrongfully beaten by the village chief for challenging the chief's arbitrary denial of permission to put up a storage shed. Seeking justice, Qiu Ju first brings a citizen complaint to the public security office, where it is informally mediated. The public security officer suggests that the chief pay for the husband's medical bills and the chief agrees to do so. Qiu, who wants an apology, is dissatisfied with the outcome and seeks review in the higher office of the public security. When the original officer's decision is affirmed by the higher office, Qiu seeks the assistance of a lawyer to file suit in court and challenge the decision as not "according to law."

Once the force of formal law is brought to bear, events spiral out of control. After losing again in the trial court, Qiu Ju appeals to a higher court. Her appeal brings further investigation by the procuracy, resulting in a higher court judgment that finds the chief guilty of assault and orders him detained for ten days. This judgment arrives, however, on the heels of a heroic effort by the village chief to save Qiu Ju when a difficult childbirth threatens her life. Qiu Ju is stunned when she hears of the chief's arrest and runs after the car that is taking him off to jail.

Realistic or not, the film conveys a strong sense that the legal system is inadequate to provide a just result. Qiu Ju had wanted an apology, a remedy the legal system did not and could not provide. Instead, strict application of the law resulted in an arrest and imprisonment, a result Qiu Ju did not want at all. While the rule of law is necessary to curb local abuses, formal application of law in this instance did not take into account the complex relationships between local chiefs and villagers or the individual relationship between Chief Wang and Qiu Ju.

This film's ambivalence about the strict application of law is also reflected in China's procedural laws. Undeniably, these procedural codes, along with the recent Judges Law and other laws such as the Lawyers Law and the Procurators Law[163] represent efforts to temper personal, self-serving

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[162] The film was made by the noted filmmaker Zhang Yimou. Interestingly, the film itself generated a civil lawsuit brought by an individual who sued the film company for civil damages for using her images in portions of the film without her permission. That lawsuit is discussed as case number 104, *in* HIGHER PEOPLE'S COURT TRAINING CENTER 355-58 (1996).

[163] Judges Law, *supra* note 25; Procurators Law, *supra* note 97; Zhonghua Renmin Gongheguo Lushifa [Law of the PRC on Lawyers] (adopted May 15, 1996), *translated in* LAWS OF THE PRC 1996, *supra* note 53, at 159-71.

discretion by enhancing professional competency and consistency. These procedural laws can ensure greater regularity in the application of enacted law and, hence, greater justice in ordinary cases. Yet, the procedural laws still preserve personal discretion in decision-making through the use of vague and general terms and through the codification of mediation. The Chinese judge can go beyond black letter law to consider a wide variety of facts and variables in rendering justice that will preserve harmony and social relations. Thus, the procedural laws codify equity in their formal requirements.

Ultimately, the rule of law may also be compromised because these laws do not allow challenges to ideological discretion. In contrast to efforts to curb self-serving personal discretion, less has been done to check ideological discretion. In fact, efforts to curb individual discretion, such as the example of adjudication supervision, can have the inverse effect of increasing systemic ideological discretion. Procedural laws serve to affirm, but not challenge, the authority of the central government. Indeed, while they provide the basis for challenges to discretionary decisions rendered "not in accordance to law," they do not allow challenges to the validity of the substantive and procedural laws themselves.

China has made much progress in ensuring procedural regularity, but China's legal system still accords the individual judge limited authority within the boundaries of greater discretion. In sum, the system remains more a system of discretion supplemented by law than a system of law supplemented by discretion.