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Building Judicial Integrity in China

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Judicial reforms aimed at improving the rule of law and ethical integrity has been an ongoing goal of the Chinese government since the late 1970s. Both rule of law and judicial integrity have some unique characteristics in the Chinese context. In the 2010 Code of Conduct for Judges and 2010 Basic Standards of Professional Ethics for Judges in the People's Republic of China, the Chinese Supreme People's Court requires judges to be loyal to the Chinese Communist Party (CCP), the Constitution, and the law. Additionally, judges are required by the Supreme People's Court to be both politically reliable and professionally competent.²

This article addresses the following questions: How has judicial reform progressed in the People's Republic of China and what defines the court in an authoritarian state struggling for integrity and the rule of law? Are courts and their judges politically independent? Can the law be applied judicially in adjudication? How widespread is judicial corruption in China? Can legal reforms provide at least partial remedies to ethical problems that Chinese courts face? In order to answer those questions,

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² Faguan Xingwei Guifan (法官行为规范) [Code of Conduct for Judges] (promulgated by the Sup. People's Ct., Dec. 6, 2010, effective Dec. 6, 2010) Westlaw China; Zhonghuarenminguoheguo Faguan Zhiye Daode Jiben Zhunze (中华人民共和国法官职业道德基本准则) [Basic Standards of the People's Republic of China on Professional Ethics of Judges] (promulgated by the Sup. People's Ct., Dec. 6, 2010, effective Dec. 6, 2010) Westlaw China.

we need first to examine the context of China's ongoing judicial reform. The court is an integral part of the country's political system, and judicial reform cannot take place in isolation. Judicial reform, in order to be successful, must be embedded in the larger political, bureaucratic, and social contexts from which judges originate and courts operate.

Context of Judicial Reform

Judicial reform in China, as is the case anywhere, does not take place in a vacuum. The reform is embedded in a particular political and social context. There are three important contextual issues in studying China's judicial reform.

First, there is a political context, which affects the parameters of reform. China is a one party authoritarian state where the ruling Chinese Communist Party ("CCP") has its leadership position entrenched in the Constitution. This allows the CCP to dominate legal reform and control judges. The Chinese Constitution is hostile to the doctrine of separation of powers, and judicial independence has always been taboo. The political domination of the CCP has a significant impact on the independence of the court and the judicial process to the degree that the entire judicial framework is absorbed into the political process.

Judges are CCP members first and judges second. The CCP openly demands that courts be secondary to the larger political system, and the courts willingly comply, and an integral part of. That political-legal community is composed of judges, prosecutors, police officers, prison guards, and, of course, lawyers. As members of that larger

political-legal community under the direct leadership of the CCP, judges, in principle, are first and foremost loyal to the CCP and subject to its instruction and discipline. When there is a conflict of demands between CCP instructions and legal requirements, judges know exactly where their primary loyalty lies. The CCP's instructions are more consequential than legal requirements in that particular political context in which the courts operate.

Second, the bureaucratic setting of the Chinese courts also impacts the behavior of many judges. It is commonly accepted that the prevailing legal practice in China permits a degree of independence of adjudication by the court as an institution. However, it does not allow the exercise of independent adjudication by judges as individuals.

³There is a rigid and rigorous bureaucratic control within the court, and trial judges, often placed at the bottom of the judicial hierarchy, must receive multiple approvals before making their decision.. It has become a routine criticism that a fatal problem of the Chinese judiciary is those who try cases do not have the necessary authority to decide the cases. Against the bureaucratic system backdrop, judges tend to behave more like a team player in a large assembly line than an individual decision-maker; thus, the system of bureaucratic discipline that prevails in China transforms judging into a collective system. One of the ongoing judicial reforms is to increase the authority of trial judges in rendering decisions; that seemingly innocuous reform has encountered resistance not only

³ YUHUA WANG, *TYING THE AUTOCRAT'S HANDS: THE RISE OF THE RULE OF LAW IN CHINA* (2015); ALBERT CHEN, *INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* (LexisNexis 4th ed., 2011).

