

CHINA’S COURTS: RESTRICTED REFORM

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## I. INTRODUCTION

Recent developments in China's courts reflect a paradox largely avoided in literature on the subject: Can China's courts play an effective role in a non-democratic governmental system? Changes to courts' formal authority have been limited, courts still struggle to address basic impediments to serving as fair adjudicators of disputes, and courts continue to be subject to Communist Party oversight. Courts have also confronted new challenges, in particular pressure from media reports and popular protests. At the same time, however, the Party-state has permitted, and at times encouraged, both significant ground-up development of the courts and expanded use of the courts as fora for the consideration of rights-based grievances, including administrative litigation, class actions, and a small number of discrimination claims filed directly under the constitution. Some courts have engaged in significant innovation. Judges are better qualified than in the past, and are increasingly looking to other courts and judges, rather than Party superiors, in deciding novel or difficult cases. As a result, courts are increasingly coming into conflict with other state institutions, growing numbers of well-educated judges are developing professional identities, and popular attention to both the problems and the potential roles of the courts appears higher than ever before.

The current and potential future role of China's courts has received wide attention. In China, officials speak of the importance of court reform for ensuring China's goals of legal construction and modernization. But the aims of such reforms have been technical: improved training of judges, rooting out corruption, increasing efficiency, and overseeing judges more closely. Such reforms appear aimed at making the courts institutions for the fair adjudication of individual disputes. At the same time, commentators in China and in the West have argued for greater changes, contending that courts should serve not only as adjudicators of private disputes but also as checks on state power and as fora for the resolution of public rights – in sum, that the courts should play a significant role in the development of Chinese governance and society.

Discussions in both China and the West, however, have largely avoided two central questions. First, why has the Party-state permitted the courts to develop even limited new roles? Second, can courts play an effective role in a non-democratic governmental system? These questions have assumed renewed importance over the past two years as Party leaders have reemphasized the obligations of the judiciary to serve Party

goals and as Party-state concern with public opinion and social stability has led to new pressures on the courts.

This essay surveys recent developments in China's courts with a view to beginning to answer these questions. Part I examines recent top-down reforms in China's courts, highlighting what some advocates of a stronger judiciary consider signs of progress. Part II discusses new challenges that may be undermining courts' already limited autonomy. Part III argues that the most significant changes in China's courts are coming from the ground up, in particular from growing horizontal interactions among judges. Part IV asks whether recent developments suggest fundamental changes to courts' power, and then returns to the two questions posed above. My focus is primarily on civil and administrative litigation, where reforms have been more significant than in the criminal justice system.

Much theoretical scholarship on courts focuses on why democratic systems permit and encourage the development of independent courts. Explanations include the knowledge that rulers may one day find themselves out of office, the desire to make commitments credible, and the need to constrain bureaucracies.<sup>1</sup> Most such explanations have limited applicability in China, where courts are not designed to be independent of Party leadership. Scholarship on the role of courts in authoritarian societies has been limited. This essay seeks to add to this literature by exploring why a single-Party state might encourage court development, and whether courts can play significant new roles without necessarily challenging Party authority.

## II. REFORMED COURTS?

### A. Caseloads

Western scholars have long warned against equating Chinese courts with their Western counterparts. As Donald Clarke has noted, "perhaps Chinese courts are not designed to do, and should not do, the things Western courts do."<sup>2</sup> Courts are one of a number of state bureaucracies with the power to resolve disputes, and lack significant

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<sup>1</sup> For a helpful summary, see Matthew C. Stephenson, 'When the Devil Turns . . .': *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 61-64 (2003).

<sup>2</sup> Donald Clarke, *Empirical Research into the Chinese Judicial System*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 171, 164-192 (Erik Jensen & Thomas Heller eds., Stanford University Press 2003). As Martin Shapiro has noted, few courts anywhere fit the archetype of "independent judges applying preexisting legal norms after adversary proceedings to achieve a dichotomous decision." MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (University of Chicago Press 1983).

oversight powers over other state actors. For much of the period since the beginning of legal reforms in 1978, courts have remained minor actors in the overall functioning of the Chinese state. Despite these differences, Chinese judges and academic commentators have in recent years looked to Western models of courts and judging in evaluating developments in China's courts.<sup>3</sup>

