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Dispute Resolution in China after Deng Xiaoping: "Mao and Mediation" Revisited

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PART ONE: PROLOGUE

INTRODUCTION

Dispute resolution, like all other aspects of Chinese society, is being reshaped by extensive reforms that began in 1979. The changes do not only concern Chinese, who are now sometimes able to assert rights that they have never had before, but foreigners as well. As China's influence in the international community grows, other nations must also be concerned about the capacity of Chinese legal institutions to perform their declared functions. Notably, for example, if China accedes to the World Trade Organization the Chinese government will be obligated to make China a more rule-based society than it has ever been. Larger issues are involved, too, especially China's ability to move toward the rule of law that its leaders have proclaimed as a goal. In view of these concerns, Western analysis of the functions and operation of the Chinese courts and related institutions should be deepened.

Studying Chinese law today requires that we look beyond the rapid changes that have aroused world-wide attention since they began. It is necessary to consider both the starting point of legal reform and the obstacles to future progress. I have therefore looked back at Chinese

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institutions for dispute resolution when I first wrote about them in "Mao and Mediation,"[1] published thirty years ago when studies of Chinese law in the United States were still in an early stage. That attempt to understand and interpret China's legal institutions was prompted by my concern about American ignorance of China that flowed from the Sino-American estrangement of the time. Now, three decades later, China's extraordinary transformations and entry into the community of nations make it even more necessary to use law as a prism through which to view China.

The extrajudicial institutions described in "Mao and Mediation" continue to be used to resolve disputes today. In addition, millions of disputes each year arising out of transactions made possible by economic reforms are also resolved by courts. Mediation and courts have both greatly changed as a result of legal reform. This Article attempts through analysis of these institutions for dispute resolution to identify dominant currents and likely developments in Chinese law.[2] These, in turn, are significant for Western understanding of possible future constraints on the development of the rule of law and expectations about the evolution of the governance of Chinese society.

This Article presents portions of a book tentatively entitled "Bird in a Cage: Legal Reform in China After Mao." The book explores the Western vantage point from which I have viewed institutions for dispute resolution, the imprint on them of the traditional and more recent Maoist past, the disorderly context of rapid economic and social change in which they must operate today, and the larger law reforms of which they are part. Against that background it examines the operation of extrajudicial mediation and the courts. The scope of this Article is more limited.

I have not speculated here about appropriate foreign perspectives on Chinese law or about methodology at all, despite my own concern about the difficulties of cross-cultural legal study.[3] I have chosen here to invoke the Western ideal of the rule of law here as a broad general standard by which to gauge both the operation of Chinese legal institutions and Chinese aspirations, which are after all expressed by Chinese leaders and legal scholars in terms of that standard. I am fully aware that it is itself a

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1. Stanley B. Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284 (1967) [hereinafter *Mao and Mediation*].

2. Substantive criminal law and criminal procedure have not been discussed here, not only because of limitations of space, but because these areas remain highly politicized despite substantial recent reforms. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, OPENING TO REFORM?: AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW (1996).

3. See generally Stanley B. Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. COMP. L. 293 (1991).

contested and complex principle[4] and that it is often transformed into a moralistic slogan. This study is intended as "thick description"[5] of institutions that are in the process of development, and the approach seems validated by Chinese sources.[6]

Although the importation into this Article of concepts grounded in Anglo-American law has, of course, been unavoidable, I have preferred to emphasize the need to understand the *functions* of whatever legal institutions that we study. Almost thirty years ago, when I was just beginning research on Chinese law, I thought that there was promise in analyzing legal and administrative practices and arrangements "in terms of the functions they perform, recognizing that several functions may coexist, that apparently similar institutions may have different functions, and that apparently dissimilar institutions may perform similar functions."[7] Similarly, William Alford has suggested that in studying the traditional Chinese criminal justice system, we deepen our analysis of the "internal function and actual operation" of the traditional criminal justice process, of the social context in which it operated, and of the standards we use to evaluate the institutions of a society "removed from our own both culturally and temporally."[8] I believe that this approach continues to be

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4. *See, e.g.*, Richard H. Fallon Jr., *'The Rule of Law' as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 487-491 (1997).

5. *See* Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 3 (1973), and Stanley Lubman, *supra* note 3, at 333-36.

6. *See, for example*, Liu Hainian, *Yifa Zhiguo Jianshe Shehui Zhuyi Fazhi Guojia Xueshu Yantao Hui Jiyao [Summary of Forum on Ruling the Country According to Law and Constructing a Nation of Socialist Legality]*, FAXUE YANJIU [LEGAL STUDIES], No. 3, at 3 (1996); the summary of Chinese legal scholars' views expressed in 1996 that appears in *infra* note 42; as well as *Zhongguo Fazhi Gaige Xueshu Taolunhui Fayan Zhaiyao [Summary of Speeches at Conference on Reform of China's Legal System]*, *in* FAXUE YANJIU [LEGAL STUDIES], No. 2, at 10 (1989), which summarizes a similar meeting in 1989, Gao Hongjun, *Zhongguo Gongmin Quanli Yishi de Yanjiang [Lecture on Chinese Citizens' Rights Consciousness]* *in* ZOU XIANG QUANLI DE SHIDAI: ZHONGGUO GONGMIN QUANLI FAZHAN YANJIU [TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA] [hereinafter TOWARD A TIME OF RIGHTS] 3, 43 (Xia Yong ed., 1995); He Weifang, *Tongguo Sifa Shixian Shehui Zhengyi: Dui Zhongguo Faguan Xianzhuang de Yige Toushi [The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges]* *in* TOWARD A TIME OF RIGHTS, *supra*, at 212, 220; and Chen Yunsheng, *Meiyou Falü de Zhengzhi Shi Weixian de Zhengzhi [Politics Without Law is Dangerous Politics]*, FAXUE [LEGAL STUDIES], No. 1, at 2 (1987).

7. Stanley B. Lubman, *Methodological Problems in Studying Chinese Communist "Civil Law"*, *in* CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 230, 258 (Jerome A. Cohen ed., 1970).

8. William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CALIF. L. REV. 1245, 1280 (1984).

helpful in understanding contemporary Chinese institutions.

Part One sketches the operation of mediation and Chinese law generally before reform, then describes legal reform and the institutional context of dispute resolution in China today. Parts Two and Three are devoted to extrajudicial mediation and the courts, respectively, and Part Four concludes with reflections on the broader significance of the operation of the institutions that have been discussed here.

I. LAW UNDER MAO

A. Mediation

To understand Maoist mediation, the reader should first become acquainted with "Model Mediation Committee Member Aunty Wu," described in a Beijing newspaper article published in 1955:

> If mediation isn't successful once, then it is carried out a second, and a third time, with the aim of continuing right up until the question is decided. Once, while Auntie Wu was walking along the street, she heard a child being beaten and scolded in a house. She went immediately to the neighboring houses of the masses, inquired, and learned that it was Li Guang-Yi's wife, Li Ping, scolding and beating the child of Li's former wife. She also learned that Li Ping often mistreated the child this way. After she understood, she went to Li's house to carry out education and urge them to stop. At the time, Li Ping mouthed full assent, but afterward she still didn't reform. With the help of the masses, Auntie Wu went repeatedly to the house to educate and advise, and carry out criticism of the woman's treatment of the child. Finally, they caused Li Ping to repent and thoroughly correct her error, and now she treats the child well. Everyone says Auntie Wu is certainly good at handling these matters, but she says, "If I didn't depend on everyone, nothing could be solved."[9]

This extract exemplifies the functions and goals formerly assigned to mediation under Mao. Mediators—dedicated activists—were supposed

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9. GUANGMING RIBAO [BRIGHT DAILY] (Beijing), Oct. 14, 1955, *quoted in Mao and Mediation, supra* note 1, at 1284.

to help operate the apparatus of control that thrust totalitarian political institutions intrusively into Chinese society. To them, a dispute signified a public disturbance to be suppressed and private thoughts to be corrected, so that the Chinese people could labor together more effectively to realize socialism. Mediation was intended to produce politically correct results, such as benefiting persons with "good" (worker or peasant) class status, helping to propagandize policies, and strengthening control of the Party-state over "bad elements."

At the same time, émigré interviews and documentary sources suggested that despite attempts to suppress "unprincipled mediation"—a label for the practice of ignoring politics and reaching satisfactory compromises—the traditional preference for compromise persisted even if disguised by political rhetoric. When I wrote thirty years ago, Communist mediation attempted to break with traditions that stressed harmony and compromise and yet, beneath the surface, traditional attitudes persisted to some extent among mediators and the populace alike.

The Cultural Revolution made impossible the already difficult task of understanding the interaction between traditional and Communist-promoted values. The more recent creation of new legal institutions adds additional values to that complicated mixture. Before turning to the current scene we should recall some other elements of pre-reform practice that may have left their imprints.

B. The Criminal Process[10]

The politicization of mediation was an expression of a larger trend affecting all legal institutions, including rules themselves. Throughout the Maoist period, the Chinese Communist Party (CCP) used laws and regulations less as specific guides or prescriptions and more as general and exhortative policy statements. Such legal rules summarized policy decisions already made and were used to "mobilize" lower-level officials and the populace in implementing policy. Secret directives and regulations were issued to guide cadre discretion, but these were often as ambiguous or tentative as the original public statements.

In the criminal process, both substantive standards and procedures were politicized by making class background determinative of outcomes and by varying sanctions in response to various political "campaigns"

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10. The discussion in this paragraph is based on Stanley B. Lubman, *Form and Function in the Chinese Criminal Process*, 69 COLUM. L. REV. 535 (1969).

launched throughout the 1950s and 1960s. Police organs frequently disregarded requirements of the formal criminal process and administered their own separate system of administratively imposed sanctions. One leading Chinese judge, writing in 1956, characterized police, Procuracy and courts as "three workshops in one factory."[11]

Within the Chinese criminal process at the time, a major issue of contention was whether or not legal institutions should be differentiated from other bureaucratic institutions and allowed to develop unique doctrine and decision-making processes. Debates in the 1950s about regularization of the criminal process derived less from notions about law than from ideological questions about the management and leadership of Chinese society. Some Chinese leaders, including Mao himself, warned that bureaucracy threatened to dissipate revolutionary fervor. Concerns over the political functions of bureaucratic institutions grew into a contest between mobilizational and bureaucratic models of legal institutions. As part of the reaction to the criticism of the Party by intellectuals during the "Hundred Flowers" period of 1956-1957, most of the regularization that might have been realized by bureaucratization of the criminal process was rejected in the name of political orthodoxy. This contest between the two models has left its traces on contemporary institutions.

C. Civil Law

Under Mao, legal institutions outside the criminal process were relegated to even greater insignificance.[12] The collectivization of almost all private property left little scope for non-criminal law. Dispute resolution was almost always conducted through mediation, as described above, or through negotiation between administrative units. In the planned economy, contracts between state-owned enterprises did formalize plan-imposed obligations, but they did not function as sources of legal rights and obligations. Disputes were resolved as administrative matters. If the enterprises could not work out problems themselves, their superiors in the state industrial hierarchy, members of economic commissions (agencies that implemented the economic plans) and bank representatives might become involved, as might responsible Party officials. Enterprises tried to resolve failures to perform contracts through flexible, highly pragmatic at-

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11. Ma Xiwu, *Guanyu Dangqian Shenpan Gongzuo Zhong de Jige Wenti* [*On Several Problems in Adjudication Work at the Present Time*], ZHENGFA YANJIU [POLITICAL LEGAL RESEARCH], No. 1, at 3 (1956).

12. The discussion in this paragraph is based on Lubman, *supra* note 7, at 258.

tempts to adjust problems without fixing legal blame. Thus, when law was not transformed into politics it was treated as a form of administration.

D. The Cultural Revolution, 1966-1976

During the Cultural Revolution—a catastrophe for all of China—formal legal institutions became totally irrelevant. The formal criminal process disappeared, and with it, the internal police procedures that years earlier had become the only occasionally effective control over arbitrary sanctions. Before the Cultural Revolution, the Chinese police had exercised immense power and were a major instrument of coercion. Between 1966 and 1969 Party leaders severely criticized the police, the Procuracy and the courts, and virtually suspended their activities. Widespread general disruption of public order and the reappearance of crime to an extent unknown in China since 1949 led to the partial reorganization of those three organs. By 1970 many police cadres had been purged; in some places the army was directly supervising the police, the courts, and the Procuracy; some police functions had been distributed to new activist organizations.

With the end of the Cultural Revolution, the army's role in peacekeeping receded. Army leader Lin Biao's attempt to seize power strengthened the determination of Mao and other Chinese leaders to scale back the army's importance, and by 1972 the police again patrolled the streets. Parapolice groups, which had appeared in the cities during the Cultural Revolution, were either disbanded, gradually assimilated into urban militia forces, or placed under direct Party control. Courts resumed their activities, although no more vigorously than before the Cultural Revolution. A new constitution adopted in 1975 contained only limited references to judicial activity, and the Procuracy disappeared from view. However, with the overthrow of the "Gang of Four" in 1976, a new stage of Chinese history began. After several years during which the power of a newly pragmatic leadership was consolidated, formal legal institutions began to receive a level of attention unseen for over twenty years. The damage done to the social fabric by the Cultural Revolution moved some Chinese leaders—and many ordinary Chinese—to believe that the regularized formulation and application of known rules should have a prominent role in the government of China. An era of reform began, in which law has risen to greater prominence in the governance of Chinese society than ever before in Chinese history.

II. POST-MAO LEGAL REFORM: AN INTRODUCTION

Legal reform has been driven by economic reform. To understand the operation of Chinese legal institutions it is necessary first to sketch the major economic changes that provide the context for their operation, with emphasis on those aspects with the clearest implications for law.

A. The Social and Economic Context

1. The Control and Influence of Local Governments over Economic Resources and Local Business Activity are Increasing

Under reforms the planned sector of the economy has declined steadily and is now rivaled by a growing and increasingly differentiated nonpublic sector composed of enterprises under widely varying degrees of control by local governments and private owners.[13] At the beginning of reforms the central government gave local governments the rights to retain certain tax and non-tax revenues and minimized its own claims to revenues generated locally. At the same time, many Township and Village Enterprises (TVEs) were transferred to private entrepreneurs in exchange for cash payments to the local governments that had formerly administered them.

This decentralization, it is important to emphasize, continued a tendency in Chinese socialism that not only distinguished it from the far more centralized Soviet variety but also facilitated the piecemeal reform undertaken in the PRC. Long before reform, localities acquired administrative expertise because they managed many Chinese enterprises, and "local cadres took advantage of China's 'sporadic totalitarian state' which was unable to maintain consistent supervision of the nation's localities." As central control weakened, "cadres not only promoted illicit activities, they also skirted fiscal and budgetary regulations in order to increase local development."[14] When the reforms began, the previous experience that localities had gained administering economic enterprises also made it possible to create a parallel economy alongside the state economy. These two characteristics of the Chinese economic system,

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13. The discussion in this paragraph is based on JEAN OI, RURAL CHINA TAKES OFF: THE POLITICAL BASIS FOR ECONOMIC REFORM (forthcoming).

14. Steven M. Goldstein, *China in Transition: The Political Foundations of Incremental Reform*, CHINA Q., No. 144, at 1105, 1115 (1995).

devolution of power to the localities and creation of a parallel economy, have helped to foster economic reform but, as I suggest below, their combined force may also retard and deflect Chinese legal development.

Although these key moves promoted industrialization in the countryside, they did not create a private sector because local governments kept ties to these enterprises. In many places, private firms were allowed to register as collectives in return for payments to local officials. Local officials formed alliances with private enterprises, and benefited from the ambiguous legal status of private firms, by peddling influence and protection in forms such as subsidies and favorable tax treatment. By the end of the 1980s, "many rural firms that were nominally collective had in fact become private firms operated with the cooperation of local officials."[15] In such TVEs, officials control appointment of the managers and the size and composition of the labor force, provide investment capital, promote production, and protect from competition. The economy that has developed is "more negotiated than [it is] competitive and market-driven."[16]

The forms of local government involvement in enterprises are continuing to change. In some places the degree of privatization of local enterprises increased during the mid-1990s, as local governments decided that privatization did not diminish their control. Their influence over enterprises is exercised not only by direct supervision, as in the licensing process, but also by selecting some enterprises as beneficiaries of their support with credit, tax breaks or exemptions, allocations at market prices of scarce goods and access to information about new products, technology and markets.[17]

The current configuration of institutions is transitional. The Chinese economy's future trajectory will take it far from its Maoist origins, but the goals of the Chinese leadership remain undefined and the journey will certainly be shaped by forces beyond their control. In the near term,

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15. BARRY NAUGHTON, GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM, 1978-1993, 157 (1995).

16. KENNETH G. LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 264-265 (1995).

17. *See* Oi, *supra* note 13. Another interpretation regards TVEs not as necessarily strengthening formal state power at the local level, but as a form of local "dictatorship" dominated by "family links." DAVID ZWEIG, FREEING CHINA'S FARMERS: RURAL RESTRUCTURING IN THE REFORM ERA 24 (1997) (summarizing the conclusions of Nan Lin, *Local Market Socialism*, 24 THEORY AND SOCIETY 301 (1995)).

perhaps the economy will be "marketized but not privatized."[18]

In the institutional flux caused by reform, the growth of local government power in the non-state sector will continue to influence the evolution of legal institutions. One scholar calls the relations of government and business at the local level nothing less than "interpenetration,"[19] involving bargains struck daily between business and bureaucrats who may be disguised owners or simply accepting payoffs and bribery. Relations among Chinese are changing, also, as new networks of personal relationships appear as means of getting things done. The weakening of the totalitarian grip on individual lives has permitted an emphasis on personal relationships to reemerge. Although the traditional notion of behavior based on *guanxi* (relationships) has not been pecuniary, in China today the concept is often transmuted into highly instrumental behavior. A recent study of business in Xiamen describes patron-client relationships in which entrepreneurs provide bribes and other benefits to officials in return for use of their personal ties within the bureaucracy. The developing patron-client relationships seem to shift power downward to the lowest levels in society at which business and bureaucracy intersect and to benefit *local* interests. As a result, lines of authority are weakened, deviation from central state policies is encouraged, and the overall power of the state is undermined.[20]

2. The State Sector

In the meantime, the state sector of the economy, long recognized as failing and a drag on the rest of the economy, continues to face difficult obstacles to economic and legal reform,[21] and at this moment it remains

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18. This distinction is used by Robert F. Dernberger, *China's Transition to the Future, Mired in the Present, or Through the Looking Glass to the Market Economy?, in* CHINA'S ECONOMIC FUTURE: CHALLENGES TO U.S. POLICY, STUDY PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES, 104TH CONGRESS, 2D SESSION [hereinafter CHINA'S ECONOMIC FUTURE], 57, at 58 (1996).

19. Dorothy Solinger, *Urban Entrepreneurs and the State: The Merger of State and Society, in* STATE AND SOCIETY IN CHINA: THE CONSEQUENCES OF REFORM 121, 136 (Arthur L. Rosenbaum ed., 1992).

20. David L. Wank, *Bureaucratic Patronage and Private Business: Changing Networks of Power in Urban China, in* THE WANING OF THE COMMUNIST STATE: ECONOMIC ORIGINS OF POLITICAL DECLINE IN CHINA AND HUNGARY [hereinafter THE WANING OF THE COMMUNIST STATE] 153 (Andrew G. Walder ed., 1995).

21. The problems are summarized in Jeffrey D. Sachs & Wing Thye Woo, *Understanding China's Economic Performance*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER, No. 5935, at 3, 29-30 (1997) (predicting that "privatization would continue under the protection of a

governed by rules and practices to which legal rules are essentially irrelevant. Relations between center and locality and between administrative superiors and inferiors are currently based on bargaining.[22] In planning projects, the center must bargain with localities to match funds. Local governments wish to maximize investment from the center and also to maximize their control over resources and finances. State enterprises are still not behaving in a pure market environment even for the out-of- quota products that they sell on the market. They face bureaucratic pressure to avoid price increases; they seek to reduce taxes, buy goods at concessionary prices (including consumption goods sold to the workers) and collect individual benefits for key individuals through corrupt transactions. Enterprise profits, subsidized by the state, are bargained over, as are taxes, and "redistributional bargaining in China is peculiarly unconstrained because of the absence of clear fiscal and financial regulations. Almost any parameter can be altered through negotiation between superiors and subordinates."[23] In this environment, enterprises and superiors "face a vast realm of indeterminacy, in which everything—price, plan, supply, tax, credit—is subject to change and negotiation."[24] In the state sector, the enterprise and its superior are locked in an inextricable embrace in which they must bargain with each other; in the bargaining process, accountability fades away.

3. Recent Changes in the Chinese State Caused by Reform Are Hostile to Development of a Legal System, At Least in the Short Run

The Chinese political system, never before monolithic, has become extensively decentralized. Bureaucratic decision-making has now become so subject to inter-unit bargaining that Chinese authoritarianism is best

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terminological haze"). After the Fifteenth Party Congress in September 1997, Premier Jiang Zemin declared a commitment to reduce government ownership over industrial enterprises, and in March 1998 newly-elected Premier Zhu Rongji announced an energetic program of transforming state-owned enterprises through sell-offs, mergers or reorganizations. *See* Erik Eckholm, *New China Leader Promises Reforms*, N.Y. TIMES, Mar. 20, 1998. Retreat from SOE reform as a consequence of the slowing down of the Chinese economy in 1997-1998 is discussed in Nicholas Lardy, *China Chooses Growth Today, Reckoning Tomorrow*, ASIAN WALL ST. J., Sept. 30, 1998.

22. This discussion of the state sector draws on Barry Naughton, *Hierarchy and the Bargaining Economy: Government and Enterprise in the Reform Process, in* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 245 (Kenneth G. Lieberthal & David M. Lampton eds., 1992).

23. *Id.* at 268.

24. *Id.* at 270.

described as "fragmented."[25] One scholar concludes that:

> [I]n a space of fifteen years or so, the Chinese political structure has been transformed from one that was once reputed for its high degree of centralization and effectiveness into one in which the center has difficulty coordinating its own agents' behavior. Because power and resources are dispersed, the exercise of central control now depends to a large extent upon the consent of the sub-national units whose actions are slipping from central control.[26]

This devolution of power downwards, often leading to downright defiance of central government policies, may in the short run promote a particularism unhealthy for the growth of national regulation and law-making. Ultimately, however, it could promote perceptions of the need to make implementation of law more regularized. One Chinese law reformer with whom this question was discussed in April 1997 argued optimistically that the current configuration of institutions summarized here is but a prelude to a higher stage, in which universally valid rules will apply throughout China. Indeed, some peasants have become aware of their rights under new national policies and laws and have invoked them to defend themselves against arbitrary cadres.[27]

The new business-government alliances and *guanxi* networks may mark a transition between the breakdown of old bureaucracies and the emergence of markets, but the weight of Western scholarship is more pessimistic.[28] Many scholars, rather than seeing a post-totalitarian separation between state and society, perceive the emergence of a "corporatist" state[29] in which non-governmental actors "reflect state

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25. Kenneth G. Lieberthal, *Introduction: The "Fragmented Authoritarianism" Model and its Limitations*, *in* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA, *supra* note 22, at 1.

26. Wang Shaoguang, *The Rise of the Regions: Fiscal Reform and the Decline of Central State Capacity in China*, *in* THE WANING OF THE COMMUNIST STATE, *supra* note 20, at 87, 109.

27. Li Lianjiang & Kevin J. O'Brien, *Villagers and Popular Resistance in Contemporary China*, 22 MODERN CHINA 28 (1996).

28. *See, e.g.*, Goldstein, *supra* note 14, at 1105 and sources cited.

29. Jean C. Oi, *Fiscal Reform and the Economic Foundations of Local State Corporatism in China*, 45 WORLD POLITICS 99 (1992) ("state corporatism"); Margaret M. Pearson, *The Janus Face of Business Associations in China: Socialist Corporatism in Foreign Enterprises*, 31 AUSTRALIAN J. CHINESE AFFAIRS 26 (1994) ("socialist corporatism").

motives and state action."[30] At the same time, reform affects state power very differently in relatively poor areas. State corporatism brings stability to local polities in wealthy areas, but "significant parts of rural China lack the political institutions or party authority to maintain a stable political order."[31] The current decline of central control and the growth of local economic and political power make problematic the standardized application of law and implementation of policies.

4. Reform Has Created a Crisis of Values in China

The profound political and economic changes that are taking place have unsettled the beliefs and values of China's people. While the material lives of many have been improved by an extraordinary rate of economic growth for a decade,[32] both traditional values and values promoted during decades of Communism are being threatened by the effects of the economic reforms.

The personal freedom of many Chinese individuals has been enlarged. Before reform, work units—state enterprises and state offices, organizations, rural communes—exercised enormous power over all who worked in them and who were dependent on them for many aspects of life outside the workplace. Chinese are now more able to communicate without fearing surveillance, criticism or denial of access to social welfare for political reasons by agents of the police in their work unit. The state is beginning to channel social services such as housing, social security and medical services through local governments rather than through work units. Privatization has encouraged many to "jump into the sea" (*xiahai*) of private enterprise and entrepreneurship, and has created employment alternatives in the non-state sector.

The reforms have led to relaxation of state control over the lives of the Chinese populace in some noticeable ways that have been much commented on by scholars, journalists and travelers.[33] In matters of dress,

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30. GORDON WHITE, JUDE HOWELL & SHANG XIAOYUAN, IN SEARCH OF CIVIL SOCIETY: MARKET REFORM AND SOCIAL CHANGE IN CONTEMPORARY CHINA 126 (1996).

31. Zweig, *supra* note 17, at 25.

32. Official Chinese estimates calculate the growth rate at over nine percent for a decade, but even if it is overstated, it has still been extremely high. See Jeffrey D. Sachs & Wing-Thye Woo, *Chinese Economic Growth: Explanations and the Task Ahead*, *in* CHINA'S ECONOMIC FUTURE, *supra* note 18, at 70, 74-78 for an analysis of the growth rate.

33. *See, e.g.*, Vivienne Shue, *State Sprawl: The Regulatory State and Social Life in a Small Chinese City*, *in* URBAN SPACES IN CONTEMPORARY CHINA: THE POTENTIAL FOR AUTONOMY AND COMMUNITY IN POST-MAO CHINA 90 (Deborah S. Davis et al. eds., 1995); Wang Shaoguang, *The*

home decoration and use of leisure time, for example, all severely constricted under Maoism, personal choice has begun to flourish. Although under Mao the very concept of "private life" was unacceptable, under Deng it became more extensive and less politicized. The social values and intellectual life of many Chinese, especially in the cities along the Coast, have moved farther from government and Party control than could have been deemed possible in 1979.[34]

With dramatic improvement in material and personal life have come changes in China's social fabric both momentous and irreversible. Income disparity is growing, both as a general phenomenon and between urban and rural areas. Demographic pressures and the lure of increased income have prompted a huge number of peasants to leave the countryside in search of employment in the cities. This population flow, formerly forbidden, has created a "floating population" of as many as 100 million in China's cities, people unattached to work-units and who constitute "swelling armies of impoverished rural floaters."[35]

Reports continue to emerge about rural discontent among peasants angry at their exploitation by local cadres, high unemployment and considerable alienation among young people.[36] Since the beginning of economic reform crime, violent and otherwise, has risen, provoking widespread concern about social order and promoting the Chinese leadership to launch numerous campaigns against crime.

Corruption, too, has increased markedly. Distinctions between state and non-state property and rights are vague; standards of appropriate conduct whether ideological, legal or moral are lacking. Within the business sector, "[g]ranting licenses and loans, forgiving debts, allowing tax breaks, and providing access to needed electricity, water, telephones, and transportation are only a few of the types of decisions for which PRC officials now expect 'tea money,' or bribes."[37] One of the most dramatic

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Politics of Private Time: Changing Leisure Patterns in Urban China, in URBAN SPACES IN CONTEMPORARY CHINA: THE POTENTIAL FOR AUTONOMY AND COMMUNITY IN POST-MAO CHINA 149 (Deborah S. Davis et al. eds., 1995).

34. *See, e.g.*, CHARLOTTE IKELS, THE RETURN OF THE GOD OF WEALTH (1996); RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING 376-380 (1994).

35. Baum, *supra* note 34, at 380. For a description of the problems of communities of provincials who have moved to large cities from the countryside, see Wang Chunguang, *Communities of "Provincials" in the Large Cities: Conflicts and Integration*, CHINA PERSPECTIVES, No. 2, at 17 (1995) and the accompanying series of articles. On the growing economic difficulties of many urban residents, see Elisabeth Rosenthal, *Poverty Spreads, and Deepens, in China's Cities*, NY TIMES, Oct. 4, 1998.

36. Baum, *supra* note 34, at 376-380.

37. Lieberthal, *supra* note 16, at 268.

changes in Chinese life is the new importance of wealth as the key to social status, which is an extraordinary reversal of Maoist egalitarianism and a challenge to long-held and widely shared perceptions of many Chinese about how society should be organized.[38]

The success of economic reforms has led many Chinese to lose what little faith they may have had in the ideology of Marxism-Leninism-Mao Zedong Thought. The Cultural Revolution and the great hardships that Mao's policies had caused before that disaster had already begun to weaken belief in the ideology, and the economic reforms have further accelerated its decline. The Party's legitimacy will, as a result, increasingly be questioned. The ideology to which the leadership constantly proclaims loyalty is being hollowed out from above and eroded from below. Policy is repeatedly changed while maintaining its ostensible consistency with established ideology, such as when the stated goal of economic reform moved from a "Socialist commodity economy" to a "Socialist market economy," without clearly defining the characteristics of either.

Even as the ideology that justifies the Party's rule declines, the opening of China to the rest of the world has helped to inform the Chinese people about many new values and ideas. Interest in politics and belief in the virtue of the officials of the Party-state has declined, and the leadership's calls to create a "spiritual civilization" elicit little popular enthusiasm. No alternative system of belief has appeared to challenge an increasingly hollow Communism, and at this moment China is drifting ideologically. One disillusioned Communist has written of "the widespread spiritual malaise among people from all walks of life, a growing mood of depression, even despair, a loss of hope for the future and of any sense of social responsibility."[39] Slacking of Chinese economic growth can only aggravate these tensions.

In this setting, the prospects for the sustained development of meaningful legal institutions seem doubtful. The expansion of economic opportunities and relationships, together with the decline of the work unit and the multiplication of alternative routes for the delivery of social services, could all increase pressure to develop legal institutions. On the other hand, the moral vacuum and the decline of Party-state control over society encourage opportunistic behavior. These conflicting trends are evident in the operation of the legal institutions that have been created as part of the economic reforms, to which discussion now turns.

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38. *See, e.g.*, Anne F. Thurston, *A Society at the Crossroads*, 21 CHINA BUS. REV., No. 3, at 16 (1994).

39. LIU BINYAN, CHINA'S CRISIS, CHINA'S HOPE 22 (1990).

B. Basic Legal Reforms

Against the preceding background, some essential ingredients of Chinese law reform and the major issues that it presents outside the criminal area can be surveyed.

1. Policy

a. Legalization

Law reform was initiated by a leadership decision to establish law as a source of authoritative rules. Under Mao policy alone, as articulated and applied by the CCP, directed and guided the entire Chinese Party-state. A shift away from using legislation as exhortation was formalized by the Constitution of 1982, which recognized promulgated laws enacted by the legislative organs of the state as the appropriate vehicles for declaring and implementing policy. Formal legislation has since performed those functions. The elevated status given to rules, while important, is still relative. Legislation remains dependent on CCP formulation of specific policies; sometimes important policies are announced in laws that are accompanied by statements by the CCP; and CCP directives are still used to modify policies, previously given legislative expression. Nonetheless, the change expresses a fundamentally new orientation toward governing China that has generally been followed since the early 1980s.

The size of the country and the growing complexity of Chinese society caused by the reforms further complicate the task of legislating for China, whether nationally or locally. In addition, the range of problems that must be dealt with by central and local laws is so extensive that the formulation of legislation is being transformed from the passive translation of policy into a specialized professional activity. The fragmentation of Chinese authoritarianism, which even before reform required extensive inter-unit negotiation and consensus building, has become even more pronounced with the devolution of much central power to provincial and local governments.

b. The Rule of Law

"Democracy has to be institutionalized and written into law, so as to make sure that institutions and laws do not change whenever the

leadership changes or whenever the leaders change their views."[40]

Deng and other Chinese leaders have expressed a high ideal, but it is one toward which they are deeply ambivalent. Two conflicting principles were uneasily yoked together from the very first efforts at legal reform in 1979. Party policy dictates that law must serve the Party-state, but at the same time requires that China must be governed by law and must attain the rule of law. In February 1996, Jiang Zemin spoke at a Party conference devoted to "issues of theory and practice with regard to administering the country according to law, and establishing a socialist legal system in China."[41] In his speech Jiang used a four-character slogan, "rule the country according to law" – but in the same sentence he used another phrase that emphasized the need to protect long-term peace and stability. "Stability" is shorthand for continued Party control, and despite the Party's endorsement of government by law, the Party's basic policy insists that law must be secondary to Party policies. Jiang stated in the same speech that "strengthening the legal system, [and] running the country according to law" means that China must become "legal-systematized" (*fazhihua*) and "standardized" (*guifanhua*). These words fall short of affirming the supremacy of law.

While Chinese leaders continue to refer to law using the Marxist-Leninist jargon that has been standard since 1949, Chinese legal scholars articulate a broader vision of the role of law in China today.[42] But acceptance of the ideal of the rule of law is not confined to legal scholars.

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40. DENG XIAOPING, SELECTED WORKS OF DENG XIAOPING 18 (1984).

41. *See* Liu, *supra* note 6, at 3.

42. *See id.* which summarizes discussions of a group of legal scholars. Liu, Deputy Director of the Institute, noted that some "high cadres" had interfered with justice, that the old habits of "substituting instructions for law" had reappeared, and that there was considerable official disregard of the law. He called for establishing a legal system that would guarantee the equality of all participants in the economy, protect property rights and differentiate between the rights of the state as a legal entity and those of property owners. He urged that in perfecting the legal system, China should look to the experience of other countries, as well as to Hong Kong and Taiwan. He called for further exercise of supervisory power by the National People's Congress and local national people's congresses; adherence to procedure; independence of the judiciary; a better-trained and professional judiciary; the absolute superiority of the law over all political parties, organizations and individuals; and finally, a transition from "rule by administration" to "rule by law." Conspicuously absent, both from Liu's article and the comments made at the symposium, is any attempt to counterbalance the need for the rule of law with the need to protect stability on which Jiang himself insisted. *See also* the views expressed at a similar conference in the spring of 1989. *Zhongguo Fazhi Gaige Xueshu Taolunhui Fayan Zhaiyao* [*Summary of Speeches at Conference on Reform of China's Legal System*], *supra* note 6, at 10; RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW (1994) (relying almost exclusively—and too optimistically—on scholarly discussions to conclude that China has accepted the rule of law). *See also* Stanley B. Lubman, *Book Review*, CHINA Q., No. 142, at 609 (1995).

A recent study suggests that many ordinary Chinese equate justice with substantive fairness and criticize economic and social injustice and the Party-state's support of privileged status for its élite.[43] My own impressions, gathered during countless visits to China over the past twenty-five years, are consistent with this conclusion and suggest that many Chinese believe that laws should convey adequate notice to citizens of the consequences of their acts, that they should be consistently administered over time, that their application should not be varied by changes in policy or by the arbitrary exercise of official discretion, and that the acts of government and Party officials should be reviewable for legality. Their use of a legal standard to measure the performance of the Party-state embodies the essence of the rule of law. Although that concept is often said to be a unique product of Western civilization, and many Chinese have learned of it as an imported idea, it has seemingly also arisen as a product of Chinese circumstances. The perception that they have been ruled for decades by arbitrary and frequently hypocritical cadres has led many Chinese to think that government by objective rules is desirable and that under such government certain rights ought to be recognized and protected by the uniform application of rules. The increasing value that the Chinese place on legal rules is suggested by the increase in the numbers of civil and economic cases being brought to the courts, a phenomenon explored more fully below.

The principle of Party supremacy constitutes, at the very least, an outer limit on legal change. Although the Criminal Procedure Code of 1979 was recently reformed, notably by increasing the scope of the right to counsel, Western scholars believe that punishment for political crimes will continue to be administered without much regard for legality and that legislation alone cannot easily change practice in a process long dominated by police. The Lawyers' Committee on Human Rights has published an excellent report by Jonathan Hecht, a scholar of Chinese law, which suggests that "if past history is any guide, the Chinese government will not necessarily abide by the revised law at all times, particularly in politically sensitive cases" and in ordinary criminal cases will continue to prefer to "strike hard" in recurrent campaigns against crime rather than protect the rights of persons accused of crimes.[44]

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43. Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, CHINA Q., No. 138, at 325, 352-57 (1994).

44. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 79.

c. *The Primacy of Policy and the Instrumental Use of Law*

The increased role of legislation may force revision of the principle that policy holds unquestioned supremacy over law. Chinese scholars have difficulty in reconciling the two,[45] and certain leaders, notably Peng Zhen, have emphasized the need to "systematize"[46] *(zhidu hua)* and "legalize" *(falü hua)* democracy.[47] There is no doubt that in formal doctrine, at any rate, law must still be subservient to policy,[48] and an *instrumental* conception of law prevails in current Chinese thought and practice. Law is used to promote policies in every society, but under Mao it became completely subservient to policies of the moment, as in the use of the courts to symbolize and dramatize mass campaigns promoting particular policies.[49] Since Mao's death, the overt use of campaigns has declined and public administration has become more regular, but the revolutionary style has not been completely stilled.

One remnant of pre-reform policy toward law has been the use of propaganda and exhortation to promote support for new legal institutions and procedures. During the early years of legal reform the Party-led propaganda apparatus popularized new laws and procedures just as it had unceasingly trumpeted revolutionary institutions in earlier years.[50] "Five

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45. *See, e.g.*, SHEN ZONGLING, BIJIAO FA ZONGLUN [GENERAL THEORY OF COMPARATIVE LAW] 363-64 (1987) (stressing the complementarity and mutual support of law and policy, and obviously reluctant to articulate the concept of law's supremacy. Old habits die hard, he adds.).

46. *See, e.g., Jiaqiang Fazhi Xuanchuan Shi Xinwenjie de Zhongyao Zhize [Strengthening Legal Propaganda Is an Important Responsibility of Journalistic Circles]*, RENMIN RIBAO [PEOPLE'S DAILY], May 12, 1984.

47. Peng Zhen, *Guanyu Zhengfa Gongzuo de Jige Wenti [Several Questions Concerning Political and Judicial Work]*, HONGQI [RED FLAG], No. 9, at 3 (1987).

48. *See, e.g.*, Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29, 47 (1989) ("law is always an expression of policy and has no independent status of its own.").

49. William Alford has described Chinese instrumentalism as reflecting "the willingness of states or individuals to use legality as an instrument to achieve their policy objectives but to depart from it when compliance with the law no longer serves the attainment of such ends." William P. Alford, *Double-edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China, in* CHINA IN TRANSFORMATION 45, 65 n.8 (Tu Wei-ming ed., 1994).

50. *See, e.g., Anhui Holds Telephone Conference on Publicizing NPC Laws*, FOREIGN BROADCAST INFORMATION SERVICE, DAILY REPORT, CHINA [hereinafter FBIS], Aug. 15, 1979, at O3-O4. (after the first major burst of legislation in 1979 produced seven new laws, a provincial Party called to urge that they be studied and publicized "to make them known to every household and person.").

Year Plans" for legal education of the masses adopted in 1986 and 1991[51] also reflect continued commitment to the exhortative style that has marked the Party-controlled media since 1949. We may question the usefulness of efforts to quantify targets in the legal realm, as in reports of the number of officials at certain levels who completed their legal studies. Such efforts were not successful in the past, when the objective was to raise more pigs or manufacture more steel, and might not be well-suited to raising popular awareness of the existence and significance of legal institutions.

It might be hasty, however, to dismiss attempts to support law reform like those described above. Is it possible to seek to change the legal culture of the populace through propaganda? In recent years, propagandistic efforts to popularize new laws have informed citizens of newly-created rights under the law. Some Chinese and Western scholars would argue that those efforts are both necessary and consistent with Chinese political culture. In conversation, the late Tong Rou, the Chinese law professor in charge of the drafting of the General Principles of Civil Law, stated that popular behavior could be changed faster in China than in other countries because the government does have the ability to persuade the populace. One Western scholar of Chinese law has argued that China's cultural tradition facilitates the acceptance of ideas "sown by an authoritarian system of education."[52] The reports that have been mentioned earlier of peasants relying on their knowledge of laws and policies to protest cadre arbitrariness, together with the popular sentiments about law and justice that have been noted above, suggest that the campaigns may help to raise the rights-consciousness of many ordinary Chinese, and not necessarily in the manner intended by Party propagandists.

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51. This paragraph draws on Mechtild Exner, *The Convergence of Ideology and the Law: The Functions of the Legal Education Campaign in Building a Chinese Legal System*, 31 ISSUES AND STUDIES, No. 8, at 68 (1995). Aimed at the entire population, the campaigns have also particularly targeted Party and cadre schools, youth and the military. For example, all schools at all levels were instructed to formulate legal curricula, mass organizations and enterprises have been instructed to organize legal instruction, and the media and cultural activities have been used to disseminate legal knowledge. Although the term "campaign" has not been used to describe these and other activities organized to carry out the two five-year plans and although there have been no rallies to inspire public enthusiasm, these efforts constitute an ideological campaign by the Party to disseminate legal knowledge and to promote "correct" thought about law. The campaigns have aimed both at reducing cadre arbitrariness and at supporting the Party's role in promoting China's development. While promoting the goal of greater regularity in administration, the campaigns have pointed away from suggesting development of an autonomous legal order, instead emphasizing Party leadership and the function of law in perfecting Party policy.

52. Edward J. Epstein, *Law and Legitimation in Post-Mao China*, *in* DOMESTIC LAW REFORMS IN POST-MAO CHINA 19, 35 (Pitman B. Potter ed., 1994).

The courts continue to be used to advance short-term policy goals. From the beginning of legal reform to the present day, explicit judicial priorities have been announced for the criminal law.[53] In the early 1980s, as the reforms generated new types of criminal behavior, drives against economic crimes were launched,[54] and mobilizing efforts to deal with crime have continued down to the present day.[55] More recently, another nationwide campaign to "Strike Hard" at criminals was begun in 1995 and carried out well into 1996.[56] In October, 1996 a successor campaign was announced by the Ministry of Public Security that continued into 1998.[57]

In the past, campaigns made the work of all agencies of the central and local governments, including the courts and police, especially irregular.[58] When law enforcement oscillates from campaigns to inaction

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53. For example, the President of the Supreme People's Court in 1980 called on the courts to "severely punish active criminals" by taking "sterner measures against such serious criminals who commit murder, arson, robbery and rape." Jiang Hua, *Earnestly Perform People's Court Work Well*, RENMIN RIBAO [PEOPLE'S DAILY], April 9, 1980, at 3.