from the political authorities outside the court but also from the senior management judges within the court.⁴

Third, there is a social context in which judges operate. Judges are one of the many professions in China which operate in the same social milieu, and are subject to similar incentives that shape their professional behaviors. Social constraints that affect the professional behavior of doctors, accountants, educators and others have an equal impact on judges. Judicial reform, in building ethical integrity, is constrained by the general ethical standard in society. Judicial reform, therefore, has to be embedded in the society in which it functions. If the party extends its political control to all state institutions and to the fabric of society, it is hard for the courts to resist the political overreach on their own. Similarly, if corruption is a prevalent social ill, it is not possible for judges to be immune from the disease. Professionalism and ethical integrity are systemic issues that rise and fall at a general level.

These contextual constraints impact the ethical integrity of Chinese judges and create powerful institutional barriers to their professional development. It is unsurprising that a common perception of Chinese judges is that they are not politically independent due to the entrenched leadership of the Communist Party in the PRC legal system. Individual judges are directly “accountable” and defer to the bureaucratic system inside the courts because judges are akin to cogs in a larger machine, rather than individual

⁴ Li Jingyun (李靖云), *Court Reform is not Merely to End Performance Evaluation*, SOUTHERN METROPOLIS DAILY, Feb. 1, 2015, http://epaper.oeeee.com/epaper/A/html/2015-02/01/content_3383582.htm?div=0.

judicial decision-makers. Moreover, professional ethics in the judiciary is a microcosm of ethical standard in the society at large.

The Possibility of Judicial Integrity in Authoritarian States and its Limits

China's authoritarian state strives for the rule of law, in a limited sense, and relies on an efficient and effective judiciary for dispute resolution, pronouncing and enforcing rules, and limiting local states.⁵

Rule of law serves at least three objectives for the party-state. First, it legitimizes powers; generations of party and state leaders in China have embraced the concept of rule of law. In particular, emerging leaders in the early years of their terms in office tend to emphasize the rule of law in their efforts to conquer opposition and win the hearts of the ordinary citizens. Without exception, Chinese leaders including Deng Xiaoping, Jiang Zemin, and Hu Jintao all embraced the rhetoric of rule of law in the early years of their terms in office.⁶ If a political leader lacks charisma or an appealing ideology, they regularly resort to the rhetoric of the rule of law while exercising political powers.⁷

Second, the central government may rely on the rule of law, and an effective court in particular, to rein in local governments. In China's unitary state, the central government encounters a significant asymmetry in information and near insurmountable

⁵ TOM GINSBURG & TAMIR MOUSTAFA, *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008).

⁶ Fu Hualing (傅華伶), *Challenging Authoritarianism Through Law: Potential and Limit*, 6 NAT'L TAIWAN UNIV. L. REV. 339 (2011).

⁷ See generally *RULE BY LAW*, *supra* note 5 (for a general study of reliance on law in authoritarian states).

barriers to the implementation of national policy at the local level.⁸ Resources for monitoring the performance of local officials and ensuring local compliance of central policies are limited. There are a limited number of instruments in the central government's toolkit to identify, prevent, and punish local defiance. Extra-legal measures, through party disciplines against party members, are a commonly-used strategy in extending active central control over local governments. The ongoing anti-corruption campaign clearly demonstrates that instrument,⁹ along with the party-state's use of the rule of law in conquering local resistance.¹⁰ In Yuhua Wang's words, law can be used to tie the hands of petty autocrats.¹¹

Third, the rule of law may have proved to be the most effective mechanism for dispute resolution in the long run. China's rapid social and economic transition has produced tremendous stress and generated a large number of disputes. The party-state has resorted to a variety of extra-legal ways to manage those disputes.¹² Suppression of disputes and dispute resolution, that is based on political expedience, have failed miserably in achieving effective and fair settlements. As numerous studies on the Chinese

⁸ Cigi Mei and Margaret M. Pearson, *Killing a Chicken to Scare the Monkeys? Deterrence Failure and Local Defiance In China*, 72 CHINA J. 75 (2014); and Yongshun Cai and Lin Zhu, *Disciplining Local Officials in China: The Case of Conflict Management*, 70 CHINA J. 98 (2013).