Are Chinese courts playing fundamentally different roles in society to those played in the recent past? There is no clear benchmark for evaluating changes in the position of courts within the Party-state. Official reports have noted that Chinese courts are handling more cases than at any time in the past, with some claiming that China is facing a "litigation explosion."<sup>4</sup> For example, China's courts reported hearing 8.1 million cases in 2006,<sup>5</sup> more than triple the number heard in 1986.<sup>6</sup> Yet such comparisons overstate the growth of litigation in China: as Table 1 shows, caseloads have grown only modestly, if at all, since 1999. The total number of cases heard in 2006 was only two percent higher than in 2005, and the total number of first instance cases actually decreased by two percent between 1996 and 2006. Similarly, the total number of first instance civil cases decreased in four years between 1999 and 2006; the

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<sup>3</sup> For example, see, Liao Weihua, *Fayuan zuzhi fa jiang chutai zhuanjia jianyi jiang renmin fayuan gaiming fayuan* [Court Organization Law Will Come Out, Experts Suggest Changing People's Courts into Courts], NANFANG CHUANG [SOUTH CHINA WEB], Dec. 4, 2004, <http://www.southcn.com/news/china/zgkx/200412040062.htm>. Although noting that any reforms must accord with China's "national conditions", the Supreme People's Court has acknowledged the need to look overseas in designing reforms of China's courts. Supreme People's Court, *Renmin fayuan diege wunian gaige gangyao (2004-2008)* [The Second Five-year Reform Plan of the People's Courts (2004-2008)], Oct. 26, 2005, [http://www.law-lib.com/law/law\\_view.asp?id=120832](http://www.law-lib.com/law/law_view.asp?id=120832).

<sup>4</sup> Yan Maokun, *Xiao Yang zai meiguo Yelu Daxue fabiao yanjiang Zhongguo sifa: tiaozhan yu gaige* [Xiao Yang Gives Speech at Yale University on China's Judiciary: Challenges and Reforms], ZHONGGUO FAYUAN WANG (CHINA COURT WEB), Oct. 12, 2004, <http://www.court.gov.cn/forout/200410120005.htm>; *Beijing susong shuliang baozhashi zengzhang, qunian 76% anjian weineng jian* [The Number of Cases in Beijing Increases Explosively, the Percentage of Not Closed Cases Increased by 76% Last Year], FAZHI WANBAO [BEIJING LEGAL TIMES], Apr. 27, 2005, available at [http://news.xinhuanet.com/legal/2005-04/27/content\\_2884636.htm](http://news.xinhuanet.com/legal/2005-04/27/content_2884636.htm).

<sup>5</sup> Courts reported hearing a total of 8,105,007 cases in 2006. Xiao Yang, *Zuigao Renmin Fayuan gongzuo baogao (2007)* [Supreme People's Court Work Report (2007)], Mar. 14, 2007, available at <http://www.chinacourt.org/public/detail.php?id=239089>. The figure includes both first instance cases and appeals. *Id.*

<sup>6</sup> The contrast to earlier years is even more striking: official court statistics state that China's courts handled just 300,787 first instance civil cases and 14,618 civil appeals in 1978, the year China began its economic reforms. Hence civil cases have increased more than fourteen-fold since then. RESEARCH OFFICE OF THE SUPREME PEOPLE'S COURT, *Quanguo renmin fayuan sifa tongji lishi ziliao huibian 1949-1998 (minshi bufen)* [Collection of Historical Judicial Data on the Entire Nation's People's Courts 1949-1998 (civil portion)], BEIJING: RENMIN FAYUAN CHUBAN SHE [PEOPLE'S COURT PRESS] (1999).

total number of administrative cases likewise decreased in four of those years.<sup>7</sup> The modest increases are striking when set against the backdrop of China's rapid economic growth and widespread reports of a surge of civil disturbances in China.<sup>8</sup>

The reliability of court statistics is questionable, and thus it would be a mistake to read too much into apparent increases or decreases in caseloads. Adjustments to methodologies for collecting statistics, ideological emphasis in the courts, and incentives to and targets for individual judges can have a significant effect on the total number of cases courts report hearing.<sup>9</sup> Nevertheless, lower court judges have confirmed in interviews that, as the statistics indicate, caseloads have either declined or grown only modestly over the past five years.<sup>10</sup> Judges attribute such declines to lack of confidence in the courts, in particular to difficulties successful litigants face in enforcing decisions, and to private parties' preference for informal methods of dispute resolution.<sup>11</sup>