54. Directives treated as having the force of law accompanied by explanatory policy statements explicitly called for judicial activity to focus upon economic crimes. In January 1981, for instance, the State Council issued a "circular" attempting to define illegal speculation, "profiteering" and trade in prohibited goods, such as precious metals and foreign currencies, and called for a crackdown on smuggling. *State Council Directive on Crackdown on Speculation, Smuggling; Fighting Economic Crimes*, XINHUA NEWS BULLETIN, Jan. 16, 1981, at 6. The NPC Standing Committee then amended the criminal code by increasing penalties for certain crimes (*NPC Adopts Resolution on Economic Crimes*, FBIS, *supra* note 50, Mar. 10, 1982, at K1-K3), and the Central Committee of the CCP and the State Council issued a decision on "dealing blows at serious criminal activities in the economic field." *CCPCC [China People's Political Consultative Committee], State Council Decision on Economic Crimes*, FBIS, *supra* note 50, Apr. 14, 1982, at K1-K9. Reports of judicial decisions punishing conduct of the type discussed in the "circular" proliferated, not surprisingly, soon after it was promulgated.

55. For example, in 1992 a "Central Committee for the Comprehensive Management of Public Security" was formed, of which Ren Jianxin, then President of China's Supreme People's Court, became director. The Committee was described as "the leading organ of the movement," and included representatives of the judiciary, police and other departments. Ren called for focusing its activities on areas in which public security had been poor for a long time *Ren Jianxin: Problems "Still Exist,"* XINHUA NEWS SERVICE, FBIS, *supra* note 50, No. 92-237, Dec. 9. 1992, at 15.

56. *See, e.g.*, Bruce Gilley, *Rough Justice: Executions Surge in Tough Anti-Crime Drive*, FAR E. ECON. REV., July 4, 1996, at 22.

57. *See, e.g., Security Ministry Unveils "Winter Action" Campaign as Successor to "Strike Hard,"* XINHUA NEWS SERVICE, Nov. 18, 1996; *Over 50,000 Arrested in First Half of 1997 Anti-Drugs Campaign*, TA KUNG PAO (Hong Kong), Sept. 5, 1997, *reprinted in* BRITISH BROADCASTING CORPORATION, BBC SUMMARY OF WORLD BROADCASTS, Asia-Pacific [hereinafter BBC-SWB], Oct. 3, 1997, at FE/D3040/G; *Judicial President Says People Still Unhappy about Crime Levels*, XINHUA NEWS AGENCY, Mar. 8, 1998, *reprinted in* BBC-SWB, *supra*, Mar. 11, 1998, at FE/D3172/S1.

58. *See* Lubman, *Form and Function*, *supra* note 10; JEROME A. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION (1968); A. DOAK BARNETT, WITH EZRA VOGEL, CADRES, BUREAUCRACY, AND POLITICAL POWER IN COMMUNIST CHINA (1967).

and then back to campaigns again, "what is tolerated or even positively approved by officials today may be subject to harsh penalties tomorrow."[59] A Chinese critic has also noted the adverse effects on legality of the use of what he styles as "policy laws," "which announce general goals without specifying stable procedural arrangements as the basis for official action." Enforcement is sporadic, and only when cases multiply is action taken and then by "putting together a group of people to mount an intensive investigation," which is followed by punishment of offenders during a short period of time. This usually means punishing a small number of major offenders while neglecting minor ones and then ending the crackdown.[60]

The unevenness in administering the criminal law that results from the frequent use of campaigns is clear to many ordinary Chinese citizens, who have weathered innumerable swings in policy since 1949. Campaigns that have been conducted as part of a "war on crime" have adversely affected the morale of the police, who are discouraged by the ineffectiveness of the technique.[61]

At the time the legal reforms were being initiated, the Chinese leadership was sensitive to the obvious questions about the significance for law of use of the campaign approach. For example, during the crackdown on economic crimes in early 1982 the *Beijing Review* could say that "no purge will ever happen;"[62] a *Xinhua* article distinguished the drive against economic criminals from the leftist "expansion of class struggle;"[63] and in a key decision in 1982 of the Central Committee of the Chinese Communist Party, the State said that "in dealing blows at serious criminal activities in the economic sphere, we are resolutely against making the work a mass movement." It went on to say, however, that,

> in dealing with major and key cases which are relatively complicated and which involve more people, we must completely follow the mass line; that is, we must, within a definite scope, mobilize the masses knowing about the cases to factually expose and inform against those who have committed

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59. *China Campaigns to Enforce Laws*, 2 CHINA LAW FOR BUSINESS, No. 5, at 16 (1996).

60. Meng Qinguo, *Some Issues Relating to Policy Law*, TIANJIN SHEHUI KEXUE [TIANJIN SOCIAL SCIENCE], No. 2, at 55 (1990), *translated as Shortcomings of Policy Law*, JOINT PUBLICATIONS RESEARCH SERVICE [hereinafter JPRS], No. 90038, May 17, 1990, at 21.

61. Fu Hualing, *Bird in the Cage: Police and Political Leadership in Post-Mao China*, 4 POLICING & SOCIETY at 277, 282 (1994).

62. *Fighting Economic Crimes*, BEIJING REVIEW, Feb. 22, 1982, at 3.

63. *Xinhua Comments on Punishing Economic Criminals*, FBIS, *supra* note 50, Apr. 1, 1982, at K14-KI5.

serious crimes.[64]

By the 1990s, the leadership apparently did not feel it necessary any longer to justify its use of campaigns to give the criminal law special force, which suggests the continuing appeal to the leadership of some Maoist techniques of governance and of a highly instrumental view of law. The activities of the courts reflect these implications, as further analysis will show below.

The Maoist legacy that burdens Chinese law weighs most heavily in the treatment of dissent. The Maoist Party-state waged a relentless war against "counter-revolutionaries," "bad elements," and "rightists," using a politicized, Party-dominated criminal process to punish persons suspected of disloyalty or of vaguely denominated "counter-revolutionary" crimes.[65] Deng and his successors have severely punished expressions of dissent, regardless of provisions in the Codes of Criminal Law and Criminal Procedure that protect rights of accused persons and create safeguards against arbitrary detention. The determination of the leadership not to tolerate expression of dissent was manifested in the severe punishment of dissidents throughout the 1980s,[66] was exhibited in all its repressive cruelty in the crushing of the Democracy Movement in June 1989 and the trials and convictions of demonstrators thereafter,[67] and has been sustained in the 1990s as well. The second conviction of Wei Jingsheng in 1996 further symbolized the leadership's fear of dissent and its determination to crush it with no concern for legality.[68] The leadership continues to insist, as it has since the onset of reform, that for the sake of maintaining social order Chinese democracy must be "disciplined," which means that the centralized leadership of Party and State must be upheld.[69] "Democracy," Party leaders said in 1981, cannot be used as a pretext by individuals to

64. *CCPCC, State Council Decision on Economic Crimes, supra* note 54, at K4.

65. The literature is enormous. *See*, e.g., AMNESTY INTERNATIONAL, POLITICAL IMPRISONMENT IN THE PEOPLE'S REPUBLIC OF CHINA (1978); SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS 3-34 (1985).

66. *See, e.g.*, AMNESTY INTERNATIONAL, CHINA: VIOLATIONS OF HUMAN RIGHTS: PRISONERS OF CONSCIENCE AND THE DEATH PENALTY IN THE PEOPLE'S REPUBLIC OF CHINA 5-51 (1984).

67. *See, e.g.*, BEIJING SPRING, 1989: CONFRONTATION AND CONFLICT, THE BASIC DOCUMENTS (Michel Oksenberg et al. eds., 1990).

68. *Criminal Law Expert on Wei Jingsheng Case*, FBIS, *supra* note 50, No. 96-001, Dec. 29, 1996, at 24.

69. *Socialist Democracy Requires Discipline*, JPRS, *supra* note 60, No. 77590, POLITICAL, SOCIOLOGICAL AND MILITARY AFFAIRS, No. 170, Mar. 16, 1981, at 13.

violate the basic principles of organization and discipline in China,[70] and "[o]pinions which are anti-party and anti-socialist and which sabotage the unity of the motherland and the Nationalities must be prohibited."[71] More than a decade later, a British delegation visiting China concluded that "the expression of political dissent [is] not permitted."[72] Some debate has occurred on the issues of the criminalization of free speech and related freedoms, both before and since June 1989,[73] but there seems to be no prospect of retreat from willingness to use the power of the Party-state to crush conduct that is deemed to threaten Party rule.[74]

This discussion of the campaigns against crime and the criminalization of dissidence, while summary, should serve as a reminder of the limits that policy has set on the scope of law throughout the period of reform. Still, those limits are very different from what they were before, and we now turn to a general review of the essential features of the legal reforms.

2. Legislation and the Allocation of Power in Governing China

a. The Central Role of Legislation in the Reforms

Despite the ambiguities created in legislation and in administration generally by the continued intermixing of Party and state, the Chinese leadership has effected a legislative revolution, on paper at any rate. A vast and varied assortment of legislation that amounts to nothing less than a legislative explosion has given concrete form to economic reforms. By 1996, China's laws had grown in number and complexity to embrace an

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70. This means that those who "understand freedom of speech as the freedom to say whatever they want to say and to do whatever they care to do in disregard of the state and the people's interests exceed the limit of the law. *Renmin Ribao [People's Daily]: Article on Freedom of Speech*, FBIS, *supra* note 50, Feb. 17, 1981, at L4.

71. *Gongren Ribao [Worker's Daily]: Article on Freedom of Speech*, FBIS, *supra* note 50, Mar. 30, 1981, at L13, L15; *see also People's Daily Editorial on Socialist Democracy; No Freedom of Speech for Counterrevolutionaries*, XINHUA NEWS AGENCY, Feb. 8, 1981. *See also* the rejection of the concept of "absolute freedom of speech," in *Hongqi [Red Flag], Article Discussing Freedom of Speech*, FBIS, *supra* note 50, Apr. 27, 1981, at K16.

72. HMSO, VISIT TO CHINA BY THE DELEGATION LED BY LORD HOWE OF ABERAVON 10 (1993).

73. *See, e.g.*, LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA'S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS 77-81 (1993).

74. *See, e.g.*, AMNESTY INTERNATIONAL, *supra* note 65, AMNESTY INTERNATIONAL, *supra* note 66; ANN KENT, BETWEEN FREEDOM AND SUBSISTENCE: CHINA AND HUMAN RIGHTS (1993).

enormous range of economic activity. An inventory of legislation or a chronological account would be exhausting, and here it is possible only to summarize the range of problems that has been addressed:

(i) New actors in an emerging market economy have been created, as by the Company Law that became effective in 1994.

(ii) New legal relationships appropriate to a market economy have been defined, as by the General Principles of Civil Law (a truncated civil code) and a variety of laws on civil and economic transactions. In Chinese theory, "economic" law applies to transactions in which at least one party is a state-owned enterprise, while "civil" law applies generally to all "commodity economic transactions."[75]

(iii) Legislation has been used to express and implement macroeconomic policies, as in banking legislation.

(iv) New rights and interests have been given legal recognition, as in a Labor Law and rules on consumer protection.

(v) A framework has been created for direct foreign investment, as in rules on various forms of investment (such as joint ventures, contractual joint ventures, and wholly owned foreign enterprises).

(vi) Legislation has been used for a range of other purposes, as in regulating basic industries such as mining, setting standards for environmental protection, and sanctioning violations of intellectual property rights.

China now has a large body of legal rules for domestic and foreign-related transactions (e.g., involving foreign trade and investment). Whether it has a *legal system* is quite another question, since not only is political authority fragmented, but existing practice in making and interpreting laws is also extremely disorderly.

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75. General Principles of Civil Law of the people's Republic of China (*adopted on* Apr. 12, 1986, *effective* jan. 1, 1987) [hereinafter General Principles of Civil Law or GPCL], *in* CCH CHINA LAW FOR FOREIGN BUSINESS, ¶19-150, *also in* Whitmore Grey & Henry Ruiheng Zheng, 52 L. & CONTEMP. PROBS. 27 (1989). The distinction between the two realms is very unclear. *See* the Supreme People's Court interpretation, *Zuigao Renmin Fayuan Guanyu Jiaqiang Jingji Shenpan Gongzuo de Tongzhi* [*Circular of the Supreme People's Count on Strengthening Economic Trial Work*], Dec. 9, 1985, *reprinted in* ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1987, *also in* CHINA LAW YEARBOOK 1987: FIRST ENGLISH EDITION 428 (1989). *See also* GUIGUO WANG, BUSINESS LAW OF CHINA: CASES, TEXTS, AND COMMENTARIES 6-11 (1993). Drafting of additional contract legislation began in 1993, and in 1997 a draft "unified Contract Law" was issued that would apply identical principles to both types of contracts. *See* Charles D. Paglee, *Contract Law in China: Drafting a Uniform Contract Law, available at* Website <http://www.qis.net.chinalaw>. The draft matured into a draft law that was published, *see* Zhonghua Renmin Gongheguo Hetong Fa (Caoan) [Contract Law of the People's Republic of China (Draft)], RENMIN RIBAO [People's Daily], Sept. 5, 1998.

b. *Rule-making by the Bureaucracy and its Control*

Nowhere is the absence of the rule of law better illustrated than in the hesitantly developing field of administrative law[76]. The arbitrariness of Chinese bureaucrats is legendary. They exercise very broad administrative discretion in making and implementing general rules in a system in which multiple hierarchies, often overlapping in jurisdiction, exercise poorly defined authority. A notable cellularity, in addition, inhibits interagency communication and encourages consensus decision-making.

A number of recently promulgated rules seem to be hesitant steps in the direction of defining the scope of administrative authority and remedying the exercise of arbitrary power. An Administrative Punishments Law defines the wide assortment of punishments that may be imposed by administrative agencies, an Administrative Compensation Law defines the situations in which governmental agencies may be liable for injurious consequences of their acts, and an Administrative Litigation Law (ALL) gives affected persons or organizations the right to sue in the Chinese courts agencies that have acted unlawfully. Suits brought against administrative agencies under the ALL have been increasing (but are still under 100,000) yearly. The sparse available information suggests that plaintiffs win outright in around 15% of the cases, but that a large number of suits—in some years more than half—are withdrawn after the administrative agencies have modified the action that provoked litigation.

The jurisdiction of the courts, the extent to which they may vindicate rights, and their power to restrain arbitrariness all remain very limited. Under the ALL, the courts can neither review the validity of general rules issued by administrative agencies nor decide that they improperly used their discretion. The actions of administrative agencies may be reviewed only if the agency is charged with applying a law wrongly in the specific case, but this is difficult to show because the rules in question, like most Chinese laws and administrative rules, are usually generally framed and

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76. The discussion in this section relies on PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM (1996); LIN FENG, ADMINISTRATIVE LAW: PROCEDURES AND REMEDIES IN CHINA (1996); Pitman B. Potter, *The Administrative Litigation Law of the PRC in Domestic Law Reforms in Post-Mao China, in* DOMESTIC LAW REFORMS IN POST-MAO CHINA 270 (Pitman B. Potter ed., 1994). Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1 (1997) was published just as this article was in its final stage of preparation for publication, too late to incorporate the author's discussion of the National People's Congress and its supervisory functions, which are presented both in greater detail and more positively than by the sources cited here.

give agencies broad—and unreviewable—discretion. Chinese administrative law is still in a nascent state.

In practice the authority to interpret administrative rules is usually exercised only by the administrative agency that has issued the rule in question. The lack of judicial control over agencies derives from orthodox Leninist theory that permits rules to be made only by the legislative branch of government. The Chinese Constitution gives the National People's Congress supreme authority to determine the validity of local legislation and authorizes the State Council to exercise the same power over the general rules of ministries and departments under its jurisdiction. These powers do not appear to be routinely exercised, at least at the national level. At the local level, local people's congresses have secondary power over administrative agencies at this level. China remains a disorderly welter of central and local legislation and administrative rules, often mutually inconsistent.

Chinese law reformers are aware of the problems that have been created by the disorderly allocation of power to make general rules. A draft Law on Legislation, circulated in 1996, proposed to demarcate spheres of authority among central and local, superior and subordinate agencies more clearly than the Constitution and existing legislation. Even if new legislation clarifies rule-making authority and provides for its control, only energetic and consistent enforcement will bring order to the law- and rule-making of local governments and ministries, and impose meaningful limits on administrative arbitrariness.

An attempt has also been made to adapt a Leninist institution to the needs of administrative regularity. A Ministry of Supervision (successor to one established in the 1950s and abolished during the Cultural Revolution) is responsible for the supervision of all ministries under the authority of the State Council, and its local supervisory organs exercise the same power at local levels. A recent statute, the Administrative Supervision Regulation, has formalized previously existing powers to investigate problems of compliance with laws and regulations. Citizens may complain of unlawful acts by administrative organs to the supervision organs, which are empowered to investigate, hold hearings, and make recommendations regarding penalties and disciplinary punishment.[77] Under another statute, the Regulation on Administrative Reconsideration, parties whose rights and

77. *See PRC Administrative Supervision Law*, FBIS, *supra* note 50, No. 97-091, May 9, 1997, at 36; LIN FENG, *The Administrative Supervision Law*, 3 CHINA LAW FOR BUSINESS, Aug. 1997, at 10. On the Ministry of Supervision *see generally*, CORNE, *supra* note 76, at 271-75; LIN, *supra* note 76, at 41-42.

obligations have been affected by specific administrative acts may request reconsideration at a higher administrative level. This "limited unofficial review" does not extend to reviewing the legality of the general rules on which such acts are based.[78] Law reformers are considering incrementally developing more formal institutions for reviewing administrative legality, but major political decisions may ultimately be needed to effect significant reform.

c. *New Functional Specialization in Central Legislation and Rule-making*

Three principal law-making agencies share the central government's legislative power. The National People's Congress (NPC) has the power to promulgate "basic laws." Its Standing Committee has the authority to promulgate and amend "laws," with the exception of those enacted by the NPC. The State Council may enact "administrative measures . . . administrative laws and regulations . . . and orders," as well as "temporary legislation." This scheme is only general; key terms ("basic laws" and "temporary laws") are nowhere defined, and the respective jurisdictions and relationships of the three bodies are worked out in practice through informal negotiations. As a result, the three bodies must negotiate among themselves on each law that is adopted, a system aptly described as "chaotic."[79]

(1) The National People's Congress

Although the NPC is a weak legislature, it is no longer a "rubber stamp."[80] A long-time Chairman of the Standing Committee of the NPC before he was removed in 1997, Qiao Shi, vigorously promoted the role of the NPC in drafting legislation and in exercising its powers under the Constitution to supervise legality in enforcing enacted laws.[81] Still, major

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78. CORNE, *supra* note 76, at 171; *see generally* LIN, *supra* note 76, at 51-112.

79. Murray Scot Tanner, *Organizations and Politics in China's Post-Mao Law-Making System*, *in* DOMESTIC LAW REFORMS IN POST-MAO CHINA 56, 59 (Pitman B. Potter ed., 1994).

80. One American scholar has stated that it is becoming an "extremely significant political arena." *Id.* at 88. A Chinese scholar has said that the NPC has "changed from a lower quality rubber stamp to a good quality rubber stamp." James Kynge, *China's People's Congress Wakes up this Week*, FINANCIAL TIMES, March 3, 1998.

81. *See, e.g.*, *Qiao Shi Interviewed on Role of NPC*, FBIS, *supra* note 50, No. 96-242, Dec. 14, 1996, *electronically retrievable at* World News Connection, <http://www.wnc.fedworld.gov> [hereinafter WNC Website]; *Qiao Shi Discusses Political Issues with US Journalists*, FBIS, *supra*

pieces of legislation must receive prior Party approval and much of their content is decided before the NPC becomes involved. Moreover, after legislation is enacted by the NPC, the State Council exercises its power to draft implementing legislation, which may distort or pervert the legislation on which it is purportedly based. Basically, both policy and laws are determined by consensus among senior leaders, and consensus is often difficult to reach and maintain. At the same time, because legislation has become a major avenue for expressing policies, the very disorderliness of the jurisdictional arrangements among the major law-making bodies creates opportunities for innovation and has evolved away from the narrow Marxism-Leninism that originally shaped them.[82]

(2) The State Council

Most legislation originates in the State Council and in those ministries, commissions and bureaus which are subordinate to it. In practice, the boundary between the "administrative" legislation that is the proper subject of the State Council and the "legislative" activity that is reserved to the NPC is frequently obscured, given that "the State Council enjoys too much power in relation to its legally mandated role."[83]

The Office (upgraded in 1997 from Bureau) of Legislative Affairs (OLA) of the State Council, which handles legislative drafting, has worked hard at becoming a professionalized legal drafting agency, but the handicaps it must overcome are enormous.[84] Chinese legal education is formalistic (see below) and fails to teach law graduates the skills necessary to draft legislation or to investigate the social facts that shape the behavior toward which their legislation will be directed. Also, the drafting process inevitably involves extensive negotiation and consultation among the OLA and various concerned ministries. Finally, regardless of the final text of a law or regulation, the organizations that implement them can depart from or ignore the intent of the drafters.

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note 50, No. 97-012, (*available at* WNC Website, *supra*), Jan. 16, 1997.

82. Murray Scot Tanner, *How a Bill Becomes a Law in China: Stages and Processes in Lawmaking, in* CHINA'S LEGAL REFORMS 39 (Stanley B. Lubman ed., 1996) [hereinafter CHINA'S LEGAL REFORMS]. *C.f.* Tanner, *supra* note 79, at 89 ("In the long run, given the common tendency for legislatures in developing countries to become politically powerful before they become democratic, this may be a very modest source of optimism.").

83. Jiang Ping, *Chinese Legal Reform: Achievements, Problems and Prospects*, 9 J. CHINESE L. 67, 74 (1995).

84. This paragraph draws on Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1 (1996).

d. Problems

(1) The Disorderly Hierarchy of Rules

Chinese law-making became fundamentally transformed in the reform era by the delegation of much legislative power to provincial governments and to more than twenty functional bureaucracies of the central government. A formal hierarchy of legislation exists, but beneath this simple general classification is a large and confusing range of documents, and the distinctions between them and between rule-making and implementation become blurred in practice.

The allocation of rule-making power within the Chinese bureaucracy is a major structural problem in the organization of the Chinese state that has enormous implications for the future of the rule of law in China. The State Council, which stands at the head of the executive branch of the central government, supervises more than sixty departments (including ministries), commissions, administrations and offices, collectively referred to here as "central administrative agencies." These possess authority to issue regulations to implement specific legislation under a grant of such power by a legislative body such as the NPC Standing Committee, and also by way of exercising a technically distinct type of authority to execute their general administrative responsibilities. This second broad category of general rule-making power is deemed to be inherent in the agencies and enables them to issue any rule that is necessary to carry out their functions.[85] The wide array of "departmental rules" that they issue, all of which have general binding authority, are superior to all local enactments.[86] No procedural rules exist to govern enactment of these important rules, which may be issued or modified by any agency with exclusive jurisdiction over the subject matter of the rule. When agencies share jurisdiction, rules must be issued either jointly, or else by one of them with the permission of the State Council.

Furthermore, crucial to the future of the role of courts and the rule of law itself, local governments and central bureaucracies alone possess the power to interpret the rules they issue. Chinese administrative agencies, then, have the power both to issue and interpret their own rules, and *to*

85. *See* CORNE, *supra* note 76, at 56.
86. *See generally id.* at 68-83.

require the courts to enforce them.[87] This power is deep-seated, drawing from the power of administrative bureaucracies within the CCP, and is extensive, because most laws originate in the state bureaucracy rather than the legislative bodies. Administrative agencies wield law-making powers to protect or increase their jurisdiction and to advance their policies. The distribution of legislative power in China suggests that China suffers from "legal fragmentation"[88] and supports the conclusion that no legal institution in China currently has "either the authority or the desire to impose order on the legal system."[89] Furthermore, governmental agencies are not unified in their outlook toward rules or their application.

This disorderly system denies to courts the role that they might play in a system that sought to maintain the rule of law. The lower courts are formally denied power other than to apply laws, although in practice the unavoidability of their involvement in interpretation is coming to be recognized[90] and the Supreme People's Court has asserted a strong role in the interpretation of laws and administrative rules, which is explored below. As legislation continues to pour forth in response to the increasing complexity of the Chinese economy, the disorderliness of Chinese legislation will also continue. Enlarging the role of the courts, expanding systems of internal administrative review, or both, will require institutional innovations that can only be part of a political solution to the current fragmentation of authority.

The institutional structure and the bureaucratic mind-set that permit administration to be conducted without involving courts is further illustrated by prior lack of concern even for publishing the rules that were being applied. For the first thirty years of Communist rule, bureaucrats relied on Party policies and internal rules to guide them in their daily work; the bureaucratic attitudes that produced and relied on secret rules have not changed quickly. Foreigners, particularly lawyers representing foreign companies attempting to negotiate trade or investment transactions in China, have exerted pressure for change, and some Chinese officials have been sensitive to foreign complaints. In October, 1988, it was announced

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87. Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 734 (1994); Anthony Dicks, *Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform*, *in* CHINA'S LEGAL REFORMS, *supra* note 82, at 82, 99-103.

88. Dicks, *supra* note 87, at 108.

89. *See* Keller, *supra* note 87, at 740. Relations between the courts and administrative agencies are further described in Part Three, *infra*.

90. Perry Keller, *Legislation in the People's Republic of China*, 23 U. BRIT. COLUM. L. REV. 653, 668 (1989).

that "all administrative laws and regulations issued by the State Council" would be signed by the Premier, published in the Bulletin of the State Council and in People's Daily, and distributed by the New China News Agency. Considerable progress has been made to date in promulgating central government legislation and ministerial regulations. However, many ministerial regulations and much provincial and local legislation remains internal or difficult to obtain, even when it is technically public.[91]

(2) The Influence of Drafting Techniques

The language and phrasing of Chinese legislation and rules create wide scope for administrative discretion in interpretation because a major goal of Chinese legislative drafting is "flexibility." As a result, at all levels Chinese legislation is intentionally drafted in "broad, indeterminate language," which will allow administrators to vary the specific meaning of legislative language with circumstances.[92] Standard drafting techniques include the use of general principles, undefined terms, broadly worded discretion, omissions, and general catch-all phrases.[93]

(3) Literalism

Legal uncertainty is compounded by a combination of three related attitudes toward legislation that I shall call here "literalism."

The first is positivism, expressed in the view that legislatures are the sole sources of law; the second is formalism, expressed in the tendency to regard legislative tenets as equivalent to practice;[94] and the third, flowing from the previous two, is inattention to practice and to interpretation of legislation by the courts and by administrative agencies.

The partial consequence of these views of legislation is that although progress has been made in publishing collections of laws,[95] much less effort has been devoted to making interpretations of laws available to the public.

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91. For numerous examples *see* CORNE, *supra* note 76, at 71-77.

92. *See* Keller, *supra* note 87, at 750-752.

93. This helpful catalogue is from CORNE, *supra* note 76, at 95-104.

94. Potter, *supra* note 43. For other definitions of formalism that might also apply, see Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 509-510 (1998).

95. In addition to a yearly compilation of laws and regulations enacted by the National People's Congress and its Standing Committee, ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN [COLLECTION OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA], laws and regulations have been published with increasing frequency in compilations. Some of these are cited in Keller, *supra* note 87, at 711 n.1.

Progress has been made in publishing collections of laws, the Supreme People's Court publishes in its Gazette opinions on typical cases selected for "guidance" of lower courts and general prospective interpretations of laws,[96] but the Gazette contains only a fraction of the Court's rulings and interpretations on national legislation.[97] Most others remain unpublished.

Judicial decisions are being published in increasing number, although unofficially by commercial publishers or semi-officially by the Supreme People's Court. Comments by Chinese lawyers and law professors suggest that published reports of judicial decisions are little relied on by the courts. The significance of Supreme People's Court interpretations and other judicial decisions as sources of law is explored further below.

e. Continuing Legislative Incoherence

The foregoing enumeration of problems suggests that the making and interpretation of laws in China is marked by disorder and potential for arbitrariness. Lawmakers exercise power to interpret rules of their own making, which are couched in indeterminate language. No wonder one writer concludes that "[t]he disparate mass of laws and regulations which makes up the formal written sources of Chinese law does not possess sufficient unity to be regarded as a coherent body of law. In their disarray, the sources of Chinese law seem barely capable of providing the basic point of reference which all complex systems of law require."[93] One root cause of disorder is the persisting tendency to interpret and apply Chinese laws like the policies they are supposedly intended to replace. Formerly, many policies had to be complied with in spirit only,[99] and bureaucrats may have difficulty distinguishing the current proliferation of normative documents from policy documents, a distinction that did not exist before reform. That task is made more difficult by the existence of a large gray area of what Chinese legal scholar Meng Qinguo terms "policy laws" – policy statements, administrative regulations, meetings, notices,

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96. NANPING LIU, JUDICIAL INTERPRETATION IN CHINA: OPINIONS OF THE SUPREME PEOPLE'S COURT 131-89 (1997).

97. Although informative collections of cases have been published in recent years, they are unofficial. *See* Mark Sidel, *Recent and Noteworthy Legal Works Published in China*, 1 J. CHINESE L. 251, 258-61 (1987). The only official publication of cases is the Gazette of the Supreme People's Court. Some publications are published under semi-official auspices, such as by the Supreme People's Court Training Center for Judges. *See infra* Part Three, III. C. for a discussion of one such source.

98. Keller, *supra* note 87, at 711.

99. *See* CORNE, *supra* note 76, at 90.

instructions, and speeches that are given legal effectiveness because they emanate from authoritative government and Party bodies.[100] Meng argues that reliance on "policy laws" is undemocratic, disorderly and a source of instability; "policy laws" do not set precise limits on legal and illegal behavior nor define the legal consequences of failure to comply, and they are procedurally unclear. This criticism parallels Western views that when Party policy takes precedence over law, law loses its rationality and the need to be internally consistent and orderly.[101]

The tentativeness of much Chinese policy in the past may further contribute to legal uncertainty. Maoist-style administration assumed the requirement that policies be applied experimentally and that the Party alone should decide how to apply local experiments on a national scale. When Party authority dictates variations in how legislation is applied, as Perry Keller has observed, the boundaries of positive law are blurred:

> Chinese legislation is perpetually in half focus as it faces into its background context of Party decisions and policy documents. It consequently fails to achieve a separate identity as the formal source of Chinese law. The continued reliance of Chinese decision makers on policy directives and makeshift regulations to introduce reforms clearly compromises any movement towards a legislative model in which the formal sources of law provide a coherent foundation for interpretation and doctrinal elaboration. It also underscores the ambivalence of many Chinese legislative officials towards such a model.[102]

III. INSTITUTION-BUILDING

In 1979, early law reformers undertook three initial tasks: rebuilding the courts, legal education and the bar. The courts and legal education had been politicized long before the Cultural Revolution, and the bar had not existed since 1959. The reformers first looked to the original outlines and structures of the Stalinist-type institutions that had already existed since the 1950s, and which they have since transcended.

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100. Meng, *supra* note 60.
101. *See* Keller, *supra* note 87.
102. *Id.* at 731.

A. The Courts

A central position in the law reforms has been given to reconstructing the courts. It is generally assumed in the West that courts are established by the state to protect and vindicate rights, among other functions. In China, too, the courts are increasingly being used as forums in which rights created by legislation are asserted by citizens against each other and to some extent against the government. Scorned as "rightist" institutions at the end of the 1950s and as "bourgeois" during the Cultural Revolution, courts have been given an increasingly meaningful and credible role in resolving civil and economic disputes.

Like its pre-Cultural Revolution predecessor, the post-reform judicial system is a hierarchy of "People's Courts." The Supreme People's Court has below it four levels of jurisdiction, as well as Special People's Courts with functional jurisdiction over such areas as the military, forestry and various means of transport. The courts are examined in more detail in Part Three of this Article.

B. Legal Education

On the eve of the Cultural Revolution only a small number of university-level institutions offered law degrees. Most were under the jurisdiction of the Ministry of Education, the most noted of these were Beijing University and Fudan University in Shanghai. Other schools trained "political-legal cadres," i.e., cadres for the courts, the police and Procuracy. All law schools were closed in 1967 and were among the last university-level institutions to be reopened.

The work of reconstructing legal education began with the reopening of some law schools in 1979;[103] they began to graduate students in 1982. Over thirty full-time institutions of legal education existed by the end of

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103. This section is based primarily on William P. Alford & Fang Liufang, with Lu Zhifang, Legal Training and Education in the 1990's: An Overview and Assessment of China's Needs (unpublished manuscript in the author's possession, Jan. 31, 1994). On legal education at the beginning of the 1980s, see Timothy A. Gelatt & Frederick Snyder, *Legal Education in China: Training for a New Era*, 1 CHINA L. REP. 41 (1980). A more recent article is James Kraus, *Legal Education in the People's Republic of China*, 13 SUFFOLK TRANSNAT'L L. J. 75 (1989), which is informative both about curricula and student attitudes, although it is sometimes overly optimistic, e.g., "China has embraced the need to produce more lawyers . . . while recognizing that a stronger judiciary and growth in the role of law are beneficial aspects of its more liberal internal policies" *id.* at 132. *See also* Sharon K. Hom, *Legal Education in the People's Republic of China: A Select Annotated Bibliography of English-Language Materials*, 6 CHINA L. REP. 73 (1989).

the decade, and by the mid-1990s over 70 universities and other institutions of higher learning were awarding law degrees. Of these, the largest number are under the jurisdiction of the State Educational Commission (the former Ministry of Education). After its re-establishment in 1979, the Ministry of Justice resumed its administration of a group of schools once again dubbed *zhengfa xueyuan*. No doubt intended to symbolize a change in policy, when this term is translated into English in China today it is rendered as schools of "political science and law," although before reform the same term was rendered as "political-legal" schools. There are now five such institutes, including the largest law school in the country, the University of Political Science and Law in Beijing. In addition, other institutions are run by the Chinese Academy of Social Sciences in Beijing and its provincial affiliates, the Ministry of Finance, the Ministry of Foreign Economic Cooperation and Trade, and other ministries. Altogether, there are over 30,000 students registered for the full-time study of law in four-year undergraduate programs at these institutions. Some 5000 students are enrolled in programs leading to master's and doctor's degrees. Legal education can also be pursued via general education programs, correspondence courses, "self-study" programs that confer degrees after students pass an examination, and shorter term training programs leading to certificates of various types.

The quality of most Chinese legal education has not kept pace with its expansion. Law teaching involves recitation and exposition of legislative provisions – "students are given few if any opportunities to analyze fact patterns by reference to legal and regulatory norms;"[104] instead, Chinese law students "reify their experience through highly abstract units of legal thought."[105] The significance of these observations goes far beyond the classroom. Emphasis on rote learning reinforces "the perspective that the law on the books is and should be the main focus of inquiry, [and admits] little concern for actual legal behavior and practice."[106] Fully one-quarter of all teaching personnel at top schools lack bachelor's degrees.[107] Universities generally are notoriously under-funded and law professors' lives are marked by low salaries, inadequate libraries, and little or no support for research in which they are nonetheless expected to engage. It is no wonder that many law teachers have left their law

104. Pitman B. Potter, *Class Action: Educating Lawyers in China*, 22 CHINA EXCHANGE NEWS, No. 4, at 16, 17 (1994).

105. Epstein, *supra* note 52, at 34.

106. Potter, *supra* note 104.

107. *See* Alford & Fang, *supra* note 103, at 17.

schools or departments to enter the more lucrative practice of law.

Chinese legal education has received some Western influence through legal exchanges. Hundreds of law teachers from Chinese law schools and Chinese legal scholars from the Chinese Academy of Social Sciences have gone abroad to do research or attend classes in foreign law schools, the majority in the United States under the sponsorship of the Committee on Chinese Legal Educational Exchanges (CLEEC). CLEEC was established in 1982 with support from the Ford Foundation and later obtained additional funding from the Luce Foundation (for development of law libraries at law schools) and the United States Information Agency (for summer programs for Chinese law teachers and researchers preparing to study in the United States). Chinese participants were placed in American law schools, with supervision for visiting scholars and instruction for degree candidates; an in-country course on American law was offered since the mid-1980s, staffed by American law professors and lawyers on an unsalaried basis. After June 1989, Chinese individuals were not allowed by China's authorities to attend degree programs, but CLEEC's efforts continued until 1995, when Ford Foundation grants were exhausted and congressional cuts in the budget for the United States Information Agency ended the summer program.[103]

C. *The Chinese Bar Reestablished*

1. Early History

No feature of China's contemporary legal scene better embodies both the novelty and aspirations of legal reform than the recently reestablished Chinese bar. Traditional Chinese culture weighs heavily on it. The concept of a legal profession acting as an intermediary between the populace and the state was essentially unknown in traditional China, and the small Westernized bar that emerged in China's cities during the Republic was unknown to most Chinese. Later, the CCP was hardly more friendly. An experiment with a Soviet-style bar began in 1954 but was ended in 1957, when lawyers were included among the targets of the Anti-Rightist campaign against bourgeois institutions. The legal advisory offices were closed (around 800, with 3,000 lawyers, by then) and China remained without a legal profession for over twenty years before the reforms began.

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108. Funding was made available for a summer program in 1998, directed by Professors Sharon Hom of the City University of New York and Kathleen Price of the New York University School of Law.

2. Initial Attempts to Define the Lawyers' Role

The Chinese bar was formally reestablished at the beginning of the 1980s. "Provisional regulations" on lawyers were adopted by the Standing Committee of the National People's Congress in August 1980 and became effective on January 1, 1982.[109] Lawyers, characterized as "legal workers of the state," were organized into legal advisory offices supervised by the Ministry of Justice (reestablished in 1979), effectively recreating the legal profession as it had been organized in the mid-1950s. These early regulations expressed an ambivalence about the legal profession that flowed from basic contradictions in Chinese policy toward law. They instructed lawyers both to "serve the cause of socialism" and "protect the interests of the state and the collective" and also to protect the "legitimate rights and interests of the citizens." The basic tension between these imperatives lingers today, although it is less stark.

Standards for qualification to practice were initially low, but have risen. Lawyers were certified by the Ministry of Justice if they had a college education and additional relevant work experience which, in the case of candidates with no law degrees, was only vaguely defined. Applicants with minimum amounts of education, experience or both were also approved by agencies of the Ministry of Justice. A nation-wide bar examination was first given in 1986, biannually after that until 1993, and annually since then. In 1988 the Ministry of Justice established a two-step qualification procedure that requires candidates to pass the bar examination and successfully complete a one-year internship in a law office, although the alternative method of certification was retained.

Educational levels remain low. Only about one-fifth of all Chinese lawyers in 1994 had earned undergraduate degrees by successfully completing a full four-year course of study,[110] and as of 1996, almost 30% had no formal education beyond high school.[111] Less than half of China's lawyers are likely to have law degrees by the year 2000.

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109. Provisional Regulations on Lawyers, Passed on Aug. 26, 1980, *translated by* Tao-tai Hsia & Charlotte Hambley 1 CHINA L. REP. 217 (1981). *See generally*, Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 J. INT'L L & POLITICS 751 (1991). Two thoughtful reviews of the problems discussed here are William P. Alford, *Tasselled Loafers for Barefoot lawyers: Transformation and Tension in the World of Chinese Legal Workers* in CHINA'S LEGAL REFORMS, *supra* note 82, at 22; and LAWYERS COMMITTEE FOR HUMAN RIGHTS, LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS [hereinafter LAWYERS IN CHINA] (1998).

110. Alford & Fang, *supra* note 103, at 7.

111. LAWYERS IN CHINA, *supra* note 109, at 65.

3. Further Growth

The organizations in which lawyers practiced in the early 1980s were first called "legal advisory offices." The term "law office" came into use by the middle of the decade, some organized not by the Ministry of Justice but by other ministries and state organizations. Cooperative law firms were first authorized in 1988, and partnerships and individual law firms have been added.[112] By 1997, China had 8,300 law firms and over 110,000 lawyers; foreign law firms, first permitted to register in 1992, numbered 67.[113] Lawyers have increasingly been involved in representing clients in litigation, although in 1996 clients were represented by counsel in only about 17% of the 5,682,363 cases resolved by the courts in that year.[114] As foreign investment has grown, Chinese law firms have expanded their services to foreign investors.[115]

4. The Lawyers Law

Further evolution of the bar is reflected in the Law on Lawyers, which became effective on January 1, 1997.[116] The new law, which supersedes the earlier regulations, has a much less overtly political tone. References to lawyers' duties to serve socialism and the state have been deleted, and lawyers are defined simply as "personnel who have obtained a business license for settling up practice of a lawyer in accordance with the law *and [who] provide legal services for the public*" (emphasis added) (Art. 2). The Law falls short, however, of defining lawyers as independent professionals, a formulation that was rejected by the drafters. The Law sets forth requirements for qualifying as a lawyer by taking the national examination and receiving a license to practice. A legal education is not mandatory and a college education or a vaguely defined equivalent suffices as the minimum educational requirement. The Law also still permits

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112. *See id.* at 34-35.

113. *Id.* at 29, 37, citing Chen Yanni, *Legal Sector Opening Wider*, CHINA DAILY (Feb. 21, 1998), at 1. On the growth and regulation of foreign law firms *see* LAWYERS IN CHINA, *supra* note 109, at 36-38.

114. ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1997, at 1055, 1074.

115. *See, e.g.*, Randall Peerenboom, China's Developing Legal Profession: The Implications for Foreign Investors (unpublished manuscript in the author's possession, 1998).

116. Lawyers Law of the People's Republic of China (*passed on* May 15, 1996), *published in* XINHUA NEWS SERVICE, May 15, 1996, *available in* FBIS, *supra* note 50, No. 96-109 (*available at* WNC Website, *supra* note 81) [hereinafter Lawyers Law]. The Law is exhaustively discussed in LAWYERS IN CHINA, *supra* note 109, on which this discussion draws.

candidates to be qualified without law degrees, although the rules have been tightened so that this route to qualification is essentially open only to law teachers, judges and members of the Procuracy.

The Law recognizes the three types of law offices that had been previously approved - state, cooperative and partnership; requires fee contracts to be signed with clients; and enumerates the tasks that lawyers may carry out for their clients (such as acting as legal advisers, representing clients in disputes, and otherwise giving legal advice). Lawyers are required to "maintain the legitimate rights and interest" of clients, may be discharged by their clients, and may not refuse to act for clients once they have accepted a fee (Art. 27).

The Law states that lawyers may not be interfered with in carrying out their duties —the right to meet with clients "whose personal freedom is under restrictions" is specifically mentioned (Art. 30)—and may conduct investigations on behalf of their clients if the "relevant units or individuals" approve (Art. 31). Some effort has been made to define ethical standards, at least negatively, by prohibiting lawyers from such acts as representing both sides in litigation; accepting things of value from the other side in a litigation; meeting with judges, procurators or arbitrators "in violation of regulations" or entertaining, bribing or attempting to bribe them; or providing false evidence (Art. 35).

The bar is formally regulated jointly by the All China Lawyers Association, which is supposed to educate lawyers and supervise their professional ethics and discipline, and by the provincial judicial bureaus may suspend lawyers for violating the ethical rules itemized above and revoke their licenses for a variety of listed offenses. Regardless of formal separation of responsibilities, the Association remains closely tied to the Ministry of Justice. The Law no longer treats that ministry as the "department in charge" of lawyers, but it still retains basic responsibility for qualifying lawyers and reviewing all law firms annually.