⁹ Hualing Fu (傅華伶), *Wielding the Sword: President Xi's New Anti-Corruption Campaign*, in GREED, CORRUPTION, AND THE MODERN STATE: ESSAYS IN POLITICAL ECONOMY (Susan Rose-Ackerman & Paul Lagunes eds., Edward Elgar forthcoming Nov. 2015).

¹⁰ See generally Rachel E. Stern, *The Political Logic of China's New Environmental Courts*, 72 THE CHINA J. 53 (2014) and Mary E. Gallagher & Baohua Dong, *Legislating Harmony: Labor Law Reform in Contemporary China*, in FROM IRON-RICE BOWL TO INFORMALIZATION: MARKETS, STATE AND WORKERS IN A CHANGING CHINA 36 (Mary E Gallagher et al. eds., 2011) (for the examples of renewed attempts to use courts to rein in local resistance in environmental protection and labor standard respectively).

¹¹ Wang, *supra* note 3, at 158.

¹² Fu, *supra*, note 6; Hualing Fu (傅華伶), *Mediation and the Rule of Law: The Chinese Landscape*, in FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION (Joachim Zekoll et al. eds., 2015); Carl F. Minzner, *China's Turn Against Law*, 59 AMERICAN JOURNAL OF COMPARATIVE LAW 935 (2001).

petition system has shown, unprincipled dispute resolution that bypasses the legal system eventually exacerbates social conflict and becomes a destabilizing force itself.¹³ There was serious soul-searching in the post-Hu era (2002-2012) on the danger of using extra-law in social control. With the renewed efforts by the CCP's Central Committee's Fourth Plenum on further development of the legal system, China resumed and broadened the reform of building a socialist system.¹⁴ There is an emerging consensus among political elites that dispute resolution, based on the rule of law and legal principles, is the most cost-effective way to resolve the vast majority of the cases.¹⁵

Of course, China has demonstrated unique characteristics in its legal development that are strongly associated with its political system. Putting China in a historical and comparative context, there is strong reason to argue that China is following an East Asian Model (EAM) of developmental state.¹⁶ In that model there is state-led economic reform followed by the development of commercial rule of law to facilitate the market economy. At the initial stage, the state promotes civil law rights (such as the freedom of contract) and social and economic rights (consumer right, labor right and non-discrimination and

¹³ Liangjiang Li et al., *Petitioning Beijing: The High Tide of 2003-2006*, 210 CHINA Q. 313 (2012); Carl F. Minzner, *Xin角度: An Alternative to Formal Chinese Legal Institutions* 42 STANFORD JOURNAL OF INTERNATIONAL LAW 103 (2006); Yanhua Deng and Kevin. J. O'Brien, *Relational Repression in China: Using Social Ties to Demobilize Protesters* 214 CHINA Q. 533 (2013).

¹⁴ Communiqué of the 4th Plenary Session of the 18th Central Committee of Communist Party of China (Dec. 2, 2014), available at http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm.

¹⁵ Randall Peerenboom, *The Future of Legal Reforms in China: A Critical Appraisal of the Decision on Comprehensively Deepening Reform*, Soc. Sci. Res. Network (Jan. 14, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379161.

¹⁶ See generally RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? (2008) (for an elaboration of this model), and RANDALL PEERENBOOM & TOM GINSBURG, LAW AND DEVELOPMENT OF MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP (2014) (for a discussion of the correlation between national wealth and legal development).

equality right), yet limits collective rights and political rights. As the economy grows, the state invests more in institutions, trains professionals, improves education, and diverts resources to human development. From that stage onward, the state is on the defensive and starts to jealously guard its power and privilege, refusing to make further concessions unless absolutely necessary. But, by that late stage, the economy has changed, society has changed, and people have changed, creating persistent demand for rule of law, government accountability, and an expansion of collective and political rights. This is the trajectory of incremental growth and managed legal development that China is following.