Even if the total number of cases has grown only slightly in recent years, the long-term trend appears to reflect a modest increase in the use of the courts, and that a greater range of cases and cases of greater complexity are being brought. Litigants are also increasingly challenging

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<sup>7</sup> As Table 1 and Figure 1 show, the total number of first instance civil and administrative cases peaked in 1999; despite modest increases in recent years, the 2006 figures remained below the 1999 totals. For analysis of the decline in caseloads, see Xin He, *The Recent Decline in Economic Caseloads in Chinese Courts: Exploration of a Surprising Puzzle*, 190 CHINA Q. 352 (2007); Pan Duola, "Susong baozha" wei wenti de beihou [*Behind the Fake Question of a "Litigation Explosion"*], YANZHAO DUSHI BAO [YANZHAO METROPOLITAN DAILY], Apr. 28, 2005, available at <http://he.people.com.cn/GB/channel10/200504/28/7821.html>.

<sup>8</sup> The conventional wisdom has been that the economic development and reduced state control over individuals' lives has resulted in a greater number of cases in the courts. Thus, for example, Xin Chunying argues that greater use of the courts is a consequence of multiple factors, including the weakening of administrative oversight of individuals' lives, the shifting role of Party-state units, and the lack of protections for rural workers. Xin Chunying, *21 shiji: Zhongguo xuyao shenmeyang de sifa quanli?* [*The 21<sup>st</sup> Century: What Kind of Judicial Power does China Need?*], ZHONGGUO FAZI WANG [NATIONAL INSTITUTE OF LAW, CHINA], <http://www.iolaw.org.cn/showarticle.asp?id=1712> (last visited Oct. 9, 2007).

<sup>9</sup> For example, some judges attribute the decline in administrative cases to changes in reporting methodologies. Whereas in the past a case involving fifty plaintiffs might have been counted as fifty cases, courts have recently begun to count such cases as a single case. Likewise, although the official *Law Yearbooks* show only a three-fold increase in caseloads since 1987, in a recent speech in 2004 the President of the SPC stated that the total number of civil cases handled by China's courts had increased more than ten-fold over the past twenty years. See Yan, *supra* note 5.

<sup>10</sup> Much of the information in this essay is based on interviews with more than 200 judges, lawyers, and academics in China. Interviews were conducted in Beijing, Shanghai, Guangdong, Jiangxi, Hubei, Jilin, Sichuan, and Shaanxi between 2003 and 2007 [hereinafter *Interviews*].

<sup>11</sup> *Id.*

first instance decisions: appeals have grown at a much faster rate than first instance cases, with appeals nearly doubling between 1995 and 2006. This increase in appeals suggests that litigants may be both more familiar with legal procedures, and perhaps more confident of the willingness of higher courts to issue decisions that differ from those of lower courts.

Table 1: Number of cases (first instance and appeals) closed nationwide, 1994-2006

Year	1994	1995	1996	1997	1998	1999
1 <sup>st</sup> Crim.	480914	496082	616676	440577	480374	539335
1 <sup>st</sup> Civil <sup>12</sup>	3427614	3986099	4588958	4720341	4816275	5060611
1 <sup>st</sup> Admin.	34567	51370	79537	88542	98390	98759
All 1 <sup>st</sup> Inst.	3943095	4533551	5285171	5249460	5395039	5698705
Criminal 2 <sup>nd</sup>	52579	53942	67087	64548	70767	78803
Civil 2 <sup>nd</sup>	179687	208263	243510	263664	294219	339929
Admin 2 <sup>nd</sup>	7672	9536	11365	12684	14220	18072
All 2 <sup>nd</sup>	239938	271741	321962	340896	379206	436804
Letters & Visits to Courts <sup>13</sup>	5847948	6361495	6960162	7131469	9351928	10691048
Mediation by People's Mediation Committees	6123729	6028481	5802230	5543166	5267194	5188646

<sup>12</sup> Prior to 2002 Chinese courts had separate divisions for handling civil cases and economic cases; they were merged in 2002. The figures for 1994 to 2001 thus include both civil and economic cases.

<sup>13</sup> "Letters and visits" refers to complaints about cases received in writing or in person by courts; for a discussion of the letters and visits system, *see infra* pp. 26-29. Complaints about the courts to letters and visits offices at other Party or state institutions are not included in this figure.