5. Legal Aid

The 1990s saw the emergence of legal aid schemes, including *pro bono* programs initiated and funded by law firms, and legal aid programs established and funded by local governments and lawyers associations.[117]

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117. *See generally* LUO QIZHI, LEGAL AID PRACTICES IN THE PRC IN THE 1990S: DYNAMICS, CONTENTS AND IMPLICATIONS (1997). In the principal type of arrangement, lawyers volunteer or are required under licensing agreements to take on cases for no or low fees; in some cases they are reimbursed in full or in part by legal aid funds provided by a variety of sources (local governments,

The Minister of Justice announced in early 1995 that a legal aid scheme would soon be created, and legal aid offices have already begun to operate in Beijing, Guangzhou and Shanghai.[118]

The construction of legal aid schemes has encountered difficulties. Some are caused by administrative and Party interference and the localism that infects the entire judicial system, but one problem derives from broader considerations. A Chinese lawyer who has studied legal aid has observed that the legal profession has itself shown some ambivalence toward it, and that "instead of challenging the authority of the government under the CCP leadership . . . has opted to reorganize its apparatus within the authoritarian structure [of the CCP]," and not seek autonomy from the state.[119] Although it is not possible to explore here either the mentalities of Chinese lawyers or Chinese officialdom, hesitations and uncertainty in each about the role of the profession should be noted.

6. Continuing Ambiguities in the Role of Lawyers

China's lawyers still encounter substantial limits on the expansion of their roles. Their numbers are few and their professional qualifications and educational standards remain low; as one close observer has commented, "barely one-fifth of Chinese lawyers have earned law degrees and many of them studied law in a centrally planned economy, much of which has been superseded, and in a manner hardly conducive to the cultivation of analytical skills."[120]

The Party-state has not yet completely recognized lawyers' functions. A clear example of the limits on the role of the lawyer has been the criminal process, in which lawyers have generally lacked a meaningful ability to assert their clients' innocence. Although the lawyer's role has been expanded in the latest revision of the Criminal Procedure Law, it remains restricted by a number of serious limitations.[121]

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private sector, and international NGOs). A small number of local governments have also established permanent staffs of legal aid lawyers. The Law provides generally for a legal assistance scheme for litigants unable to afford lawyers' fees. The details of the scheme are promised in subsequent legislation and will likely build on several pilot projects already in place. One of these, the Center for the Protection of the Rights of the Disadvantaged in Wuhan, has been providing legal assistance to women, children and the handicapped since 1992.

118. *Lawyers: A Profession in Flux*, CHINA NEWS ANALYSIS, Feb. 15, 1996, at 8-10.

119. LUO, *supra* note 117, at 59.

120. Alford, *supra* note 109, at 31 (footnotes omitted).

121. Criminal Procedure Law of the People's Republic of China, *adopted at* the Second Session of the Fifth National People's Congress, July 1, 1979, and *revised in accordance with* the Decision on Revising the Criminal Procedure Law of the People's Republic of China, *adopted at* the

Other problems arise from the explosion of materialism in Chinese society at the moment of the revival of the legal profession. Lawyers, judges and officials encounter enormous temptations to engage in bribery and a variety of corrupt practices that currently pervade their professional activities. The use of personal contacts with judges or other officials to attempt to influence the outcomes of cases, for example, is pervasive, according to practicing lawyers with whom the problems have been discussed. There is every reason to believe that in the near future the pressures on lawyers to use personal connections on behalf of their clients will continue.

Can China's lawyers develop their mentality into that of an independent profession? Under the best of circumstances such an evolution can occur only very slowly. Prepared more to work as "state legal workers" than as autonomous lawyers, China's lawyers are caught between the need to define standards for a post-totalitarian society and the persistence of totalitarian institutions and ways of thought. One of the many contradictions caused by this tension is the beginning of efforts to build a legal aid system even though almost all criminal defendants who are brought to trial are convicted.[122] Alford notes that:

> If . . . the function of legal professionals is to reconcile public and private interests, the absence of clear, broadly shared understandings of what these interests are at a time when the contents of the Party's core ideology and of morality itself are increasingly open to contestation and manipulation leaves lawyers without more than a highly personalized basis for framing such reconciliations.[123]

At the same time, Western standards cannot be strictly applied, given that many of the ethical problems that confront Chinese practitioners are difficult even for Western lawyers to solve. The high ideals claimed by the legal profession in the West have also been impaired as the profession

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Fourth Session of the Eighth National People's Congress, Mar. 17, 1996 [hereinafter Revised Criminal Procedure Law], *available in* Law of the People's Republic of China (1996) 63 (1997); *See, e.g.*, LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 2, at 35-43 (1996).

122. In 1995, of 496,082 criminal cases concluded, 1,886 persons (0.38 percent) were found not guilty. *Zuigao Renmin Fayuan Gongzuo Baogao* [*Supreme People's Court Work Report*] *delivered by* Ren Jianxin on Mar. 12, 1996, in ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1997, at 44, 45.

123. Alford, *supra* note 109, at 36.

becomes "just another business."[124]

Basically, the bar must be invented as a profession without any guidance from Chinese tradition or China's recent history. Moreover, the dilemmas of the legal profession reflect the profound philosophical, moral and ethical problems that trouble Chinese society in the midst of a number of remarkable and simultaneous transitions. Still, the Party-state has passed from totalitarianism to a system which, although authoritarian, has also begun to accept lawyers in a manner inconceivable to the drafters of the first regulations on lawyers in 1980.

Still, at the moment, the CCP, or at least elements within it, can be counted on to hark back to its Maoist past: After the Lawyers Law was promulgated, the Ministry of Justice issued a notice that not only emphasized the need for lawyers to place the interests of "society" first, but, more pointedly, required all law firms with three or more CCP members to form a Party cell.[125] The Ministry's notion of proper professional behavior is illustrated by an article published in 1997 in *Chinese Lawyer*, a magazine published by the Ministry. It celebrated a model lawyer who told of how, whenever he was involved in foreign-related cases, he respected the principle that "the national interest is higher than anything . . . a lawyer handling foreign-related cases . . . absolutely must not allow the national interest to be illegally infringed upon."[126]

Finally, among the basic problems embedded in Chinese political and legal culture that confront the bar is the unresolved contradiction between a legal profession and CCP opposition to autonomous organizations and professions. An example is a letter to a legal monthly published just several weeks after the Lawyer's Law was enacted.[127] The writer tells of a lawyer in a Hainan county law office who represented two elderly men in their appeal of a local police decision to impose detention for 15 days. Their offense was that they had not registered an "Old Fisherman's Society" that

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124. *Id.* at 37.

125. *See* Article 7 of the Ministry of Justice's 1996 "Decision Concerning the Strict Enforcement of the Lawyers Law and the Further Strengthening of the Establishment of the Lawyer Force," as *cited in* LAWYERS IN CHINA, *supra* note 109, at 51 n.177.

126. Gao Zongze, *Zhongguo Lüshi Shi Renmin de Lüshi: Gao Zongze Lüshi Zai Quanguo Youxiu Lüshi Shiji Baogaotuan de Yanjiang* [*Chinese Lawyers are People's Lawyers: Gao Zongze's Speech Before the National Outstanding Model Lawyer Report Group*], ZHONGGUO LÜSHI [CHINESE LAWYER], No. 3, at 18 (1997).

127. Zhou Min, *Xianwei Zuzhibu Bu Rang Wo Dang Lüshi* [*The County Organizational Department Won't Let Me Be a Lawyer*], MINZHU YU FAZHI [DEMOCRACY AND LEGALITY], No. 11, at 11-12 (1996). See LAWYERS IN CHINA, *supra* note 109, at 31-33, for accounts of violent physical attacks on lawyers; and at 81-84, for examples of regulations prohibiting interference with the work of lawyers, including conduct in the courtroom.

they had organized. The lawyer wrote a statement, used by the two men in their appeal to the next higher-level police bureau, which argued that their "Society" had no organization, charter, manager or seal, did no business with anyone and generally did not meet the criteria for an organization that should register. The decision to impose punishment was reversed, but soon thereafter the secretary of the county CCP Organization Department ordered that a meeting be assembled at which he criticized the lawyer for representing the two men and being at odds with the police. This was followed by an Organization Department decision forbidding the lawyer from practicing. It is a measure of the progress that has been made by the bar that the aggrieved lawyer could petition county, province and central authorities, citing laws and regulations that provide that lawyers shall not be interfered with in the lawful conduct of their profession, and remind them that, "[I]n a certain sense, the lawyer system is a gauge of the legalization (*fazhihua*) of society."[128] By his standard, the progress of the Chinese bar since 1980 has been considerable, but by the same standard a long road lies ahead.

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The disorderly assortment of institutions and values in flux that has been summarized here suggests the complexity of the environment in which Chinese legal institutions must operate. This Article now turns to a discussion of the institutions of dispute resolution and some of their interactions with the society around them.

PART TWO: MEDIATION AFTER MAO

INTRODUCTION

The forces that have launched extraordinary transformations of China's planned economy and society present Chinese institutions for dispute resolution with enormous challenges. The reforms of the 1980s gave birth to a great surge of commerce, entrepreneurship and corruption – and to more disputes and the need for institutions to resolve them. China's law reformers have been required to generate legal rules to govern transactions that in the West would lie in the realm of civil law, to build

128. Zhou, *supra* note 127, at 12.

institutions that apply legal rules in specific disputes, and to adapt previous dispute resolution procedures to different circumstances. Today, dispute resolution by extrajudicial and judicial institutions today departs widely from pre-reform assumptions about how the Party-state should address social conflict, but it also bears weighty legacies of pre-reform organization and habits of thought. Some functions of the institutions are post-totalitarian, but some of their previous functions linger.

Institution-building for dispute resolution has taken place in three principal areas since 1979:

Mediation. In 1989 new regulations on people's mediation committees replaced the 1954 regulations. The Ministry of Justice revived the nation-wide network of rural mediators as an instrument to maintain public order and to alleviate an otherwise intolerable burden on the courts. These committees are supervised and supported by Judicial Assistants and by Township and Village Legal Service Offices (TVLSOs), which are both intended to augment rural dispute resolution institutions. At the same time, social and economic effects of reform have reduced the scope and authority of mediation.

Arbitration. As contract disputes multiplied after the onset of economic reforms, a variety of new organizations were improvised to arbitrate contract disputes. These have been replaced by a nation-wide system of local arbitration commissions whose gradual establishment began in 1995.

Adjudication. Once only tokens of Chinese party-state legitimacy, courts have been revived, expanded and developed. A civil procedure law was adopted on a trial basis in 1982, then revised in 1991.[129] Civil litigation has grown steadily. At the same time, persistent and formidable political forces constrain the power and authority of the courts.

This Part analyzes extrajudicial (i.e., "people's") mediation as it operates today, bringing up to date the study of mediation that began with "Mao and Mediation." In the subsequent Part, I turn to the operation of the courts.

Post-Mao revival of extrajudicial mediation. The people's mediation committees described in "Mao and Mediation" came under attack from the left in the Chinese leadership during the latter part of the 1950s. Although

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129. Zhonghua Renmin Gong Heguo Minshi Susong Fa [Civil Procedure Law of the People's Republic of China][hereinafter Civil Procedure Law], *in* ZHONGHUA RENMIN GONG HEGUO QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUANHUI GONGBAO [PEOPLE'S REPUBLIC OF CHINA STANDING COMMITTEE GAZETTE], No. 3, July 10, 1991, *translated in* 5 CHINA L. & PRACTICE, No. 5, at 15 (1991) and CCH CHINA LAWS FOR FOREIGN BUSINESS §19-201.

they were briefly incorporated into grass-roots crime prevention and security organizations, they survived; during the Cultural Revolution, however they were entirely suspended or abolished, along with other legal institutions. The apparatus of urban control—of which the mediation committees were a part—was reconstituted during the 1970s and early 1980s. Rural people's mediation committees had not been as affected by the upheavals and violence of the late 1960s; with the disappearance of the rural people's communes, the rural village has regained some of the importance it had before the communes were organized in 1958-1960.

I. THE SUSTAINED OVERALL POLICY EMPHASIS ON EXTRAJUDICIAL MEDIATION

The political leadership remains attached to the urban people's mediation committees. Throughout the 1970s I and other visitors to China who were interested in law were permitted to visit residents committees and the mediation committees under them that specialized in handling disputes. The latter were invariably exhibited as embodiments of a uniquely Chinese Communist approach to handling minor disputes. In 1973, 1978 and 1979 I visited urban neighborhoods, and on each occasion my hosts described the activities of mediators in a way that uncannily resembled, in theme and emphasis, the sources I had cited earlier in "Mao and Mediation." Auntie Wu, the model mediator extolled in the newspaper article quoted at the beginning of this Article, had formerly been only remotely known to me, but after meeting women mediators in Beijing and Shanghai who echoed her words two decades later, I felt that I had come to know her a good deal better. My inquiries into the processes of dispute resolution were limited during these visits, however, because my hosts were unwilling to depart from superficial descriptions of dispute resolution practice.

After the Cultural Revolution ended, the Ministry of Justice, itself reestablished in 1979, not only revived mediation but emphasized that it was to be the primary avenue for resolving civil disputes.[130] The

130. The statistical information and summary of main policy currents in this and the following paragraphs are drawn from JIANG YUE, RENMIN TIAOJIE ZHIDU DE LILUN YU SHIXIAN [THEORY AND PRACTICE OF THE INSTITUTION OF PEOPLE'S MEDIATION] 8-16 (1994); RENMIN TIAOJIEYUAN GONGZUO SHOUCE [HANDBOOK OF PEOPLE'S MEDIATORS' WORK] [hereinafter HANDBOOK] 8-13 (Zhang Yunqing and Zhang Yushan eds., 1992); Li Chunlin & Pan Xiaming, *Renmin Tiaojie Wenti Zhengyi Zhi Wo Jian [Our View of the Debate Over Issues in People's Mediation]*, ZHENGFA LUNTAN [POLITICS AND LAW FORUM], No. 2, at 16, 18-19 (1990).

formulation of that policy has changed somewhat over the years. Before 1982, the policy was expressed as "mediation first, litigation second"; the Civil Procedure Law of 1982 changed this to an injunction to "emphasize mediation" (Art. 6); when the Civil Procedure Law was revised in 1991 it provided that the courts should "conduct mediation in accordance with the principles of voluntary participation by the parties" (Art. 85). The shift has been explained as a change in focus from extrajudicial to judicial mediation,[131] which is discussed below. The growth and increasing complexity of more formal institutions for dispute resolution challenge people's mediation committees to remain relevant to the lives of the Chinese populace, especially in the cities, where economic life has changed markedly since 1979, and residents no longer live under the political constraints that made the neighborhood committee a forum that could not be avoided.

By 1981 there were 5,575,000 mediators working throughout China. In the countryside mediation training had been increased and new mediators recruited. The role of mediation grew as economic disputes multiplied over economic contracts and over such matters as rights over land, water and agricultural implements. By the end of 1992, the number of mediators had almost doubled, to over ten million mediators and over one million mediation committees. From 1985 to 1992 mediation committees handled over 5.26 million cases, almost five times the number received by the courts during the same period and, according to one observer, they achieved a success rate of 91.6%.[132]

Mediation is often characterized in the controlled press as a product of Chinese traditions, both pre-Revolutionary and Communist,[133] which meets various needs of the state:

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131. Jiang Wei & Li Hao, *Lun Shichang Jingji Yu Fayuan Tiaojie Zhidu de Wanshan [On the Market Economy and Perfecting the Institution of Judicial Mediation]*, ZHONGGUO RENMIN DAXUE XUEBAO [CHINA PEOPLE'S UNIVERSITY ACADEMIC JOURNAL], NO. 3, at 87 (1995), *also in* FAXUE [LEGAL STUDIES (MONTHLY)], No. 7, at 187 (Zhongguo Renmin Daxue Shubao Celiao Zhongxin [China People's University Books and Journals Materials Center], FUYIN BAOKAN CELIAO [DUPLICATED PRESS MATERIALS],1995) [hereinafter People's University, LEGAL STUDIES MONTHLY].

132. JIANG, *supra* note 130, at 1-2.

133. The traditions in which mediation is rooted are commonly expressed in two ways. A preference for mediation long antedating the advent of Communism is celebrated. For example, *Ministry Explains Communities' Role*, XINHUA NEWS SERVICE, Aug. 17, 1985, states, "The Chinese people have a tradition of solving civil disputes through neighbors' mediation. The tradition dates back more than 1,000 years." Links to revolutionary institutions in the 1920s and in later Communist-administered Revolutionary Bases are also emphasized. *See, e.g.*, DEPARTMENT OF GRASS-ROOTS WORK, MINISTRY OF JUSTICE, PEOPLE'S MEDIATION IN CHINA 87-88 (1991).

Civil dispute settlement. Mediation is deemed suited for resolving minor disputes, such as marital and family problems, real property and debts, and demands for compensation for injuries after fights.

Preventing social disorder. People's mediation has long been viewed by the leaders of the Party-state as helping to prevent social disorder and crime. Liu Shaoqi, China's Prime Minister before the Cultural Revolution, in 1957 called people's mediation the "first line of defense" in the work of "political-legal construction." The Ministry of Justice department in charge of mediation work, the Department of Grass-Roots Work, has recently echoed Liu Shaoqi's characterization of mediation as a first line of defense because it prevents disputes from "becoming acute and causing crimes," promotes family unity and enhances "social stability and unity." The Ministry continues to describe mediation as an expression of the "people's democratic dictatorship" and an appropriate means for dealing with "contradictions within the people."[134]

Responding to cultural preferences. Although the formal legal system has been developed, litigation is expensive and time-consuming, and the legal system cannot handle all disputes that arise. Many among the populace are wary of litigation, dare not sue in the courts, and are more comfortable settling disputes in the traditional manner of using intermediaries. One Chinese author writes:

> Since the 1980s this situation has been changing, but traditional consciousness cannot be thoroughly changed within a short period of time, unless there is really is no other alternative, [Chinese people] simply are not willing to litigate in the courts. People's mediation is just right for satisfying the hopes of the masses for solving disputes without litigation.[135]

The pragmatic, depoliticized rhetoric of this last quotation is representative of discussion in recent years. Political language is also all but absent from the most recent legislation under which mediation is carried out.

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134. DEPARTMENT OF GRASS-ROOTS WORK, MINISTRY OF JUSTICE, *supra* note 133.

135. JIANG, *supra* note 130, at 48.

II. THE CHANGING LEGISLATIVE FRAMEWORK OF PEOPLE'S MEDIATION

A. *The Regulations on People's Mediation Committees*

The revival of mediation was underscored when new regulations (Mediation Regulations) were issued in 1989, replacing the original regulations that had governed the mediation committees since 1954.[136] Although there are continuities, some differences between the two sets of rules are evident.

1. The Goals of Mediation Have Become Less Didactic and Less Politicized

In addition to resolving disputes, the old rules aimed at "strengthening the people's education in patriotic observance of the law, and promoting internal unity of the people in order to benefit production by the people and construction by the state" (Art. 1). The new rule omits reference to "patriotism" but retains the explicit educational function expressed in the old regulations, although it is now more closely related to law. The old regulations referred to "conducting propaganda-education," (Art. 3) but the new ones speak of "propagandizing state laws, regulations, rules and policies through mediation work" and "educating citizens to obey law and discipline, and to respect social ethics" (Art. 4). The purpose of the mediation committees, in addition to mediating civil disputes, is said to be "promoting the unity of the people, maintaining social stability, and benefiting the construction of socialist modernization" (Art. 1).

2. Legal Rules Now More Prominently Shape Outcomes

The old regulations stated that mediation had to be conducted "in compliance with the policies, laws and decrees of the people's government" (Art. 6(1)). The new regulations state that the guiding principles for the mediation committees are to be "laws, regulations, rules and policies." They add that "where there are no clear stipulations in laws,

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136. For the old rules see Renmin Tiaojie Weiyuanhui Zanxing Zuzhi Tongze [Provisional Organizational General Rules for People's Mediation Committees], *in* ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN, JAN.-SEPT. 1954 [THE COLLECTED LAWS AND DECREES OF THE CENTRAL PEOPLE'S GOVERNMENT, JAN.-SEPT. 1954], at 55. For the new rules see Renmin Tiaojie Weiyuanhui Zuzhi Tiaoli [Organizational Regulations for People's Mediation Committees], *reprinted in* HANDBOOK, *supra* note 130, at 388-91.

regulations, rules or policies," the mediators must rely on "social ethics" (Art. 6(1)). The role of law has been formally elevated and policy placed last among authoritative norms emanating from the Party-state. At the same time, as will be shown below, dispute settlement, like other law-related institutions, nonetheless remains an instrument of policy.

3. Formality Has Been Increased

The new regulations add formality to the procedures of mediation committee by providing, as earlier regulations did not, for registering and recording mediation proceedings in writing.

4. Mediation Is Less Explicitly Tied to Politics

People's mediators elected to the committees are to be "adult citizens who are fair-minded, linked with the masses, enthusiastic about mediation work and who have a certain level of legal knowledge and a certain level of understanding about policies" (Art. 4). This clause has replaced the requirement for a correct "political attitude" that was previously an expressed prerequisite for a proper "understanding of policies." The need for some legal knowledge has also been added.

5. Mediation Committees Are More Closely Supervised by the People's Courts

Both the 1954 and 1989 regulations state that the local people's governments and the courts supervise the mediation committees, but the new Mediation Regulations state that the daily supervision of their work shall be done by Judicial Assistants, administrators attached to the local bureaus of the Ministry of Justice (see below), who are also charged with mediating difficult cases themselves.

6. More Support is Provided to the Mediation Committees

The Mediation Regulations provide that "appropriate subsidies" may be given to mediators (Art. 14).

7. Voluntariness

Like the old regulations, the new ones warn against coercing the parties to agree to a settlement, and state that mediation is not a

prerequisite to bringing suit in the courts. Parties may not be prevented from filing suit because they have not gone through mediation or because mediation has been unsuccessful (Art. 6 (1)). In practice, coercion in practice remains a concern, as discussed below.

8. Standards Have Been Set for Mediators' Behavior

The new regulations are more comprehensive in their requirements that mediators avoid acting out of personal considerations or committing fraud, suppressing disputes, retaliating against or insulting the parties, disclosing their private matters, or accepting bribes or gifts.

9. Mediation Committees No Longer Have Sanctioning Powers

The mediation committees' power to deal with minor criminal cases under the 1954 regulations has been omitted from the more recent Regulations.

10. The Rules Reflect Changing Demands on Mediation

These rules, while looking backward to earlier practice, also hesitantly look a bit forward as well. They reiterate the preference for voluntary non-adjudicated settlement that has long informed Chinese approaches to law and which continues to be embedded in all Chinese institutions for dispute resolution. At the same time they shift the mediation committees away from their previous role as vehicles for overtly disseminating propaganda and declare more explicitly than before that their mission is to resolve disputes by applying legal rules.

B. Other Mediation-related Legislation

1. Judicial Assistants

The renewed emphasis on people's mediation committees brought with it the need to regularize their supervision. By as early as 1979, courts were transferring responsibility for that supervision to Judicial

Assistants.[137] The Ministry of Justice promulgated provisional rules on the work of these Judicial Assistants in November 1981,[138] but only in April 1990 did it issue regulations explicitly addressing their work, describing them as "judicial administrative workers at the basic level of People's Government, specifically responsible for the work of handling people's disputes" (Art. 2). They supervise and participate directly in mediation, bridging the workings of the people's mediation committees and local government administration. Two scholars who studied rural mediation indicated in discussion in Beijing in 1995 that Judicial Assistants were able to function effectively in villages although their legal training was limited to participating in short-term classes. They noted that mediators were often village committee members, and, unlike many of their counterparts in the cities, were usually not retired from other careers. The Judicial Bureau organizes classes for them and conducts legal propaganda and publicity. It appears that the efficacy of these rural mediators rests less on legal training than on their relationships with local élites.[139]

2. Methods for Handling Disputes among Citizens

The "Methods for Handling Disputes Among Citizens" (Methods) were promulgated in 1990 by the Ministry of Justice.[140] They outline how the Judicial Assistants are to deal with disputes "over personal or property rights or other disputes arising in the course of daily life" (Art. 3) by directing the parties to a mediation committee if they have not already gone to one; by directly mediating cases in which mediation has not resulted in settlement; or by declaring void a settlement that violates law, regulations, administrative rules or policies (Art. 18). Mediation is clearly the preferred method for dealing with disputes, but when it fails, the local government may "decisively handle" them. If one of the parties wishes to repudiate a

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137. Fu Hualing, *Understanding People's Mediation in Post-Mao China*, 6 J. CHINESE L. 211, 233 n.94 (1992) (citing Wang Hongyan & Yang Yuanzhong, *Shilun Renmin Tiaojie Zhidu de Fazhan [On the Development of the People's Mediation System]*, FAXUE YANJIU [LEGAL RESEARCH], NO. 2, at 72 (1988)).

138. For these provisional rules and their explanation, see RENMIN TIAOJIE SHIYONG DAQUAN [PRACTICAL COMPENDIUM ON PEOPLE'S MEDIATION] 819-823 (Liu Zhitao ed., 1990).

139. Liu Guangan & Li Cunpeng, *Minjian Tiaojie Yü Quanli Baohu [Civil Mediation and the Protection of Rights]*, *in* TOWARD A TIME OF RIGHTS, *supra* note 6, at 285. This article, a report based on research by two scholars at the Institute of Law of the Chinese Academy of Social Sciences, is a valuable discussion of contemporary Chinese legal culture.

140. Minjian Jiufen Chuli Banfa [Methods for Handling People's Disputes Among Citizens], ZHONGHUA RENMIN GONGHEGUO GUOWU YUAN GONGBAO [PEOPLE'S REPUBLIC OF CHINA STATE COUNCIL GAZETTE], Apr. 1, 1990, at 597 [hereinafter Methods].

settlement, it must apply to a court within fifteen days after the agreement has been signed. If after fifteen days the agreement has neither been carried out nor made the subject of application to the court, one of the parties may apply to the court to "take the necessary measures to carry out [the agreement]." As in the mediation regulations, voluntariness and legality have been emphasized. The Methods also underscore the mediation committees' ties to the Ministry of Justice—rather than to the courts—by making the Judicial Assistants the managers of mediation.

3. Township and Village Legal Service Offices (TVLSOs)

With the advent of the contract-responsibility system came a burgeoning need for legal expertise in rural areas. New legal service organizations arose, and their operations were formalized in May 1987 in the "Provisional Rules for Township and Village Legal Service Offices." But only in September 1991 did the Ministry of Justice issue comprehensive regulations governing the conduct of all rural legal service work,[141] which effectively clarified the status of those organizations.[142] Under the leadership of local governments and Judicial Assistants, these offices act both as mediators and as agents for parties in mediation and other legal actions. The Ministry's 1992 "Opinion on Reforms in Basic Level Legal Service Work" makes it clear that the agencies are expected to operate as private service enterprises rather than any form of governmental or mass organization.[143] In practice, they have indeed evolved into the general service offices they were intended to be, supporting but not displacing existing dispute resolution entities.

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The legislation surveyed here seeks to preserve existing resources for informal dispute resolution and to provide additional resources. Gradual economic changes caused by reform, however, may also create demands that the institutions defined by that legislation cannot meet. From the current operation of these institutions, to which I now turn, it may be

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141. HANDBOOK, *supra* note 130, at 394-415.

142. These regulations and their explanation are available in RENMIN TIAOJIE SHIYONG DAQUAN, *supra* note 138, at 824-26. For a fuller discussion of these offices *see* RENMIN TIAOJIEXUE GAILUN [AN INTRODUCTION TO PEOPLE'S MEDIATION STUDIES] 112-114 (Jiang Wei & Yang Rongxin eds., 1990).

143. For excerpts from this opinion see Liu & Li, *supra* note 139, at 291.

possible to infer future trends.

III. THE MEDIATION COMMITTEES AT WORK

A. *General*

The extent of extrajudicial mediation and the types of cases that it handles may be best understood against the background of recent statistics:

Cases handled by Peoples Mediation Committees, 1985, 1990-1996

	1985	1990	1991	1992	1993	1994	1995	1996
marriage	1,072,116	1,222,214	1,333,026	1,183,317	1,187,687	1,191,925	1,146,769	1,091,703
succession	206,943	284,979	295,794	280,448	295,766	296,227	311,159	305,336
support	347,377	445,963	472,188	413,476	434,085	440,621	451,490	432,931
houses/	1,035,618	894,349	859,857	721,004	687,822	659,980	641,074	591,567
debt	254,669	498,564	435,016	415558	463,727	462,539	477,318	480,662
production/	900,093	751,651	744,818	623,492	626,722	611,555	636,018	602,932
damages	570,596	528,148	531,927	464,736	442,967	492,325	415,886	414,518
other family	463,167	1,167,792	723,154	602,351	587,173	570,404	544,425	534,102
neighbors	508,476	989,827	1,074,351	946,080	947,589	899,226	883,281	838,157
other	973,858	625,735	599,110	522,747	549,420	498,927	509,563	510,332
Total	6,332,913	7,409,222	7,069,241	6,173,209	6,222,958	6,123,729	6,016,983	5,802,240
Family	2,089,603	3,120,948	2,824,162	2,479,592	2,504,711	2,499,177	2,453,843	2,364,072
Non-family	4,243,310	4,288,274	4,245,079	3,693,617	3,718,247	3,624,552	3,563,140	3,438,168
Family	33.0%	42.1%	40.0%	40.2%	40.2%	40.8%	40.8%	40.7%
Non-family	67.0%	57.9%	60.0%	59.8%	59.8%	59.2%	59.2%	59.3%

Source for 1985 is DEPARTMENT OF GRASS-ROOTS WORK, PEOPLE'S MEDIATION IN CHINA. Source for other years is: ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK]: 1991 (956), 1992 (875), 1993 (956), 1994 (1047), 1995 (1081), 1996 (977), 1997 (1075). Discrepancies in figures appear in originals.

Although the number of cases mediated by the mediation committees each year declined by 21% between 1990 and 1996, and is now below the number handled in 1985, the committees still handle more civil cases than the courts, and as many family matters as they handled in 1985. In 1990,

TVLSOs handled 15% of all cases of extrajudicial mediation, a number which rose to 22% in 1996.[144] In the meantime, by comparison, the number of civil cases handled by the courts went from 1.85 million in 1990 to 3.08 million in 1996.

These figures show that family and minor civil disputes remain at the core of the work of the mediation committees. In 1996 they constituted 40.7% of the cases handled by mediation committees, a reduction of 7% from 1990. Disputes arising out of the economic contracts have for the most part been channeled to new arbitration organs and the courts. (The number of economic cases handled by the courts rose from 588,143 in 1990 to 1,519,793 in 1996.).

As noted earlier, the boundary between "civil" and "economic" matters has not been precise. Among the principal types of disputes that one Supreme Court notice classified as "economic" are those involving: contracts between persons or between juristic persons and individuals or "specialized households;" trade-related contracts with foreigners or Chinese counterparts in Hong Kong and Macao; and disputes involving the claims of juristic persons for damages for tortious conduct related to "production and circulation."[145] "Civil" contracts and other "civil" matters, by default, are those that have not been included in the Economic Contract Law or in various notices of the Supreme People's Court, like the one quoted above on jurisdiction.

During the reform years official media accounts of the types of cases handled by the mediation committees have remained quite consistent, stating that "most civil cases involved marriage, love affairs, inheritance, support of parents, housing, family disputes, relations between neighbors and debt."[146] They can be grouped into three primary categories: personal; production-related; or property-related (in cases in which kin ties are not relevant).[147]

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144. ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1991, at 956; ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1997, at 1075. The total number of cases mediated by the TVLSOs fell, however, from 1,300,700 in 1990 to 1,252,500 in 1996.

145. Circular of the Supreme People's Court on Strengthening the Economic Trial Work, *in* ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1987, at 583-584, *found also in* CHINA LAW YEARBOOK 1987: FIRST ENGLISH EDITION, at 428-429 (1989). On the appearance in September, 1998 of a new draft contract law that attempts to apply the same rules to both types of contracts, see Jiang, *supra* note 83.

146. *Mediation in Shanghai*, XINHUA NEWS SERVICE, Apr. 1, 1985. In 1986, a spokesman for the Ministry of Justice stated that of 3.5 million cases solved through mediation, 577,000 had involved marital matters, 540,000 were housing and land disputes, and 121,000 concerned inheritance. Zhong Hua, *System of Mediating Disputes Examined*, CHINA DAILY, Dec. 12, 1986.

147. RENMIN TIAOJIEXUE GAILUN, *supra* note 142, at 168-179.

Personal disputes related to marriage can involve demands for the return of betrothal gifts after broken engagements and for divorce, including questions of custody, child support, and the division of marital property. They may involve co-resident kin; inheritance, and obligations to support and care for the elderly, spouses, and children of one's extended family. Chinese law requires younger generations to support elder generations, which leads to complications when middle generations die leaving young couples to care for elderly grandparents.

Production-related disputes include those which arise out of responsibility contracts that allocate managerial rights to households and to larger social units over property such as land, forests, water, livestock and farm implements. Typical of the more difficult cases encountered by mediators are disputes over rights and property arising out of contracts under which the management of an enterprise is contracted to a designated individual. Conflicts may occur between two contract-managers, between one contract-manager and private citizens or households, or within a single managerial unit. Other production-related disputes can arise:

(i) within partnerships, in which partners' mutual and joint rights and obligations are often only dimly articulated, even when written contracts exist;

(ii) over rent/lease agreements, whether for residential or commercial property or for equipment used in production and transportation; or

(iii) over commodity quality and quantity, including disputes between manufacturer and reseller or between reseller and customer.

As the Chinese economy has grown more complex, the level of technical knowledge necessary to determine whether products, services or financial obligations meet contractual requirements has also increased, and some cases are becoming too difficult for mediators.

Property disputes can arise over ownership of land, often when parties seek to reclaim land taken over during state campaigns or unlawfully occupied during periods of social upheaval. The subsequent sale, rental, or use as collateral of such land and the addition of improvements, further complicates these disputes. The number of disputes over land intended for property construction—especially survey disputes—has risen sharply. Mediating disputes over debts is complicated, whether money or goods such as grain is involved, especially in transactions that may be tainted by illegal profiteering. Certain miscellaneous cases, those involving uninvited stewardship—when one party without solicitation causes benefit to another party and then demands recompense—suggest that mediators may have to rely heavily on Chinese ideals of social ethics when resolving disputes.

A final, distinct, category of dispute involves damage to "civil rights" that would be classified in Anglo-American law as torts, involving claims for monetary damages for injury to person, property, or reputation.

B. The Organizational Context

1. Urban Neighborhoods

Dispute resolution continues to be a core activity of neighborhood committees. First established in the 1950s and revived after the Cultural Revolution, these remain the essential basic-level units in the urban apparatus of control. In new regulations on the neighborhood residents' committees issued in 1990, a list of functions prominently includes "mediating in non-governmental disputes."[148]

Before reforms this system of urban control was capable of levels of efficiency and intrusiveness into residents' lives unsurpassed by any other twentieth-century totalitarian regime. In 1989 one observer noted, "virtually nothing escapes the notice of the street committee,"[149] and as recently as 1991 residents' committees were described "at times . . . as therapist, at times as utility company, at times as patrol unit, always trying to prod, scold, nudge and push the Government's policies down to the masses."[150]

Most recently, however, the urban control network is showing signs of decay. The CCP may not be able to maintain it in the face of new social values and economic pursuits that have appeared with economic reform.[151] The population to be served by each committee has increased, but the quality and quantity of committee members have declined. Interviews with legal scholars and judges suggest most urban mediators are still mostly retired workers or housewives, as they were before the Cultural Revolution,[152] although an increasing number of mediators are drawn from

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148. Organic Law on Urban Neighborhood Committees of the People's Republic of China, (*adopted on* Dec. 26, 1989), FBIS, *supra* note 50, No. 90-011, Jan. 17, 1990.

149. Ted Gup, *Granny as Big Brother*, FAR E. ECON. REV. Aug. 17, 1989, at 34.

150. Sheryl WuDunn, *In the Cities of China, the Busybodies Are Organized and Are Busy Indeed*, N.Y. TIMES, Mar. 13, 1991.

151. Fu, *supra* note 137, at 223.

152. *See* Robert Benewick, *Political Institutionalisation at the Basic Level of Government and Below in China*, *in* THE CHINESE STATE IN THE ERA OF ECONOMIC REFORM 243, 255 (Gordon White ed., 1991) ("Our own research reinforces the conventional view of an organisation of housewives and retired workers, mainly women, tied to the neighbourhood because of the demands of their circumstances.").

the ranks of retired cadres. A survey of 20 residents' committees conducted in Beijing in 1990 indicated that most members were housewives who had been members for decades and were "illiterate or only semi-literate."[153] Stipends paid to residents' committee members have stayed at the same low levels for 40 years, and even in the residents' committees that are working well, running profitable businesses has become more important than performing duties related to maintaining social order.[154] Indeed, in Shanghai some street committees were reported in 1997 to have become part of Coca-Cola's distribution network.[155] In the 1950s and 1960s police were involved in resolving disputes, but police are now more occupied with fighting crime, and generally may have less authority than they did in Maoist China.[156] Charlotte Ikels, studying Guangzhou in the 1990s, finds that serving the people is no longer a meaningful ideal.[157] Former volunteers now work elsewhere for pay or help with the work of their employed or enterprising family members; the volunteers who remain are overworked. It is not clear who will be their successors.

Changes in the physical configuration of large Chinese cities lessen the neighborhood committees' ability to play a role in the affairs of urban residents, simply by making it more difficult for committee members to pry and spy. New high-rise apartment dwellings encourage a growing sense of privacy, which in turns fosters resentment of neighborhood busybodies.

Before reforms urban residents were closely tied to their residences through China's household registration system. During the reform years, personal mobility has continued to grow steadily. Despite efforts to contain them, urban residents in the huge "floating population" often operate outside the urban network of control.

2. Rural Villages

When the rural people's communes were disbanded and their functions transferred to townships and villages,[158] more resources and functions were given to rural committees than to urban residents' committees. In an environment of "uneven institutionalization," the powers

153. FAZHI RIBAO [LEGAL SYSTEM DAILY], Aug. 20, 1990, *cited in* Fu, *supra* note 137, at 224.
154. *Id.* at 224-226.
155. *Distribution Is It*, 23 BUSINESS CHINA 12 (April 28, 1997).
156. Fu, *supra* note 137, at 222-23.
157. IKELS, *supra* note 34, at 43.
158. Organic Law of Village Committees, *in* BBC-SWB, *supra* note 57, Jan. 1, 1988, at FE 0038.

of the CCP and government are not clearly separated.[159] Today village heads and Party Secretaries still exercise much power over many matters, including dispute resolution. A variety of factors may affect the justice they dispense, such as whether economic reform has made the villagers wealthy, and therefore less dependent on officials, or on whether parties or the official who must decide the dispute belong to powerful families.[160] The official press disregards such distinctions, and continues to celebrate rural mediators as much as their urban counterparts.

In the countryside, in addition to economic changes caused by reform, some very traditional forces have reappeared. For centuries clans were a primary social unit in the Chinese countryside, and until 1949 their powerful role in organizing rural society was expressed in part by their participation in mediation and control over the suppression of local disputes. Central-state power historically manifested a Confucian interest in permitting clan leaders to enjoy some degree of autonomy over clan disputes.[161] Since 1949, however, the construction of basic-level people's governmental institutions was predicated on the eradication of clan organizations. Whether clans were in fact uprooted, or whether their roots simply lay dormant in the chilling economic climate of collectivization, clan organizations have flourished in the post-reform period, and clan mediation is now on the rise in areas with a strong clan tradition.[162] In some areas disputes over property are first mediated by clan leaders and brought to People's Mediation Committees only after clan mediation fails. Clans also exercise influence over dispute mediation indirectly by co-opting existing state-sponsored vehicles for mediation. Fu Hauling observes that experiments in the 1980s to contract responsibility for dispute settlement (and public order generally) to village leaders led to "the contract security system [being] hijacked by clan organizations."[163]

3. Mediation at Work Units

Although people's mediation was intended to be operative in the workplace as well as residential space, little has appeared in the Chinese

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159. Benewick, *supra* note 152, at 261.

160. *See, e.g.*, Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, at 269-270 (1991).

161. Shi Fengyi, *Renmin Tiaojie Zhidu Suyuan [The Origins of the System of People's Mediation]*, ZHONGGUO FAXUE [CHINESE LEGAL STUDIES], NO. 3, 44, at 45-46 (1987).

162. Liu & Li, *supra* note 139, at 285-326 (citing an investigation that documented clan mediation activities in the 1980s).

163. Fu, *supra* note 137, at 242.

press about this form of mediation. The work-unit's dominance over many aspects of the lives of its members has declined with reforms and consequently fewer disputes are likely to be mediated in the workplace, but its continued presence is significant. In one industrialized town a factory oversaw 48 mediation committees comprising over 2,000 mediators, who served 55,000 employees and their additional 20,000 dependents.[164] But only when work unit leaders supervise their workers' residential environment do they also oversee mediation, and then for the usual range of disputes arising in the course of social life. Under the Labor Law promulgated in 1995, labor disputes are initially dealt with by mediation conducted by commissions set up for the purpose and, if mediation fails, by labor dispute arbitration commissions whose decisions may be appealed to the courts.[165]

C. *Mediation Style in Practice*

In one recent study of the operation of people's mediation committees and Chinese legal culture, authors Liu Jungian and Li Cunpeng distinguished three styles of mediations according to the principal bases for the outcomes: (1) emotion and reason; (2) law; and (3) a combination of feeling (*ganqing*) and law.[166] It is striking that they omit policy as a source of standards for decision since it is difficult to imagine that policy has become totally irrelevant to mediation. On the other hand, just as traditional and other non-policy factors could formerly hide behind a facade of policy, the reverse is also possible.

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164. *See* Michael Palmer, *The Revival of Mediation in the People's Republic of China: (1) Extra-Judicial Mediation, in* YEARBOOK OF SOCIALIST LEGAL SYSTEMS 1987, 219, 257 (W.E. Butler ed., 1988).

165. Labor Law of the People's Republic of China, arts. 77-84 (*adopted by* the Standing Committee of the National People's Congress, July 5, 1994 and *effective* January 1, 1995), *in* 7 CHINA L. & PRACTICE 21 (August 29,1994). Before then, regulations now superseded and not relevant here dealt with labor disputes in state-owned enterprises.

166. A fourth type of mediation identified by Liu and Li is based on custom, because some customs among minorities "still play a role in contemporary civil mediation." They cite one case in which violence was averted in a dispute between two minority villages over ownership of agricultural land when the mediator used a minority custom to settle disputes over wine, and another in which minority custom was invoked to require that the owner of an ox pay compensation for vegetables that the ox had eaten; the force of the custom was moderated, however, when the two villages agreed that it would be too costly to slaughter the offending ox and share its meat. Liu & Li, *supra* note 139, at 299.

1. Mediation Based on Emotion and Reason (*Qingli*)

The mediation regulations of 1989 require that mediation be carried out according to "law, regulations, rules and policies," and that in the absence of "clear stipulations" in these sources, mediators shall rely on "social morality" (*shehui gongde*). Liu and Li suggested that outcomes expressed in legal terms were often based on social morality rather than on law.[167] They cited a number of examples that are summarized below:

(i) Two brothers disputed over the division of family property for 14 years. The mediation committee director engaged in heart-to-heart talks with the brothers, assisted them with their needs and recalled their goodwill in the past. They reconciled and renounced their bitterness, and continued their business relationship.