China is on the trajectory of that EAM and the legal reforms are taking place decisively within the framework of its authoritarian system. There is an inherent tension between the necessity to uphold the authoritarian rule and the imperative to live up to the party's own rhetoric. An authoritarian system struggling for a degree of rule of law undoubtedly constrains the scope of judicial reform.

China prioritizes the supply side of the rule of law, but there has been a gradual shift to the demand side. The supply side includes legal rules and the institutions that apply those legal rules with courts at the center. On the demand side, citizens are aware of their rights and the political-legal culture in a given society, and lawyers and social organizations channel disputes into legal institutions and facilitate protecting those rights.

It is expected that in the beginning of building the rule of law, rulemaking, as a top-down process, has the priority. After all, rule of law requires that there are rules in existence to be enforced. Once the rules are made, it is often the case that those rules are

not properly enforced, and the rule of law appears to be superficial and lacks serious commitment. The second stage of reform is often about institutional capacity building. In general, in China, there is effective supply of rules and institutions but there is insufficient channeling between the world in which disputes have occurred and the world in which disputes can be resolved. A weak channeling function of the law appears to be a bottleneck in the Chinese law reform as in the case of other transition countries.¹⁷ As Epp¹⁸ has forcefully argued, what distinguishes a weak legal system, such as that in India, from a strong legal system, such as that in Canada, is not the rules or institutions of a respective country, but is what he refers to as the support structure, including principally the legal profession, NGOs and other intermediaries that play that channeling function. In building a legal system, empowering lawyers is as important as enhancing the capacity of judges. There cannot be a well functioning legal system without an effective and competent legal profession.

Additionally, it is possible for authoritarian states to create an effective legal system which can respect freedom, protect rights and develop a degree of rule of law. The party state in China is adaptable, resilient and largely legitimate in the eyes of the general public, partly because it creates legal rights and has them enforced through a

¹⁷ Fu Hualing (傅華伶), *Access to Justice and Constitutionalism in China*, in BUILDING CONSTITUTIONALISM IN CHINA 163 (Stéphanie Balme and Michael W. Dowdle eds., 2009); Mary Gallagher, *Mobilizing the Law in China: "Informed Disenchantment" and the Development of the Legal Consciousness*, LAW & SOC'Y REV. 783 (2006); Fu Hualing (傅華伶), "Use the Law as Your Weapon!" *Institutional Change and Legal Mobilization in China*, in ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 54 (Neil Diamant et al. eds., 2005).

¹⁸ CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

judicial process in response to societal need.¹⁹ But, like other transition states, China prioritizes rule of law and the protection of rights in selective policy areas depending on the perceived necessity and feasibility. Consistent with legal development in authoritarian societies, there is more rule of law in commerce and trade but less in media, religion, criminal law, and other politically sensitive areas.²⁰ There are areas, such as anti-corruption, in which the law remains largely silent. In general, the law is more effective and consequential in civil law rights or social-economic rights than political rights. Therefore, legal dualism co-exists. A professional justice serves for the vast majority of ordinary cases, and a politicized justice serves for a range of exceptional cases, as discussed below.

That dualism has also caused a dilemma in the judiciary when facing cases of different political natures. For example, is the judiciary in China independent? This is not a meaningful question without referring to the particular context in which the question is posed. Any possible answer would have to be case-specific, institution-specific and context-specific.²¹ In the Chinese case, courts are structurally dependent on China's political system, and they are unlikely to gain any institutional independence as long as the existing political system remains. But, the courts can achieve a degree of operational independence in the actual adjudication of cases depending on the nature of cases involved. There will continue to be politically sensitive cases such as the corruption cases

¹⁹ Andrew J. Nathan, *Authoritarian Resilience*, 14 J. Democracy 6 (2003). Martin Dimitrova, *The Resilient Authoritarians*, CURRENT HISTORY 24 (2008).

²⁰ RANDALL PEERENBOOM, JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (2009).