Year	2000	2001	2002	2003	2004	2005	2006
1 <sup>st</sup> Crim.	560111	623792	628549	634953	644248	683997	701379
1 <sup>st</sup> Civil	4733886	4616472	4393306	4416168	4303744	4360184	4382407
1 <sup>st</sup> Admin.	86614	95984	84943	88050	92192	95707	95052
All 1 <sup>st</sup> Inst.	5380611	5336248	5106798	5139171	5040184	5139888	5178838
Criminal 2 <sup>nd</sup>	86619	98157	89440	96797	96204	96776	94092
Civil 2 <sup>nd</sup>	363522	377672	357821	370770	377052	392191	406381
Admin 2 <sup>nd</sup>	19404	22149	27649	25045	27273	29176	29054
All 2 <sup>nd</sup>	469545	497978	474910	492612	500529	518143	529527
Letters & Visits	9394358	9148816	3656102	3973357	4220222	3995244	Not yet available
Mediation	5030619	4860695	4636139	4492157	4414233	4486825	Not yet available

Source for 1994-2005 data: 1995-2006 *ZHONGGUO FALÜ NIANJIAN* [CHINA LAW YEARBOOK].

Sources for 2006 data: 2007 SPC WORK REPORT (for first instance data); Supreme People's Court, *2006 nian quanguo fayuan shenli zhixing anjian qingkuang* [Details of Cases Tried and Enforced Nationwide in 2006], available at <http://www.dffy.com/sifashijian/ziliao/200703/20070314163527.htm> (for data on second instance cases).

Figure 1: First Instance Cases, Mediation by People's Mediation Committees, and Court Letters and Visits, 1994–2006

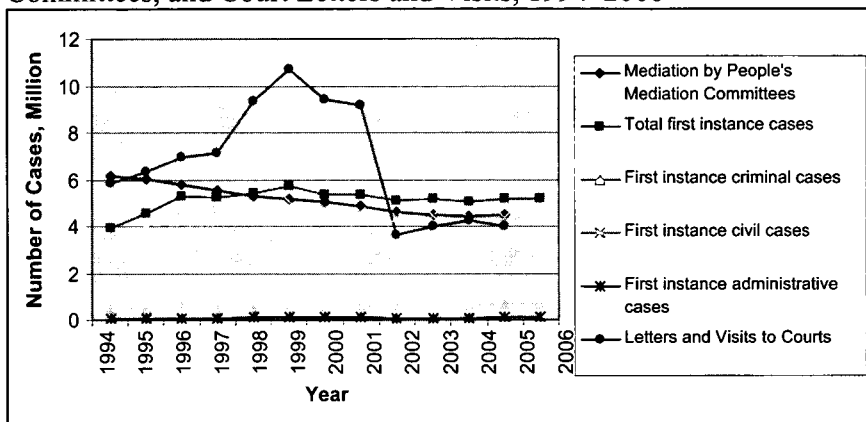
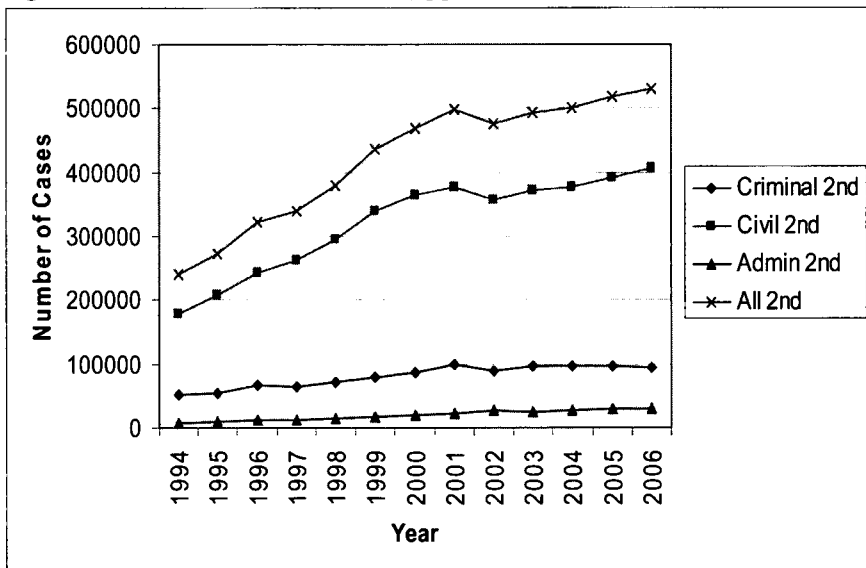