(ii) When a husband wanted to divorce his wife because she was childless, the mediator reminded him of the good care his wife gave him. The couple adopted a child.

In these cases mediators did not focus on the rights of the parties, their views of the facts or any laws at all. They "departed from the dispute itself," emphasizing instead the relationships involved and the desirability of reconciliation. Summaries of two other cases illustrate the same approach:

(i) A retired worker named Ho had only two small rooms for his nine-member family. Cramped conditions contributed to the failure of his 26-year-old youngest son in wooing several girlfriends. The young man pestered the father to build a new house—materials had already been purchased—but Ho could not obtain a construction license. Aware of the situation, the director of the mediation committee made four trips to the district Urban Construction Bureau. Within days a permit for the house was issued. The old couple was so moved that they kowtowed to the mediator to express their appreciation.

(ii) An 80-year-old woman intended to commit suicide because none of her four sons would support her. A mediator talked with them many times, but they would not listen to him. The mediator himself took care of the woman for months, and his deeds moved her sons to acknowledge their

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167. The following discussion of "emotion and reason" in settling disputes is based on *id.* at 294-306.

wrongdoing. They divided responsibility for their mother's care.

In all of these cases the mediators caused the dispute to subside by calming the parties, not by explaining or analyzing any gain or loss of rights by the parties. This approach is not merely dispute-suppression, because it aims at achieving a new social equilibrium. Yet while it may work to resolve difficult problems, it may not promote legality. Also, a political dimension is not absent: When the mediators sacrifice time and effort to solve a dispute, they illustrate the Party-state's solicitousness for the masses.

2. Mediation Based on Law: Legal Rules as Sources of Standards for Decision

Mediation outcomes are increasingly expressed in terms of formal legal rules. For example, ownership disputes over land are settled on the basis of rights recorded in local property registers, or on the basis of whether or not a certificate of ownership had been issued by the local government.[168] At the same time, legal rules are invoked less frequently than principles derived from reason or custom. Liu and Li do not indicate whether disputants *themselves* think in terms of rights, and, if so, what they view as the basis of their rights. They nonetheless see mediation today as a force for "persuasion and education" about individual rights.[169]

One impediment to the application of legal rules lies in mediators' personal limitations. Liu and Li write that the educational level of mediators is low, and even state propaganda avoids mention of any rise in the legal sophistication of mediators. Many lack substantial formal education, and the training they receive is only short-term. Liu and Li also suggest that law-based mediation is less frequent because it fails to protect the "face" (*qingmian*) of the disputants after the dispute is settled. They note that most mediated disputes are divorce and neighborhood disputes that cannot necessarily be resolved according to law.

Policy now favors resolving disputes according to the legal rights of the parties and no longer emphasizes learning from the masses. The long-standing preference for compromise has also been allowed to re-emerge – although policy still sets limits. Policy considerations no longer dominate mediation, but are still sometimes relevant to outcomes. One manual for

168. *Id.* at 297-300.
169. *Id.* at 293-294.

mediators instructs the reader that in contract disputes the mediator must consider whether the contract in question is within the economic plan. In contracts between a collective and one or some of its members, the mediator is told that the collective represents the national interest.[170] The shrinking of the plan and the rise of localistic forces in the countryside that has been mentioned above makes it difficult to think that such emphases on factors so central to the pre-reform Party-state continue to be observed.

3. Mediation Based on Combining "Emotion, Reason and Law"

The relative depoliticization of mediation that has occurred in recent years is illustrated by the endorsement that the traditional Chinese value of "yielding" (*rang*) now receives.[171] Frowned upon under Maoism as a relic of "feudalism," yielding is central to the most widely used style of mediation, "mediation concurrently using feeling and law." Liu and Li characterize the style as seeking to "influence by appealing to emotion, instruct by appealing to reason, and make judgments according to law" (*dong zhi yi qing, xiao zhi yi li, ming zhi yi fa*). This compressed summary, elegantly balancing three elements, expresses the essence of thousands of years of traditional views of dispute resolution. Some mediators seek to avoid the burden of investigating, but succeed only in "plastering over" (*huo xini*)[172] the dispute. Liu and Li are unsympathetic to mediation that simply focuses on suppressing disputes without clarifying the legal interests involved or dealing with the feelings of the parties. The Supreme People's Court has also expressly disapproved *huo xini* and unwillingness to determine liability for breaches of contract.[173]

IV. THE CONTEMPORARY FUNCTIONS OF PEOPLE'S MEDIATION

In "Mao and Mediation" I identified four functions of mediation in Chinese society prior to the Cultural Revolution: dispute settlement;

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170. HANDBOOK, *supra* note 130, at 125.

171. See e.g., *SUN PIZHI & WANG WEI, RENMIN TIAOJIE ZHISHI [PEOPLE'S MEDIATION KNOWLEDGE] 60 (1985) ("in accordance with law and policy, mediators should persuade parties to promote peace and unity, and to yield and reconcile (huliang hurang).").*

172. Zheng Qixiang, Wu Tongzhang & Chen Guohua, *'Zhuozhong Tiaojie' de Tifa Yingyu Xiugai:Dui Minshi Susong Tiaojie Zhidu de Zai Shentao [The Wording of 'Emphasizing Mediation' Should Be Amended:Re-examining the Institution of Mediation in Civil Lawsuits]*, FAXUE [LAW SCIENCE MONTHLY], No. 2, at 26 (1990).

173. Potter, *supra* note 43, at 325.

mobilizing mass support for CCP policies, dispute suppression, and social control. Not surprisingly, reform has significantly changed these functions and their relative importance. Dispute settlement was the least important in the Maoist era, when extrajudicial mediation was cast as an adjunct to political mobilization and social control. Maoist mediation did not aim to resolve a dispute in terms of issues and concepts most relevant to the disputants, but rather in terms of policy. For example, one couple seeking a divorce was told they owed it to the task of "national construction" to stay married, although building socialism *per se* was presumably less important to them than resolving their personal conflicts. A party with "good" class status very often prevailed over one with "bad" class status regardless of the specific issues that had caused the dispute. Mediators were instructed to view disputes as disruptions of social order that interfered with national goals. At the same time, even though mediation committees often expressed solutions in terms of Maoist concepts and slogans, other forces influenced outcomes such as the traditional preference for compromise.

A. Civil Dispute Settlement

The prime function of mediation today has shifted to resolving civil disputes in non-political terms, although other functions continue to compete with and may sometimes overwhelm this basic function. Also, as economic relationships grow more numerous and more complex, claims couched in terms of claimants' views of their rights derived from promulgated laws are on the rise, and laws increasingly provide the referents for the settlement of mediated disputes.

When market-oriented economic reforms began in 1979, some legal scholars assumed that mediation was still a useful mode of resolving contract disputes, and argued that mediation was appropriate in disputes between state-owned enterprises, because all were working for socialism.[174] Such sentiments are noticeably absent today. Instead, in the growing non-governmental sectors of the economy an individualistic and competitive mentality has displaced past notions of socialist harmony; litigation over civil and economic matters has increased, and mediation is receding.

Because mediation is less politicized than before, its vocabulary has been changed. Post-Maoist mediation can settle the dispute in such terms of the issues disputants themselves might raise, such as whether a husband

174. Liang Qinhan, *Chuli Jingji Jiufen Anjian Ying Zhuozhong Tiaojie [Mediation Should be Stressed in Dealing with Economic Dispute Cases]*, FAXUE YANJIU [LEGAL RESEARCH], No. 4, at 13 (1981).

mistreated a wife, whether a debt is owed, or who started a fracas and why. Moreover, law and policy require, relatively more strongly than before reform, that mediation be voluntary: Disputants need not carry out mediation at all, and, if they do go through mediation, need not abide by its outcome if they wish to go to court. At the same time, mediation remains available to the Party-state as an instrument of policy. As already noted, mediators may still decide that a particular outcome is required when it contributes to some policy goal regardless of the rights of the parties.

B. Dispute Suppression and Social Control

Dispute suppression remains a key goal of mediation policy, but much more to prevent crime and disorder than to promote a more explicitly political aim. Liu and Li summarize the official line as one that still "propagandizes people's mediation work from the angle of protecting social stability and strengthening comprehensive management of social order."[175] Official policy continues to emphasize the prevention of crime, in the sense of preventing minor disputes from escalating into larger ones involving injury or death.[176] Reports regularly calculate the number of crimes prevented, and one high official stated that the 14 million civil disputes mediated in 1987 "could have resulted in some 140,000 murders and suicides" or 210,000 personal injury cases.[177] By and large, class struggle is no longer emphasized, although and some commentators have clung to old rhetoric.[178] Some discussions suggest that the People's Mediation Committees should act as eyes and ears for the police, as they did when they were organized in 1950, by recording disputes, keeping statistics, and reporting upwards all cases that might escalate.[179]

Liu and Li ascribe governmental support of mediation to the official concern for stability. They cite a 1994 newspaper article describing a "war

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175. Liu & Li, *supra* note 139, at 323.

176. *See e.g.*, Zhang Lin, *Mediators Urged to Help Cut Crime*, CHINA DAILY, July 14, 1988; *Civil Mediators Successful in Beijing*, XINHUA NEWS SERVICE, Nov. 19, 1990; *Community Mediators Heal Family Discord*, XINHUA NEWS SERVICE, Mar. 3, 1989.

177. *More Mediation in Civil Disputes Called For*, XINHUA NEWS SERVICE, July 12, 1988. Michael Palmer has referred to "a shift in concern from households with doubtful class backgrounds to households which are quarrelsome." Palmer, *supra* note 164, at 261.

178. For example, see the discussion of the need for socialist legality to strengthen the people's democratic dictatorship, *see* HANDBOOK, *supra* note 130, at 174.

179. JIANG, *supra* note 130, at 247 (1994); RENMIN TIAOJIEXUE GAILUN, *supra* note 142, at 192-198.

of annihilation" launched by officials in Zhejiang, who mobilized 1,290 county mediators in a rural area and sent them to the countryside for five days, during which time they and others disposed of 180 cases. The authors note that while this method may be useful to calm (*pingxi*) some disputes, it would not pay attention to special questions or to the demands of parties that their rights be protected.[180]

C. *Mobilization*

The use of mediation to focus the attention of the populace on a particular problem of policy has become less noticeable than in the Maoist era, but mediation is still sporadically linked to specific policies. In the mid-1980s, for example, recourse to both mediation and the courts was urged in order to uphold peasants' contracts. In early 1993, the Guangzhou Municipal CCP Committee was concerned about a rise in rural land disputes and sent work teams to "launch education on law and discipline in the villages and to mediate land and mountain forest disputes."[181] The teams were expected to stay in the villages for three to six months to investigate problems, educate the villagers on relevant laws and regulations, and mediate disputes. Soon after the Tiananmen tragedy, press articles fell back on an older rhetoric of struggle discussing mediation as a vehicle for propagandizing policy and educating the masses on correct political thought.[182] More recently, mediation is consistently praised in connection with preventing crime.

V. THE FUTURE OF PEOPLE'S MEDIATION

In other modernizing societies such as Taiwan, the penetration of society by the state has caused traditional institutions for dispute resolution to decline and the use of state institutions to grow.[183] On the mainland,

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180. Liu & Li, *supra* note 139, at 306. Liu and Li summarize two cases to illustrate the combination of rights-based argument and the invocation of sentiments such as the desirability of reconciliation. In each, disputants had been on the point of committing violent acts, and in each there was less emphasis on analyzing legal issues than on the human and emotional problems that provoked and deepened the dispute. Although in both of the illustrative cases mediators prevented crimes from being committed, the authors express concern about encouraging ordinary mediators to take on such responsibilities, which are beyond the capacities of most. *Id.* at 301-03.

181. *Guangzhou Teams to Arbitrate Land Disputes*, FBIS, *supra* note 50, No. 93-098, May 24, 1993, at 68.

182. *E.g., Mediators Help Ensure Social Stability*, XINHUA NEWS SERVICE, Oct. 31, 1989.

183. MICHAEL J. MOSER, LAW AND SOCIAL CHANGE IN A CHINESE COMMUNITY: A CASE STUDY IN A CHINESE COMMUNITY (1962).

extrajudicial mediation will probably decline for the same reasons it has done so in other modernizing societies. The discussion that follows first assesses some of the conflicting forces that are shaping mediation today, and then discusses the future of mediation and its importance relative to other forms of dispute resolution.

A. *Forces Promoting Continuation of People's Mediation*

1. Concern for Social Control

People's mediation can be expected to remain significant in the foreseeable future because of the Party-state's strong interest in using people's mediation committees as a "first line of defense" against crime and social disorder, and as a means of lightening the workload of the courts.[184]

The Ministry of Justice is presumably also interested in maintaining people's mediation, in order to preserve its sphere of bureaucratic authority. Also, the CCP has sought to maintain symbols of socialism even while it undoes the planned economy, and may be reluctant to abandon yet another symbol of the Maoist past, especially one that is grounded in Chinese tradition and not borrowed from the Soviet Union. The mediation committees have a participatory form familiar to older generations of Chinese leaders and bureaucrats that provides some basis for the argument that the mediation committees represent an exercise in popular democracy.

2. Chinese Legal Culture and Mediation

Mediation is also deeply rooted in traditional Chinese culture because it emphasizes the desirability of maintaining personal relationships. Chinese social networks, especially in the countryside, are based on acquaintances (*shuren*) known from their residence or workplace. In such contexts, people do not want to use law to handle ordinary disputes and injure relationships. They would rather renounce some rights if it serves

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184. Liu and Li insert a note of doubt. They observe that although the number of mediation committees has increased from 1980 to 1992, the ratio of mediated cases to those heard in the courts has dropped from almost 11:1 to a little over 3:1 and the absolute number of mediated cases has stayed steady at between six and seven million cases annually. Liu & Li, *supra* note 139, at 307-08. The statistics for 1990-1994 show that the totals for 1993 and 1994 were 6.22 and 6.12 million, respectively, and in 1995 and 1996 dropped to 6.0 and 5.8 million, respectively (*see* table *in* this Part, III.A. *supra*).

emotion and reason in order to improve social relations around them.[185] Mediation still offers opportunities for face-saving compromise as an alternative to an all-or-nothing outcome. Also, some problems are just too small to warrant adjudication, and are not even perceived as raising legal issues. One judge said:

> Attitudes are changing, but many people still want to go to the mediation committees. Family matters, disputes between neighbors . . . residents still go to the mediation committees, which have a function for these kinds of disputes. Many disputes do not involve law but morality (*daode*), like dumping water out of a window onto the street, small assaults, thefts and the like.[186]

Popular perceptions of litigation also buttress people's mediation. Many Chinese are ignorant about the courts and their functions; the courts have long been characterized in propaganda as instruments to exercise dictatorship over class enemies rather than to settle disputes among the people.[187] The low level of the courts, popular cynicism about the influence of *guanxi* on outcomes and a general lack of confidence in judicial fairness further combine to deter potential litigants. Uncertainty about costs is another factor. Finally, mediation fills a need when rural Judicial Assistants or personnel in the TVLSOs are unable to provide effective legal assistance.

B. Forces Promoting the Decline of People's Mediation

1. Changing Nature of Disputes

As reforms create a more differentiated society, new kinds of disputes fall outside the jurisdiction of the mediation committees. Labor disputes and disputes arising out of economic contracts, for example, are channeled to arbitration commissions and to the courts. In the past, mediation most often involved transactions among inhabitants of the same neighborhood or village. Today contracts involve parties from different

185. Liu & Li, *supra* note 139, at 305.

186. Interview on file with the author.

187. Liu & Li, *supra* note 139, at 308 ("Many people cannot, dare not, do not know or are not willing to choose legal proceedngs, but must rely on mediation while waiving or injuring the exercise of rights to legal proceedings.").

locales, parties without prior relationships, and higher monetary stakes than disputes centered on residence, family or small transactions among relatives or acquaintances. Under these circumstances, effective mediation seems less possible and litigation has grown.

2. Changing Values

As emphasis on materialism and personal advancement grows among the Chinese populace, interest in contributing to a commonwealth, socialist or otherwise, has declined. The decline of interest in community matters is most noticeable among the young, the well-educated and other persons most exposed to Western influence.[188] Urban residents are both apathetic about serving on local residents' committees and less willing to submit their disputes to them. One judge comments:

> The scope of mediation has shrunk, and the function of the street committees has changed. There is a new emphasis on privacy, and disputants may not want the intervention. Retired workers and old women now have less education than the parties, who would prefer to go to lawyers and courts, at least in the cities.[189]

In the countryside other factors may discourage disputants from using mediation committees. Rural people's mediation committees are still often seen as the grassroots representatives of state administrative power, and once involved, villagers may feel subject to that power.[190]

3. Growing Rights-consciousness

Fundamental changes in Chinese society brought on by reforms have also stimulated rights-consciousness and the use of courts to protect rights and seek compensation for infringement of rights.[191] At the same time individual Chinese increasingly pursue private economic interests, and the power of cadres and administrative units has decreased in many places. The use of contracts has increased, as has as the number of rights given

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188. GODWIN C. CHU & YANAN JU, THE GREAT WALL IN RUINS: COMMUNICATION AND CULTURAL CHANGE IN CHINA 149-168 (1993).

189. Interview on file with the author.

190. Liu & Li, *supra* note 139, at 324.

191. Gao, *supra* note 6, at 3, 43.

explicit legal protection—such as rights in intellectual property and in reputation—and the number of cases brought to the courts. One scholar at the Chinese Academy of Social Sciences has noted that while the number of disputes brought to the courts has increased, the number of cases brought to mediation organizations has not.[192] Since he wrote, the number of cases brought to mediation committees fell to below six million for the first time in 1996.[193]

Research by scholars at the Institute of Law of the Chinese Academy of Social Sciences shows that villagers are slowly becoming more willing to bypass local leaders and to seek redress directly in the courts, like their counterparts in the cities who are increasingly willing to bypass the local residents' committees.[194] Among more than 5,000 Chinese surveyed, considerable numbers stated that in the event of an assault by a boss or a law enforcement employee, they would be willing to sue, although many stated that they would feel shame if they were to institute a lawsuit, in some kinds of cases – especially when a family member was involved.

Of course these changes in values can only occur slowly. One influence inhibiting the growth of rights-consciousness is the traditional notion that rights are granted by the state rather than being inherent to the individual. Other influences include the necessity and the practice of submitting to greater power, reluctance to seek formal redress for grievances, and the long-standing emphasis on collective harmony rather than individual rights. Ignorance of rights and the slowness of the law to keep up with social developments further impede the expansion of rights-consciousness.

4. Decline in Authority of the Mediation Committees

The general loosening of the Party-state's control over citizens' lives seems to be weakening the authority of urban mediation committees. Fu Hualing argues that reform has eroded the mediation committees' rationale for existence. Formerly their members were chosen because they were activists and wanted to serve the revolution. Now that mediation must be conducted according to law, mediators cannot actually exercise state power because they cannot enforce their own decisions. He concludes that, "[t]he reform has created a cultural and structural imperative that makes mediators powerless and their job meaningless . . . . The legalization and

192. *Id.* at 33-34.
193. ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1997, at 1075.
194. Liu & Li, *supra* note 139.

professionalism of people's mediation itself remains largely rhetoric."[195]

C. *Continuing Issues for the Future*

Recent discussions of mediation in Chinese journals and newspapers illustrate some of the contradictory forces tugging at mediation today. People's mediation, like many Chinese institutions, bears traces of a Maoist conception of society on which the Chinese leadership no longer relies. With the ideological justifications for the economic reforms themselves unclear, it is not surprising that policy toward mediation, other than a stress on its usefulness in maintaining social order, is no more coherent than Chinese policy generally. Some sources continue to praise people's mediation as an instrument of mass self-government and extol the voluntariness of parties' participation as an expression of democracy. Other sources look less to theory than to practical arguments for mediation. They cite its flexibility and the familiarity of mediators with the milieu in which disputes arise, and they praise it for leading to the direct and timely resolution of disputes and saving the time and energy of the courts.[196]

Some academics would insist that mediation should be more closely associated with law. Before the Mediation Regulations were adopted in 1989, some Chinese observers had expressed concern that mediation was not linked closely enough to the law.[197] More recently, others argue that as the disputes change, the style of mediation must also change; taking reasonableness as a standard may lead to rights being neglected.[198] Criticisms of coercion and of "plastering over" disputes reflect the view that the mediation process slights legal rules. An article co-authored by Jiang Wei, one of China's leading scholars of civil procedure, argues that although mediation is appropriate when laws are general or vague, as civil law becomes more complex, the rights and obligations that it creates should receive greater protection in dispute-settling processes.[199] Although Jiang is concerned with judicial mediation, his reasoning is broad enough to apply to mediation generally. Other scholars also urge that adjudication

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195. Fu, *supra* note 137, at 243.

196. JIANG, *supra* note 130, at 18-19; similar views are expressed in HANDBOOK, *supra* note 130, at 1-2; Kong Qinghua, *Renmin Tiaojie Zhidu Shi Yixiang Juyou Zhongguo Tese de Falü Zhidu [The People's Mediation System is a Legal System with Chinese Characteristics]*, ZHONGGUO FAXUE [CHINESE LEGAL STUDIES], No. 3, at 20 (1987).

197. *See, e.g.*, Sun Pizhi, *Renmin Tiaojie Xuyao Zhiduhua Falühua [People's Mediation Must be Systematized and Legalized]*, ZHONGGUO FAXUE [CHINESE LEGAL STUDIES], No. 3, at 16 (1987).

198. RENMIN TIAOJIEXUE GAILUN, *supra* note 142, at 58-59.

199. Jiang & Li, *supra* note 131, at 189.

should increase in importance over mediation, particularly in economic cases.[200]

Writers from the other school, less concerned about legal rights, seek autonomy for mediation. They seem to prefer to consider the people's mediation as not constituting part of the legal system at all because it is based on voluntary mediation agreements,[201] and they criticize attempts to apply to mediation rules of procedure like those used in the courts, presumably because they do not wish to curb its spontaneity.[202] Still others take an intermediate position. Recognizing that economic reform has changed both the nature of the disputes that arise and the social context of mediation, they argue that the function of mediation has shifted from serving economic construction indirectly—by maintaining stability and order—to serving it directly.[203] They urge that mediation should be expanded and more closely supervised.

These two contrasting schools of thought in Chinese legal circles have been characterized as "Populists" and "Legalists."[204] Populists argue that since mediation is a form of popular justice, it should be left alone by the state; even if abuses exist, they can be corrected by "scientific management."[205] They further argue that it is unrealistic to expect mediators to represent parties in economic transactions or to provide a wider range of legal services, given their low levels of education and legal sophistication.[206]

Legalists, mindful of the coercive power that people's mediation exercised before the Cultural Revolution, would limit its scope. When the mediation regulations were revised, Legalists succeeded in formally removing minor criminal cases from the jurisdiction of the mediation committees. Rejecting mediation's intrusiveness, they argue that mediators should not become involved unless specifically requested by the disputants.[207]

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200. Wang Yaxin, *Lun Minshi, Jingji Shenpan Fangshi de Gaige [On Reforming the Method of Civil and Economic Adjudication]*, in PEOPLE'S UNIVERSITY, LEGAL STUDIES MONTHLY, No. 4, at 137 (1994).

201. Li & Pan, *supra* note 130, at 17-18.

202. *Id.* at 19-20.

203. Wen Jing, *Jiaqiang Renmin Tiaojie Gongzuo de Kexue Xing [Strengthen Scientific Administration of People's Mediation Work]*, ZHONGGUO FAXUE [CHINESE LEGAL STUDIES], NO. 3, at 23 (1987).

204. The distinction is Fu's, although Palmer's is similar. *See* Fu, *supra* note 135, at 230-33 and Palmer, *supra* note 164, at 153-56.

205. Fu, *supra* note 137, at 230-31.

206. JIANG, *supra* note 130, at 256-57.

207. Fu, *supra* note 137, at 232.

One problem, however, is that although courts might provide an accessible alternative to mediation committees, the courts sometimes refuse to accept small disputes.[208] In any event, strengthening the authority of the mediation committees remains problematic. Fu argues that to make the mediation committees meaningful they must be given additional authority to enforce their decisions, but this seems unlikely in view of the tendency to stress supervision of the mediation committees by the courts and the Judicial Assistants.

Even if peoples' mediation somehow becomes more "legalized," Chinese disputants may still avoid it. Donald Clarke suggests that mediation may combine the coercive features of mediation with the weakness of the courts. He adds that, "as mediation becomes institutionalized, it becomes an arm of the state, and the Chinese state is generally uncomfortable with the idea of letting individuals make their own deals, whether in dispute resolution or in the market place."[209]

It may be that mediation in cities and in the countryside will evolve differently. Fu Hualing proposes that mediation be allowed to decay in the cities, where he views its power and prestige as declining, but that the countryside be treated differently:

> Due to the cultural and physical distance between the state-supported law and the peasants, rural societies are different from cities, and should be treated as such. Accordingly, local features should be considered, local customs and regulations respected, and local élites given authority to resolve certain civil and criminal matters within their communities. At the same time, however, the basic principles of criminal law should be upheld.[210]

Too many factors that have been already discussed, however, warn against delegating power to local élites. As already indicated, central power has

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208. Zhang Youyu, *Tantan Renmin Tiaojie Gongzuo de Jige Wenti [Discussing Several Issues in People's Mediation Work]*, FAXUE YANJIU [LEGAL RESEARCH], No. 2, at 69 (1987).

209. Clarke, *supra* note 160, at 294-295. A hint that participation im mediation by citizen activists might decline while that of permanent state employees might increase is provided in a recent article which, while celebrating the patience and devotion of a mediator in Shanghai called "Aunt Huang," also states that "civil mediators are made up [sic] *judicial assistants, clerks of neighborhood committees and some senior citizens.*" *China: Civil Mediation System Ensures Harmony in Shanghai*, XINHUA NEWS REPORT, May 1, 1998, *in* FBIS, *supra* note 50, No. 98-121, May 1, 1998, *available at* WNC Website, *supra* note 81.

210. Fu, *supra* note 137, at 245-46.

already weakened as a result of reform; further delegation of power to maintain order could mean even greater weakening, not only of the center, but within localities as well.[211] At the moment, there seems to be no serious sign of interest in changing the link between courts and mediation committees. If formal legal institutions gain further credibility, the contrast between adjudicating rights in courts (or in arbitration tribunals) and effecting compromises and repairing relationships in mediation committees may be intensified.

Yet another problem in defining the function of people's mediation is the need to identify the values it should promote. Laura Nader has analyzed "ideologies of harmony" in dispute resolution, noting that they may be used defensively by a community to resist domination by other groups in the society (such as colonizers) or offensively as part of an ideology that justifies the exercise of control by one group over others.[212] Mediation under Mao was most unambiguously suffused with an ideology of control which required that the outcomes of mediated disputes be "correct" according to politicized criteria. Today, however, the basis of that ideology of control has been seriously eroded. The need for social order may rationalize maintaining the apparatus of control, but the Chinese leadership, faced with Maoist ideology's loss of legitimacy, must decide what values they will want mediation to affirm.

While they are deciding, however, Chinese society will not wait; values are emerging independent of the Party-state. Current mediation regulations explicitly recognize "social morality" as one of the bases on which mediated solutions to disputes rest. That social morality will inform solutions to disputes in neighborhoods and villages where values are shared, including whatever ideology about harmony may exist in popular culture.

In attempts to understand Chinese legal culture and institutions, "mediation" cannot be treated as a unitary concept. It had no single style or form in traditional China;[213] under Maoism it was more complex than it was portrayed in the official press, and promoted a mixture of traditional

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211. Fu himself has observed that attempts during the 1980s to contract with villages for maintenance of public order has led to local élite expanding their control over the countryside (*id.* at 241). To endow local governments with greater power, whether alone or in corporatist alliances with a growing class of entrepreneurs, might further weaken the center and worsen the prospects for a nation-wide rule of law.

212. LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND SOCIAL CONTROL IN ZAPOTEC MOUNTAIN VILLAGES (1990).

213. *See, e.g.*, MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 182-193 (1981).

and modern values that were not always mutually consistent. Today, styles of mediation and the values it promotes vary greatly when practiced in settings as diverse as urban neighborhood mediation committees, factories, city offices for settling housing disputes, arbitration commissions for settling contract disputes, and the courts themselves. The status and power of mediators, particularly in the countryside, are also bound to affect the outcomes of disputes and perceptions of the process by both disputants and observers.[214]

Research suggests, not surprisingly, the existence of a range of attitudes toward assertion of claims in court from traditionally-motivated reluctance to state-promoted aggressiveness, with traditional values still dominant. Neither rights nor traditional attitudes toward those rights are unitary or fixed. Changes in traditional values are suggested by the continuous rise in contract litigation. At the same time, the concepts of rights held by litigants, whether peasant households or urban entrepreneurs, may be less rigid than those of Western counterparts. Chinese claimants may expect less than American litigants when they assert that their "rights" have been violated, suggesting some continuity with the "softness" of concepts of rights in earlier times. Even notions of rights that seem diluted by comparison to Western ideal types could, however, still be useful—and perceived by Chinese claimants as being useful—in bringing about results considered to be just or fair in a Chinese context.

Larger developmental processes not unique to the PRC will also affect dispute settlement. Economic growth on Taiwan caused values associated with tradition to become increasingly fragmented and easily manipulated in the settlement of disputes,[215] and, as private and collective economic activity grows in the PRC similar fragmentation of values will occur. Finally, an even broader perspective suggests that although mediation everywhere professes to restore or establish social harmony, if its functions are to be understood the "harmony ideologies" underlying mediation must be clearly identified.[216]

For the moment all the alternatives available to disputants will have some relationship to the Party-state, which has not displayed a willingness to foster or permit "non-state" mediation. The Chinese view of law may be

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214. *See* SULAMITH HEINS POTTER & JACK M. POTTER, CHINA'S PEASANTS: THE ANTHROPOLOGY OF A REVOLUTION 296-312 (1989) (discussing "a caste-like system of social stratification" in the countryside).

215. *See* MOSER, *supra* note 183, at 184 ("for individual disputants in search of vindication, revenge, self-gain or face [Confucian ideology] constitutes a rich vocabulary of shared symbols by which private action may be justified in the public arena.").

216. *See* NADER, *supra* note 212, *especially* at 291-322.

so rooted in social control that mediators may continue to effect compromises that conform to "the values embodied in state norms," rather than play a facilitative role for private economic actors. Disputants may prefer to look for mediation that is more truly "non-state mediation,"[217] and the Party-state may not be able to prevent the growth of informal practices of dispute resolution in whatever patterns of state-society relations may emerge in China in the future.

The destiny of people's mediation is linked to that of the courts, especially if the latter become more professionalized their autonomy increases. The emergence of rights-consciousness and legal consciousness will turn partly on perceptions among the general population of how the courts resolve disputes that are brought to them. The new arbitration commissions provide an additional alternative to formal adjudication that is more rigorous than people's mediation and could enhance rights-consciousness.[218]

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217. Clarke, *supra* note 160, at 295 ("just as non-state mediation institutions in traditional China grew from the desire of individuals to avoid the loss of control associated with complaints to the magistrate, so we may expect that there will continue to be a demand in China for the kind of mediation that can be found only beyond the horizon of official 'mediation' institutions.").

218. Another sign of limitations on the role of mediation has been the emergence of arbitration. Arbitration received passing consideration during the 1950s as a possible method of settling contract disputes among state-owned enterprises on the model of the Soviet Union. A State Council notice in 1962 provided that disputes among state enterprises should be "arbitrated" by local branches of the State Economic Commission that was charged at the time with executing the five-year and yearly plans, but as a quasi-official commentator later recognized, "although the term 'arbitration' appeared, in reality this was not arbitration, but administrative handling." *Zhonghua Renmin Gonghe Guo Zhongcai Fa Jeshuo [Explanation of the Arbitration Law of the PRC], in* ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUANSHU [ENCYCLOPEDIA OF ARBITRATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 1, 9 (Quanguo Renda Changweihui Fazhi Gongzuo Weiyuanhui Minfa Shi [National People's Congress Standing Committee Legal Affairs Committee Civil Law Chamber] and Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuanhui Mishu Ju [Secretarial Bureau of the China International Economic and Trade Arbitration Commission], comp., 1995). The Cultural Revolution prevented further experimentation with legal institutions, and arbitration mechanisms did not reappear until the early 1980s. As new commercial transactions were defined by legislation, arbitration bodies were created on an ad hoc basis, without unifying concepts or principles, to deal with a growing number of disputes. Confusion between administration and dispute-settlement grew, and contradictory views of the function of arbitration contended with each other. Was arbitration to emphasize mediation and conciliation or was it to be more like adjudication? Was it to be final? If not, should a decision be appealable? If appealable, should the appeal go to an administrative body (if so, which one?) or to a court? The relations between the new arbitration organizations and the courts differed considerably among the various arbitration schemes, as did the finality of the arbitral decisions. After more than ten years of experimentation the Arbitration Law of the PRC, which became effective on September 1, 1995 was adopted with the aim of establishing a coherent and internally consistent arbitral system. Because of space limitations, arbitration is not further discussed in this article. An excellent and thorough review of the situation before the enactment of the Arbitration Law and of the aims of that legislation is Donald Lewis & Karen Ip, *Domestic*

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Extrajudicial dispute resolution and judicial mediation now exist in a social and economic environment that is very different from pre-reform China. Although extrajudicial mediation has faded in prominence, for many Chinese it nonetheless still offers a compelling style of dispute resolution and an attractive alternative to adjudication. It may also dilute emerging conceptions of rights and blunt growing rights-consciousness. In the chapter that follows, we move to the courts and explore their approaches to dispute resolution, and will there also discern the continuing strengths of mediation.

PART THREE: THE CHINESE COURTS UNDER REFORM

> *Courts throughout the country are vigorously advocating the 'Iron Judge' spirit of making selfless contributions in upholding the law impartially, causing an outpouring of good judges in the style of Tan Lin. In the court of Zhangjiagang, in Jiangsu Province, studying Tan Lin begins with the leaders. Members of the court's Party organization take the lead, handling several important cases each month.... Throughout the three levels of courts in Beijing, officials promote the Tan Lin spirit that 'People's Court officials... carry the scales of justice on their shoulders, we absolutely cannot permit one case in our hands to be handled incorrectly', and participate actively in the 'Strike Hard' struggle.*[219]

Commercial Arbitration in the People's Republic of China, in DISPUTE RESOLUTION IN THE PRC: A PRACTICAL GUIDE TO LITIGATION AND ARBITRATION IN CHINA 74, 89n.d. *See also* Donald Lewis, *New Arbitration Law Brings Order to Dispute Settlement*, ASIA LAW, Nov. 1994, at 19. The new commissions were surprisingly given jurisdiction over "foreign-related" disputes although the China International Economic and Trade Arbitration Commission ("CIETAC") had formerly exercised exclusive jurisdiction over such disputes, *see* Stanley B. Lubman, *Setback for China-Wide Rule of Law*, FAR E. ECON. REV., Nov. 7, 1996, at 39. In May 1998 CIETAC revised its rules to expand its jurisdiction, explicitly including for the first time any disputes involving "foreign-invested enterprises." *See* Jingzhou Tao, *Modified Rules Expand CIETAC's Role in FIE Disputes*, 12 CHINA L. & PRACTICE, No. 5, at 16 (1998).

219. *Activities Underway Everywhere as Courts Study Tan Lin*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Oct. 14, 1997, at 1.

INTRODUCTION

Today, China's judges adjudicate disputes by applying promulgated laws and follow rules of civil procedure quite familiar to Western observers. The contrast with their activity before reform is very great. The imprint of the pre-reform past lingers, however, and very different philosophies of law and organization continue to contend for dominance in defining judges' tasks and their methods of work. New forces generated by reform also greatly complicate attempts to strengthen the courts and their influence in Chinese society.

A majority of the disputes that reach the courts, for example, still end in mediated rather than in adjudicated outcomes. Also, policy and propaganda continue to emphasize an overt political dimension in the work of the courts. This is symbolized, for example, by the resemblance between the praise of a model judge in 1996 that is quoted above and the celebration of a model Maoist mediator in 1955 quoted in Part One. Mediator and judge alike are praised because they perform their work in a politically correct manner, and, as we will see below, state propaganda still commonly views judges as soldiers in struggles, such as in the "Strike Hard" campaigns against crime that have continued to skew the work of the Chinese courts for years.

This Part analyzes the operation of the courts from a variety of perspectives. It introduces the judicial hierarchy, surveys the education, selection and promotion of judges, and discusses the values that they are supposed to embody and the ethical dilemmas that they constantly encounter. It then examines the operations of the judicial process, the sources of the rules that judges apply in their decisions and reports of judicial decisions. Finally, it proposes an interpretation of Chinese conceptions of the function of courts and notes implications of those conceptions for further Chinese efforts to expand the rule of law.

I. THE CHINESE JUDICIAL SYSTEM

For the first thirty years of the People's Republic, Chinese courts existed essentially in form but not in substance; they all but disappeared during the Cultural Revolution. The judicial system has been extensively rebuilt since 1979, and the organization of the new system is summarized here.

A. *The Judicial Hierarchy*

The Chinese judicial system includes courts of general jurisdiction as well as specialized courts.[220] The courts of general jurisdiction are organized hierarchically by location: At the top is the *Zuigao Renmin Fayuan*, or Supreme People's Court (SPC) in Beijing, below which are three levels. These are, first, 30 *Gaoji Renmin Fayuan*, or Higher-Level People's Courts (HLPC). This "higher level" includes centrally-administered cities like Beijing and Shanghai and autonomous regions like Tibet and Xinjiang, in addition to each of China's provinces. At the next level are 389 *Zhongji Renmin Fayuan*, or Intermediate-Level People's Courts (ILPC). This "prefectural level" includes provincially-administered cities (*shi*), as well as prefectures (*diqu*) directly beneath the provinces, and districts within centrally-administered cities. At the lowest level (rural counties and urban districts) are 3,067 *Jiceng Renmin Fayuan*, or Basic Level People's Courts (BLPC). In large rural counties with dispersed populations the county BLPC often establish People's Tribunals (*Renmin Fating*) in outlying areas, which are technically at the same administrative level as their parent BLPC rather than at a subordinate fifth level. In 1994, excluding the People's Tribunals (of which there are approximately 18,000), the total number of People's Courts at all four levels was 3,486.[221] There are also over 100 specialized courts, including railway, forestry, maritime and military courts, whose jurisdiction is not limited by the administrative boundaries discussed above.

This jurisdictional pyramid is not as neat as it would appear, because higher-level courts may sometimes exercise primary jurisdiction over cases that would have an "influence" in their district.[222] In economic cases, the stated criteria for determining whether higher-level jurisdiction should be

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220. For an admirable summary of the structure of the Chinese courts and a particularly thoughtful analysis of the Chinese judicial system see Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996). An excellent detailed study of the courts and civil procedure, with considerable emphasis on aspects of particular interest to foreign litigants in the Chinese courts, is Helena Kolenda, Jerome A. Cohen & Michael R. March, *People's Republic of China*, *in* ENCYCLOPEDIA OF INTERNATIONAL COMMERCIAL LITIGATION (Sir Andrew Coleman ed., 1995).

221. *Renmin Fayuan Zai Gaige Kaifang Zhong Quanmian Fazhan—Fang Zuigao Renmin Fauyan Yuanzhang Ren Jianxin [People's Courts are Developing in All Areas in the Course of Opening and Reform—An Interview with President of the Supreme People's Court Ren Jianxin]* ZHONGGUO FALÜ [CHINESE LAW], No. 2, June 15, 1995, at 2.

222. Opinion of the Supreme People's Court on Several Issues Concerning the Implementation of the Civil Procedure Law (for Trial Implementation) in the Work of Economic Trials, *promulgated* Sept. 17, 1984, *in* CHINA LAW YEARBOOK 1987: FIRST ENGLISH EDITION, 404 (1989).

exercised include the level in the governmental hierarchy of the departments involved, the amount of money involved and the complexity of the case.

B. *Organization of the Courts*

Courts of general jurisdiction at all levels are administered by general administrative and personnel offices, and are organized into separate divisions (*ting*) for criminal, administrative, civil and economic matters and enforcement. Administrative divisions handle cases involving disputes of individuals, organizations or enterprises with governmental agencies. Civil divisions tend to focus upon family and inheritance law, and on contract, property and tort disputes between natural persons. Almost half of all cases brought before the People's Courts in 1996 concerned marriage and family (*hunyin jiating*), with debts running a close second.[223] As reform of real estate ownership and management have been instituted, disputes over rights to real property have appeared. Economic divisions focus on contract disputes among state-owned enterprises and between those enterprises and a variety of new economic actors that have appeared as a result of economic reform.[224] Tort litigation, involving such matters as accidents and product liability, has also been growing. Most basic-level and intermediate courts also have enforcement and appeals divisions.[225] Also, various specialized divisions have been set up in recent years, including, notably, for intellectual property matters.

Each court has a president, one or more vice presidents, an Adjudication Committee (*shenpan weiyuanhui*), judges who work in the divisions and clerks. The court president has three types of duties: substantive case work, internal administration and external affairs, discussed here in order. First because all decisions in cases within Chinese courts must be approved by either the court president, a vice president or a division chief (*tingzhang*), the president is usually involved in his court's most important cases. Second, the president is responsible for the court's finances and personnel matters. This task is closely tied to his third and most important duty, external relations. Chinese judges do not have tenure

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223. Of a total of 3,093,995 civil cases received in 1996, 1,397,672 involved marriage and family disputes, while 1,164,253 concerned debts. ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1997, at 1056.

224. Of a total of 1,519,793 economic dispute cases received in 1996, 1,404,921 involved domestic contracts. *Id.*

225. Of a total of 323,995 appeals heard in 1996, over half involved civil cases, with the remainder divided fairly equally between criminal (21%) and economic (26%) disputes. *Id.* at 1057.

of any kind and are therefore beholden to local government and Party officials for their positions and their courts' finances. Local Party Secretaries and their Political-Legal Committees (*zhengfa weiyuanhui*), routinely review the disposition of court cases (their involvement in the work of the courts is discussed in detail below). Relations with such local power-holders are a vital, if informal, aspect of the court president's job.[226]

Because the court president is busy dealing with local officials, much of his administrative and case approval duties fall to his vice president(s) who supervise the work of the divisions. Each division has a chief judge, judges, assistant judges, and clerks. Cases are heard by a three judge panel called a collegiate bench (*heyiting*), with one judge in charge.[227] Some cases are also heard by a panel of one judge and two People's Assessors (*renmin peishenyuan*). While each member of such committees formally has equal say, in practice People's Assessors are expected to follow the ruling of the presiding judge.[228]

C. *The Types of Civil and Economic Cases Handled by the Courts*

First Instance Economic Dispute Cases Handled, 1990-1996

	Total	Contract	Damages	Labor	Bankruptcy
1990	598,317	553,540	1,134	521	
1991	583,771	535,799	1,613	547	
1992	648,018	595,510	2,392		265
1993	883,681	814,842	2,707		710
1994	1,045,440	964,302	2,682		1,156
1995	1,271,434	1,178,311	3,742		1,938
1996		1,393,275	3,629		4,400

Source: ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1991 (935), 1992 (855), 1993 (936), 1994 (1028), 1995 (1065), 1996 (959), 1997 (1056).