²¹ Fu Hualing (傅华伶), *Putting China's Judiciary into Perspective: Is it Independent, Competent and Fair?*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 193 (Erik Jensen & Tom Heller eds., 2003).

involving political elites or cases concerning political dissent. In those exceptional cases, the courts will continue to depend on political instructions and defer to political order. However, in the vast majority of the cases relating civil and commercial matters, courts can be independent even within the authoritarian system. In ordinary civil and criminal justice matters, the concern is no longer judicial independence or the lack thereof, but accountability on the part of the judges and a smarter way of supervision and control. The CCP has shown little interest in interfering with ordinary civil and commercial disputes and is satisfied to leave their resolution to the courts. Once the concern over a lack of independence is taken out of the equation, an immediate question becomes whether the court has the institutional capacity to offer fair and effective resolution of the vast majority of ordinary cases. With the support of the CCP to build a judiciary with integrity, the answer to the above question can be affirmative.

That raises the final characteristic of the rule of law under authoritarianism, that is the lack of a deep moral commitment to limited government and liberty. In China, the reform promotes a thin (formal) version of the rule of law without asking the harder question of thick (substantive) version of the rule of law. The thin version of rule of law focuses on the internal quality of law, such as the requirement that law must be public, accessible, generally applicable, clear, prospective and consistent on the whole. The thin version also focuses on the institutional dimension of enforcement and requires valid rules for law-making, fair application of law, effective enforcement and general acceptance of rules.²²

²² RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

Critics of the thin version of rule of law point out that it does not provide a normative foundation, and therefore “thin” because it is not supported by a rights-based system commonly observed in a liberal democracy. Legal reform in this context is largely illiberal; the legal system the CCP is building is not rights-based. Instead, reform efforts have been concentrated on developing a rule of law system to ensure certainty, clarity, and to some extent, procedural fairness. The law is used to improve government effectiveness and enhance state capacity and legitimacy. However, it does not restrain the CCP itself. As China has been institutionalizing, regularizing, and professionalizing their courts, but it is still encountering insurmountable difficulties inherent in the political system.

Judicial Reform in China

Since the late 1970s, the Chinese courts have undergone a continuous reform process of professionalization and institutionalization.²³ Despite the political constraints, there are sufficient opportunities and incentives to continue China's judicial reform so as to enhance judicial capacity and rebuild trust and credibility. It is undeniable that the Chinese judiciary has been improving itself noticeably through enhancing professionalism, institutionalization and autonomy.

The CCP has made efforts to make judgeships an attractive profession in comparison with other civil services. Indeed, a well-educated judiciary places its own demand on the quality of the judiciary and takes pride in its profession. When the quality

²³ *Id.*

of the judicial remains unsatisfactory , judges quit, adding internal pressure on the CCP to improve the judicial conditions.²⁴ In response to the challenge, China has started a new round of judicial reform.²⁵ Under the leadership of Zhou Qiang, the first Chief Justice who received formal legal education in the reform era, a prototype of a (further) reformed judiciary is slowly taking shape in Shanghai, Shenzhen and other key pilot cities. The core feature of this round of reform is the creation of a separate judicial track within the civil service.²⁶

While the creation of a separate judicial track is important in boosting judicial morale, it is not intended to generate a sense of judicial independence. It is principally a financial incentive to rationalize and stabilize the judiciary.²⁷ A separate judicial track creates more opportunities for career enhancement by decoupling salary and rank. Judges, like other civil servants, are facing a more acute problem. The administrative rank of a basic court, where the vast majority of judges in China work, was kept a low level and there were a large number of judges working in a low ranking station. Naturally

²⁴ Judges have been leaving courts en masse to take positions in the private sectors. In Shanghai, for example, more than 70 judges resigned in 2013 and 86 judges did so in 2014. In the five year before 2013, an average of 67 judges left the judiciary per year. The commonly cited reason is high pressure and low pay. Those who left tended to be middle-aged and talented judges in coastal cities. *See 86 Judges Resigned from Courts in Shanghai Last Year; Would Judicial Reform Weaken the Waves of Resigning?*, EASTDAY, April 20, 2015, available at <http://shzw.eastday.com/shzw/G/20150420/u1ai147926.html>. (last visited Oct. 14, 2015); *see also Designing Waves Appeared in Judicial Institutions and the Numbers are Increasing*, SOHU NEWS, available at <http://news.sohu.com/20150415/n411311749.shtml> (last visited Oct. 14, 2015) (for the case in other major cities); *see also Stanley Lubman, China's Exodus of Judges*, CHINA REAL TIME, May 24, 2015, available at <http://blogs.wsj.com/chinarealtime/2015/05/04/what-a-stubborn-exodus-of-judges-means-for-legal-reform-in-china> (last visited Oct. 14, 2015) (an insightful comment).