Figure 2: Second Instance Cases (appeals), 1994–2006





The modest growth in litigation in the past few years suggests that despite emphasis on court reform, courts are not necessarily playing a greater role relative to other institutions engaged in dispute resolution. The increase in court caseloads coincided with a decline in the total number of disputes resolved through People's Mediation Committees until 2004.<sup>14</sup> As Table 1 and Figure 1 show, the total number of cases resolved through People's Mediation Committees decreased each year from 1994 to 2004.<sup>15</sup> Compared to other institutions engaged in dispute resolution, however, the modest rise in the total number of court cases appears less significant. Disputes and complaints of all types have increased in China in recent years,<sup>16</sup> and thus any increase in court caseloads may simply be part of the more general increase in both disputes and grievances. For example, far more grievances are raised through the letters and visits system than through the courts.<sup>17</sup> As Table 1 and Figure 1 show, the total number of complaints raised to court letters and visits offices is only slightly below the number of cases heard. Commercial arbitration cases, including both domestic and international disputes, increased by more than twenty percent annually from 2004 to 2006.<sup>18</sup> Labor arbitration cases more than quintupled between 1996 and

<sup>14</sup> The number of disputes resolved through People's Mediation Committees grew in 2005, the first increase in more than a decade. The increase likely reflects renewed state emphasis on mediation as part of efforts to construct a "harmonious society." People's mediation committees are under the supervision of the Ministry of Justice and are distinct from court-supervised mediation, which occurs in the context of litigation.

<sup>15</sup> For a discussion of the weakening of informal dispute resolution, including mediation, in Chengdu in recent years, see *Di si jie Chengdu fayuan yuanzhang luntan, Qu Ying yuanzhang kaimu zhici* [The Fourth Chengdu Court Presidents' Forum, Opening Remarks from President Qu Ying], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], Oct. 18, 2004, <http://cdfy.chinacourt.org/yzlt/> [hereinafter *The fourth Chengdu court*]. People's Mediation Committees operate under the jurisdiction of the Ministry of Justice and local justice bureaux, not the courts. Mediation of cases brought in court also decreased throughout the 1990s, but appears to have increased recently due to renewed emphasis on mediation by the Supreme People's Court. See *infra* text accompanying note 48.

<sup>16</sup> See *The fourth Chengdu court*, *supra* note 16.

<sup>17</sup> The letters and visits system, or *xinfang*, refers to offices that exist at most levels of the Party-state and at most central Party and government departments to handle both written and in-person complaints. Although the total number of complaints raised is not made public, the system handles an enormous volume of grievances each year. For a full discussion of the letters and visits system, see Carl F. Minzner, *Xinfang: An Alternative to the Formal Chinese Legal System*, 42 STAN. J. INT'L L. 103, 103-179 (2006).

<sup>18</sup> Wen Jie, 2006 *Niandu quanguo zhongcai anjian shouli shuju jianxi* [Brief Analysis of the Arbitration Cases Decided Nationally in 2006], ZHONGGUO ZHONGCAI WANG [CHINA ARBITRATION WEB], Mar. 15, 2007, <http://www.china-arbitration.com/readArticle.do?id=ff80818111440b34011153d7086a0046>; Wen Yan, 2005 *nian quanguo ge zhongcai weiyuanhui shouli anjian qingkuang* [Statistics of Cases Decided by Arbitration Committees Nationwide in 2005], ZHONGGUO ZHONGCAI WANG [CHINA ARBITRATION WEB], Feb. 27, 2006, <http://www.china->

2004.<sup>19</sup> In addition, Chinese scholars have argued that recourse to social networks and to government departments and officials remains a preferred method of dispute resolution, in particular in rural China.<sup>20</sup> The fact that the number of disputes and complaints raised in other institutions has continued to rise suggests that the decrease in the growth of litigation has not resulted from increased clarity of legal norms.