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226. *See, e.g.*, Donald C. Clarke, *The Execution of Civil and Economic Judgements in China, in* NEW DIRECTIONS, NEW DEVELOPMENTS AND NEW OPPORTUNITIES: DISPUTE RESOLUTION IN CHINA AND HONG KONG (papers for a conference sponsored by Euroforum), 261, 263 (May 30 and 31, 1996); Fang Chengzhi, *Renmin Fayuan Zai Guojia Jigou Zhong de Diwei [The Position of People's Courts Within the Government Structure]*, FAXUE ZAZHI [LEGAL STUDIES MAGAZINE], NO. 4, 15, at 16 (1985). The involvement of Party and state officials in the day-to-day work of the courts is discussed below.

227. Susan Finder, *Inside the People's Courts: China's Litigation System and the Resolution of Commercial Disputes* in DISPUTE RESOLUTION IN THE PRC: A PRACTICAL GUIDE TO LITIGATION AND ARBITRATION IN CHINA 63, 67-68 (Asia Law & Practice ed., 1996).

228. Clarke, *supra* note 160, at 255 n.29.

First Instance Civil Cases Handled, 1990-1996

	Civil	Marriage and Family	Debt	Tort	Housing
1990	1,849,728	935,831	568,016	169,919	58,095
1991	1,910,013	1,007,901	543,322	184,878	57,747
1992	1,948,949	1,042,880	565,880	190,073	59,052
1993	2,091,651	1,096,164	638,318	197,606	67,036
1994	2,382,174	1,197,343	783,007	213,455	80,868
1995	2,714,665	1,314,678	939,927	245,004	93,147
1996	3,084,464	1,398,396	1,156,431	275,233	108,760

	Civil	Marriage and Family	Debt	Tort	Housing
1990	1,849,728	50.6%	30.7%	9.2%	3.1%
1991	1,910,013	52.8%	28.4%	9.7%	3.0%
1992	1,948,949	53.5%	29.0%	9.8%	3.0%
1993	2,091,651	52.4%	30.5%	9.4%	3.2%
1994	2,382,174	50.3%	32.9%	9.0%	3.4%
1995	2,714,665	48.4%	34.6%	9.0%	3.4%
1996	3,084,464	45.3%	37.5%	8.9%	3.5%

Source: ZHONGGUO FALU NIANJIAN [CHINA LAW YEARBOOK] 1991 (934), 1992 (855), 1993 (936), 1994 (1028), 1995 (1064), 1996 (958), 1997 (1056).

The tables reflect the increasing commercialization of the Chinese economy: marriage and family disputes did not increase very much during the five-year period considered here, whereas the number of debt cases in the civil category and the total number of economic cases and contract disputes almost doubled during the same period. The rising number of cases also reflects government policy to encourage use of the courts.[229]

229. Fu, *supra* note 137, at 217.

II. THE CHINESE COURTS AT WORK

A. *The Judges*

1. Qualifications

The size of the Chinese judiciary has grown dramatically since the reforms began – from 58,000 court cadres in 1979 to 292,000 in 1995, of whom 156,000 were judges, with the remainder court police and other court staff.[230] Throughout the 1980s most of China's judges came to their positions through transfer from Party and military posts. Most lacked a university education, and very few had received formal legal instruction.

Demobilized soldiers have been a major pool from which judges have been drawn since the early 1950s. According to one judge,[231] PLA officers were considered good candidates for judgeships because they, like police, were engaged in enforcing proletarian dictatorship and possessed the appropriate ideological outlook on their work. Some were made Vice Presidents of the courts even though they had no legal educations. The former PLA officers were instructed in "basic legal knowledge" and "legal practice" in special spare time training courses instituted at the courts to make up for their low educational level.[232]

More formal training programs have been established by the Supreme People's Court at Beijing University and at People's University, where judges attend courses for a period of from one year to three years. There are also one-year programs for assistant judges, who can be promoted to senior judge if they are successful on an examination, and six-month programs for judges from intermediate courts and the Supreme People's court.[233] A Judicial Training College was established in Beijing in 1997.[234] Although these training efforts have raised the educational level of judges

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230. He, *supra* note 6, at 212, 220. This essay by a law professor at Beijing University presents remarkable insights into the legal culture of judges.

231. Interview on file with the author.

232. Chinese informants were often dismissive of the former PLA officers, but one Chinese judge, himself not a law graduate but who had learned "on the job" and in spare time courses, expressed a kinder view of demobilized soldiers in the courts. He said that ten years ago many judges were demobilized PLA officers, but now even these are more experienced and many have studied and have received degrees and can handle the normal burdens of a judge.

233. For more on judicial training programs *see* Alford & Fang, *supra* note 103, at 20-23.

234. *See China: Leaders Attend Opening of National Judges College (Nov. 10, 1997)*, FBIS, *supra* note 50, No. 97-314, Nov. 10, 1997 (*available at* WNC Website, *supra* note 81).

considerably,[235] overall levels remain low. In 1994, a provincial higher court president wrote that "about half of the judges in the country have not reached the level of university level legal education."[236] In 1993 almost 30% of chief judges of HLPCs lacked a university or college background.[237] A study noted in 1994 that hope was entertained at the Ministry of Justice that by 1997 general diplomas from part-time universities would have been awarded to 70% of court employees, 80% of judges, and 90% of court presidents.[238]

Whether or not a judge has a degree may not be very meaningful. Some college degrees were granted after only short periods of study during the early 1980s, and some of the degrees earned were not in law. The content and the effectiveness of the courses intended to raise the legal sophistication of the judges is questionable. One judge who had completed a two-year part-time course told an interviewer that "many of the students, including me, at that time wanted only to get a diploma . . . . At present, few verdicts or reports summarizing cases are well written."[239]

Although law schools are producing graduates in unprecedented numbers, only 500-600 of these new law graduates were assigned to courts each year throughout most of the 1980s.[240] Some of these were appointed to staff positions such as secretaries, rather than judges. Moreover, the recent law graduates are still too young and too few to play a significant role in the system. The shortage of legally trained judges makes judicial ignorance of the law a real danger, particularly because of the legislative incoherence that has been mentioned above.

2. The Law on Judges

Objective qualifications for all judges were not formally established until a Law on Judges ("Judges Law")[241] was promulgated in 1995, and judges then in office who did not meet the qualifications were given an

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235. The percentage of judges with "college or higher academic credentials" rose from 17.1% in 1987 to 66.6% in 1992, according to a report by President of the Supreme People's Court Ren Jianxin in 1993, *Supreme People's Court Work Report (Apr. 4, 1993)*, FBIS, *supra* note 50, No. 93-0065, Apr. 7, 1993, at 24.

236. Quoted in He, *supra* note 6, at 228.

237. *Id.* at 238.

238. Alford & Fang, *supra* note 103, at 21.

239. He, *supra* note 6, at 241.

240. Alford & Fang, *supra* note 103, at 21.

241. Zhonghua Renmin Gongheguo Faguan Fa [Law on Judges of the People's Republic of China], FAZHI RIBAO [LEGAL SYSTEM DAILY], Mar. 3, 1995, *translated in* FBIS, *supra* note 50, No. 95-054, Mar. 21, 1995, at 32 [hereinafter Judges Law].

undetermined amount of time to attain them.[242] Nonetheless, the Judges Law helped to raise standards by requiring academic qualifications for judges. It provides that Chinese citizens who have reached the minimum age of 23, uphold the Constitution and "possess good political and professional quality and good conduct," may become judges if they have graduated from an institution of higher learning where they specialized in law as undergraduates or graduates or, if they have graduated from such an institution with a specialization other than law, have "professional legal knowledge" and have worked for two years.[243]

Provision was made in the Judges Law for examinations of judges, with grades on such examinations to be the basis for "rewards, punishments, training, dismissals and readjustment of grades and wages" (Art. 13). Each People's Court is to establish examination and appraisal committees, and the committee at the Supreme People's Court is to organize national examinations for newly appointed judges and assistant judges (Art. 46). Judges face annual performance reviews, and can be dismissed for, among other reasons, having been rated as "incompetent" in two consecutive years.

3. Appointment, Removal and Reward of Judges

Appointment and removal of chief judges at each level in the hierarchy are made by decision of the legislative body at the same level. Thus, the Supreme People's Court President is appointed by the National People's Congress, and lower courts' presidents are elected and removed by the people's congresses at the corresponding level. Judicial personnel above the rank of assistant judge (i.e., judges, deputy chief judges, members of the Adjudication Committee and deputy court presidents), are selected by the chief judges at each level and approved by the Standing Committees of local people's congress at that level. Assistant judges are selected by chief judges.

Although the Judges Law places a value on formal educational qualifications, non-professional criteria are widely used in selecting judges, and in practice local Party organizational departments have the final say over all judicial appointments.[244] Strikingly, relatively few lawyers have

242. Clarke, *supra* note 160, at 258.

243. Some judges, in private conversation, regretted the failure to adopt other obvious methods of raising standards such as increasing judges' pay and employing a nationwide competitive examination. Interviews on file with the author.

244. *See, e.g.*, Clarke, *supra* note 220, at 8.

been selected to be judges. One judge, interviewed before the Judges Law was enacted, reported that:

> [O]ur organization department has an express provision, that those who have not tempered themselves in departments of politics and law, who have no experience in handling cases, who have not majored in the legal profession, including those with [an academic level of] middle school or high school—of course primary school is too low—people like that can become judges.[245]

CCP officials determine for local Party congresses which candidates to select for the judiciary, and often value *guanxi* and political orthodoxy over professional standards.

4. The Chinese Judiciary: Performance Criteria

a. The Judge as Soldier of the State

He Weifang cautions that despite a decline in public emphasis on recruiting PLA officers as judges, the outlook and the cast of mind that favored them have not completely changed. Analyzing the content of an internal judicial system newspaper, He Weifang finds that model judges are commended for fighting in support of the PRC on the civilian front. Demobilized soldiers, as compared to university and college graduates, are disproportionately singled out for commendation in the performance of judicial duties, and their accomplishments are often described using militaristic imagery. Articles analogize courts to fighting units; one report told of a night raid on a Jilin town by court cadres and policemen to round up persons who had failed to obey verdicts or court orders "as if on a battlefield instead of in a dignified but solemn court."[246] When judges with formal education are commended, they are praised for "work-style" and dedication rather than experience or legal knowledge.

b. Criteria for Rewards

Further insight into the contemporary Chinese conception of the judge is the provision in the Judges Law on rewards (Art. 28), which

245. He, *supra* note 6, at 240.
246. *Id.* at 236.

enumerates the "outstanding performances" that may be rewarded with three grades of merit citations. The first three, understandably, are "enforcing the law fairly," "summing up practical experience in trials and playing a guiding role in judicial work" and proposing suggestions for judicial reform that achieve "outstanding results." Improving judicial work and assisting people's mediation committees are also commendable deeds. Also listed, however, are "safeguarding state, collective and individual interests to prevent major losses," "courageously struggling against criminal activities," and "protecting state secrets and secrets in judicial work."

These last examples of exemplary conduct are more consistent with qualities desirable in administrators of social or political programs. They bespeak overt responsibilities of Chinese judges to promote the interests of the state. In the West judicial systems are hardly beyond politics; in the US, politics have a heavy influence on the nomination and election of judges. The Western judge also personifies and has the duty of promoting the authority of the state, but there is a qualitative difference between the political colorations of judges in China and their Western counterparts.

c. Politicized Criteria of Judicial Excellence

He Weifang notes that judges are also frequently praised for devotion to the Party. Like innumerable political models in the PRC, a judge of peasant origin who had served in the PLA and then, upon demobilization, was sent to work as a People's Court judge, is quoted as saying: "I am a lucky fellow among tens of thousands of peasant children. I am grateful to the Party for its nurture and education, so I will never slacken my efforts in whatever work the Party assigns me to do."[247]

These words recognizably echo the politicization of the courts under Mao, when judges were deliberately undifferentiated from other cadres and all were supposed to remain close to the masses. During the 1950s and 1960s, as has been noted earlier, two competing conceptions of the courts suggested contrasting types of bureaucracies: The Maoist concept, deliberately fluid and consultative, rejected professional expertise; a more rational and professionalized alternative, although articulated during one brief period in 1956-1957, remained unacceptable from the late 1950s until the onset of reform.[248] The rule of law was essentially irrelevant to both, except to the extent that regularity in bureaucratic decision-making could

247. *Id.* at 249-250.

248. Lubman, *supra* note 10, at 549, 552.

overlap with controls over arbitrariness. Before reform, model Communist judges were celebrated for going to the masses to solve their problems on the spot.[249] He Weifang's observation that the current propaganda on the correct behavior of judges echoes this earlier line can be confirmed by reading similar reports in the *Legal Daily* (*Fazhi Bao*), published by the Ministry of Justice.

B. The Judicial Process

Examination of the work of the Chinese courts begins here by surveying trial procedure, beginning with the judicial process in courts of first instance, and then passing to the multiple methods used to review court decisions and the problems of enforcing judgements. Judicial mediation is then examined, followed by a discussion of judicial ethics.

1. Trial Procedure: An Overview

Trial procedure, summarized below, is conducted according to the 1991 Civil Procedure Law (CPL), which builds on ten years of practice under the predecessor "trial" civil procedure law.

a. Commencement of a Civil Action

Parties to disputes may act on their own behalf or by agents *ad litem* who may be lawyers or any citizen approved by the court.[250] After a would-be plaintiff files a written complaint at a court, litigation is formally begun when the court, acting through a clerk or judge who has ascertained that the court has jurisdiction and that the complaint states the facts and the nature of the dispute, accepts the case. The plaintiff must pay a "case acceptance fee" and other fees "according to regulations" (Art. 107). Communications are generally conducted via the court, which is responsible for serving documents on the parties under specific rules on the service of process that are not relevant here. The defendant will then be notified to reply.

After the case has been accepted, a judge is assigned by the chief of his division (*tingzhang*) to handle the case, first with regard to all pre-trial issues, and then to act as the presiding judge if a three-judge panel is formed to conduct the trial. The methods of determining assignments vary

249. *Mao and Mediation, supra* note 1, at 1307.

250. China is one of the few countries in the world that permits class actions. *See* Benjamin L. Liebman, Note: *Class Action Litigation in China,* 111 HARV. L. REV. 1523 (1998).

in each court, and often it is not done strictly by rotation. The *tingzhang* may make assignments according to the weak and strong points of various judges. If the case is "complicated," additional judges may be assigned, or the matter may be referred to the Adjudication Committee of the court, which is discussed in greater detail below. The *tingzhang* may continue to look over the shoulders of the judges throughout the process.

b. Pretrial Procedure

The judicial personnel (who may include People's Assessors, although as noted above the collegial panels are generally composed of three judges) "must conscientiously read and examine case materials and investigate necessary evidence" (Art. 116). If the investigating judges encounter problems, they may discuss them with the *tingzhang*, singly or at a meeting. Although the CPL makes no provision for pre-trial hearings, sometimes the court will hold hearings to clarify facts or issues. Judicial mediation would occur at this stage if the parties agree, either willingly or if pressed by a judge.[251] Also during the pre-trial stage, the court may hear and decide on any application by a party to preserve evidence or property, or to provide security if the court is satisfied that a judgment might otherwise be impossible or difficult to execute.

c. Gathering of Evidence

Each of the parties bears responsibility for coming forward with evidence supporting their positions (Art. 64). The various types of evidence are enumerated, but the CPL says nothing about how the parties may collect evidence. In practice, the parties conduct their own investigations, which may involve deposing witnesses. There is no reference to anything resembling pre-trial discovery. The courts have the primary task of gathering evidence from any individuals or organizations and may also obtain assistance on specialized issues from an "appraisal authority" (Art. 72).[252] Evidence in the possession of banks or state agencies cannot be obtained by parties directly, and as a result it is sometimes necessary for judges to travel to collect evidence. Although they are allowed a *per diem* travel allowance out of the court's budget, it is regularly supplemented by the litigants, which, as one observer wryly notes, "may influence the

251. Judicial mediation is examined in II. B. 5 in this Part *infra*.

252. *See generally* Kolenda, et. al., *supra* note 220, A9.89-A9.108.

eventual judicial decision."[253] The courts must examine evidence for "veracity and validity" (Art. 65). Judicial style has been an active one, with courts frequently conducting their own investigations, but in recent years considerable interest has been shown in placing the burden of investigation on the parties.

d. Trial Procedure

The Chinese trial is marked by the judge-dominated civil law model that the Republic of China first began to use before the PRC was established, and which it continues to use on Taiwan. Under the CPL judges consider evidence in the following order:

(i) presentation of statements by the parties;

(ii)testimony by witnesses and reading of statements by absent witnesses;

(iii) presentation of documentary and material evidence;

(iv) reading of testimony of expert witnesses;

(v) reading records of inspections.

The parties may introduce new evidence at trial, including evidence that differs from evidence previously introduced. The court, and afterwards the parties with permission of the court, may question witnesses or present other evidence.[254]

The next stage of the trial is the "debate," the stage when each party formally argues its views; after each has stated its views they may then debate with each other, often with the participation of the court, which may continue to ask questions of all the parties. The formal proceedings end with concluding statements by each party. The CPL provides that after the debate has ended, the court shall make its judgment. Consistent with the general preference for mediation that has already been discussed, the CPL states that if mediation is possible before the rendering of a judgment, "mediation procedures may be undertaken. If mediation is unsuccessful, a judgment shall be made without delay" (Art. 128).

The trial procedure outlined here makes considerable demands on judges that present difficulties for a judiciary that is not completely professionalized. For example, one court reported that judges are reluctant to participate in open trials of economic disputes because they are used to

253. Finder, *supra* note 227, at 71.

254. Informal discussions with Chinese lawyers suggest that sometimes the parties prefer not to present witnesses in court because they would like to avoid unexpected answers by witnesses to questions posed by opposing counsel or the judge.

deciding only on the basis of the file in the case and interviews of the parties, they lack confidence, and they are unqualified.[255]

The general framework for the conduct of trials outlined here varies significantly in practice by what one observer has called "advocacy outside the courtroom":

> It is considered normal practice for judges to meet with counsel in the judges' office, without opposing counsel being present. This is not considered to violate the prohibition in the Judges Law on judges meeting privately with litigants or their agents. Although prohibited by the Civil Procedure Law, a frequent practice in many areas is for lawyers to meet with the judges involved in their case over the dinner table or at other places of entertainment.[256]

Other problems of professional responsibility that litigation presents to the emerging Chinese bar include the creation of business joint ventures between law firms and courts, pressures on clients to use law firms in which a government official has a financial interest and bribery of judges or regulatory officials.[257]

2. The Judicial Process Prior to Judgment

a. Internal Review of Judge's Decisions at the Courts of First Instance

The decision-making process at the trial court level involves, often decisively, the participation of judges other than those initially charged with handling cases. Before the court's judgment is issued it may be

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255. Qinghai Sheng Gaoji Renmin Fayuan [Qinghai Provincial Higher-Level People's Court], *Quanmian Tuixing Ershen Jingji Jiufen Anjian Gongkai Shenpan de Jidian Zuofa [Several Methods of Work in the Comprehensive Promotion of Public Trials for Economic Dispute Cases at the Second Instance]*, in JINGJI SHEN PAN CANYUAN CELIAO YÜ XINLEIXING ANLI PINGXI [ECONOMIC ADJUDICATION REFERENCE MATERIALS AND ANALYSIS OF NEW TYPES OF CASES] 66, 67 (Supreme People's Court Economic Chamber ed., 1994) [hereinafter ECONOMIC ADJUDICATION REFERENCE MATERIALS]. In mid-1998 the Supreme People's Court "suggested that open trials be implemented as a key measure to improve the competence of the ranks of judicial personnel." *Supreme Court President on Open Trial, Live Coverage*, XINHUA NEWS SERVICE, July 15, 1998, *in* FBIS, *supra* note 50, No. 98-199, July 21, 1998, *available at* WNC Website, *supra* note 81.

256. Finder, *supra* note 227, at 72.

257. Alford, *supra* note 109, at 33. On the increase in judicial corruption reported in 1998, see the sources cited in note 336 *infra*.

reviewed and approved by other judges, judicial superiors and higher courts, in a manner very different from practice in either Anglo-American or Continental civil courts to which Chinese sometimes claim affinity. Most striking is the fact that the outcome of the case may be shaped by the extrajudicial influence of local Party or government officials.

Interviews with five judges[258] indicate that opinions are normally reviewed twice in civil cases and three times in criminal cases. After the collegiate bench (*heyiting)* has heard the case, the judge in charge will write a report and a draft opinion, which he sends to the chief or deputy chief of his chamber (*tingzhang* or *fu tingzhang*). Practice is not uniform, and one judge stated that in his court review stopped at the level of the deputy president of the court. Two judges stated that in some courts, if the matter is "simple" the *heyiting* will reach a decision that will not have to approved by the *tingzhang*. The factors that will require approval before a judgment is issued include the amount of money involved, whether there are legal problems involved such as doubt over the applicability of a particular rule, the possible influence or effect of the case, and of course the ease with which a disposition can be reached. As will be seen below, the possible effect of a judgment on the revenues of local enterprises may also be taken into account; caseload, too, is a factor. Draft opinions on all but the simplest cases are likely to be reviewed and revised, perhaps a number of times. In criminal cases the case would be sent higher, perhaps to the president of the court.

b. Internal Review of Cases by the Adjudication Committee

The judges interviewed all agreed that if a case is "complicated" it would be sent to the Adjudication Committee of the court, either by the various *tingzhang* or the president of the court. The Adjudication Committee includes the senior judges such as the *tingzhang* in addition to the chief judge. The Organizational Law of the People's Courts requires courts to establish Adjudication Committees, whose tasks are to "sum up judicial experience, discuss major or difficult cases and discuss other issues of judicial work."[259] Chinese sources give only limited explication of the

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258. Interviews on file with the author.

259. Organic Law of the People's Courts of the People's Republic of China (*adopted* July 1, 1979, *amended* Sept. 2, 1983 and Dec. 2, 1986), art. 11, *in* LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1983-1986, (Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, comp., 1987).

role of the Adjudication Committees. According to one recent book on court administration,[260] "doubtful" cases are those in which the facts are in issue, whereas "difficult" cases involve interpersonal relationships such as differing opinions within the court or between judges of higher and lower courts. A Western observer notes that "more often a case is 'difficult' due to the complex personal and institutional relationships involved."[261]

Although in principle cases are supposed to be submitted to the Adjudication Committee only after they have been heard by a panel of judges, sometimes Adjudication Committees discuss cases *before* trial, making for a pithy summary of the consequences: "Those who try the case do not decide it, and those who decide the case do not try it."[262] This has been questioned as a violation of legality because it denies a party the right to a public trial. Just as troubling is the problem that arises if the decision of the Adjudication Committee differs from that of the panel of judges initially charged with deciding the case. There is a clear tension between the basic responsibility of the panel of judges and the administrative realities of the courts. One writer states that, contrary to claims that the decision of the Adjudication Committee should not be substituted for that of a panel, in practice, the decision of the Adjudication Committee must be carried out.[263] One judge offers a simple explanation: "the authority of the Adjudication Committee is too great."[264]

Internal review of cases by senior judges or Adjudication Committees, while it departs from Western ideals of judicial independence, is entirely consistent with the Chinese view of judicial autonomy. The Judges Law (reiterating the Constitution) provides that judges shall not be subjected to interference from "administrative bodies, social organizations, [or] individuals" while judging cases according to law.[265] The People's

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260. WEN JING, FAYUAN SHENPAN YEWU GUANLI [Management of Court Adjudication Work] 103-105 (1992). The author is a judge, who wrote the book while studying at the Training Center for Higher Judges.

261. Finder, *supra* note 227, at 68.

262. Clarke, *supra* note 160, at 260.

263. WEN, *supra* note 260, at 107.

264. Zhou Dao, *Shiying Shehui Zhuyi Shichang Jingji Tizhi Xuyao Jiakuai Fayuan Tizhi Gaige Bufa [To Adapt to the Socialist Market Economy, the Pace of Reform of the Court System Must be Quickened]* in ZHONGGUO SIFA ZHIDU GAIGE ZONGHENG TAN: QUANGUO FAYUAN XITONG DILIU JIE XUESHU TAOLUN HUI LUNWEN XUAN [A FREE DISCUSSION OF THE REFORM OF CHINA'S JUDICIAL SYSTEM: A COLLECTION OF ESSAYS FROM THE SIXTH ACADEMIC CONFERENCE OF THE NATIONAL COURT SYSTEM] 1, 12 (1994). The Revised Criminal Procedure Law, *supra* note 121, art. 149 provides that the collegiate bench must carry out the decree of the Adjudication Committee. No such rule is explicitly stated in the Civil Procedure Law.

265. Judges Law, *supra* note 241, art. 8 (2).

Courts are required to "independently exercise the right of adjudication by law,"[266] but in the current Chinese view this means that the court *as a whole entity* is independent, not the individual judge.[267] This *collective responsibility* is derived from the principle of democratic centralism, which has often been stated to be as basic as an administrative principle for the judiciary as it is for all the other organs of the Party-state[268] – and which means that the work of the Chinese courts is conceived of quite differently from adjudication in Western courts. More bluntly, the Adjudication Committee serves to coordinate judicial decisions at each court with current interpretations of state and Party policy.[269]

c. *Internal Review: Requesting Instructions from Higher Level Courts*

Although the Chinese system limits appeals so that they can ascend only to the next higher judicial level above the trial court, appeals may be effectively short-circuited by the practice of not hearing or deciding a case until the court of first instance has requested instructions on deciding the specific matter from its superior-level court. As one Chinese judge has noted, there should be no need for this practice, but courts "have traditionally been managed by administrative methods," the quality of judicial personnel has not been high, and requesting instructions from higher courts helps bring about the correct application of the law.[270] The quality of personnel is improving but the practice continues, often because lower courts seek guidance because of the generality or incompleteness of legislation.[271] Interviews with judges suggest that because they are

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266. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, art. 126, *adopted at* the Fifth Session of the Eighth National People's Congress, Dec. 4, 1982, *in* LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, 1 LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-82, at 3, 30.

267. WEN, *supra* note 260, at 36-37.

268. *See* Tang Dehua, *Quanmian Jiaqiang Jingji Shenpan Gongzuo, Wei jingji Jianshe He Shehui Zhuyi Shichang Jingji Tizhi de Jianli Tigong Sifa Baozhang* [*Comprehensively Strengthen Economic Adjudication Work, Provide Legal Safeguards for Economic Construction and the Establishment of the Socialist Market Economy System*] 143 (work report delivered on 21 Oct. 1994 at the Third National Economic Adjudication Work Meeting, *excerpted in* ZUIGAO RENMIN FAYUAN GONGBAO [SUPREME PEOPLE'S COURT GAZETTE], NO. 4, Dec. 20, 1994, at 143.

269. Margaret Y.K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMP. L. 95, 107 (1991).

270. WEN, *supra* note 260, at 91.

271. For example, in one case involving liability for breach of contract made by an association of enterprises created before "partnerships" and "legal persons" were defined in the General Principles of Civil Law, a provincial higher people's court did not decide the case until after the

concerned that their decisions might be reversed, they continue to request instructions from superior courts, a practice that lower court judges call "buying insurance."[272] When a lower court requests instructions on interpreting a law that is involved in a case pending before it, the proceedings will be suspended. Whether the court notifies counsel is at the discretion of the court.[273]

Lower courts also seek instruction from administrative agencies. When the court must interpret a rule that requires the action of a non-judicial administrative agency to implement its interpretation, it will consult with the highest level of that agency beforehand. That administrative superior might then issue instructions within its own hierarchy or bureaucratic system, informing its lower-level agencies of the interpretation, and instructing them to comply.[274]

d. Involvement of the Local Party-state

Numerous extrajudicial influences of which the CCP is only one, often affect the outcomes in specific cases. The vulnerability of the Chinese courts to interference in their work by local representatives of the Party-state has been frankly discussed by insiders and closely studied by foreign scholars.[275] At the beginning of the reforms an effort to remove CCP organizations at the courts from involvement in daily judicial work was aborted,[276] and the evidence of continuing involvement of Party officials in the work of the courts is compelling. For example, a book written by a judge on managing the work of the courts advises courts to rely heavily on the Party Committee:

> [The court] must take the initiative to ask for instruction from

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Court had analyzed the facts, including the written agreement of association, and the law, and decided that the association was a legal person and that its member enterprises were not liable for its debts. Rectification Leading Group of Shanxi Industrial Group v. Guangxi Lingchuan Ferroalloy Factory *in* ECONOMIC ADJUDICATION REFERENCE MATERIALS, *supra* note 255, at 373.

272. WEN, *supra* note 260, at 90.

273. On procedure in the Supreme People's Court, *see* Susan Finder, *The Supreme Court of the People's Republic of China*, 7 J. CHINESE L. 145, 174 (1993).

274. *Id. at* 176.

275. Clarke, *supra* note 160, at 260-268; Clarke, *supra* note 220, at 8 n.23. For one representative foreign view, see Hikota Koguchi, *Some Observations About "Judicial Independence" in Post-Mao China*, 7 B.C. THIRD WORLD L. J. 195, 202 (1987) ("There is no doubt that the Party, and not the court, was, and is, the real decision-maker in P.R.C. adjudication. The Party is clearly the center of judicial power.").

276. Koguchi, *supra* note 275, at 202.

> and report work to the Party Committee of the same level. Issues related to the ideology and organization of the court, the implementation of judicial principles and important policies . . . important and new social developments discovered in the course of adjudication, individual cases involving important social and political influences should be actively reported to the Party Committee to seek guidance and support.[277]

One county court judge offers a strong indictment of the power that local officials wield over the courts. As a result of the power concentrated in local Party Committees and exercised by First Secretaries, he says, "courts cannot avoid being manipulated by senior officials," in a system in which the weakness of the courts is exacerbated by the "unified leadership" of the court by the localities, which control the courts' personnel, finances and housing.[278] This leads to improper pressures on the courts to persuade complaining parties to withdraw suits, to issue judgments not in accord with law and facts and to transfer judges who try to be impartial.

The extent to which the CCP remains embedded in Chinese legal institutions has been closely studied by He Weifang, whose research strongly suggests that the principal affairs of the court are directed by the Party organization within the court, which is itself subject to the leadership of the local Party Committee. Party leadership over the courts is reflected both in selecting judges (in which the local Party committee and its personnel department as well as the Party committee at the court are likely to be involved) and in the handling of some important and "difficult" cases. In such cases: "[the court] often reports . . . to the local Party committee and solicits opinions for solution . . . and if contradictions arise among different judicial organs, the Party's political-legal committee often steps forward to coordinate."[279] Political-legal committees are in charge of the courts, police and Procuracy, as well as civil affairs at each level of organization and these committees also deal with "important and difficult cases."[280] Local Party secretaries regularly reviewed cases before legal reform began[281] and they continue to possess this power. In criminal matters their political influence may be stronger by directly or indirectly exerting pressure to fulfill goals that have been enunciated (although not

277. WEN, *supra* note 260, at 43.
278. Zhou, *supra* note 264, at 10.
279. He, *supra* note 6, at 249.
280. Clarke, *supra* note 160, at 261.
281. *Id.* at 261-62.

numerical targets or percentages like those used in campaigns during the 1950s).[282] Several judges who were interviewed suggested that direct CCP influence in non-criminal matters may be lessening slowly.

In non-criminal cases, however, the *financial* interests of the local Party-state may be strong, and can be more potent and pervasive than crude political influence. Interviews and published discussions indicate that in economic cases officials of the local Party-state frequently seek to influence outcomes, either to prevent local enterprises from suffering losses that would reduce the revenue of the local government or to protect parties to the dispute with whom they have personal or economic relationships.

Some basic characteristics of the non-state economic sector that has been the engine of reform, highlighted in Part One, often significantly affect the work of the courts. Decentralization has not meant a lessening of state control. It has rightly been observed that: "there is nothing particularly non-state about this sector. In China's cities and counties, the two ownership types of state and collective overwhelmingly dominate, and are both managed by the state structure *at that level.*"[283] As noted earlier, whether through partnership, clientelistic relations or bribery, business in the private sector is advancing by promoting particularistic relationships with local government units. Local enterprises must enter into a variety of arrangements with local governments in order to obtain the desired status of collectives and receive protection from the local cadres.[284] The need for these relationship arises, as has already been explained, because local enterprises lack well-defined legal rights that protect their property and local officials may perceive it to be in their interests to keep property rights weak.

As has been noted, local courts are funded by local governments, not the central government. As a result, when local courts deal with legal problems arising out of reform, local officials can use the absence of a strong legal system to their advantage. For example, the courts must sometimes decide which entities should be made parties to litigation involving the debts of defunct enterprises, and it may be difficult to hold government departments liable for their failure to pay in capital as required

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282. Interview on file with the author.

283. Goldstein, *supra* note 14, at 1105, 1116. "[T]he 'non-state' sector is not to be confused with separateness from administrative control." *Id.* at 1118.

284. Oi cautions that "[the term] contracting suggests a degree of autonomy and allocation of property rights that simply is not present. In contrast to agriculture and land, the property rights of township and village firms remain in the hands of local governments." Jean C. Oi, *Role of the Local State in China's Transitional Economy*, CHINA Q., No. 144, at 1132, 1136 (1995).

by law or for improper management practices.[285] Patron-client relations directly affect the application of legal rules[286] and shape the strategies adopted by economic actors to protect themselves.[287] Local protectionism, often inspired by courts' reluctance to impose measures that may inflict serious economic harm on a local enterprise involved such as forcing it into bankruptcy leads courts to refuse to aid other courts, procrastinate in handling cases brought by outsiders, and decide cases unfairly against them.[288]

One judge interviewed by He Weifang illustrated local protectionism with the following example: If the courts are asked by local officials to unfreeze a bank account that they were required to freeze by law, they must comply. A higher level court might admonish the lower court for unfreezing the account, but not the local leadership, which would have had no direct administrative relationship with the higher court. In this kind of situation, "you cannot make the party secretary, mayor or [municipal] district head accountable to others. What they say counts, they have the power, but yet they are not responsible."[289] The judicial newspaper has stated that in poor areas the shortage of funds for courts influences their work and the chief judge's independence. The courts must placate local power-holders, because "Everything the judge does, he has to ask for help."[290] Another judge is explicit on the consequences of this judicial dependence: "If the Bureau of Finance is offended by [your handling of] a case, the new Procuracy building next door will get built all right, but your [court] building won't."[291]

Influence can be exerted on the courts from many quarters. According to one judge interviewed in 1995, inquiries may be directed anywhere in the judicial hierarchy as well as to the local government, the local People's Congress, the NPC, or the Procuracy, at any stage of the

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285. Yangzhou Shi Zhongji Renmin Fayuan (Yangzhou Municipal Intermediate Level People's Court) *Kefu Difang Baohu Zhuyi, Jianchi Yansu Gongzheng Zhifa [Overcome Local Protectionism, Resolve to Seriously and Justly Uphold the Law]*, in ECONOMIC ADJUDICATION REFERENCE MATERIALS, *supra* note 255, at 113, 122-123.

286. Oi, *supra* note 284, at 1136.

287. *See, e.g.*, Wank, *supra* note 20.

288. *See* Clarke, *supra* note 220, at 40-49; *see also* Seth Faison, *Razors, Soap, Cornflakes: Pirating Spreads to China*, N.Y. TIMES, Feb. 17, 1995 (a representative of the State Administration of Industry and Commerce explained that he did not want to seek to impose high penalties for counterfeiting trade-marked goods because of the harm to society that would be caused if the counterfeiting enterprise was forced into bankruptcy as a result).

289. He, *supra* note 6, at 255.

290. *Id.* at 261.

291. *Id.* at 259.

proceedings – even after the case has been decided.[292] One estimate is that some twenty to thirty "proposals" from members of the NPC are submitted yearly to the Supreme People's Court, which replies with reports to the NPC member on each matter.[293]

Discussing the problem in a book edited by the Economic Division of the Supreme People's Court,[294] the authors admit that cadre interference must be eliminated if the courts are to be independent, although they also recognize that the courts cannot solve such problems themselves. In the face of the political realities that presently constrict judicial autonomy, the authors turn timid. They say that "comprehensive handling" is necessary, and that it is necessary to "improve and adjust certain (*mouxie*) relationships"[295] involved with the bureaucratic system, so that courts can resist the pressure from administrative cadres. More specifically, the authors recommend that when cadres from the Party, government or NPC ask for reports on pending cases, the judges should explain the law, noting that very often an interested party has related the facts incorrectly. They add the pious view that if the judges sincerely handle the case, report on it accurately and explain the law clearly, practice shows that the majority of leaders will support the right of the courts to carry out independent adjudication. It has also been suggested that local officials may cease their pressure to influence particular outcomes if lower courts are acting according to instructions from higher-level courts, because lower level officials understand that lower courts, like themselves, must obey higher level instructions.[296]

3. Judgments and Enforcement; Local Protectionism

The impact on the judicial process of the increased strength of local governments is most visible in efforts to collect judgments. The formal requirements for judgments are easily summarized: Judgments must be publicly pronounced. Once pronounced in court, a written judgment must be issued within ten days; if pronounced later, the written judgment must follow immediately. In any event the parties must be informed of their rights to appeal and the court to which appeal must be addressed.

Even when parties overcome traditional reluctance to sue, and

292. Interview on file with the author.
293. Finder, *supra* note 273, at 153.
294. ECONOMIC ADJUDICATION REFERENCE MATERIALS, *supra* note 255, at 106-112.
295. *Id.* at 111.
296. Finder, *supra* note 273, at 173.

persevere through litigation to obtain a favorable judgment, they may fail to vindicate their claim because of difficulties in enforcing court judgments. In 1988, Supreme People's Court President Zheng Tianxiang acknowledged that "about 30 percent of the economic dispute cases on which courts made decisions last year were not enforced, and the ratio exceeded 40 percent in some provinces." Zheng blamed "local protectionism and selfish departmentalism, which make it difficult to execute court rulings."[297] Adequate statistics are not available, although Donald Clarke suggests that in 1992, around 35 to 40 percent of all civil and economic disputes were referred to enforcement divisions, and that the reported success rate in such referrals is 80 percent. The statistics cannot be relied on except to indicate that the problem is considerable.[298]

The original court of first instance normally carries out execution of its judgments through its enforcement division, but if the losing party either is domiciled or has property outside the district in which the judgment is rendered, the court that has awarded the judgment must request the assistance of other courts to reach the defendant's person or property. If a party fails to comply with a judgment the other party may apply to the court for execution within specified time limits, or the court itself may initiate execution proceedings. The CPL arms the courts with the power to order "compulsory execution measures" such as freezing bank accounts, confiscating or withholding part of a party's income or ordering the confiscation or sale of a party's property. (Arts. 221, 222).

Judgments may be unenforceable for a variety of reasons. The economic reforms have brought about changes that make Chinese organizations less powerful over the persons who work in them. As Clarke points out, when all workers are state workers it is easy to garnish the salary of those who are judgment debtors, but that becomes impossible when the debtor in question is a private business person with no wages to garnish.[299] But more serious problems arise out of fundamental changes in the Chinese Party-state that have been discussed earlier in the survey of economic reform and its consequences in Part One. Ren Jianxin, President of the Supreme People's Court for over a decade until he retired from that post in 1998, enumerated the following causes of non-enforcement of

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297. Zheng Tianxiang, *Zuigao Renmin Fayuan Gongzuo Baogao* [*Supreme People's Court Work Report April 1, 1988*], *reprinted in* ZUIGAO RENMIN FAYUAN GONGBAO [SUPREME PEOPLE'S COURT GAZETTE], NO. 2, 3, at 8 (June 20, 1988).

298. Clarke, *supra* note 220, at 34. Clarke notes a study suggesting that in 11 New Jersey counties in 1987 only 25% of all writs of execution in civil cases were returned fully satisfied.

299. *Id.* at 86.

judgments:[300]

(i) enterprises "deep in the red" are unable to pay their debts;

(ii) localities or departments protect local units and refuse to cooperate with the courts;

(iii) parties that lack "a strong sense of law" avoid their obligations; and

(iv) a small number of decisions are "unfair" and can not be enforced. To these a number of other reasons have been added by Donald Clarke:[301]

(i) a genuine reluctance to use coercion in civil cases that flows from the Maoist notion that these disputes are contradictions "within the people" and not with an "enemy";

(ii) the lack of finality in the Chinese system that arises out of the multiplicity of avenues that unsuccessful parties can use to relitigate a case (discussed below); and

(iii) the immunity in practice of certain enterprises, such as those run by the military.

Of these, the most serious may be local protectionism. The same political and economic forces that may influence the outcome of judgments can also create formidable obstacles to enforcing a judgment against a local individual or enterprise. Economic reform has increased the dependence of local governments on revenue from local enterprises and has consequently increased their inclination to defend local enterprises against economic damage.[302] Local governments possess considerable resources to defend themselves, for example by employing the local police and Procuracy to resist the enforcement of judgments against local enterprises.[303] Some reports have told of clans resisting enforcement.[304]

Sometimes local protectionism combines with the financial weakness of state-owned enterprises. As noted by Ren Jianxin, many enterprises are unable to pay their debts, including their judgment debts. In addition,

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300. *See Supreme People's Court Work Report (April 4, 1993)*, *supra* note 235, at 20. This catalog by China's chief judge is sufficient evidence of the gravity of the problem. A more detailed and scathing review is *China: Protectionism Rampant in Legal Enforcement*, in FBIS, *supra* note 50, No. 97-044, Feb. 17, 1997, a translation of *Resolutely Eliminate Local and Departmental Protectionism in Law Enforcement*, LIAOWANG [OUTLOOK], No. 7, at 4 (Feb. 17, 1997) (*available at* WNC Website, *supra* note 81).

301. Clarke, *supra* note 220, at 35-37, 38-40, 63-64.

302. *Id.* at 41-42.

303. *See, e.g.*, Zhou, *supra* note 264; *Procuratorates Told Not to Overstep Authority (Aug. 15, 1992)*, XINHUA NEWS SERVICE, *in* FBIS, *supra* note 50, No. 92-159, Aug. 17, 1992, at 30.

304. *See, e.g.*, Yu Bo, *Guidong Baoli Kangju Zhifa Anjian Shimo [The Beginning and End of a Violent Obstruction of Justice in Eastern Guangxi]*, FALÜ YU SHENGHUO [LAW AND LIFE], No. 3, at 31 (1995).

however, local governments have sometimes helped to make them judgment-proof. When government credit was tightened in the late 1980s in an effort to restrain inflationary economic growth, the working capital of many enterprises shrank and they became technically insolvent. But, as Clarke notes, some government departments that run enterprises escaped liability by closing businesses down or by using subterfuges to avoid the impact of legislation that imposed liability on local administrative agencies.