²⁵ CPC, *supra* note 14; PEERENBOOM, *supra* note 15.

²⁶ Jian Zhang & Xueyu Liu, *Procurators and Judges Removed from the Rank of Civil Servants?*, JINGHUA, June 16, 2014, available at http://epaper.jinghua.cn/html/2014-06/16/content_96872.htm (last visited Oct. 14, 2015).

²⁷ Xing Shiwei, *Shanghai Judicial Reform Plan: Judges' Income Higher than Ordinary Civil Servants by 43%*, NEWS 163, Apr. 24, 2015, available at <http://news.163.com/15/0424/02/ANUCS0U800014AED.html> (last visited Oct. 14, 2015).

promotion opportunities were limited and, without promotion, salaries were capped. It was impossible for the vast majority of the judges to have their salary increased beyond a certain point. To deal with a large number of frustrated judges, the reform proposes a separate track of civil servants for judges separating salary and rank so that there is salary increment without promotion in rank. In conclusion, the revised judicial track is a significant move in the context of a larger judicial reform. It will boost judicial morale and strengthen judicial identity.

Second, judging is now an institutionalized professional practice. After decades' of incremental reforms, there are well-established judicial rules, procedures and practices that have accumulated within the Chinese judiciary. If a political ethic defined the courts in the Maoist China before 1980s, professionalism defines the judiciary in the reform period in spite of continuing attempts to politicize the court.²⁸ The courts have been introducing reform measures since late 1970s, and those institutionalized practices have largely survived and proven to be resilient. With the exception of a range of politically sensitive cases, as mentioned below, courts have demonstrated the potentials to adjudicate cases fairly and effectively as the Chinese law requires. Even under the one Party framework, it is still possible most judicial decisions can offer a degree of certainty and predictability. This is possible because of the improved rule-making, rule-based decision-making, and the diminished role of corruption and bias in the process.²⁹ In the

²⁸ Minzner, *supra* note 12.

²⁹ Benjamin Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q., Sep. 2007, at 620; YUWEN LI, *THE JUDICIAL SYSTEM AND REFORM IN POST-MAO CHINA: STUMBLING TOWARDS JUSTICE* (Ashgate, 2014).

future, judging ordinary cases in China will look more like judging elsewhere, especially countries sharing a common legal tradition and at a similar level of prosperity.

Third, within limits noted above, and as outlined more fully below, the court as an institution has become more autonomous in adjudicating cases and in designing accountability mechanisms. The limited degree of autonomy in judicial decisions comes in part from the inner desire of professionalized judges. With the further improvement of legal education and training, there will be a stronger and more distinct judicial identity.

Ironically, autonomy also comes from the CCP. The Party's attitude towards judicial decisions has evolved and, while there has been frequent and significant pushback against autonomy, the larger trend since the late 1970s has been one of increased autonomy in judicial decisions makings. The CCP itself has decided not to make decisions on individual cases and has passed resolutions to prohibit any improper influences on, and interference in, individual cases. The CCP has created a mechanism through which judicial personnel in charge of a case shall note and record any improper influence on that case and file a complaint with the relevant disciplinary authorities.³⁰ A similar mechanism has also been created to prohibit improper influences within legal institutions.³¹ While judicial independence in mature legal systems may depend on separation of powers, in China it has to rely principally on self-regulation and self-discipline of the ruling Party.

³⁰ “*Lingdao Ganbu Ganyu Sifa Huodong, Chashou Juti Anjian Chuli de Jilu, Tongbao he Zeren Zhuijiu Guiding*” *Yinfa* («领导干部干预司法活动、插手具体案件处理的记录、通报和责任追究规定»), XINHUA NEWS, Mar. 30, 2015, available at http://news.xinhuanet.com/2015-03/30/c_1114812232.htm (last visited Oct. 14, 2015).

³¹ *Zhongyang Zhengfa Wei Yinfa* “*Sifa Jiguan Neibu Renyuan Guowen Anjian de Jilu he Zeren Zhuijiu Guiding*” (中央政法委印发«司法机关内部人员过问案件的记录和责任追究规定»), XINHUA NEWS, Mar. 30, 2015, available at http://news.xinhuanet.com/2015-03/30/c_1114812926.htm.

Judicial autonomy under the current reform is reflected in vertical and horizontal aspects. Vertically, the court is able to assert its institutional distinction in relation to other political and legal institutions, such as the police and procuratorate, in issues ranging from rule-making to individual decision-making. It is common knowledge that China operates a police-centric criminal justice system. Police have a significantly higher political status than the procuratorate and the court.³² The police exercise broad legal powers in maintaining public order, carrying out criminal investigation, and imposing administrative penalties without effective judicial supervision. In criminal cases, the procuratorate and court largely defer on police investigative decisions.

While there is police-centric structure remaining in operation, there are some optimistic early signs that the Party is prepared to shift the center of the criminal process from police investigation to court trial. If the 1979 Criminal Procedural Law (CPL) was successful in laying an institutional frame in regulating the exercising power in the criminal process, the 1996 and 2012 Amendments of the CPL, and the subsequent policy reforms, have created significant formal procedural constraints in the process.³³ These constraints have the potential to shift the gravitas of the criminal process gradually but forcefully to the courts. In their reform agenda, the police have committed to a criminal process that centers on trials and are prepared to accept judicial scrutiny on matters

³² Fu Hualing (傅華伶), *A Bird in the Cage: Police and Political Leadership in PRC*, 4 POLICING AND SOCIETY 277 (1994); Fu Hualing (傅華伶), *Autonomy, Courts and the Political Order in Contemporary China*, in HANDBOOK OF CHINESE CRIMINOLOGY 76 (Cao Liqun et al. eds., 2013); Fu Hualing (傅華伶), *After Dictatorship: The Nature and Function of the Police in Post-Mao China*, in POLICING, SECURITY AND DEMOCRACY: THEORY AND PRACTICE 259 (M. Amir & S. Einstein eds., Office of Int'l Crim. Just. 2001).

³³ Fu Hualing (傅華伶), *The Upward and Downward Spirals in China's Anti-Corruption Enforcement*, in COMPARATIVE PERSPECTIVES ON CRIMINAL JUSTICE IN CHINA 390 (Mike McConville & Eva Pils eds., 2013).

relating to torture and lawfulness of police evidence.³⁴ This is a significant first step to take in developing judicial control over the entire criminal justice in China. For example, the high profile judicial decision to find murder suspects not guilty for lack of evidence seems to show an increasing judicial strength and determination to act independently and forcefully against police decisions.³⁵

Horizontally, the Party is removing the control of local governments of the courts by centralizing court financing and judicial appointments and re-defining jurisdictions. Given the difficulty the Party has faced in controlling defiance and resistance in the policy process, this reform seems a logical move to ensure local accountability and compliance with central decisions. As commonly observed, local protectionism is one of the significant barriers in developing rule of law in China and, when local courts are placed under local political control, they serve localized political and economic interests.³⁶

There is a serious attempt to separate judges from management staff in the court on a permanent basis, so as to “de-bureaucratize” the judiciary and prioritize the role of trial judges in the adjudication process. With more power to make individual decisions, judges are also expected to shoulder more responsibilities. The enhanced accountability would necessarily reinforce judges’ fidelity to law and independent decision-making on the part of the judges. The reform highlights the real or perceived tension between judges

³⁴ “*Guanyu Quanmian Shenhua Gong'an Gaige Ruogan Zhongda Wenti de Kuangjia Yijian*” *Ji Xiangguan Gaige Fang'an Yijing Zhongyang Shenyi Tongguo* («关于全面深化公安改革若干重大问题的框架意见»及相关改革方案已经中央审议通过) XINHUA NEWS, Feb. 15, 2015, available at http://news.xinhuanet.com/legal/2015-02/15/c_1114379121.htm (last visited Oct. 14, 2015).