"Local protectionism" is an ominous reason for non-enforcement of judgments because it testifies so strongly to the weakness of the central government and the fragmentation of the legal system. Some law enforcement officials and judges have called for the need to employ a national perspective in order to protect legality, fairness and the national interest.[305] Sometimes local courts are congratulated in the judiciary newspaper for soliciting or seeking instructions from local Party and government leaders when presented with important cases involving enforcement problems.[306] Appeals to judges to consider national interests that transcend those of their localities, however, seem unlikely to succeed in a political culture in which each hierarchy makes vigorous efforts to protect its turf. An authoritative Chinese source mentions "agency protectionism" (*bumen baohu zhuyi*) and "local protectionism" side by side,[307] and both reflect a disarray in the state apparatus that obstructs the growth of regularity and legality. For example, courts seeking to enforce judgments might discover that agencies whose action is required to assist the courts will not cooperate. Such disobedience to court orders arises, in part, because in the Chinese bureaucratic scheme courts do not rank in authority above the banks but merely belong to a hierarchy, or *xitong* ("system") that exists *parallel* to banks and all other agencies. "Protectionism," it is clear, pervades the judicial process and constrains the growth of judicial autonomy. The extent to which it can be reduced will depend on many factors outside the legal institutions themselves.

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305. *See, e.g.*, Tang, *supra* note 264.

306. He, *supra* note 6, at 256. A Xinhua press release in 1998 reported that Supreme People's Court President Xiao Yang had referred to "the current situation [in which] people's courts are seriously troubled by difficulties in executing their verdicts,' and added that the Court had "commended 38 courts of law which have distinguished themselves in executing courts verdicts." *China: Supreme Court President on Executing Courts Verdicts*, XINHUA NEWS SERVICE, *in* FBIS, *supra* note 50, No. 98-128, May 7, 1998, *available at* WNC Website, *supra* note 81, May 8, 1998.

307. ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1995, at 98.

4. Review of Lower Court Decisions after Judgment

Every judicial system has to strike a balance between reviewing the outcomes of cases for consistency with law and policy and assuring their finality so that disputes will be ended and expectations made secure. A striking aspect of the Chinese judicial system is the low degree of finality that judicial decisions—and successful litigants—are permitted to enjoy because of a variety of means that allow cases to be reviewed and reopened.

a. Appeal

When a case is appealed the court of second instance may consider all relevant issues of fact and law, regardless of what issues were raised by the parties either in the lower court or on appeal. Chinese practice diverges from that of common law jurisdictions, in which appeals are limited to the issues raised by the parties and factual issues are not reexamined. In this, Chinese appellate courts are more like courts in civil law jurisdictions. The appellate court forms a collegiate bench, as in the lower courts, and in addition to reviewing the record may also conduct its own investigations and question the parties. After having done so, it may consider the facts of the case to be verified and render a judgment without a hearing (Art. 152), or it may also collect new evidence and hold an entirely new hearing. The court may reject the appeal, set aside the lower court judgment and remand it for a retrial, or modify the judgment. Appeals may only be made to the next highest level, and consequently, judgments of courts of second instance are final and further appeal is barred, although the CPL also provides that parties "may appeal against a new judgment or ruling rendered after a retrial of their case" (Art. 153).

Lower-court judges know that appeals from their decisions can affect their record and chances of promotion, and their resulting concern to avoid reversals impels many to encourage mediation of cases that come to their courts. Judges may also exert pressure on the parties not to appeal.[308] Concern may also run in the opposite direction: Higher-level courts may sometimes refrain from reversing lower court judgments out of concern for the feelings of the lower court judges, or focus only on the substantive result reached by the lower court while overlooking procedural irregularities; sometimes, for the same reason, the higher court may send

308. WEN, *supra* note 260, at 90-91.

the case back for retrial rather than reverse the lower court decision.

b. Petition

In addition to review by appeal, the CPL provides that for up to two years after a judgment or ruling has become legally effective, a party may petition either the court that originally heard the case or a higher-level court for a retrial. (Arts. 178, 182). Such a retrial may be ordered if:

(i) new evidence compels reversal of the original judgment;

(ii) the evidence on which the original judgment was based is insufficient;

(iii) the original judgment misapplied the law;

(iv) the court of first instance committed a procedural violation that affected the correctness of its judgment; or

(v) judicial personnel "accepted bribes, practiced favoritism for personal benefit or perverted the law" (Art. 179).

One judge described the handling of petitions.[309] Many courts have offices that handle "visits from the people." When a person presents a matter that he claims was handled wrongly, the staff and some judges would discuss it. If the staff member who investigates finds errors the matter will be discussed informally at a higher level, such as with a section chief (*zuzhang*). If the petition is presented to a higher court, it could decide that a mistake had been made that did not critically affect the result, or send a memorandum to the original trial court, indicating that a litigant claimed that the court erred and had requested a review. The higher court will then decide that the original decision was correct, should be modified, or should be reversed. The procedure, to this point, can be characterized, as the judge interviewed put it, as an "informal administrative proceeding." It becomes more formal when the matter is returned to the trial court, which may not wish to change its decision. In that event, the upper-level court will issue a formal finding that the possibility of error exists and order that the matter be formally reopened. After this opinion is drafted and before it is sent to the lower court it will be reviewed internally by the group leader, then a *tingzhang*, who will then refer it to the Adjudication Committee for decision.

309. Interview on file with the author.

c. *Supervision*

Judgments may also be reviewed and reopened without any request by the parties, as an administrative matter, either by the court that rendered the original judgment or by a higher level court. The CPL provides that if a chief judge finds a "definite error" in a legally effective judgment or ruling, he shall refer the matter to the Adjudication Committee of the court (Art. 177). Similarly, if the Supreme People's Court finds a "definite error" in the decision of any lower level court or if a higher level court discovers such an error in a lower level court, the higher courts may either review such matters themselves or order retrial at a lower level (Art. 177).

A group of judges interviewed in late 1995 expressed differing views on how cases were selected to be reviewed. One stated that his court reviewed cases that had aroused considerable "public comment." A small percentage of cases were also selected randomly for quality control, targeted by subject matter or by lower court. A Beijing judge said that in reviewing cases, notice was taken not only of major errors that required reversal or modification of lower court opinions, but also of less serious errors that had not in themselves caused the decision to be wrong. These would be recorded and discussed by the reviewing judges at periodic meetings with the lower level judges who had been involved.

One judge at a high-level court interviewed in 1995 stated that readjudication is highly flexible, and that the courts have great discretion to decide whether or not to review a case. In such cases, if the lawyers or the parties know the judges personally, such relationships could influence the decision to review. Judges exercise enormous discretionary power, and procedure is so informal that it lends itself to unreviewable decisions. Interviews with two practicing lawyers, also in 1995, supported this assessment.

d. *Procuratorial Review*

The People's Procuracy was established in the early years of the PRC. Like the Soviet institution on which it was modeled it was formally entrusted with two roles, i.e., carrying out the duties of a public prosecutor and supervising the legality of the organs of the state. In practice, the "general legal supervision" function withered and died during the 1950s, but with the advent of reform it has been revived. Under legislation promulgated in 1992 the Procuracy at each level may protest to the court

at that level judgments that have already become legally effective.[310] An exception is that when judgments of basic level courts are protested, the Procuracy at that level must request a higher level Procuracy to handle the matter. Protests may be on the grounds of insufficient evidence, errors of law, violations of procedure that affect the correctness of the judgment, or the same types of misconduct by judicial personnel that may be the foundation of parties' protest.

e. Multiple Avenues of Review and Finality: Implications

The multiplicity of means of review of trial court judgments and the resulting detraction from the finality of their decisions suggests a considerable difference between Chinese and Western conceptions of a judicial system. In the Western view, as long as the parties have had a fair and full hearing, they should not obtain a second hearing of the same facts and issues. Procedural justice is so important that some substantive injustice will be tolerated in the interests of stability. The Chinese system, by contrast, displays "a [broad] reluctance to allow any aspect of procedure to dictate a substantive result, a reluctance that finds expression throughout the legal system."[311]

The multiplicity of avenues of review has obvious implications for the attainability of the rule of law in China. In the West, that concept expresses the aspiration for society to be governed by laws that are prospective, ascertainable, uniformly applied and stable. Opening judicial decisions to scrutiny long after they become effective introduces instability that undermines the legitimacy of the judicial system.

5. Judicial Mediation

The predominance of mediation does not end at the doors of Chinese courts. Some of the forces that shape extrajudicial mediation—cultural tradition, Maoist political roots, and limits on available resources—also lead courts to rely heavily on mediating civil disputes. Because mediation at the courts is so extensive, it deserves close examination.

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310. Zuigao Renmin Jiancha Yuan Guanyu Minshi Shenpan Jiandu Chengxu Kangsu Gongzuo Zanxing Guiding [Interim Provisions of the Supreme People's Procuracy Concerning the Work of Civil Adjudication Supervision Procedure and Protest], *in* ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1993, at 733.

311. Clarke, *supra* note 220, at 83.

a. *Judicial Mediation as a Major Mode of Dispute Resolution*

We begin with a basic fact: Well over half of all the civil and economic disputes brought to the courts are mediated. In the mid-1980s the Ministry of Justice *expected* the courts to conclude no less than eighty percent of all civil disputes by means of mediated settlement.[312] Statistics for recent years indicate that although the percentage is now lower, it is still closer to 60% and mediation retains its dominant position.[313]

Civil Cases by Disposition, 1990-1996

Year	Case Concluded	Mediated	Adjudicated or Decided by Ruling	Other	Transferred
1990	1,849,728	1,194,350	353,940	301,438	
1991	1,910,013	1,128,465	456,000	325,548	
1992	1,948,989	1,136,970	460,932	351,047	
1993	2,091,651	1,224,060	854,227		13,364
1994	2,382,174	1,392,114	977,773		12,287
1995	2,714,665	1,544,258	1,156,823		13,584
1996	3,084,464	1,672,892	1,395,061		16,511

Year	Cases Concluded	Mediated	Adjudicated or Decided by Ruling	Other	Transferred
1990	1,849,728	64.6%	19.1%	16.3%	
1991	1,910,013	59.1%	23.9%	17.0%	
1992	1,948,989	58.3%	23.6%	18.0%	
1993	2,091,651	58.5%	40.8%		0.6%
1994	2,382,174	58.4%	41.0%		0.5%
1995	2,714,665	56.9%	42.6%		0.5%
1996	3,084,464	54.2%	45.2%		0.5%

Source: ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1991(934), 1992 (855), 1993 (936), 1994 (1028), 1995 (1064), 1996 (958), 1997 (1056).

312. Michael Palmer, *The Revival of Mediation in the People's Republic of China: (2) Judicial Mediation, in* YEARBOOK OF SOCIALIST LEGAL SYSTEMS 1988, at 143, 145 (W.E. Butler ed., 1989).

313. Jiang & Li, *supra* note 131, at 189.

b. Procedure

The Chinese Law on Civil Procedure provides very generally for mediation. All civil cases once accepted by the courts can be mediated (Art. 85). Judicial mediation, must be initiated on the basis of the parties' voluntary participation and conducted by "ascertaining the facts and distinguishing right from wrong" (Art. 85). Mediation may be done by one or more judges, and "as far as possible" should be done outside the courtroom, "on the spot" (Art. 86). The courts may invite relevant units and people to assist the mediation (Art. 87). Mediation may not be coerced, and the parties should reach agreement voluntarily (Art. 88). If mediation ends with an agreed settlement, it must be recorded in a formal agreement, prepared by the court and signed by the judge. It becomes legally effective when delivered to the parties. Such agreements are required in all but divorce actions that end in reconciliation, adoption cases that end with the maintenance of the adoptive relationship, or in other cases in the discretion of the judges. (Arts. 89 and 90). If mediation is not effective or a party decides not to carry out such an agreement, the court must "promptly" adjudicate the matter (Art. 91). Mediation can be carried out at any time before a judgment is rendered (Art. 128). Mediation is also possible on appeal.

c. Common Problems

Within this very general framework, is mediation inside the courts conducted any differently than outside them? Although procedure in the court could arguably be "more rigorous, structured and weighty than that relied on in extrajudicial mediation,"[314] considerable evidence suggests that judicial mediation is often as amorphous and open to abuse as extrajudicial mediation. The authority and responsibilities of judicial mediators are greater than those of extrajudicial mediators, judicial mediation may deal with more complicated issues, and the judges' participation is probably more active than that of extrajudicial mediators. Interviews with judges and Chinese scholarly commentary alike suggest that the differences between the two kinds of mediation may be less than might be expected, and that judicial mediation not only exhibits some of the same problems that surround extrajudicial mediation, but others as well. A variety of sources suggest that in practice judicial mediation raises some serious issues of

314. Palmer, *supra* note 312, at 153.

legality.[315]

(1) Mediation and Adjudication Are Not Rigorously Separated

If mediation fails and the court elects to try the case, it may without further investigation rely solely on the information acquired by the judge while he acted as a mediator. Often, critics say, a court secretary will be assigned to mediate and will propose a solution, but if it is not accepted, that proposal then becomes the basis for the decision without any judicial participation. One judge who was interviewed agreed that sometimes court secretaries mediate, explaining that they often have a better legal education than judges.

(2) Judges May "Plaster Over" the Dispute

Another complaint is that the mediating judge often foregoes investigation and superficially compromises the dispute in the name of reasonableness, but without defining and resolving the parties' rights and duties. This style should be distinguished from the combination of law with "emotion and reason" that was mentioned in discussing people's mediation. The Chinese phrase "to do work (on)" is often used to describe the judge's conduct toward parties, and connotes a range of techniques that bureaucrats engage in to persuade, cajole and coerce the person who is the object of the "work" to agree or submit to the speaker. Liu and Li argue that this is inimical to the protection or exercise of rights and also undermines the legal system.[316] It affects the trust that parties place in the court disappoints their hope that judicial mediation will be better than village mediation, and increases their reluctance to return to the courts. Furthermore, Liu and Li argue, if many citizens become disappointed, the growth of such a mentality may endanger social stability because it could lead to more attempts at self-help.

(3) Coercion by the Courts; In General

In some cases a judge may conduct mediation and then, if the parties

315. ZHONGGUO MINSHI SUSONG FA JIAOCHENG [TEXTBOOK OF CHINESE CIVIL PROCEDURE LAW] 316-329 (Wang Huaian ed., 1994) [hereinafter CCPL TEXTBOOK]; Liu & Li, *supra* note 139, at 285, 316-320.

316. Liu & Li, *supra* note 139, at 318-319.

do not accept his proposed solution, adjudicate the case on the basis of the rejected proposal. This creates much pressure on the parties, who are afraid that they will lose in the adjudication. The Civil Procedure Textbook states that when the CPL was modified by substituting the phrase "carry out lawful mediation based on voluntarism and law" for the previous injunction to "emphasize carrying out mediation," this change was not intended to weaken mediation as an institution, but was aimed at "one-sidedly" raising the number of mediated cases, and at reducing coerced and illegal mediation.[317]

Interviews with judges add further detail.[318] A judge who served in a basic-level court during the mid-1980s stated that at that time, all cases were routinely mediated. These were civil matters, usually divorces, and the rate of settlement was high. The judges "mobilized" the parties, indicating that if they did not come to a reconciliation the dispute might take as long as a year or more to adjudicate. After a notice was issued by the Supreme People's Court in 1987 emphasizing voluntariness, the number of cases settled by mediation declined. But as changes in economic policy affecting legal rights and obligations swelled courts' caseloads, pressure on the courts to mediate increased.

A second judge who had served in a basic-level court during the late 1980s said that the Civil Procedure Code's emphasis on mediation had been revised because the law was not being applied and too much time was being taken by mediation in the courts. There was much "stirring up the mud," i.e., disputation without really settling the cases.

A third judge, who had served both in district (basic-level) and intermediate-level courts in Beijing during the mid-1980s, said that although some 80% of cases in rural counties were dealt with by mediation, only 60% were handled in this manner in the cities. Coercion was a problem against which there was little protection. The judges liked mediation because it was simple and because one, not three judges, were needed to do the work, since a court secretary could conduct the mediation. Reflecting a general inattention to procedure that has been remarked on by Chinese legal scholars in conversations on the subject, many thought they could violate the law when conducting mediation because they regarded it as entirely extra-legal.

These interviews suggest that coercion remains as much of a problem inside the courts as it is outside of them. Indeed, because the courts are

317. CCPL TEXTBOOK, *supra* note 315, at 178.

318. Summaries of these interviews, conducted by the author in 1995 in New York and Beijing, are in the author's files.

more authoritative than mediation committees, the problem may be worse. Some factors that impel judges to press for mediation are discussed immediately below.

(4) Gaps in the Law

Judges often encounter disputes that are novel, and whose subject matter has not been addressed by legislation. In these circumstances they see no choice but to mediate.[319]

(5) Bureaucratically-generated Pressures on Judges to Mediate

One thoughtful Chinese observer traces problems to the bureaucratic setting of judicial dispute settlement:

> In practice, judges prefer to use mediation because the successful rate of mediation is used as a quota in evaluating the achievements of the court. The more cases the judges successfully mediate, the more praise they will receive from their superiors. As a result, delays frequently occur due to the judge's insistence on using mediation in spite of the fact that the dispute in question is not likely to be resolved through mediation. This kind of practice has received much criticism in recent years.[320]

Although these words were written in 1984, more recent research suggests that some of the pressures on judges to mediate have persisted. Mediation can be used to avoid the possibility of appeals. One judge stated that in basic-level courts, judges' chances for promotion are influenced by the number of their cases that are subsequently reversed or retried. Judges do not wish to write long opinions that might be reversed, and generally appeals from their decisions are considered to reflect badly on them if they are reversed. Another judge said that during the mid-1980s the percentage of cases settled through mediation was required to meet a standard that varied from court to court, but sometimes could be as high as 80%-90%.

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319. Li Hao, *Minshi Shenpan Zhong de Tiaoshen Fenli* [*Separating Mediation and Adjudication in Civil Trials*], FAXUE YANJIU [LEGAL RESEARCH], NO. 105, 57, at 60 (1996).

320. Wang Jianping, Judicial and Administrative Mediation in the People's Republic of China 18 (May 1984) (unpublished manuscript in the author's possession).

Adherence to or deviation from this standard would be noted in their record, and would affect their chances for promotion.

(6) Pressure on Courts to Mediate Because of Difficulty of Enforcing Civil Judgments

"Local protectionism," which has been identified above in the context of enforcement as a critical weakness of the current Chinese judicial system, may also influence judges' choices of the mode of resolution. Courts often simply wish to mediate rather than adjudicate a dispute when they believe that it would be difficult to enforce a judgment against a local party.[321] One judge in Yangzhou reports that *whenever* a litigant from outside the province appears, his court always attempts to settle the dispute through mediation rather than risk encountering opposition to a judgment that resulted from an adjudicated end to the dispute.[322]

(7) Mediation at the Second Instance

Mediation can be conducted at all stages of a dispute, and is built into appellate procedure as solidly as in trial procedure. This further contributes to the lack of finality in the judicial process because it gives the parties an opportunity to renegotiate even those lower court decisions that clarified the facts and applied the law correctly. According to Palmer, sometimes a party who resists mediation and loses in the trial court appeals and then accepts mediation at the appellate level, reasoning that he will do better because the result reached by the lower court will be undercut by a compromise.[323]

(8) Pressure on the Courts to Mediate Generated by Their Rising Workload

As economic reform created new economic relationships, the number of disputes inevitably increased. At the beginning of the 1980s disputes were handled only by the mediation committees and the courts, which created economic divisions in 1979. Numerous *ad hoc* organizations to arbitrate economic disputes were created throughout the 1980s, but have

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321. Palmer, *supra* note 312, at 149-151.

322. Yangzhou Shi Zhongji Renmin Fayuan [Yangzhou Municipal Intermediate Level People's Court], *supra* note 285, at 15.

323. Palmer, *supra* note 312, at 163.

since been replaced by a nation-wide arbitration system. By the mid-1980s, the rapid growth of contract disputes seemed to require the creation of additional mechanisms.

One experiment, apparently short-lived, illustrates the persistence of devotion to mediation.[324] On the initiative of Ren Jianxin, then President of the Supreme People's Court, Economic Dispute Mediation Centers (*Jingji Jiufen Tiaojie Zhongxin*, hereinafter EDMC) were established, first experimentally in Shenzhen and at other courts. All economic disputes brought to the courts had to be mediated at the new Centers. Although they were very speedy in processing cases, many scholars criticized them. Although this innovation was reported to the NPC for approval, no legislation was ever promulgated to formalize the creation of the new centers: Their procedure was not governed by law; when mediation failed the parties had to pay court fees again for the adjudication phase that then followed; their power was great, and opportunities for corruption were greater.[325]

To some extent, opposition to the Centers developed as a result of changing notions about rights. New economic policies gave enterprise managers more power over the property of their enterprise and the managers became more personally interested in the economic outcomes of their disputes. If a dispute was taken to the EDMC, both parties to the dispute anticipated that they would have to compromise if the dispute was mediated, yet they were reluctant to abandon positions based on their view of their rights under the contract in question. The use of lawyers in economic disputes has grown, especially in the cities. Lawyers are used in 90% of "large" cases, according to a Chinese judge with whom the centers were discussed. Most recently, the Chinese press has stopped referring to

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324. This discussion is based on separate interviews by the author with three legal scholars in Beijing in late 1995 and early 1996.

325. One scholar has suggested in discussions that mediation was a means of increasing the revenue earned by the courts because the court retained 20-30% of the fees. Lawyers, too, favored the new centers because they were used as mediators as well as judges. In the absence of jurisdictional rules, lower courts began to create such centers. There was also doubt as to whether the centers could, like the courts, use compulsory measures to protect property during a dispute. The relationship between the new centers and the economic divisions of the courts was unclear. According to the scholars interviewed, legal scholars opposed the EDMCs and a negative report was written by staff at the Supreme People's Court. The Court decided that the system should be rationalized, but no specific measures were adopted. At a conference of economic judges in 1993 the centers were discussed and the experiment was allowed to continue, although negative opinion continued to be expressed. Meanwhile, the rising number of cases has remained a problem. In 1996, the 1,519,793 economic cases received by the courts represented an increase of 17.8 percent over the previous year. ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1997, at 1056.

the EDMCs, and their function is declining in favor of new arbitration tribunals established under the Arbitration Law promulgated in 1994.

d. Contending Views of Legality

Rights-oriented solutions and solutions more obviously based on compromise are likely to continue to compete. Will mediation endure because of culturally-dictated preferences? As I suggested in "Mao and Mediation," although traditional influences lent some support to the use of mediational forms favored by Communist ideology, those influences also diluted the politicization of mediation. As the foregoing discussion has shown, some preferences for mediation over adjudication have lingered within the courts themselves, despite the decline of Communist ideology generally and the frequent extolling of rights-related adjudication in the courts as a matter of policy.

At the same time, mediation is being reexamined, at least by some judges and legal scholars who criticize its excessive use and would like to reduce the proportion of disputes that are mediated. Two scholars have suggested that mediation is not the best way to define and protect the rights that were being created by the economic reforms,[326] and another has criticized it for wasting time, producing "plastered-over" or coerced outcomes and one-sidedly promoting the development of judges' skills at mediating rather than adjudicating.[327] By compromising cases mediation allows parties who breach contracts to escape full liability for their breach; by restricting appeals it allows substandard work by judges and it exposes judges to the possibility of corruption.[328] The increased use of lawyers by some litigants, especially in the cities, expresses their resistance to diluting legal rights by compromise. One judge commented in an interview:

> The lawyers make it difficult for the judges to mediate. A basic feature of mediation is to ask each party to give up some portion of their legal rights, while lawyers will emphasize the rights of the parties. Maybe now in the cities [in economic disputes] some 50% of the parties would have lawyers, and all legal persons have lawyers. In civil and adoption cases over 60% of the disputants might not have lawyers, but this is changing, too.

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326. Jiang & Li, *supra* note 131, at 163
327. Zheng, et. al., *supra* note 172, at 26.
328. Jiang & Li, *supra* note 131.

> Mediation also allows external reasons to influence the disposition of the matter. Some judges do not want to waste time on mediation, they have strong legal educations and want to judge cases according to law. These are the younger, better educated judges. There is a hopeful trend here.[329]

This suggests that at least in the cities a new rights-consciousness is emerging that prompts disputants to seek adjudication rather than mediation.[330] While this may be a trend, it has begun to emerge only slowly: Litigants were represented in less than a quarter of the cases heard by the courts in 1996, as has been noted.[331]

6. Judicial Ethics

Judges may be subjected to powerful pressures that often affect their decisions. The pressures come from both within and outside the courts, and the judges' tasks are made difficult because their domain is not separated from the world, bureaucratic and otherwise, outside the courts. Quite apart from being asked to accept bribes and otherwise benefit from clearly corrupt conduct, they are the objects of other not-so-subtle pressures on their judgments and emotions by the governments that appoint them and pay their salaries and by connections (*guanxi*) with interested parties, such as relatives or administrative superiors. The high value that Chinese culture places on enduring human relationships denoted by the two Chinese concepts of *guanxi* and "human feelings" (*renqing*) often leads to behavior that in the West would be considered corrupt. For example, one judge has noted the obvious implications of inquiries about pending cases by the high government officials who appoint, remove and pay the judges: "[These] leaders don't have to give you gifts, because they are your superiors. But to handle the case the way they ask, that's doing them a favor. In the

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329. Interview on file with the author.

330. Some foreign visitors to China during the 1980s, including Chief Justice Warren Burger, uncritically praised China for reducing litigation through the use of mediation and advocated that the West study China in this regard. *U.S. Chief Justice in Shanghai*, XINHUA NEWS SERVICE, Sept. 8, 1981, *in* BBC-SWB, Sept. 10, 1981, at FE/6824/A1/1. Palmer found increasing interest in having the Chinese courts operate in a more rigorous manner than that infused with "the popular-participatory approach that dominated during the more radical years of socialist rule [and move] to a more professional orientation." Palmer, *supra* note 312, at 168. He found that "serious consideration" had been given to "restricting the role of judicial mediation," *id.* at 169, and it has declined somewhat since he wrote.

331. 5,712,669 cases of all types were heard by the courts in 1996; lawyers represented clients in 979,301 cases, or 17%. ZHONGGUO FALÜ NIANJIAN [CHINA LAW YEARBOOK] 1997, at 1055, 1074.

future, if your court has some kind of problem, you find those leaders and they can fix things for you."[332]

The judges' lack of distance from their communities together with their low salaries makes them susceptible to misconduct that influences their impartiality. One commentator has noted that "the relative social acceptability of supplemental financial payments (such as for travel to collect evidence) means that bribery of judges is a widespread phenomenon."[333]

He Weifang has noted that although current policy stresses objective adjudication, it is difficult to ascertain how deeply it is taking hold. The media rarely reports cases of serious violations of judicial ethics, and the judges he interviewed were generally reluctant to discuss corruption and violation of ethics. He assumes, though, that such conduct is extensive, and conversations with Chinese lawyers, judges and law professors are corroborative.[334] He Weifang notes, in one case, a judge self-reportedly refused a large number of bribes and banquet invitations. For that, "she was ridiculed by her neighbors, treated coldly by her friends and was even the object of revenge and abuse by scoundrels, but in the end she won the trust and praise of the masses."[335] After giving other examples, he suggests that the frequency of such articles shows how serious bribery has become and concludes that China lacks a "comprehensive system of standards, of judicial professional ethics," as well as a system for enforcing such ethics.

Courts are being enmeshed in relationships among officials and private enterprises that involve both traditional values and the newly respectable profit motive. Pressures on judges to accept bribes or to favor local parties are generated by low salaries and financial dependence on local governments. One Chinese legal scholar quotes a statement made at a meeting of high-level court presidents: "In the past two years some problems among court personnel have already become quite serious, the phenomenon of corruption has been growing ferociously and developing quickly. In some places it is relatively common for court workers to accept favors and presents, it is done almost half-openly."[336] Also, judges have not

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332. He, *supra* note 6, at 279.

333. Finder, *supra* note 227, at 69.

334. *See* He, *supra* note 6, at 272-273 (noting the blatant behavior of two litigants who went to judges' offices to offer bribes).

335. *Id.* at 266-67.

336. Li Hao, *Lun Fayuan Tiaojie Chengxü Shitifa Yueshu de Shuangchong Ruanhua: Jianxi Minshi Susong Zhong Pianzhong Tiaojie Yu Yansu Zhifa de Maodun [On the Double Weakening of Procedural Law and Substantive Law in Judicial Mediation: Analyzing the Contradiction Between Emphasizing Mediation and Rigorously Upholding the Law in Civil Litigation]* FAXUE PINGLUN

been expected to maintain a greater distance from their local communities than other officials, indeed:

> [judges] generally work in their home district, where they have long-standing ties with classmates or friends who are lawyers, business people and government officials. Certain aspects of the Chinese social environment also influence the way Chinese judges approach cases. In particular, Chinese society places a high value on the maintenance of proper relations, both among institutions and individuals. Therefore, Chinese judges may accommodate their decisions to maintain good relations with powerful persons, institutions, or companies.[337]

Relationships and corruption, then, in a society increasingly without moral compass, pose strong threats to judicial independence, perhaps as serious as that of political control by the CCP.

At the same time, in the midst of their difficult circumstances, Chinese judges must decide disputes brought to them by growing numbers of litigants. The discussion below explores the sources of the legal rules that judges apply in their decisions, and the support they seem to provide for assertions of the new rights that have been created by legislation implementing the economic reforms.

III. SOURCES OF LAW

Chinese constitutional rules and doctrine are deceptively and superficially clear about the allocation of the power to generate rules of society-wide application, as has been noted in Part One. Nonetheless,

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[LEGAL STUDIES REVIEW], No. 4, 11, at 12 (1996) (citing *Miandui Gaige de Xin Xingshi—Guanguo Gaoji Fayuan Yuanzhang Huiyi Fangtan Lu [Facing a New Style of Reforms—Interviews from the National Meeting of High-Level People's Court Presidents]*, RENMIN SIFA [PEOPLE'S JUDICATURE], No. 2 (1994)). In 1998 a campaign was announced against abuse of power by the police and the courts, and corruption in the courts was specifically targeted. *See, e.g., China: Cleaning Up Judicial Organs, Police, in* FBIS, *supra* note 50, No. 98-169, June 18, 1998; *China: Article Urges Control Over Judicial Powers, in* FBIS, *supra* note 50, No. 98-134, May 14, 1998; *China: CPC [Communist Party of China] to Rectify Political, Legal Affairs Organs, in* FBIS, *supra* note 50, No. 98-170, June 19, 1998. *China: Wei Jianxing Speaks at Forum of Court Presidents, in* FBIS, *supra* note 50, No. 98-190, July 9, 1998; *China: Li Peng at NPC Judicial Affairs Committee, in* FBIS, *supra* note 50, No. 98-262, Sept. 19, 1998 ("public corruption and unhealthy tendencies in the Party are steadily infiltrating the judicial ranks"). *See also China: Circular Bans Business in Judicial Administration, in* FBIS, *supra* note 50, No. 98-217, Aug. 5, 1998.

337. Finder, *supra* note 227, at 69.

issues of fundamental importance have emerged over the sources of the rules of law that Chinese courts apply in the cases that come before them.

A. *The Supremacy of Policy Revisited: The Instrumental Background*

I have already suggested that an instrumental concept of law continues to influence the implementation of policies, and pointed to the enlistment of the courts in widely-publicized campaigns against crime as the most obvious example. There are more subtle manifestations of instrumentalist direction of the work of the courts to implement policies.[338] Courts are sometimes given specific tasks, such as when campaigns mobilize them to help enterprises not only by assisting them to collect debts but by taking the initiative to advise enterprises to file suit.[339] Courts have been lauded for assisting specific economic policies, including one that promoted spring ploughing and won the support of the masses and rural cadres by organizing groups of judges who visited peasants during the spring ploughing seasons and conducted public trials of criminals who "sabotaged rural social security." Another court worked with the peasants to help them discover "seven ways to get rich." Yet another seized the mood of the Spring Festival, a time when families wish to be united, and conducted mediation work among estranged couples. The extent to which courts are part of the local administrative apparatus is also reflected in the expectation that court personnel can be mobilized to help deal with problems that confront local governments such as helping with the poor, or conducting socialist education.[340]

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338. *See, e.g.*, a report in 1994 by a Deputy President of the Supreme People's Court praising the courts for promoting the independence of enterprises, preventing losses of national capital, promoting the establishment of markets and lawful trade, and controlling illegal conduct, protecting fair competition and for being attentive to promoting new transactions. Tang, *supra* note 268, at 143.

339. One court, cited as a model, assigned staff to "look for cases," and had them visit a paper mill that was owed 15 million RMB by almost 300 enterprises. They spent "over 100 days and nights" seeking out debts in over 12 provinces and cities, and their success in recovering 4.6 million RMB inspired the praise of the local Party secretary: "this is service, this is efficiency." He, *supra* note 6, at 251.

340. For these cases see *id.* at 251-253. Similarly, in a collection of essays for judges assembled by the Judge's Training Center of the Supreme People's Court, one article instructs judges to "adopt an attitude that actively and with initiative" takes jurisdiction over cases that endanger social stability. It relates how the courts dealt with a sudden rise in cases in Sichuan arising out of failure by buyers of nutrias to honor their contracts to purchase the animals from "tens of thousands" of households that had raised them in the hope of getting rich quickly. In the face of considerable public agitation over the losses and responding to instructions of the provincial higher court, lower courts acted quickly to begin hearing cases, sending "swindlers" to the police, and

Although the close ties of the courts to policy and Party have been criticized and greater judicial autonomy sought by some judges and legal scholars, the mind-set of many judges may accept as proper the interrelationships of policy and law that have been sketched here. One Western observer notes: "[M]any officials involved in the development of Chinese law appear content that the legal system should derive consistency and coherence primarily from the dictates of Party and state policy and perhaps even the commonly held values of Chinese society."[341]

B. Chinese Courts and Legislative Supremacy

More than policy situates the courts in a subservient position to other organs of the Party-state. I have already noted that the legislature is viewed as the sole source of law. That doctrine is being quietly challenged by the Supreme People's Court in a manner that echoes long-standing and ongoing Western problems of defining the relationship of the courts and the legislature. Here, the endless debate in the West can only be caricatured: One conception of the functions of the courts insists that as faithful agents of the legislature they may only "apply" laws. A range of competing views conceives of courts as employing far more discretion, to the extent of acting as interstitial legislators. These conceptions, and intermediate notions of judicial activism that lie between them, may yet come into contention in China.

Every legal and political system has its own doctrine of the sources of law. In all countries that belong to the two great families of Western legal systems, there is a tension between the authority of legislatures and administrative agencies to make rules and the freedom of judges to interpret rules. Each system defines in its own way the powers that courts exercise when they apply rules, whether emanating from legislatures, administrative agencies or other courts. The fundamental allocations of power in Western democracies have not, of course, averted controversies over the power of courts to interpret legislation in situations in which the

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advising breeders on where to file cases. They then decided some cases quickly that served as "models," and thereby brought hope to the breeders. Sichuan Sheng Gaoji Renmin Fayuan [Sichuan Provincial High-level People's Court], *Fahui Jingji Shenpan Zhineng Zuoyong, Wei Weihu Shehui Wending Fuwu [Develop the Functions of Economic Adjudication Work to Serve the Protection of Social Stability]*, *in* ECONOMIC ADJUDICATION REFERENCE MATERIALS, *supra* note 255, at 7-8. For the text of a document issued by the Supreme People's Court intended to mobilize the courts to carry out a CCP Central Committee decision to punish economic crimes seriously, see LIU, *supra* note 96, at 51-54.

341. Keller, *supra* note 87, at 729.

applicability of a rule is unclear or was unforeseen by the legislator. For the civil law systems, the French Revolution established a concept of separation of powers that limited the courts to *applying* the rules enacted by the legislature; courts were otherwise "completely forbidden to intrude upon the policy-making function of the legislature. In theory, courts were prohibited even such interstitial creativity as is required by the interpretation of statutes."[342] Indeed, at the very beginning of the French Revolution, when French courts were in doubt about legislative intent, they were required to refer matters back to the legislators.

As one scholar has noted, "similar unrealistic bans on judicial interpretation were imposed by absolutist rulers from Justinian to Frederick II of Prussia to Joseph II of Austria .... It hardly needs saying that all such prohibitions were of short duration."[343] In civil and common law jurisdictions alike, no amount of legislation or administrative rules has been able to eliminate judicial discretion. In civil law jurisdictions the interpretative role of the courts came to be recognized despite strong doctrinal insistence that courts could only "apply" the law.

China today seems destined to follow the paths of those earlier unsuccessful attempts in the West to restrain interpretative activity of the courts. As already noted, Chinese doctrine views central and local-level legislation and administrative regulations as the sole sources of legal rules, and insists that only the legislative or administrative body that promulgated a rule may interpret it. This leaves no room for an interpretative role for China's courts, whose decisions have no formal precedental value, although other courts deciding later cases may use them as "reference." Economic reforms, however, are generating pressures on the courts to depart from these doctrines, and the Supreme People's Court is engaged in an effort to promote the coherence of promulgated laws and to provide guidance to a judicial hierarchy whose authority is badly splintered.

C. *Development of Processes of Interpretation*

1. The Limited Authority of the Supreme People's Court to Interpret the Law

The basic power to interpret legislation, as explained in Part One, is divided between the Standing Committee of the NPC and the State

342. *See* MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 37 (1986).

343. *Id.* at 37 n.38.

Council, with only limited roles assigned to the Supreme People's Court and the Procuracy. As already noted, under the applicable State Council resolution, the Supreme People's Court has been given only the power to interpret "any "problems of the concrete application of laws or regulations in the course of litigation," while the Procuracy may interpret only "questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates." In this scheme, laws "unrelated" to either the courts or the Procuracy may be interpreted only by the State Council or "competent departments."[344]

As the language of the resolution suggests, the Court's interpretative powers differ from legislative interpretation by the NPC Standing Committee and the State Council. As one observer has explained it, the Standing Committee "may supplement and amend laws if necessary. In contrast, the Court's interpretive function is limited to clarifying and strengthening the laws without changing their original meaning."[345] The Court is further limited to interpreting only laws promulgated by the NPC and the State Council. It may not interpret any other laws, nor may it invalidate any laws at all. These limits on the Court's interpretative power flow from its nature as an administrative organ that supervises the courts in their "adjudication work" under legislation promulgated by the law-making bodies of the central government. The courts must consult other agencies, such as ministries under the jurisdiction of the State Council, when a case involves interpretation of their rules, and *these agencies' own interpretations of such rules must be followed.*

Despite limits on its power, in practice the Supreme People's Court has begun to interpret laws and regulations independently. These interpretations are expressed in no less than nine different types of documents, which are in form identical with the administrative documents issued by every other government department. In these documents the Court, as administrative organ, applies legislated rules to situations that they did not address directly, and sets down general rules with broad prospective application.[346]

The range of these interpretations demonstrates the extensive interpretative power the Court has gained since 1979. The broadest and

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344. Finder, *supra* note 273, at 251. This section on judicial interpretation draws on the Finder article cited in this note; Shizhou Wang, *The Judicial Explanation in Chinese Criminal Law*, 43 AM. J. OF COMP. L. 569 (1995); and Nanping Liu, *An Ignored Source of Chinese Law: The Gazette of the Supreme People's Court*, 5 CONN. J. INT. L. 271 (1989).

345. LIU, *supra* note 96, at 30.

346. Finder, *supra* note 273, at 167.

most wide-ranging are official opinions (*yijian*) or interpretations (*jieda* or *jieshi*), which are general statements of normative rules not made in connection with pending litigation. They may be either opinions on an entire law, or on specific sections, and in practice may sometimes establish new rules or even contradict NPC legislation.[347] Those published in the Court's official gazette become authoritative sources of rules for decision in cases. Official replies and letters (*pifu, fuhan* or *dafu*) are issued in response to requests for advice from lower courts on the interpretation of a law. Official notices (*tongzhi* or *tonggao*) contain interpretations of law that are binding and are sometimes issued jointly with other agencies. The Court also issues summaries of conferences at which important matters were discussed (*yiyao*); in practice these are treated by the lower courts as weightily as other more formal interpretations.

2. Problems Presented by the Court's Exercise of its Interpretative Role

The evolving practice of the Supreme People's Court raises a number of issues:

a. In Practice, the Court Often Legislates, and Therefore Exceeds the Scope of its Legal Authority

When the generality of Chinese legislation creates difficulties for lower courts, the Supreme People's Court provides rules that serve as the sources of their decisions. Illustratively, the Court's opinion on the General Principles of Civil Law laid down many rules to supplement the code.[348] In one case, although the General Principles requires partners to draw up a written partnership agreement, the Court issued a rule that permits courts to validate oral agreements in cases in which partners had fulfilled all other requirements of a partnership and their relationship could be proven by evidence from two or more persons.[349] In the criminal area, the Court ruled that individuals who were not state officials could be charged with corruption if they colluded with a state official engaged in corrupt

347. Finder gives examples, such as the definition of a crucial term or one instance in which the Court changed a rule to make it conform to "reality." *Id.* at 168.

348. Opinion (For Trial Use) of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People's Republic of China (*adopted* Jan. 26, 1988, *effective* Jan. 1, 1987), *translated by* Whitmore Gray & Henry Ruiheng Zheng *in* 52 L. & CONTEMP. PROBS. 59 (1989).

349. *Id.* art. 50.

conduct.[350] No legislative authority exists for this practice, and it has been suggested that justification lies in the supremacy of the CCP within the Party-state and the consequent use of the Court to issue interpretations that will keep the application of law consistent with policy.[351] Presumably such extra-legal considerations justify the occasional practice of the Court in issuing interpretations jointly with administrative agencies, such as the Ministry of Public Security, with which it is only coequal in status.

b. Practice Is Not Standardized, and Not All Interpretations Are Published

The relative authority of different kinds of documents is unclear; for example, notices and conference summaries are not supposed to be interpretations, but are taken as such by lower court judges. The Court has also been inconsistent in its policy toward the power of the lower courts to interpret laws. A more serious problem of legality is that many interpretations are never published at all; of those that are, some appear in the Court's official gazette, while others can only be found in publications that circulate within the court system.[352]

3. The Emergence of Case Law

Published accounts of decided cases have emerged as another source of law without formal legislative authorization. Chinese doctrine firmly rejects the doctrine of precedent (*pan li*), denying any binding force to judicial decisions. Although prior cases may be considered instructive examples (*an li*), they are not binding and are not supposed to be considered a source of law.[353] In practice, the Supreme People's Court has been publishing decisions in its Gazette since 1985 for their "reference" and "educational value." Most are lower court decisions that have been carefully chosen and substantially rewritten in order to transmit to the

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350. LIU, *supra* note 96, at 106-107.

351. This is the general argument of LIU, *id.*

352. One estimate is that about half of all of the Court's interpretations issued by the Court between 1985 and 1991 were published in the gazette. Finder, *supra* note 273, at 187 n.160 (citing Zhang Jun, *Zuigao Shenpan Jiguan Xinshi Sifa Jieshi Gongzuo Huigu Yu Sikao, 1980-1990* [*Review and Thoughts About Judicial Interpretation of the Criminal Law by the Highest Judicial Organs, 1980-1990*], FAXUE YANJIU [LEGAL RESEARCH], NO. 3, at 46, 52 (1991)).