³⁵ Josh Chin, *China Top Judge Apologizes for Wrongful Convictions*, Wall St. J., March 12, 2015, available at <http://www.wsj.com/articles/china-top-judge-apologizes-for-wrongful-convictions-1426184136> (last visited Oct. 14, 2015).

³⁶ Stanley Lubman, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (1999)

and their managers and the possibility of a diminished bureaucratic control within the courts. Court presidents and other managing judges routinely design multiple measures to control judges in the judicial process. They shape not only the decision-making process but also the substance of the decisions. In general, managing judges are reluctant to allow other judges make decisions without prior approval on the ground that any relaxation in judicial control would lower the quality of court decisions. From this perspective, the real threat to judicial independence comes from the heart of the courts – those who have control over the decision-making process.³⁷

There are of course frequent setbacks in the reform process. But it is important to note that regardless of the frequent setbacks, the Chinese judiciary has become noticeably different. Chinese judicial reform has been incremental in the sense that a reform program is often followed by a severe setback with some of the reform programs being rolled back.³⁸ However, most of the institutional innovations and designs survive the setbacks. They gradually settle and then form part of the established practices with each reform episode adding a new element to judicial practice.

A Dual Legal System in China's Neo-authoritarianism

What would be the best case scenario for fostering ethical integrity of the Chinese judiciary? Over time and because of the accumulative impact of the limited reform, there

³⁷ Li Jingyun, *Court Reform is Not Merely to End Performance Evaluation*, S. METROPOLIS DAILY, Feb. 1, 2015, http://epaper.oeeee.com/epaper/A/html/2015-02/01/content_3383582.htm?div=0.

³⁸ See Fu, *supra* note 5. (China's court reform has been moving forward in a zigzag way. The judicial reform programs of the 1980s were largely suspended in the aftermath of the 1989 crackdown on the students-led democratic movement. Between 1998 and 2002, Xiao Yang, the Chief Justice during that period, led a systematic court reform to professionalize China's judiciary. However, his successor, Wang Shengjun, shelved and reversed the core aspects of the Xiao reform in the subsequent 10 years. The current Chief Justice, Zhou Qiang, continued the court reform that Xiao Yang started.)

will be a distinct judicial community with a common identity and interest. As previously stated, Chinese judges are better educated and trained in terms of the overall professional education, continuing judicial training, and knowledge of foreign practices and ideas. Judging will continue to be institutionalized in terms of more entrenched judicial formality, more specialist rules of procedure for adjudication and rigorous codes of conduct for judges. As a result, there will be an enhanced judicial authority as part of the legal process. The Chinese judiciary is likely to be more autonomous from other legal institutions and local political authorities.

But the reform will continue to be carried out within the existing political framework. Rule of law and judicial professionalism are possible to the extent they may strengthen and legitimize the CCP's rule. Within that authoritarian context, even in the best case scenario, the court will continue to be submissive to the CCP and be compliant to its political demand. Political or otherwise “sensitive” cases will continue to exist in which the court will defer to the CCP's wishes. Chinese courts will not be able to make public policies or strike down unconstitutional legislation or rule independently on politically charged cases. The court will play only a limited role in supervising the party state.

The primary function of the court from this perspective is to offer efficient dispute resolution for the vast majority of individual cases, thereby fomenting social harmony and maintaining social stability – an essential political mission for courts in authoritarian states. To be effective for an institution that is politically weak, the judiciary must develop a sufficient degree of credibility that it is autonomous from political and social

influences, neutral to the parties before it, and fair in applying rules. China is likely to develop a judiciary that is politically submissive, but professionally capable of offering effective and fair legal solution to disputes. China's judicial credibility will build principally on the professional standing of judges, transparency of the judicial process, the rule-based decision-making process, and, above all, the personal integrity of the judges.