353. SHEN, *supra* note 45, at 466-466 (arguing for giving greater weight to cases is Cao Pei, *Borrowing the Case Law Method to Promote the Construction of the Legal System in Reform*, RENMIN RIBAO [PEOPLE'S DAILY], Mar. 3, 1987).

lower courts the Court's views on the issues involved.[354]

Other reports of decisions circulate to the lower courts through internal channels, but only the most "mature" and "representative" are selected for open publication. Although the lower courts may not cite them (by published order of the Court), Nanping Liu argues that the Court intends these published cases to carry the same weight as precedents, and reports that a growing number of Chinese legal scholars believe that they should be treated as such. He sees them as a "regulatory effort" on the part of the Court to create a "governing vehicle" through an administrative device. Since the Court alone may publish decisions, its choice of provincial cases is intended to establish centralized precedents for the judicial system as a whole.[355] The Court's claim that these cases are merely for the "guidance" of the lower courts is, in Liu's interpretation a "gesture toward other political branches," i.e., so as not to appear to be acting too aggressively as a judiciary asserting a bourgeois concept of the separation of powers.[356]

The Supreme People's Court has a high awareness of the significance of publicly reporting decisions. The editor of the Court's Bulletin expressed it clearly in a 1995 talk.[357] Chinese law, he said, was undergoing the same kind of evolution that the civil law systems of Europe had experienced. As European society became more complex in the nineteenth and twentieth centuries, judges began to create "important legal principles . . . despite the fact that the civil law system still did not admit the validity of precedent." The Supreme People's Court, by deciding to publish decisions in the Gazette, "has moved our country's legal system from nineteenth-century traditional legal theory into modern legal theory." The reported cases, he added, will both guide the courts and create legal norms (*guize*) and thereby fill in many of the gaps in Chinese law.

The ambiguous position of the courts in the Party-state make it difficult to assess the role of the Court that has been reviewed here. It is certainly performing a necessary role in filling gaps in vague and generally-drafted legislation. It may also be coordinating the application of law with current Party policy, as Nanping Liu has suggested. The current distribution of power among Party and state entities, however, limits the

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354. Liu, *Legal Precedents With Chinese Characteristics; Published Cases in the Gazette of the Supreme People's Court*, 5 J. CHINESE L. 107, 116 (1991).

355. *Id.* at 118.

356. *Id.* at 119.

357. LIANG HUIXING, MINFA DE FAZHAN YU MINFA DE FANGFALUN [THE DEVELOPMENT AND METHODOLOGY OF CIVIL LAW] 3 (1995) (lecture delivered at the Fourth Meeting of Correspondents of the Supreme People's Court Bulletin).

extent to which it can be said to introduce the doctrine of judicial precedent.

4. The Effect of Legislative Incoherence

The interpretative activity of the Supreme People's Court adds much-needed coherence to Chinese legislation, but its powers remain limited. Less limited are the activities of administrative agencies in interpreting laws and regulations. Anthony Dicks has closely examined some examples of interpretation by courts and administrative agencies, and finds that the current system permits different bureaucratic agencies to produce "logically inconsistent rules of substantive law."[358] This modern practice—understandable in terms of traditional Chinese legal culture, which did not recognize the separation of powers, and Marxism-Leninism, which insists that only legislatures may interpret legislation—has led to unfortunate consequences. When the courts are presented with issues that involve an overlap between their own jurisdiction and that of administrative agencies, they may negotiate joint interpretations, follow administrative interpretations, or even refuse jurisdiction altogether and defer to an administrative agency to decide on the interpretation of a law or regulation.

I have touched on administrative rule making powers in Part One, but its impact on the courts must be emphasized. This "legal fragmentation," as Anthony Dicks has urged, leads to "some of the worst disadvantages of federal legal systems without the appropriate legal and political machinery even to resolve the resulting conflicts and tensions, far less to unify the law," and he concludes nothing less than that "the traditional limits on the power of the People's Courts, imposed by the jurisdictional claims of other authorities, have survived the reforms of the 1980s largely unimpaired."[359] Finally, it "throws doubt on the authority of the courts as exponents of a [China-wide] generalized and universally applicable view of the law."

The need for Chinese courts to interpret inadequate legislation seems likely to grow, but greater predictability, certainty and consistency in judicial decision-making cannot be brought about by the courts without a larger political solution that raises their status above that of other agencies. In the near term at least, economic and legal reform are likely to continue to create pressure to expand the interpretative power of the courts, but the current configuration of political institutions will inhibit their ability to

358. Dicks, *supra* note 87, at 93.
359. *Id.* at 84, 108, 109.

respond to the challenge.

IV. PERSPECTIVES ON THE CHINESE COURTS

The foregoing survey of the structure and operation of the courts has reviewed the considerable difficulties they encounter. Despite the difficulties, however, litigants are bringing suits to the courts to assert rights. The rising caseload, impressionistic evidence (little more is presently available) and reported decisions from a heavily-edited Chinese source suggest that in recent years the courts have increased their ability to vindicate private rights that are asserted by litigants. The increase in judicial effectiveness is relative, to be sure, compared to the powerlessness of courts, the legislative vacuum, and the hostility to law itself in the not-so-distant past. Nevertheless, the trend is discernible in press and court reports that reflect the legislative creation and the judicial enforcement of rights.

A. *Judicial Enforcement of Rights*

1. In General

In order to define the new legal relationships and transactions created by the economic reforms, an enormous amount of legislation has been adopted. Chinese law-makers have created a framework for contract and other commercial transactions and have defined new rights in many other areas. In the realm of property, for example, one of the principal aims of an inheritance law that took effect in 1985 is the protection of private rights over property that not long ago would have been considered "means of production" and, therefore, could only be owned by the state.[360] Principles of tort liability have been articulated.[361] Legal scholars and press reports alike tell of successful lawsuits in which these new rights have been asserted, and a leading scholar has elaborated on the increasing use of the General Principles of Civil Law as the basis for suits for injury to a variety of personal rights including rights to life and health, personal names,

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360. Michael Palmer, *China's New Inheritance Law: Some Preliminary Observations, in* TRANSFORMING CHINA'S ECONOMY IN THE EIGHTIES, VOLUME 1: THE RURAL SECTOR, WELFARE AND EMPLOYMENT 169, 193 (Stephan Feuchwang et al. eds., 1988).

361. *See e.g.*, Edward J. Epstein, *Tortious Liability for Defective Products in China's General Principles of Civil Law: Theoretical Controversy in the Drafting Process and Beyond*, 52 L. & CONTEMP. PROBS. 177 (1989); Robert Force & Xia Chen, *An Introduction to Personal Injury and Death Claims in the People's Republic of China*, 15 MARITIME LAWYER 245 (1991).

image, and reputation.[362] He notes, too, that the interpretation of that code by the Supreme People's Court has expanded the definition of rights arising under its provisions, as by listing examples of conduct that should deemed to be injurious of reputation.[363] Consumers have asserted their rights to sue a retail seller for knowingly selling counterfeit goods.[364]

Notably, too, class actions have been brought to enforce a wide and growing range of rights, such as failure to pay dividends, breach of contract, damage to crops caused by inferior seed or fertilizer, and violation of environmental anti-pollution regulations.[365] Class actions create burdens on the courts, which are already suffering from the lack of resources and trained judges that has been described. Judges, whose performance assessments are based in part on the number of cases they process, may discourage such cases because they might be too time-consuming. Class actions may also not be welcomed by many lawyers because they are complex or difficult and because the regulations on legal fees do not present incentives to lawyers to take on such cases. Despite these obstacles, the use of class actions is growing and the implications of their development are of interest. They are means that citizens can use to force local governments to obey national laws, and more generally they suggest that "the ways in which litigants use the legal system to pursue their own interests may be increasingly important in shaping the evolution of law in China."[366]

2. Published Decisions

Published decisions of the courts provide additional evidence of judicial responsiveness to attempts to enforce rights. The evidence is of limited and uncertain value, however, for a number of reasons: Only a small number of cases are published in the only official publication, the Bulletin of the Supreme People's Court, which has been discussed earlier. Some are published for propaganda purposes.

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362. RENGE QUAN FA [LAW OF PERSONALITY RIGHTS] (Wang Liming et al. eds., 1997). For press coverage of the right to sue for damages over media use of a person's name or likeness, see *Law Professor Discusses Media-Related Torts*, FBIS, *supra* note 50, No. 95-221, Nov. 16, 1995, a translation of *Dialogue on Torts in the News Media Between Renmin Ribao Reporter Wang Binlai and Professor of China University of Political Science and Law Jiang Ping*, RENMIN RIBAO [PEOPLE'S DAILY], Oct. 6, 1994.

363. RENGE QUAN FA [LAW OF PERSONALITY RIGHTS], *supra* note 362, at 18.

364. *He Shan Incident Represents Consumer Rights Issue* (Oct. 17, 1996) 1-2 ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY] *in* FBIS, *supra* note 50, No. 96-252, Oct. 17, 1996.

365. This discussion of class actions is based on Liebman, *supra* note 250.

366. *Id.* at 1541.

Increasingly, though, collections of cases are being published under semi-official auspices, and appear to be intended to give guidance to the courts.[367] One such semi-official collection provides glimpses of the courts as they deal with rights arising out of economic transactions. Since 1992 the *Anthology of Adjudicated Cases in China* has been published in Chinese annually by the Senior Judges Training Center of the Supreme People's Court and the Law Faculty of People's University.[368] The first volume, containing cases decided in 1991, has been translated into English as *China Law Reports (1991)* and has been used for reference here. The *Anthology* is not representative of ordinary judicial decisions because it is a compilation of decisions submitted from courts all over China that have been chosen, edited and often extensively rewritten by law professors before publication.[369] It can be taken, however, to illustrate what Chinese legal scholars and senior judges want Chinese judicial decisions to look like, and is discussed as such below.

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367. *See, e.g.*, ZUIGAO RENMIN FAYUAN GONGBAO DIANXING ANLI HE SIFA JIESHI JINGXUAN [SELECTIONS OF MODEL CASES AND JUDICIAL EXPLANATIONS FROM THE SUPREME PEOPLE'S COURT BULLETIN] (Zuigao Renmin Fayuan Gongbao Bianjibu [Supreme People's Court Bulletin Editorial Department] ed., 1993).

368. ZHONGGUO SHENPAN ANLI YAOLAN [ANTHOLOGY OF ADJUDICATED CASES IN CHINA] (Zhongguo Gaoji Faguan Peixun Zhongxin [Senior Judges Training Center of the Supreme People's Court] and Zhongguo Renmin Daxue Faxueyuan [Law Faculty of People's University] eds.).

369. The English-language version discussed here is CHINA LAW REPORTS (1991) (Priscilla Leung Mei-fun ed., 1995). Because the editors of the translated version found most of the opinions "far too brief" and unstandardized, and because they wanted to produce a compilation that could serve as a model for judges, they consulted foreign law reports to assure that the collection would not be "a simple assemblage of [original] judgments from the People's Courts." Peter Feng, Review, *China Law Reports (1991)*, 26 HONG KONG L. J. 268, 271 (1996) (*citing* ZHONGGUO FAZHI BAO [LEGAL DAILY], May 26, 1994). The comments are largely written by the editors. A Chinese legal scholar knowledgeable about the editing process has stated in private conversation that heavy editing of the decisions has been required, expressed considerable doubt that Chinese judges use the Anthology for guidance, and offered the view that the chief value of the publication was as "propaganda."

The Hong Kong publishers have tried to heighten the symbolism of their volume. The single Chinese volume has been transformed into three English-language volumes, one each for criminal and civil cases and a third for administrative and economic cases. Titles stamped in red and gold on the handsome blue cloth that has been used to bind the books reinforce a physical resemblance to official English law reports, and exude the dignity that is expected of official court reports in the West. Elaborate headnotes have been added by the Hong Kong translators to the individual reports of each case indicating the principal topics and statutes cited, which lend the decisions an appearance of systematization suggesting far more order and certainty in the system than actually exists. Unfortunately the annotations published in the Chinese original have been omitted from the English edition because, the Introduction states, they were written by the editors and the editors did not want readers to believe that they formed part of the judgment (!). This is a decision to be deplored, because the annotations often provide useful background for understanding the decisions.

a. *The Style of Judicial Decisions*

A major limitation on the usefulness of reported decisions as sources of insights into the judicial process is the conclusory and formalistic style in which they are written. Each reported decision in the *China Law Reports* contains substantial summaries of the claims asserted by the parties and the findings of fact by the court. The CPL provides that judgments shall state "facts on which the judgment is based" and "the reasons in support" of the decision (Art. 138), paralleling civil law codes, but in most decisions the courts state only that the facts supported a finding that the case did or did not fall within a specific rule, which is expressed in formulaic invocations of the applicable laws (e.g., "in accordance with . . . plaintiff's claim is dismissed") that reveals little about the court's reasoning. The decisions give no hint that they are interpreting legislation or interpretations of the Supreme People's Court. One reviewer of the *Anthology* has rightly observed that the courts' reasoning and analysis "tends to be all too laconic."[370]

b. *Representative Outcomes*

Despite the limitations that have been noted, the cases in the *Anthology* are interesting because of the types of issues that they present. Some decisions illustrate the application of very elementary legal principles. In the non-state sector, many economic transactions have either been entered into in a legal vacuum or between parties unaware of the legal significance of their acts. Decisions in such cases might apply rules no

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370. Feng, *supra* note 369, at 271. The approach of Chinese courts is suggested by a manual written for judges, SHENPAN GUANLI CAOZUO GUIFAN [OPERATIONAL STANDARDS FOR MANAGING ADJUDICATION] (Jilin Sheng Siping Shi Zhongji Renmin Fayuan [Intermediate Level People's Court of Siping City, Jilin Province] ed., 1995) that defines standards in an effort to improve the quality of judicial work. Based on model courts in Jilin Province, it sets forth judicial practice and procedure in a codified form. The portion on civil litigation is long on descriptions of the forms that have to be filled out and the time limits imposed on various stages of procedure. *See id.* at 233. When the manual reaches actual judicial decision-making, however, its instructions are limited to the following:

Article 40. Members of the collegial bench are all responsible for the facts of the case and the use of the law. Deliberative work is directed by the responsible judge, who implements the principle of democratic centralism. If there is a division of opinions, the case should be decided through the principle of the minority being subordinated to the majority. The minority's opinions must [however] be recorded in detail.

Article 41. Case deliberations should be based upon the facts and with the law as the yardstick [of determination]. Prevent deliberation based upon subjective assumptions, emotional acts, relying upon the apparently natural, and experience, *id.* at 234.

more complicated than that parties to contracts must adhere to them, including agreements to pay damages in the event of breach.[371] When a buyer used most of the goods purchased before complaining about their quality, a higher court ruled it improper for a lower court to uphold the buyer's quality claim.[372] Other decisions apply formal legal distinctions that a party to a transaction did not understand, such as one case affirming the validity of a contract signed by an authorized representative of a local government even though he was succeeded by another person.[373] Reported cases like these may seem almost primitive to a Western lawyer, but the court's buttressing of the distinction between individuals acting in representative rather than in personal capacities is of basic commercial significance. Quite a few involve decisions on the effects of contracts that were illegal under restrictive legislation, such as a contract for a transaction not comprehended within a party's business license[374] or that violated a directive related to the state plan.[375] These illustrate the continuing existence of administrative limitations on the power of economic actors to enter into contracts.

Other decisions illustrate the creative role of the Supreme People's Court. One decision relied on an interpretation by the Supreme People's Court directed against rigorous formalism, holding that although two parties had not complied with the required procedures for forming a partnership, the facts showed that their relationship "possessed the essential elements" of one and treated it as such.[376] Another Court interpretation that defined legal duties to third persons was invoked when a manufacturer was

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371. Tairi Brickyard of Fengxian County v. Xinchang Xinnan Hardware Factory of Nanhui County, 3 CHINA LAW REPORTS (1991) 246 (1995).

372. Chemical Plant of Wuhai City v. Soda Plant of Xiadian Town, Dachang Hui Autonomous County, 3 CHINA LAW REPORTS (1991) 286 (1995).

373. Li Qingni v. People's Government of Huaizhong Township, 2 CHINA LAW REPORTS (1991) 206 (1995).

374. Shenyang Hongguang Enterprises United Co v. Lu Songtao, 3 CHINA LAW REPORTS (1991) 533 (1995).

375. Ninghsia Yinchuan Smeltery v. Huabei Co of China Color Metal Materials Corp., 3 CHINA LAW REPORTS (1991) 604 (1995).

376. Li Huixiang v. Li Changping and Dai Hongwei, 2 CHINA LAW REPORTS (1991) 535 (1995). The court relied on an interpretation by the Supreme People's Court on the implementation of the General Principles of Civil Law which, purporting to interpret the text of the General Principles of Civil Law, *supra* note 75, actually *changed* the text. Articles 31 and 33 of the General Principles of Civil Law declare that a written agreement and approval and registration [by the State Administration of Industry and Commerce] are necessary prerequisites for the creation of a partnership, and do not provide for any exception in circumstances like those involved in the reported case. The Supreme People's Court actually added the exception to the rule stated in the General Principles of Civil Law. Finder, *supra* note 273, at 168 n.98.

held liable for personal injuries to the retail purchaser of a product.[377]

Some cases apply broad general standards of fairness. In one decision,[378] plaintiff in the early 1950s agreed to buy the defendant's husband's house, took possession after paying two-thirds of the purchase price, and then left China for Taiwan without paying the balance. He returned thirty years later to reclaim the house, and the court upheld his claim in a one-sentence decision, citing without discussion Article 4 of the General Principles of Civil Law which states that "Civil activities must be carried out in accordance with the principles of voluntariness, fairness, exchange of equivalent values, and good faith." The court to which this decision was appealed agreed in a three-sentence decision that emphasized that the plaintiff had been given control of two floors of the house by the deceased seller.[379] In another case, a hotel and a peasant traveling with a pig and a donkey had to share responsibility for the hotel's loss by theft of the peasant's animals overnight. The court decided that both parties knew that their agreement that the hotel would keep them overnight was invalid, and that they should therefore bear liability in proportion to their fault under Article 61 of the General Principles of Civil Law, which allocates legal liability for invalid contracts according to the degree of the parties' fault.[380]

The political convulsions of the 1950s and 1960s continue to generate disputes over property in the lower courts and have led the Supreme People's Court to issue interpretations for their guidance. The Court has favored upholding determinations of property rights made during the land reform movement (1949-1952), presumably to avoid destabilizing long-established expectations. In disputes involving problems that arose after land reform, however, long-established interests in property have been revisited and overturned.[381]

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377. Gao Pingping v. Guanghua Agency of Arts and Crafts for Everyday Use, 2 CHINA LAW REPORTS (1991) 321 (1995). The Supreme People's Court had issued a rule permitting suit against either the manufacturer or the seller of a substandard product.

378. Zhu Huiren v. Tan Xihua, 2 CHINA LAW REPORTS (1991) 182 (1995).

379. Art. 4 of the General Principles of Civil Law was also applied in another case: plaintiff lost a cow that was found by defendants, who demanded cash for its return. The trial court mediated the dispute at the defendant's village, and pursuant to the agreement of the parties ordered that the cow be returned and that the defendants pay the costs of maintaining the cow while the defendants had possession of it. Yang Chengbao v. Ni Fenglan and another, 2 CHINA LAW REPORTS (1991) 610 (1995).

380. Zhang Fuxiang v. Oriental Hotel, 2 CHINA LAW REPORTS (1991) 337 (1995).

381. *See, e.g.*, Shi Yongming and another v. Sanjie Production Team of Luwu Village, Luwu Town, Lingshan County, 3 CHINA LAW REPORTS(1991) 730 (1995), in which a court found invalid the confiscation of three lychee trees in *1957* because the "Model Articles of Association of Higher-

c. *Award of Damages*

Because of the limitations of the reported decisions that have been noted here, no more sophisticated conclusion is offered than that the limited number of reported decisions in the 1992 compilation that have been used as a source suggests that courts are increasingly providing remedies for claimants seeking damages for violation of their rights. The reports offer no insight into the courts' reasoning about the amount of damages awarded. The relative fault of parties is explicitly mentioned in some cases, like the dispute mentioned above over animals that disappeared from a hotel overnight, but in numerous cases damages less than the amount claimed by the successful plaintiff are awarded without any explanation. Still, in a large number of the reported decisions, successful plaintiffs recovered all or substantial percentages of the amounts they requested.

The failure of the decisions to offer guidance on the theories that underlie the damage awards is understandable, perhaps, in light of the state of development of the Chinese market. When the plan was dominant, specific performance was the primary remedy. The Economic Contract Law provides for damages but also permits the injured party to demand specific performance as well.[382] The Chinese economy is still far from creating the markets that Western courts assume to exist, in which a party injured by a breach of contract is able to purchase the performance that was promised.[383]

3. Implications

The publication of these cases under the authority of the Court is an expression of the growth of the courts and of the lengthening of the reach of the laws they apply. It demonstrates—as it is no doubt intended to demonstrate—that the courts are enforcing legal rights. These cases must be read, however, in light of the evidence of strong local government involvement in the outcomes of court decisions that has been mentioned

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level Agriculture Production Cooperatives" of the time had been misapplied. Several rulings by the Supreme People's Court on disputes over inheritance of real property in which rights had been allocated in the Maoist era are in SELECTIONS OF MODEL CASES AND JUDICIAL EXPLANATIONS FROM THE SUPREME PEOPLE'S COURT BULLETIN, *supra* note 367, at 692, 694.

382. Economic Contract Law of the People's Republic of China, art. 31, *translated in* CCH CHINA LAWS FOR FOREIGN BUSINESS §5-500 (2).

383. Lucie Cheng & Arthur Rosett, *Contract With a Chinese Face: Socially Embedded Factors in the Transformation From Hierarchy to Market, 1978-1989*, 5 J. CHINESE L. 143, 229 (1991).

above. Two studies by Western scholars of dispute resolution during the 1980s concluded that the courts treated current policies and the views of local officials as more important to the outcomes than relevant laws.[384] One study, while concluding that the courts emphasized contractual rights, stressed that this derived "from an insistence upon observing the Party's current policy, not from an inalienable right to due process under law."[385] Since the research for these studies was completed, the non-state sector has grown continuously and the number of contract disputes brought to the courts has risen. At the same time, the Chinese sources that have been discussed here underline the existence of fundamental problems in the quality of Chinese adjudication and the ability of the courts to enforce their decisions. On balance, although it seems appropriate to treat the published reports of judicial decisions discussed here as evidence of some development of the courts during the past decade, they should not be taken for accurate representations of the daily work of the judicial system.

These cases suggest other issues. The Anthology provides notice, at least theoretically, to other economic actors in society about the rules applicable to business transactions. Although other collections of cases have been published commercially since the mid-1980s, this semi-official Anthology was first published in 1992. But, transmission of the rules by the courts is, as Marc Galanter has argued, "only part of the process." It is necessary to ask: "Who gets which messages? Who can evaluate and process them? Who can use the information?"[386] We know nothing yet about the impact of these reported cases, which are not supposed to have any precedental value, and which private conversations with a small number of judges and law professors suggest are not frequently consulted by lower courts. As for the lawyers, since cases are not supposed to have precedental value, might they feel less need to keep abreast of Chinese court decisions than their Western counterparts? Conversations with Chinese lawyers suggest that some, in litigation, are beginning to cite previous cases in arguments to the courts.

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384. Phyllis Chang, *Deciding Disputes: Factors that Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, 52 LAW & CONTEMP. PROBS. 101 (1989); David Zweig et al., *Law, Contracts, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms*, 23 STAN. J. INT'L L. 319 (1987). A third study of interest is Lester Ross, *The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong*, 26 STAN. J. INT. L. 15 (1990), which predicted a rise in the use of contracts and in the number of contract disputes that would be brought to the courts.

385. Zweig et al., *supra* note 384, at 362.

386. Marc Galanter, *Adjudication, Litigation and Related Phenomena*, *in* LAW AND THE SOCIAL SCIENCES 151, 219 (Leon Lipson & Stanton Wheeler eds., 1986).

The publication of decided cases reflects the accretion of experience by the courts. However, the formalism of their opinions, in addition to giving no hint of their reasoning, also conceals doctrinal and structural difficulties that have been addressed in examination here of the sources of the rules and standards that Chinese courts apply in their decisions.

Other evidence suggests that regardless of how legalistically the opinion of a court may be expressed, the wide range of values that presently coexist in Chinese society—traditional, Maoist, reformist—shapes both the arguments of parties to civil litigation and the judicial decisions that resolve disputes. One study of litigation has indicated that not only was a small percentage of litigants represented by lawyers, but that even when lawyers participated in courtroom debate they asserted arguments based not on law but on values derived from traditional society or even pre-reform "collectivist society."[387] Not one but numerous Chinese legal cultures will continue to shape the articulation and enforcement of rights in China.

The courts have only limited power to adapt Chinese legislation to the needs of a society that is undergoing extraordinary changes. Whether the function of the courts will be broadened and the limitations on their powers reduced cannot be foreseen at this time. It seems possible nonetheless to hazard a perspective on the Chinese courts that could be useful in shaping foreign understanding not just of courts, but of the developmental path that Chinese law could take in the future.

B. Chinese Courts as Bureaucratic Institutions

1. The Problem

Current ambiguities in the roles of judges are clear. Although current policy adopts terminology familiar in the West to present them as dispensers of justice, long practice treats them as cadres whose functions are not distinct from those of other officials. They have not yet been trained to prize procedural justice. This is not an exclusively Western view. At a meeting I attended with a group of judges in late 1995, a Chinese law professor criticized them for overemphasizing substantive results while neglecting the need for procedural regularity. His point was clear: Procedural justice and the rule of law are linked in Western outlooks, but they are far from ingrained in the mentalities of Chinese judges. Discussion here has illustrated the considerable pressures that face them: Policy and

387. Isabelle Thireau & Hua Linshan, *Legal Disputes and the Debate about Legitimate Norms, in* CHINA REVIEW 1997, at 349 (Maurice Brosseau et al. eds., 1997).

popular sentiment insist that they mete out even-handed justice, but irresistible claims are made on them by local governments – on whose payrolls and at whose pleasures they serve. The Party demands loyalty and adherence to Party policy. Many judges, particularly older ones, have limited legal educations and outlooks inconsistent with an independent judiciary. Corrupt litigants or officials may influence their decisions.

Since the early 1980s, the activities of judges have become increasingly regularized and rights-consciousness among the populace has grown slowly. Some Chinese judges do recognize the need to insulate the Chinese courts from pressures generated by the Chinese Party-state. Both among legal professionals and the general population an incipient belief in the legitimacy of formal institutions for dispute resolution has begun to evolve. For these trends to continue, they must be nourished by popular perceptions that the courts function meaningfully to foster substantive justice. Policy, however, remains unclear about the functions that courts should perform; little in Chinese history suggests any model for the appropriate relationship among courts, the government that created them, and the modernizing society they must now serve. This analysis suggests a perspective on the Chinese courts which, although inspired by Western scholarship, also resonates both in Chinese scholarship and in the views of several articulate Chinese judges.

2. A Western Perspective on Chinese Courts

The description here of the organization, ethos and decision-making processes of the courts highlights some ways in which Chinese courts differ significantly from Western courts, both in ideals and in practice. What emerges is the weakness of the concept of *adjudication*, which becomes clearer when we consider what we have learned about the Chinese courts when they are seen from the perspective of adjudication in the West. A broad standard of adjudicatory institutions supplies a useful perspective on contemporary Chinese courts. Such a standard has been proposed by Marc Galanter, who has identified the elements of an "adjudication prototype." These elements are italicized in the discussion below, which contrasts them with Chinese conceptions and practice.[388]

388. Galanter, *supra* note 386, at 152. The italicized formulations of the elements of adjudication that follow in this section, derived from formal judicial institutions in the United States, are my own compression of Galanter's discussion. *Id.* at 153-60.

a. Intake

The forum addresses "delimited controversies" between identified persons rather than general situations, and gives individuated treatment to each case in deciding each case on its merits.

This would apply to Chinese courts in many but not all cases. When courts are used in conjunction with campaigns to promote policy, and as adjuncts to local administrative bureaucracy, they sometimes seek out cases in order to join the efforts of other elements of the Party-state's bureaucracy further to certain stated goals.

b. Process

The disputants participate by presenting proofs and arguments, the rules of the forum govern, and the case is "defined by claims that specific events, transactions or categories should be measured by application of some delimited conceptual categories."

The central conceptions of adjudication under Chinese civil procedure would meet this criterion. But courts often move away from this aspect of classic adjudication, when mediation or decision-making takes into account matters that involve events or transactions beyond the conduct out of which the claim arises, such as personal relations between the parties.

c. Basis for Decision

The basis for decision is formally rational and the parties' claims are "assessed in the light of some bounded body of preexisting authoritative normative learning, to which the forum is committed in advance."

Decisions of Chinese courts are often shaped by political or localistic considerations external to the body of legal rules that courts are supposedly engaged in applying, and as such they are not "formally rational." Also, this criterion assumes that the courts apply publicly available rules, whereas some rules applied by Chinese courts are available only in internal publications. Further, the vagueness that marks the language of China's normative rules weakens their clarity and suggests a lack of differentiation from general policies.

d. Decision

The forum renders a decision on the merits in the form of a final

award or remedy to one party, "rather than engaging in therapeutic reintegration of the parties" and norms render readjudication difficult.

As has been shown, the Chinese courts often engage in mediation, and can do so at any stage of their proceedings. The Chinese system's encouragement of, and tolerance for, readjudication weakens the finality of judicial decisions. A range of alternatives is available to parties who wish to challenge judicial decisions even after they have become legally effective, including review initiated at the request of government or Party officials.

e. Differentiation

Adjudication is differentiated from other activities, is conducted by professional specialists and in general is "insulated from general knowledge about persons and their histories and status."

As shown here, Chinese adjudication remains closely tied to politics and policy, and considerations other than formal-legal ones may decisively influence the courts' decisions. The Party-state's policies can affect the outcomes of specific decisions, and its officials influence outcomes for personal and localistic reasons. Until the Judges Law was promulgated, the formal criteria used in selecting judges apparently did not differ significantly from the criteria used in selecting other bureaucratic personnel. Recent discussions with Chinese legal scholars suggest that the Judges Law has not yet been thoroughly implemented.

Chinese adjudication has a special characteristic thrust on it by political doctrine: Adjudication is not a society-wide phenomenon, since most of the activities of other Chinese agencies lie beyond the reach of the courts. Most controversies arising out of the exercise of power by a Chinese agency of government, central or local, to which affected persons may wish to object as a matter of law, may not and do not come to the attention of the courts at all. Other agencies of the Party-state deal with—or do not deal with—issues that are often the ordinary work of courts elsewhere.[389]

f. Impartiality and Independence

The forum is impartial and "is not the agent of any entity outside the forum, with responsibility to further policies other than those crystallized

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389. Anthony Dicks has noted that the Chinese courts share their responsibilities "with other 'courts'– ministries, commissions and other bodies." Dicks, *supra* note 87, at 86.

in the decision."

A Deputy President of the Supreme People's Court stated explicitly in 1994 that when higher courts carry out adjudication supervision they are not only carrying out the law but "concretely expressing the democratic centralism of the CCP in the work of the courts."[390] The responsibility of the Chinese courts to support and advance policies of the Party-state and their dependence on local governments has been sufficiently reviewed above to warrant no further discussion here.

Today Chinese courts and law are far less politicized than at any time since the PRC was founded—otherwise there would be no point in writing about them in such detail—but they still remain so functionally undifferentiated from the rest of the Party-state that they should be characterized as bureaucratic rather than adjudicatory organs. Courts everywhere have bureaucratic characteristics, more so in the civil law systems than in the Anglo-American system because "the emphasis on career service, explicit hierarchy of posts, precise application of codes, the elaboration of files, and correction and supervision by superiors matches the bureaucratic model fairly closely."[391] It is instructive to consider the Chinese courts in light of the distinctions between courts and bureaucracies in Anglo-American jurisdictions:

> Appellate courts [in the West] are usually not hierarchic superiors to trial courts . . . . They may overrule trial court decisions [but their] review . . . is initiated by litigants. It is not motivated by a policy focus of the higher court, nor does it constitute a systematic quality control of the work of the trial courts . . . . Supreme courts often promulgate procedural rules that govern trial courts, but they exercise no continuous supervision over day-to-day trial work and almost none over the flow of cases that courts process. They almost never hire, transfer, or fire trial judge or other trial courtroom personnel. They have little or no influence over trial court budgets.[392]

By contrast, the Chinese courts exaggerate most of these enumerated features. The extent of hierarchical review of judicial decisions, within and between courts—often before decisions are final—suggests that Chinese

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390. Tang, *supra* note 268, at 143.

391. Galanter, *supra* note 386, at 172.

392. Herbert Jacob, *Courts as Organizations, in* EMPIRICAL THEORIES ABOUT COURTS 191, 193 (K. Boyum & L. Mather eds., 1983).

judicial decision-making is more of an administrative process than a judicial one, especially if the criteria are judicial independence and the judge's individual responsibility for the decision.[393]

These aspects of the judicial hierarchy reflect its position as only one of many bureaucratic "systems" (*xitong*), existing in parallel with, but not superior, to all others. This integration of courts into the entire Chinese bureaucracy[394] causes adjudication to resemble the acts of any other governmental agency – such as issuing permits, establishing production targets for state-owned enterprises or making safety rules for the roads.

3. A Chinese Perspective on Chinese Courts

The appropriateness of the view of Chinese courts that has been proposed here is suggested by recent research by He Weifang that captures the views of some judges on the position of their courts in Chinese society. One interview, with a county court judge before enactment of the Judges Law, is particularly telling. Although a major concern was selection of judges, the judge looked to underlying problems:

> The management style of our courts is a kind of unprofessionalized form of management. Why is it so difficult to reform the style of adjudication? Because Chinese law is mass-oriented (*qunzhong hua*) and anti-professionalized . . . judges of grassroots and intermediate courts with low levels of legal professionalization handle many cases . . . . [W]hy is it for a long time there has been no change in the situation in which a large number of demobilized soldiers become judges? I once worked in a county . . . . [T]he director of the county personnel department said: 'What is the PLA for? It serves as a tool of proletarian dictatorship. And what is a judicial organ for? It is also a tool of proletarian dictatorship. It's the same thing.' Apart from this, anyone from any profession can join judicial organs . . . . [T]he best cadres will not be assigned to work at the court, only those without a profession will be assigned to the courts because anyone can do the job. Can this profession have any authority? . . . This is a systemic problem, and cannot be solved by the judicial organs alone.[395]

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393. This analysis has also been advanced by Koguchi, *supra* note 275.
394. Keller, *supra* note 87, at 753.
395. He, *supra* note 6, at 233-34.

Based on such interviews He Weifang concludes that "as long as the judge fulfills a kind of administrative or non-judicial function, there will be no possibility or necessity to attain professionalism in the selection of judges."[396] He Weifang goes on to note the current problems faced by one vice president of a provincial court:

> The operational mechanism of the court isn't scientific, it's 'just a copy from the same old Political-Legal department mold'; [it] lacks a mechanism that would guarantee independent adjudication by law and mixes Party and governmental functions with adjudication; [it provides] no legal guarantee of occupation, position, or salary for the judge, [and] no legal guarantee of financial support, [so that] the courts are restricted by administrative agencies.[397]

These last interviews emphatically indicate the continuing impact of the values and institutions of the Maoist period, and further highlight the complexities of defining the function of Chinese courts.

The current situation reflects the continuing challenge that organizational patterns antedating reform present to legal reform today. I have already emphasized that under Mao, Chinese law was assimilated to administration and became an arena of contention between two different views of bureaucracy, as shown by the contrast and conflict between "Red" and "Expert." Today Chinese law reformers must make fundamentally different distinctions. As totalitarianism ebbs and functional specialization increases, speculation has begun in China about a view of judicial activity centered on upholding the rule of law, and about the professional orientation that is appropriate to the courts in light of this goal. Instead of viewing courts in terms of bureaucracy, an alternative vision is emerging.

The nature of that alternative is still obscured by considerable continuous confusion of law with bureaucracy and by the failure thus far to commit the Party-state to moving toward the rule of law in practice, at

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396. *Id.* at 245. *See also* He Weifang, *Zhongguo Sifa Guanli Zhidu de Liangge Wenti* [*Two Problems of the Chinese System of Judicial Administration*], ZHONGGUO SHEHUI KEXUE [SOCIAL SCIENCES IN CHINA], NO. 6, at 117 (1997) (arguing that the courts must be managed and run differently from administrative agencies in the Chinese bureaucracy. He Weifang notes the practice, mentioned above, of lower courts seeking guidance from higher courts and, more generally, that the higher courts "lead" (*lingdao*) rather than "supervise" (*jiandu*).).

397. He, *supra* note 6, at 254-255 (citing RENMIN FAYUAN BAO [PEOPLE'S COURT NEWS], June 6, 1994).

least as that ideal is understood in the West. In both Chinese tradition and Communist practice, law has been regarded principally as an ensemble of rules for administering a society rather than an arrangement of norms that create rights in the persons and entities in that society. This further helps explain the generality of much Chinese legislation, its resemblance to statements of policy and the lodging of vast discretion in the administrative agencies that administer often mutually indistinguishable laws and policies.

To link the activity of the courts to the rule of law requires a perspective different from the one that underlies the current status of the Chinese courts. The rule of law *is* an ideology.[398] Courts that are basically dedicated to promoting that ideal cannot be instruments of a government that uses them to promote frequently changing political tasks, but must have a more passive interest in solving conflict to attain a social equilibrium.[399] Because the rule of law implies a very different view of the state, movement in the PRC toward legality remains hobbled. It puts into question a fundamental element of current Party policy – insistence that the boundaries of reform must be set by the CCP without changing its position in the Party-state. A metaphor that may be appropriate here was suggested early in the reforms by the call of a senior Chinese economist to keep the non-state sector of the economy as a "a bird in a cage." That expression no longer fits the economy, but it does describe law reform today, which is still enclosed by the bars of a cage.

PART FOUR: CONCLUSION

"The political and civil laws of each nation must be proper for the people for whom they are made, so much so that it is a very great accident if those of one nation can fit another . . . . They must agree . . . with the customs [of the people]."[400]

This final Part considers the likely future of China's legal reforms

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398. Epstein, *supra* note 52.

399. At the same time, although the Chinese courts have not yet consistently attained the level of legality of any Western European or Anglo-American legal system, the manner in which the debates within the United States on China policy has been framed overlooks the fact that different societies have devised different institutional frameworks for maintaining the rule of law. Some of the characteristics of the Chinese judicial system, such as audit of lower court opinions by administrative superiors and the provisionality of lower court decisions, also mark some legal systems of Western Europe. *See* Damaska, *supra* note 342.

400. MONTESQUIEU, THE SPIRIT OF THE LAWS, *quoted in* THOMAS GEORGE STAUNTON, TA TSING LEU LEE, xxv (1810).

and the political, institutional and cultural obstacles that must be overcome if China is to make further progress toward establishing and maintaining a stable rule of law. The accomplishments of China's legal reformers have been impressive despite the limitations set by policy on the role of law itself, the flux of China's ongoing social and economic transformations since 1979, and the continuing strength of traditional legal culture. The future growth of legal institutions depends critically on the support that they receive, both from the Party-state that creates them and from the society they must serve; Chinese legal institutions must overcome the mistrust of both.

As long as the policies toward law that have been in effect in recent years are continued, reformers ought to be able to continue to strengthen the institutions they have created. Building and consolidating legality, however, are primarily political tasks. Regardless of how much legislation is promulgated and how many judges are trained and installed in the courts, legality will not grow unless the Party-state fosters and maintains a commitment to it and alters the allocation of power between the courts and the rest of the Party-state. This, however, would require the Party to abandon its dominance. Moreover, regardless of whether Party and government encourage the autonomy of the legal institutions they have put in place, to be effective the institutions will have to become more rooted in Chinese society than they are today. The changes in Chinese legal culture that have begun to occur will have to go further before the institutions become healthy.

The conclusions that follow draw together some implications of the preceding discussion for Chinese legal development and for US-China relations. I have first considered a mix of forces that seem likely to constrain the further development of legal institutions, arising out of relations between state and society that were introduced in Part One as essential elements of the context in which the legal reforms are taking place. I have then speculated on the relevance and acceptability in China of the rule of law as an ideology and as a vehicle for political reform. The final section is concerned with some implications for the US of the likely slow growth in Chinese legality. American involvement with China is growing because of the increasing volume of Sino-American economic relations and because China's growing power requires that the US "engage" China on a wide variety of regional and global issues. The US must maintain friendly relations with an authoritarian government of which many Americans disapprove. Because many Americans care about law, legality and related issues of human rights, American perceptions of Chinese legal institutions should be clarified. I have ended by noting

implications for US policy toward China, specifically on human rights and on China's membership in the WTO, which should flow from a clear understanding of the current state of Chinese legal institutions and from realistic expectations about the prospects for their further development.

I. SOME MAJOR INFLUENCES ON LEGAL DEVELOPMENT

A. Party Policies

Some current limits on legal reform derive from pre-reform policies that remain in place. Most notably, although Chinese leaders declare that the rule of man must be replaced by the rule of law, they continue to insist that law must serve policy generally and respond to specific demands by the central Party-state. In Part One I mentioned the most visible expression of these demands, in the intensification of criminal punishments during repeated campaigns against crime and in judicial subservience to the Party when dissidents are accused. Part Three noted other intrusions of policy into the daily work of the courts, less obvious but implying no less subordination of the courts to implementation of policies.

Policy toward law also reflects other ambiguities. Chinese leaders as well as legal scholars have articulated a view of law that is quite recognizable in the West. They have repeatedly said that for Chinese legal development to be meaningful, rules enforced by the power of the Chinese state must protect the expectations of individual citizens, groups, enterprises and organizations arising out of economic transactions. This view is expressed in legislation on civil and economic law and in the work of building institutions to settle disputes arising out of them. Continued economic development will intensify pressures to employ and expand legal institutions and to develop additional ones. Contracts are being used more widely in China and rights claimed to arise out of them are being asserted more frequently. Both the consciousness and the security of those rights can be expected to grow, albeit slowly, if citizens perceive that vindication of their rights is supported by the policy and practice of the Party-state.

By what standards will attempts to exercise rights be understood? In the West, private law establishes a framework for individuals to pursue their interests autonomously, with the state creating "the means whereby, if necessary, those individuals can secure the interest in question by calling

upon the state's judicial and law-enforcement apparatus."[401] It is not yet clear, however, how comprehensively the Chinese Party-state will permit law to function as a framework to facilitate private transactions. Both long before and since the PRC was established, law has been regarded in China exclusively as an instrument of control and discipline. In the non-state sector there is a lingering adherence to the notion that contract law should be an administrative device to "manage" contracts.[402] Policy that requires functionaries of the Party-state to let "private" behavior alone departs radically from long-established injunctions to punish "speculation." This is especially confusing because economic reform has often caused officials much difficulty in distinguishing lawful "private" economic activity from criminal "speculation."

B. The State Bureaucracy and the Courts

A critical limit on expansion of the power of courts lies in the absence of effective restraints on the Chinese bureaucracy, whose grip on Chinese society will be difficult to dislodge. The decision to adopt the Administrative Litigation Law (ALL) reflected recognition, albeit limited, of the need to protect individuals and entities against official arbitrariness by empowering them to challenge certain narrowly-defined violations of law by officials. Administrative litigation under current legislation will not, however, remove the major obstacles that current Chinese administrative practices present to the growth of the rule of law. As already noted, legislation and administrative rules are often so generally drafted that they resemble statements of policy, which are "clarified" through interpretation and application by bureaucrats exercising extensive discretion. Foreign investors commonly note this problem as one of the more troubling features of the Chinese investment environment, and we may be sure that it is a fact of life for Chinese.

Changing the language of Chinese law will be especially difficult, because it is not merely drafting techniques that must change but

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401. GIANFRANCO POGGI, THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION 103 (1978).

402. For example, the State Administration of Industry and Commerce has evidently held the position that it should be able to "supervise and manage" contracts in which one party is a state or collective enterprise and which could injure "state interests." Qian Guzhou, *Hetong Guanli: Fangzhi Guoyou Zichan Liushi de Yitiao Zhongyao Tujing, Guojia Gongshangju Gongping Jiaoyi Ju Juzhang Li Bida Fangtan Lu [Contract Management: An Important Approach to Preventing the Loss of State-Property, Notes from an Interview with Li Bida, National Ministry of Industry and Commerce Fair Trade Bureau Bureau-Chief]*, ZHONGGUO LÜSHI [CHINA LAWYER], NO. 8, at 22 (1997).

underlying attitudes toward power. As long as Chinese bureaucrats enjoy both the power to write their own rules as broadly as they do now and also to interpret them, they will have a license to be arbitrary. To change this, the domain of law would have to be enlarged and the powers of bureaucrats diminished. At present, this seems beyond the will of the current leaders of the Party-state. A senior Chinese judge with whom these problems were discussed in conversation agreed, saying, "there is much that has to be changed from outside, not from within the courts."

Judicial powers will also not expand as long as the judicial hierarchy remains only one among many bureaucratic hierarchies, existing coordinate with them but possessing no greater authority than any of them. The rule of law will not advance as long as the courts (or some other functional equivalent within the administration) lack the power to interpret and decide on the validity of legislation and of administrative rules. As I have already emphasized, major political decisions will be required in order to change the position of the courts vis-à-vis the rest of the Party-state. Absent such decisions, all that can be realistically hoped for in the near future is incremental partial reform.

C. The Rise in the Power of the Local Party-state

In Part One, sketching some of the major changes brought about by the economic reform, I stressed the importance of the devolution of power to the localities that allowed them to create a parallel marketized economy. Although this vibrant sector of the economy has been the engine of reform, its growth may retard and deflect Chinese legal development. The weakening of central power creates difficulties for efforts to construct and strengthen a unified national legal system. The interpenetration of business and government at the local level promotes particularistic relationships that do not seem conducive to the strengthening of concepts of law and legality. I have already noted the power of local Party and government officials over the courts and the difficulties that "local protectionism" has created for the courts. Although one optimistic view suggests that proliferation of particularistic relationships is but a step toward the breakdown of the vertical bureaucracies of the Party-state and a preliminary step not only to the building of markets but to the construction of universalistic legal rule,[403] current tendencies do not suggest such a trend.

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403. *See* Victor Nee, *Peasant Entrepreneurship and the Politics of Regulation in China, in* REMAKING THE ECONOMIC INSTITUTIONS OF SOCIALISM: CHINA AND EASTERN EUROPE 169 (Victor Nee & David Stark eds., 1989).

At the moment of writing, the weight of Western scholarly opinion greatly emphasizes that although the reforms have reduced central control, the local manifestations of the state have not been in retreat. One writer notes, "despite the political leeway that currently exists in China, it is notable that few anecdotes reveal substantial social activity that is wholly independent of the state."[404] The changes do not suggest "a 'society' detaching itself from, and gaining greater autonomy and power vis-à-vis the 'state'," but rather "the lower reaches of a state structure gaining increased autonomy from higher reaches and forging new kinds of political and economic ties with individuals and enterprises outside."[405] As a result, courts are involved in relationships among officialdom and business that both echo traditional values and practices and also reflect outright contemporary profit-seeking. Judicial independence is threatened by the strength of these relationships, which are more tenacious than political control by the CCP because they are so rooted in Chinese society.[406]

Moreover, personal relationships are embedded in the economic relationships of commerce in the non-state sector (they also flourish, differently, in the state sector). Even though the central Party-state's ideology has become more noticeably hospitable to autonomous private economic activity, the integrity and universality of the legal framework for such activity is threatened by local-level interests. One aspect of the problem that looms critically large in the future of legal reform is the current ambiguity of rights over the acquisition, management and disposition of property. One Western scholar, writing in 1997, noted that although local firms and governments were beginning to retain lawyers, "perhaps it is these social ties and the credible expectations that are embedded within them, rather than any hard and fast laws, that have made

404. LIEBERTHAL, *supra* note 16, at 301.

405. Andrew G. Walder, *The Quiet Revolution from Within: Economic Reform as a Source of Political Decline*, *in* THE WANING OF THE COMMUNIST STATE, *supra* note 20, at 1, 16. On resistance to intervention by higher-level governmental authorities, see Ole Bruun, *Political Hierarchy and Private Entrepreneurship in a Chinese Neighborhood*, *in* THE WANING OF THE COMMUNIST STATE, *supra* note 20, at 184, 206.

406. A Chinese reformer has suggested that to counter local protectionism, regional courts under the direct supervision of the Supreme People's Court should be created to handle disputes between parties from different areas, and that the Supreme People's Court itself should exercise original jurisdiction over such cases as well. Cao Siyuan, *China's Ailing Courts*, ASIAN WALL ST. J., May 9, 1996. Although this suggestion is attractive, especially to Americans familiar with federalism (*see, e.g.*, Jerome A. Cohen, *Reforming China's Civil Procedure*, 45 AM. J. COMP. L. 793, 803-804 (1997)), it may underestimate the difficulty of negotiating power-sharing among China's central and provincial governments. Also, expanded jurisdiction of the Supreme People's Court could be a vehicle for asserting Party control over important court decisions.

it possible to have growth without clear and secure property rights in the western sense of the term."[407]

How might these institutions evolve? It is impossible to predict the length or outcome of the contest between nation-wide legal rules and the particularistic relationships on which many businesses rely today. Conventional Western theory teaches that the participants in a marketizing economy desire legal certainty and that an increasingly complex economy ought to generate more precise conceptions of rights. The rights-consciousness that is slowly emerging in China suggests that formal legal institutions—legal rules and the courts that can enforce them—can gain importance. Their relative power, however, could long be blunted by other Chinese institutions and by certain components of traditional Chinese culture.

D. The Rule of Law and Chinese Legal Culture

A striking characteristic of Chinese legal culture has been the primacy of interpersonal relations over legal relationships. This has been demonstrated to me throughout my twenty-five years of negotiating Sino-Western transactions in China, as well as in conversations with Chinese for many years and in my academic research. It would be wrong to draw too strong a contrast between Westerners who conceive of their business relationships in terms of legal rights and duties, and Chinese who are concerned only with personal qualities and relationships. After all, considerable Western legal scholarship shows that significant economic relationships are sometimes managed entirely outside the law,[408] and that parties to contracts are often willing to forego their legal rights on the basis of other considerations.[409] Nonetheless, the Chinese emphasis on relationships (*guanxi*) seems to have had a strength and durability for thousands of years that makes it more powerful and pervasive than comparable Western emphases.

Although this Article has focused on legal institutions that in the West are at least formally independent of personal relationships, such relationships are so important in Chinese culture that no assessment of

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407. Oi, *supra* note 13, at 341-42.

408. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

409. *See, e.g.*, Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study, in* LAW AND THE BEHAVIORAL SCIENCES 141 (Lawrence M. Friedman & Stewart Macaulay eds. 1977).

Chinese law should fail to weigh heavily the interactions between law and traditional forms of *guanxi* and its modern manifestations. This theme has emerged here despite any conscious intention to emphasize it and without even recalling the importance of status relationships in traditional China. It is enough to remark on the use of personal relationships in Maoist times to overcome rigidities in the administrative apparatus and the state sector of the economy,[410] and the obvious growth of powerful *guanxi* relationships among businesses and officials at the local level as a result of economic reform. Such relationships are likely to be of continuing importance in the future of Chinese law.

The strength of these traditional values presents a considerable obstacle to the deepening of legal consciousness and the strengthening of legal institutions. Two scholars who studied the resolution of contract disputes throughout the 1980s wrote persuasively of the cultural "embeddedness" of the emphasis on personal relationships.[411] Although they suggested that the deepening of economic reforms would expand contract relations and legal concepts of contract alike, the continuing strength of *guanxi* relationships suggests that such changes in values will only occur slowly.[412]

Guanxi, to be sure, is not unchanging. Rather, the "production of *guanxi*" is the outcome of behavior that is conditioned both by past traditions and current practical concerns.[413] Although the influence of the past is considerable, Chinese economic actors are confronted by new challenges that include, among others, the importance of economic exchange in relationships affected both by *guanxi* and by increasingly important legal institutions. Although law is a recent addition to the configuration of rules and institutions that govern China, it has become more visible in shaping relationships and managing conflict.[414]

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410. *See, e.g.*, David M. Lampton, *A Plum for a Peach: Bargaining, Interest and Bureaucratic Politics in China*, *in* BUREAUCRACY, POLITICS & DECISION-MAKING IN POST-MAO CHINA 33, 56-57 (Kenneth G. Lieberthal & David M. Lampton eds., 1992).

411. Cheng & Rosett, *supra* note 383.

412. Relevant here also is the study of litigation that was mentioned in Part Three, in which the writers noted that even when litigants were represented by lawyers, most of the argumentation was not centered on legal issues. Thireau & Hua, *supra* note 387.

413. ANDREW B. KIPNIS, PRODUCING GUANXI: SENTIMENT, SELF AND SUBCULTURE IN A NORTH CHINA VILLAGE 185 (1997).

414. *See* Douglas Guthrie, *The Declining Significance of Guanxi in China's Economic Transition*, CHINA Q., NO. 154, at 254 (1998). Signs of these changes include the relative decline of extra-judicial mediation and the increase in litigation of all major types, such as class actions and challenges to administrative arbitrariness, which have been mentioned earlier. To this may be added suits by employees against their work units. *See, e.g.*, Elisabeth Rosenthal, *A Day in Court, and*

The force of tradition is strong, however, and China's current crisis of values reinforces the need to rely on personal relationships in order to stabilize expectations. Moreover, the potency of traditional values is sustained by a powerful and unique source of support. Unlike all other post-totalitarian Communist societies, a vast number of its ethnic compatriots residing abroad make massive contributions to China's economic reform. As much as 80 percent of all foreign investment may be attributable to Overseas Chinese.[415] They bring to China not only their capital, remittances and expertise, but also their ideas about how businesses and governments ought to work. Some, especially from Southeast Asia, may also carry with them values that may not be conducive to the growth of a legal system.[416] All businessmen, regardless of their ethnicity, especially if they work in multinational corporations, must conduct their businesses in conformity with the legal environment in which they operate.[417] Even with this caveat, however, it is still apparent to many observers inside and outside China that Overseas Chinese from Southeast Asia operating in China often value legal rules and the formal arrangements fashioned to conform with them very differently than many

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Justice, Sometimes, for the Chinese, N.Y. TIMES, Apr. 27, 1998.

415. Noel Tracey, *Transforming Southern China: The Role of the Chinese Diaspora in the Era of Reform, in* CHINA BUSINESS: CONTEXT AND ISSUES 1, 3 (Howard Davies ed., 1995).

416. It has been observed, for example, that Overseas Chinese fit very well into the corporatist trend toward alliances between local businesses and officials. Pitman B. Potter, *Foreign Investment Law in the People's Republic of China: Dilemmas of State Control, in* CHINA'S LEGAL REFORMS, *supra* note 82, at 155, 184. One trenchant summary notes that Overseas Chinese "are relatively untroubled by the absence of a legal and accounting framework or of reliable market research" and assume that they need "to co-opt political support to get anything done." *China's Diaspora Turns Homeward*, ECONOMIST, Nov. 27, 1993, at 33, 34.

A well-known Hong Kong Chinese businessman has been quoted as saying "Western companies take a long time to make decisions; they need a lot of lawyers. The bureaucracy is too heavy for this part of the world. Overseas Chinese know not to create such deterrents. *Woo's New Wave*, FAR E. ECON. REV., Dec. 23, 1993, at 38. The lengthy contracts that are usually preferred by many multinational corporations and their lawyers often strike their PRC counterparts as too wordy, legalistic and unfamiliar. The major concern among Overseas Chinese businessmen, however, may not be lawyers but rather the use of law itself. An American banker in Hong Kong was quoted in this pointed observation: "You need a partner for the local flavor when you negotiate . . . and to take care of things behind the scenes," *id.*

417. As one observer has noted, "Some cultures do, of course, show a remarkable continuity over long stretches of time. But . . . [a] multi-million manufacturing company in Taiwan is not simply a peasant clan writ large . . . . On the contrary, in some situations, people can drastically change their beliefs and their behavior, often in an amazingly short period of time." Peter L. Berger, *Is Asia's Success Transplantable*, ASIAN WALL ST. J., Apr. 20, 1994.

Western and Japanese businessmen.[418] These attitudes inevitably color those of Chinese counterparts with whom they deal in the PRC, and seem likely to influence the development of Chinese legal institutions.

II. THE RULE OF LAW AS AN ALTERNATIVE IDEOLOGY

In the face of policies and institutional forces noted here that limit legality, other and newer forces support law reform.

A. The Desire for Justice

As both Communist ideology and official virtue decline, the rule of law could help to fill the growing vacuum of belief, despite the fact that Chinese history lacks a strong rights-based tradition. The refusal to recognize rights that could be asserted by individuals and vindicated by legal institutions was not a Communist innovation. In traditional China, law was undifferentiated from administration and was guarded by an élite charged with governing by virtue of noble example and deep wisdom. The rule of law challenges that tradition and the decaying ideology that has been used to justify the Party-state. As noted at the end of Part Three, the rule of law itself is an ideology, which means that it legitimates the exercise of a distinct form of power.[419] When Chinese individuals participate in litigation they *experience* the rights-consciousness dimension of law. Institutions interact with legal culture, and the legitimacy of the Party-state itself would be bolstered if the legal institutions that it has created are perceived by the populace as operating in the manner in which they are advertised.

Legal reform and its heavily propagandized popularization have heightened individuals' consciousness in China about legal concepts, legal rights and substantive justice. This is due partly to the influx into China of Western ideas and partly to the legal reforms themselves. On numerous occasions in China, especially in the last ten years, I have repeatedly heard ordinary Chinese express values consistent with Western ideals of equality, justice and legality, and research provides additional albeit impressionistic

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418. Except, of course, when they are treated arbitrarily in China. *See Detained HK Man Vows to Clear Name,* SOUTH CHINA MORNING POST (Hong Kong), Oct. 11, 1993 (quoting a Hong Kong businessman holding an American passport who alleged that he had been illegally arrested in China because of a business dispute with a PRC partner: "I was a so-called China expert, but I have learned more in 40 days in detention than I have in 40 years of academia.").

419. *See* Epstein, *supra* note 52.

evidence of belief in these values.[420] Other observers have also concluded that what Chinese today mean when they say that there is no law "is something very specific: the government is not restrained by its own rules, *and it should be*."[421] In the face of the forces that constrict legality and the weaknesses in the institutions that have been described in detail here, it is difficult to be optimistic. But my own and others' personal impressions suggests that among the Chinese populace there are many who have considerable desire for a government that will give them justice.

At the same time, it should be anticipated that Chinese will not necessarily seek justice in the same places and in the same manner as they would in the West. For example, there is a deep Chinese tradition of complaining to higher levels of authority, which was even echoed in Mao's "mass line" political style that encouraged officials to maintain close contacts with the populace.[422] In the PRC today, citizens engage in direct contact with officials on policy matters, especially when they wish to seek protection from application of a policy that damages their interests. Such contacts may involve efforts at the working-level or at higher levels, the Party or the Communist Youth League, deputies to the local People's Congress, letters to newspapers, or local offices for "letters and visits," which act as complaint bureaus. The complaint bureaus have existed since the first days of CCP rule, and the results they reach after receiving complaints are decidedly mixed. The existence of this extra-legal route for redress of grievances against authority indicates the persistence of a traditional approach that is likely to continue to condition future institutional experimentation. The tendency to seek justice elsewhere than in the courts is likely to remain strong.

B. Legal Reform And Political Reform

Analysis of the operation of the Chinese courts has implications for assessing the possible influence of legal reforms on more extensive system-wide political reform. The rhetoric of legal reform often aims at nothing less. Deng Xiaoping himself said that "to realize democracy and the rule

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420. *See, e.g.*, Potter, *supra* note 43, at 325.

421. Donald C. Clarke & James V. Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, *in* CHINA'S LEGAL REFORMS, *supra* note 82, at 135, 153. For a sophisticated Chinese analysis, *see* Liang Zhiping, *Law and Fairness at a Time of Change*, CHINA PERSPECTIVES, No. 2, at 30 (1995).

422. This discussion is based on TIANJIAN SHI, POLITICAL PARTICIPATION IN BEIJING 44-66 (1997).

of law is the same as realizing the four modernizations."[423] Many Chinese legal scholars conceive of a role for law that is distinctly post-totalitarian and see law as an instrument for change.[424]

The growth of Chinese law may also resonate with other aspects of reform. Law, William Alford points out, has a "peculiar, if limited capacity to stimulate and consolidate other types of change, while, at least implicitly, diminishing claims of its autonomy."[425] Legal reform shapes and disseminates concepts about relations between state and society that affect individuals' relationships with each other as well as with the state. Although many Chinese do not yet distinguish between the courts and other state agencies, some are bringing suits to force local cadres to comply with national laws.[426] In addition, peasants angered by predatory cadre behavior use government laws and regulations as the basis for protest, sometimes violent.[427] The village elections that have been promoted by the Ministry of Civil Affairs in order to reassert weakening central control over policy implementation in the countryside could also generate institutionalized practices that limit government powers.[428]

The weakening of Beijing's control over the rest of the country since the late 1980s suggests that even if the Chinese leadership decided to promote a more integrated legal system and the rule of law, it would encounter great difficulty. Local and provincial governments that gain in strength may seek to build stronger legal institutions in the areas they rule,[429] but the relative strengths of central and local governments are presently in flux, and so too is their capacity to build stable legal institutions.

Regardless of the reluctance of the Chinese leadership to promote political reforms, some optimistic Western observers have predicted that continued and sustained economic development will lead to China's

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423. DENG XIAOPING, *Emancipate the Mind, Seek the Truth From Facts and Unite as One in Looking to the Future*, *in* SELECTED WORKS OF DENG XIAOPING, *supra* note 40, at 157-58.

424. Even to the point of believing that "creation of a legal regulatory mechanism can engender the very institution which the law has been created to regulate." James V. Feinerman, *Backwards Into the Future*, 52 LAW & CONTEMP. PROBS. 169, 169 (1989).

425. Alford, *supra* note 109, at 36.

426. *See, e.g.*, Liebman, *supra* note 250.

427. *See, e.g.*, use of the courts by peasants protesting cadre arbitrariness, *reported in* ELISABETH CROLL, FROM HEAVEN TO EARTH: IMAGES AND EXPERIENCES OF DEVELOPMENT IN CHINA 132-133 (1994); and Li & O'Brien, *supra* note 27, at 28-61.

428. *See, e.g.*, Kevin O'Brien, *Implementing Political Reform in China's Villages*, 32 AUST. J. CHINESE AFFAIRS 33 (1994).

429. *See, e.g.*, W.J.F. JENNER, THE TYRANNY OF HISTORY: THE ROOTS OF CHINA'S CRISIS 246 (1992).

becoming a democracy. Henry Rowen, extrapolating from the recent history of Taiwan and South Korea, has asserted that "a richer China will become more democratic" and even suggests that this will happen by the year 2015.[430] Minxin Pei, although more cautious, points to the strengthening of the NPC and legal reform and sees "the potential to evolve from a system of law into a rule of law."[431] Rowen does not discuss how he believes the current configuration of state-society relations could evolve, and in late 1998, when this Article was completed, no clear trends toward political reform seemed apparent.[432]

Even before an economic crisis that began in Asia in late 1997, the weight of Western scholarship on China suggested that in the next few years, the continuation of some form of authoritarianism is most probable and the establishment of a true parliamentary democracy seems most unlikely, as the crisis began to affect the Chinese economy, the near-term prospect for all reforms worsened.[433] Until now, China has been the most hesitant dragon of all to deepen legal reforms because of their serious political implications, and the economic crisis only seemed to increase leadership apprehensions.

III. SUGGESTIONS FOR US POLICY

Chinese legal institutions do not concern only China. They generate considerable interest abroad because of what they may portend for the development of the Chinese state and the manner it will exercise its power within and outside its borders. They are also intimately related to the manner in which China will fulfill certain international obligations. The foregoing analysis of the institutions of dispute resolution and the context in which they operate suggests some implications for US policy toward

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430. Henry S. Rowen, *The Short March: China's Road to Democracy*, THE NATIONAL INTEREST, No. 45, at 61, 69 (1996).

431. Minxin Pei, *Is China Democratizing?*, 77 FOREIGN AFFAIRS, No. 1, at 68 (1998).

432. Summarizing uncertainty both about the emergence of civil society in China and the appropriateness of applying the concept to China is Timothy Brook & B. Michael Frolic, *China and the Future of Civil Society*, *in* CIVIL SOCIETY IN CHINA 195 (Timothy Brook & B. Michael Frolic eds., 1997).

433. An extensive range of possibilities for political development is considered in Richard Baum, *China After Deng: Ten Scenarios in Search of Reality*, CHINA Q., No. 145, at 153 (1996). In 1998 small-scale protests against arbitrary government actions and economic distress by reform were tolerated, *see e.g.*, *Taking Liberties*, FAR E. ECON. REV., Sept. 10, 1998. However, amidst fears of social instability caused by unemployment and other effects of economic reform major financial and other reforms were put on hold, *see e.g.*, Lardy, *supra* note 21; *Reform on Ice*, ECONOMIST, July 18, 1998.

China on law-related issues.

A. *Human Rights: Less American Moralizing*

"One of the most striking aspects of American society, to natives and foreigners alike, is the way law and the legal system seem to dominate public life."[434]

The difference between the US and China in this regard, one of the sharpest differences between the two societies, is accentuated by the American tendency to stress legal concepts in international relations. George Kennan, a wise student of US foreign policy, has remarked on the American "legalistic-moralistic approach to international problems."[435] US policy on human rights is a prime example. The United States has taken the lead, among all nations of the world, in judging the treatment by other governments of the people of their own societies according to standards of human rights that it regards as universal.

Since June 1989, the US has made Chinese human rights violations a major issue in US-China relations. Such violations provoked annual debates in Congress over whether China should receive "most-favored nation" (MFN) treatment from the US until 1994, when President Clinton "delinked" the two issues. Human rights issues continue to figure not only in debates on MFN[436] but, more importantly, on overall US policy toward China.[437] From 1990 until 1997, the US led efforts to make the UN Human Rights Commission criticize China for human rights violations. The PRC, in turn, has responded angrily to what it has characterized as an attack on Chinese sovereignty and a culture-bound attempt to project Western values onto a China with different traditions and difficult economic circumstances.[438]

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434. LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 1 (1985).

435. GEORGE F. KENNAN, AMERICAN DIPLOMACY 46 (1984).

436. *See, e.g.*, Paul Gigot, *Engaging China Doesn't Have to Mean "Coddling"*, WALL ST. J., Feb. 21, 1997.

437. It is not only Sino-American relations that are troubled. As one China specialist has noted, when the US has threatened sanctions because of trade, military sales and human rights issues, "in almost every instance the other G-7 countries have not supported America's threats [which] has made Washington's claim that it is acting on behalf of widely accepted international norms ring hollow." Kenneth G. Lieberthal, *The China Challenge*, 74 FOREIGN AFFAIRS, NO. 6, at 35, 43 (1995).

438. *See, e.g.*, Commentary: *Anti-China Resolution Foiled Again*, XINHUA NEWS AGENCY, Apr. 23, 1996, *available in* LEXIS, News Library, Curnws File. The issue has declined somewhat as a point of contention. The US and the European Union decided in 1998 not to introduce a condemnatory resolution, and the PRC announced that it would sign the International Covenant on Civil and Political Rights. *See* James Kynge & James Harding, *Trade Trumps Human Rights in*

The human rights debate has generated much heat and emotion on both sides of the Pacific:

> It touches some of the core values in each society: the American values of freedom, individualism, and democracy, and the Chinese values of sovereignty, national pride, and self-determination. It evokes each society's core myths: American missionary responsibility to carry freedom and democracy overseas, and China's struggle against foreign intervention in its internal affairs.[439]

In addition, the American critique of China is based on concepts that have found only a fragile foothold in post-Mao China. The notion of rights generally is underdeveloped in China today and is only beginning to be accepted. The American human rights critique of China also projects American concepts of due process onto China.[440] Some observers question such intellectual categories as culture-bound, arguing that because China is a poor and developing country, "economic and social rights may be much more important than political and civil rights,"[441] or that Chinese undervalue individual rights because of the importance in Chinese tradition on individual behavior in groups. In this view, the assumption that a legal system should protect human rights is not relevant to understanding Chinese law and Chinese society. Analyses derived from Anglo-American concepts of legal procedure also overlook a historical Chinese lack of concern for procedural justice.

Despite these critiques, there is evidence that whatever the differences in the starting points from which Chinese and Westerners proceed when formulating concepts of governance, concern for due process values has been increasingly voiced in China, by Chinese. Chinese leaders have been consistently concerned about the need to curb official arbitrariness. Some Chinese legal scholars, officials and intellectuals have

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West's Dealings with China, FIN. TIMES, Apr. 2, 1998; *The White House: Press Briefing by Mike McCurry*, M2 Presswire, Mar. 16, 1998, *available in* LEXIS, News Library, Curnws File. China signed the Covenant on Oct. 6, 1998. *See As China Signs Rights Treaty, It Holds Activists*, N.Y. TIMES, Oct. 6, 1998, *available in* Lexis, News Library, Curnws File.

439. Harry Harding, *Breaking the Impasse over Human Rights*, *in* LIVING WITH CHINA: U.S.-CHINA RELATIONS IN THE TWENTY-FIRST CENTURY 165, 167 (Ezra F. Vogel ed., 1997).

440. *See, e.g.*, Jerome A. Cohen, *Due Process?*, *in* THE CHINA DIFFERENCE 237 (Ross Terrill ed., 1979); R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, *in* HUMAN RIGHTS IN CONTEMPORARY CHINA 42 (R. Randle Edwards et al. eds., 1986).

441. Victor H. Li, *Human Rights in a Chinese Context*, *in* THE CHINA DIFFERENCE, *supra* note 440, at 219, 221.

called for a legal system that embodies standards of procedural fairness. Since 1978, published discussions of political and legal reform as well as demonstrations by Chinese students in the name of democracy have increasingly called for the rule of law.[442] These are Chinese sentiments, not the creations of Western scholars, and they signify that the rule of law is becoming a Chinese problem. Such developments suggest, as Jerome Cohen urged as early as 1977, that the argument that "such due process values, as we call them, are irrelevant to China . . . is [an argument] of extreme cultural and political relativism."[443]

At the other extreme, some Americans insist on pronouncing censorious judgments on China and would require the US to place at the center of US policy relentless insistence that China must become a law-based society.[444] These views are often no more than simplistic calls to punish the Chinese leadership because China fails to live up to American ideals.[445]

The fundamental problems of the Chinese legal reforms that have been discussed here suggest that American policy-makers who wish to press China to move more decisively toward the rule of law should take

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442. *See, e.g.*, the most scholarly account of the democracy movement in China before 1989 is ANDREW J. NATHAN, CHINESE DEMOCRACY 3-30, 193-232 (1985); on the events of Spring 1989, see, e.g., ANDREW J. NATHAN, CHINA'S CRISIS: DILEMMAS OF REFORM AND PROSPECTS FOR DEMOCRACY 171-192 (1990). *See also* CRIES FOR DEMOCRACY: WRITINGS AND SPEECHES FROM THE 1989 CHINESE DEMOCRACY MOVEMENT (Han Minzhu ed., 1990); Andrew Walder, *The Political Sociology of the Beijing Upheaval of 1989*, PROBLEMS OF COMMUNISM 30 (Sept.-Oct. 1989). Among Chinese articles relating law to democracy see, e.g., Chen, *supra* note 6, at 2 (an outspoken call for the rule of law by a scholar at the Institute of Law of the Chinese Academy of Social Sciences).

443. Cohen, *supra* note 440, at 239.

444. *See, e.g.*, Thomas L Friedman, *Rethinking China, Part II*, N. Y. TIMES, Mar. 6, 1996. In mid-1997 Secretary Albright promised to "shine a spotlight" on Chinese human rights violations. Lewis Dolinsky, *Albright Defends China Policy in S.F. Appearance*, S. F. CHRON., June 25, 1997. While visiting Beijing earlier that year, Speaker Gingrich lectured a Chinese group on the need for the rule of law, and declared thereafter that "America cannot remain silent about the basic lack of freedom . . . in China." Patrick E. Tyler, *Now, Beijing Hears Another U.S. Voice*, N.Y. TIMES, Mar. 29, 1997. Minority Leader Gephardt has denounced China's "free-market Stalinism" as an economy based on "slave labor." Adam Clymer, *Gephardt Will Denounce Trade Policy Toward China*, N.Y. TIMES, May 27, 1997.

445. *See, e.g.*, Roberta Cohen, *People's Republic of China: The Human Rights Exception*, 9 HUM. RTS. Q. 447 (1987); HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA (Wu Yuan-li et al. eds., 1988); Robert L. Bernstein, *Break Up the Chinese Gulag*, N. Y. TIMES, Feb. 17, 1991; A.M. Rosenthal, *Muzzled by Beijing*, N.Y. TIMES, Feb. 21, 1997. Another observation by George Kennan is enlightening here: "I am extremely skeptical of the relevance and applicability of *our* moral principles to the problems and outlooks of others, and I suspect that what passes as the 'moral' approach to foreign policy in our country is often only another expression of the serious American tendency to smugness, self-righteousness and hypocrisy." *Letter to Philip Jessup* (Apr. 9, 1953), *quoted in* ANDERS STEPHANSON, KENNAN AND THE ART OF FOREIGN POLICY 183-184 (1989).

into account the constraints on China's capacity to change its legal institutions. These stem not only from the determination of the CCP to retain its rule and power, but from the lasting influences of tradition and the pre-reform Communist past, limited resources, and structural developments in state-society relations that have been caused by economic reform. Awareness of these ought to temper American impatience and help place law-related issues in perspective.

Chinese legal culture is surely relevant to American insistence on rights-based changes in Chinese behavior. In the mouths of moralistic critics of China, "human rights" has become a slogan that allows no room for "the burden of the past which any major change in the character of the Chinese rights system will have to overcome."[446] William Alford points out the narrowness of American rights-based arguments, noting that it reminds many Chinese of 150 years of exploitation and bullying by the West. To the extent that the US policy projects or relies on American legal ideals, it may generate resistance and resentment as a powerful Western nation hectoring China.

The conduct of the Chinese Party-state is unlikely to change significantly in response to foreign pressure unless rights-consciousness among Chinese rises considerably above its present level. The Sino-American disagreement on protection of the intellectual property of Americans is suggestive here. American pressure on China to toughen its laws on intellectual property protection is unlikely to succeed, suggests William Alford, without "a belief that individuals are endowed with rights that they are entitled to assert even with respect to those in positions of authority."[447] Alford further points out that "massive threats" to bring about changes in the internal laws of another country are "incapable of generating the type of domestic rationale and conditions needed to produce enduring change."[448] He argues that the "institutions, personnel and values needed to undergird a rights-based legality" must support the laws themselves. This argument seems entirely appropriate to human rights as well as other legal issues. The quotation from Montesquieu at the head of this chapter carries a lesson that seems apposite today.

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446. Andrew J. Nathan, *Sources of Chinese Rights Thinking*, *in* HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra* note 440, at 164.

447. WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 117 (1995).

448. *Id.* at 118.

B. *Promoting Legality in China*

The restraint that is urged here on US pressure on China to modify its human rights practices does not mean that the US should abandon concern about promoting legality in China. The US government, American foundations and the American business community should provide support for programs that would promote the growth of legality within China that proceed from an understanding of Chinese needs and nuanced consideration of the extent to which foreign institutions might be adapted to Chinese circumstances.

Presidents Clinton and Jiang Zemin agreed in October 1997 to establish a Sino-American program of legal exchanges, and this initial understanding, reaffirmed during President Clinton's visit to China in June, 1998, should be followed up by energetically developing long-term programs to implement the agreement.[449] Whether Congress will lend its support, after years of refusing to appropriate funds for US programs to foster the rule of law in China, remains to be seen. One of the designated themes of future Sino-American legal exchanges that cries out for immediate close attention is improvement of Chinese administrative law. The underdevelopment of Chinese administrative law and the breadth of the discretion wielded by Chinese bureaucrats, which have been noted here, present particularly great obstacles to the further development of Chinese legality. Sino-Western consultation on improving Chinese systems for review of administrative acts, therefore, should be a high priority, particularly as is shown immediately below, because this area is highly relevant to Chinese participation in the World Trade Organization (WTO).

C. *China, the WTO and the Rule of Law*

China's courts and other legal institutions present important issues connected to China's application to join the WTO. It is desirable for China to become a member because membership would multilateralize China's economic relations with the rest of the world, thereby enabling China to manage its economic relations with the world on the basis of agreed-to and enforceable rights and obligations, and to participate in writing the trade

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449. *White House Releases Joint U.S.-China Statement*, U.S. Newswire, Oct. 29, 1997, *available in* LEXIS, News Library, Curnws File; *Fact Sheet- Achievements of U.S.-China Summit*, M2 Presswire, *available in* LEXIS, News Library, Curnws File; Elisabeth Rosenthal, *China-U.S. Legal Ties to be Widened*, INT'L HERALD TRIB., June 26, 1988; Anthony Lewis, *The Engine of Law*, N.Y. TIMES, July 6, 1998.

rules for the next century.[450] It has been observed that exerting international pressure on China to abide by the rules of the WTO is "a way of pushing China to accelerate its efforts to introduce the rule of law at least into economic affairs."[451]

China's admission to the WTO should be based on its willingness and ability to adhere to the trade and economic rules agreed on by most of the world's nations and expressed in the General Agreement on Tariffs and Trade (GATT).[452] The operation of Chinese legal institutions has clear implications for US policy because the legal domain is one in which China will encounter difficulties if it must adjust its institutions to meet the requirements that membership in the WTO imposes on all members. Ability to meet the GATT requirement of transparency, in particular, is called into question. Many issues have arisen during the course of negotiations over China's membership in the WTO, but the only one that will be addressed here has been strongly suggested by the state of the Chinese legal institutions discussed here.[453]

Article X of the GATT requires that member nations must publish their laws on trade and administer them in a "uniform, impartial and reasonable manner."[454] The analysis in this Article suggests that China is far from meeting this standard at the present time, and is unlikely to be able

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450. 'China and the World Trading System': WTO Director-General's Speech at Beijing University, Speech delivered on Apr. 21, 1997 (full text *available at* WTO website: <http://www.wto.org/wto/press/chipress.htm>).

451. Dwight Perkins, *Prospects for China's Integration Into the Global Economy*, *in* CHINA'S ECONOMIC FUTURE, *supra* note 18, at 34, 39.

452. General Agreement on Tariffs and Trade, 61 Stat., Part 5 at A 2051 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 308 (1950), *reprinted in* IV GATT, BISD 77 (1969) [hereinafter GATT 1947]. GATT 1947 was continued in force by the WTO Agreement signed at the conference of the Uruguay Round of trade negotiations in 1993.

453. Abundant evidence exists of trade and investment-related practices that allow Chinese officials to discriminate against and among foreigners in a manner that violates the central GATT principles of most-favored-nation and national treatment. A useful survey of the many problems that surround China's admission to the WTO is US-CHINA BUSINESS COUNCIL, CHINA AND THE WTO: A REFERENCE GUIDE (1996). One homely example of the problems that foreign investors regularly encounter will suffice here. In connection with initiation of a policy that may tolerate foreign insurance companies in China, regulations have been issued on licenses to such companies. The regulations specifically state, however, that if a license is denied, the agency in charge does not have to explain its reasons for the denial. Larry L. Simms, *'Waiting For the Other Shoe': A Critical Analysis of the PRC's Laws on Insurance*, 11 CHINA L. & PRACTICE, No. 2, at 20, 23 (1997). Further evidence of practices that are inimical to the transparency that is required by the GATT Treaty is provided by continued use of internal regulations and guidelines and in local departures from central government policy mentioned above. On internal rules *see, e.g.*, CORNE, *supra* note 76, at 110-111; on inconsistency between local and national legislation, *see id.* at 124-135.

454. GATT 1947, *supra* note 452, art. X.

to meet it in the foreseeable future. The standard is only very general, of course, and it is certainly not consistently maintained by other GATT members. Transparency issues like others must be addressed specifically in the Protocol of Accession that will eventually be agreed on by the PRC and the Working Party that has been charged by the WTO with carrying out negotiations, and in which Chinese obligations will be defined.

The issues raised by Article X are being negotiated. As of early 1997 the text of the Draft Protocol on Chinese accession to the WTO contained, among others, a clause to which the PRC has agreed, providing that:

> China shall establish or designate, and maintain, tribunals, contact points, and procedures for the prompt review of all disputes relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application . . . the tribunals shall be independent of the agencies entrusted with administrative enforcement.[455]

This clause and the treaty standard quoted above imply that the PRC should be required to establish goals for the increased effectiveness of its legal institutions as a condition of membership, including at least a long-term commitment to build administrative law and to reduce "local protectionism" in the courts. In the short term, how might China establish nominal adherence to the requirement that tribunals be established to hear disputes under the above-cited paragraph of the Draft Protocol? In the absence of a nation-wide administrative law system it might be appropriate to establish administrative law tribunals in Beijing and two or three other cities. A crucial prerequisite, of course, would be enactment of a statute that comprehensively articulates the procedural standards that Chinese bureaucrats would have to meet and that would be applied by the "tribunals" that China has agreed to establish; no such law currently exists.

In negotiating on these issues, the US and the other major trading nations should entertain clear and realistic expectations about the limited results that can be attained by even the most energetic and sincere Chinese efforts to create and operate the judicial institutions required by the GATT. The issue is not merely China's admission to the WTO. After that event occurs, if other members of the WTO seek to invoke the WTO dispute resolution process to secure Chinese compliance with agreed-upon goals and schedules, that process could become seriously overloaded. It seems

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455. *Draft Protocol on China*, para. 2 (D) 1, INSIDE U.S. TRADE, March 14, 1997, at 25.

desirable for the EU and the US, before Chinese accession, to make clear to Beijing the types of violations that would most provoke them to invoke the dispute settlement process.[456] Overall, the institutional transformations that will be required of the PRC on legal issues alone may be so difficult that focusing international concern on Chinese legality as part of enforcing China's obligations under the WTO is likely to be a long and time-consuming process.

Study of the Chinese courts raises a further issue, of whether China possesses the *state capacity* to meet the standard of Article X or the Draft Protocol. The "fragmented authoritarianism" of Chinese governance and weakened central control are causes for concern about whether, even if the central government makes a commitment to develop Chinese legal institutions in order to approach treaty standards, it would be able to carry out such a commitment. This Article provides evidence that China does not have a legal *system.* Structural weakness, ideology rigidity, entrenched interests, localism and corruption in the Party-state limit the functions and the autonomy of the courts and corrode their legitimacy.

The weakness of the capacity of the national Party-state that is suggested by the current problems of the courts raises critical issues for the Chinese leadership and populace if they wish to continue economic reform and build strong and stable institutions. These issues, moreover, are not China's alone, because they concern other nations that would coexist with China with a minimum of contentious issues. These difficulties involve not only China's membership in the WTO, but the enforcement of all Chinese laws with international implications, such as environmental laws.[457] As a consequence, China's ability to fulfill international obligations, even after they have been freely undertaken by representatives of the central government, may sometimes be impaired. The fragility of the means at Beijing's disposal to implement laws nation-wide threatens to cause difficulties in China's international relations and to retard Chinese efforts to participate constructively in the international community.

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The problem of China's state capacity also exists in the eyes of its

456. Bruce Stokes, *The Chinese Challenge*, FIN. TIMES, Aug. 29, 1997.

457. *See, e.g.*, ELIZABETH ECONOMY, THE CASE STUDY OF CHINA, REFORM AND RESOURCES: THE IMPLICATIONS FOR STATE CAPACITY IN THE PRC (1997); William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125, 139-143 (1997).

beholders, foreign observers for whom it is difficult to form realistic expectations about Chinese legal institutions. As noted immediately above, the weaknesses of Chinese legal institutions are likely to cause concern abroad. Legal reforms complicate the problem, because they have begun to make it possible to discuss law using a vocabulary that is common both in the West and in China. That newly shared vocabulary conceals, however, underlying differences in meanings that stem from profound differences between historical and current Chinese and Western notions about law and governance.

It is essential to remain mindful of the ease with which Americans in particular insist on comparing foreign legal institutions against over-simplified models of American institutions. Thus, as one student of Japanese law has noted, it is common in the United States to "exaggerate the importance of law and neglect other means for social ordering."[458] Americans, especially policy-makers for whom the rule of law provides a rhetorical device with irresistible appeal, rarely seem aware that the functions discharged by formal legal institutions in the US might be found in institutional configurations unfamiliar to Americans. On Taiwan, for example, where democratic institutions have matured in recent years, law has been said to be "marginalized," because economic development has been fostered by a combination of modern legal institutions, networks of relationships and enforcement by organized crime.[459]

Foreign observers must question and strive to clarify their assumptions. For example, some in the West assume that newly emerging groups and strata in Chinese society, once freed from the grip of totalitarianism, will seek autonomy from the state. Not only is it unclear at the current early stage of the post-Deng history of China when and how this might occur, but such assumptions may be based on a distortion of Western history.[460] It is difficult indeed to resist transferring Western

458. JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 15 (1991).

459. Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 L. & SOCIETY REV. 193 (1994).

460. In considering the future of the Chinese bar in Part One, I raised the question of the extent to which lawyers will seek autonomy more aggressively than they have in the past or whether they will prefer to ally themselves with governing élites. The same question is relevant to entrepreneurs. While appraising links between emerging strata and local power-holders, we might revisit theoretical assumptions about Western development that are implicit in our expectations of China. A study of local Chinese legislative bodies has pointed out that although in the West the idea is popular that law grew out of medieval representative assemblies wresting concessions from kings, scholarship shows that they cooperated with kings in state-building and only slowly evolved away from being instruments of royal rule. Kevin J. O'Brien, *Chinese People's Congresses and Legislative*

assumptions about legal and economic institutions to China and to prevent uncritical generalizing from Western development – or from myths about Western development.

Only restrained interpretations of the limited available information seem appropriate at this time. The recent two decades of reform are only a brief historical moment, and deeper insight can only come from more knowledge over time. No matter how long Western observers search, though, whenever we seek to enhance our understanding of China we must recall that we need to understand ourselves as well.

Embeddedness: Understanding Early Organizational Development, 27 COMP. POL. STUDIES NO. 1, 80, 82-83 (1994).