### B. Top-Down Reform

Modest growth in caseloads does appear to reflect a conscious decision by Party-state leaders to strengthen the courts' ability to resolve an increasing number of disputes.<sup>21</sup> But the Party-state has also emphasized reforming other dispute resolution institutions – including the letters and visits system, mediation, arbitration, and administrative review. These moves suggest that the Party-state is focused on the need to resolve disputes and grievances, and thus preserve social stability. But they do not necessarily reflect a trend toward an increased role for the courts in comparison to other institutions.

Court reform has, however, received enormous attention over the past decade. China commenced its project of court reform when it began reconstruction of its legal system in 1978. The role of the courts received increased attention in the late 1990s, as China's leadership renewed efforts to strengthen the legal system. Following the embrace of "rule of law" by the 15<sup>th</sup> Congress of the Chinese Communist Party in 1997, the Supreme People's Court ("SPC") in 1999 issued its first five-year plan for reforming China's courts.<sup>22</sup> Judicial reform had been a major issue of

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arbitration.com/3a1.asp?id=1772&name=%E4%BB%B2%E8%A3%81%E5%8A%A8%E6%80%81.

<sup>19</sup> MINISTRY OF LABOUR AND SOCIAL SECURITY, *ZHONGGUO LAODONG TONGJI NIANJIAN* (2005) [YEARBOOK OF CHINA LABOR STATISTICS (2005)] 523-524, available at <http://www.molss.gov.cn/images/2006-11/16/27110316153762520791.pdf>.

<sup>20</sup> Guo Xinghua and Wang Ping, *Zhongguo nongcun de jiufen yu jie jue tujing: guanyu zhongguo nongcun falü yishi yu falü xingwei de shizheng yanjiu* [Disputes and Resolution Methods in Rural China: Empirical Research on Legal Consciousness and Legal Action in Rural China], 2004 JIANGSU SHEHUI KEXUE [JIANGSU SOCIAL SCIENCE] 2, available at [http://www.usc.cuhk.edu.hk/wk\\_wzdetails.asp?id=3609](http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=3609).

<sup>21</sup> For example, see Jiang Zemin, *Report to the 15<sup>th</sup> National Congress of the Communist Party of China*, Sept. 12, 1997, <http://dcdj.ccp.org.cn/old/ReadNews.asp?NewsID=3395> (discussing judicial reform); Xin Chunying, *supra* note 9 (arguing that courts should be the ultimate authority for dispute resolution).

<sup>22</sup> The SPC serves as the highest court and also manages the court bureaucracy. More than three hundred judges work at the court, although not all hear cases. *Zuigao Renmin Fayuan de zhize quanxian yu gongzuo yuanze* [The SPC's power and working principle], ZHONGGUO WANG [CHINA WEB], [http://news.xinhuanet.com/ziliao/2003-08/13/content\\_1024700.htm](http://news.xinhuanet.com/ziliao/2003-08/13/content_1024700.htm).

discussion beginning in the early 1990s,<sup>23</sup> but the five-year plan brought increased attention to the need to strengthen the courts. The plan set forth fifty goals.<sup>24</sup> In late 2005 the SPC issued a second five-year plan, covering the period 2004-2008, again listing fifty goals.<sup>25</sup>

Both plans address problems in the courts, ranging from judicial training to regularity in court procedures. Thus, for example, the 2005 plan calls for reforms to trial procedures and rules of evidence; clarifying procedural requirements for rehearings; addressing problems with enforcement; reforming the composition of adjudication committees; strengthening mediation and the use of simplified trial procedures; improving courts' management of cases; improving training and discipline; and reforming the system by which judges' performance is assessed. Such reforms are largely either general and overly abstract, or are primarily technical changes designed to address competence and fairness, not courts' authority or influence over other state actors.

The goals of the 2005 plan, although similar in number, also appear modest when compared to the 1999 plan.<sup>26</sup> The 1999 plan included not only specific goals but also details regarding the schedule for accomplishing such goals and the mechanisms for doing so; in contrast, the 2005 reform speaks only in declaratory terms. The earlier plan also embraced some quite significant reforms, including the creation of rules of evidence and the separation within courts of the acceptance of cases from adjudication and adjudication of cases from enforcement. With one exception – the reform of procedures for capital cases – the 2005 reforms include no major breakthroughs. Instead, the plan largely reflects changes already underway in the courts.

The 2005 plan does mention the need to address centralizing court appointments – a step toward breaking the link between local authorities, which generally control court appointments, and judges. But the plan proposes doing so only within “given areas,” not nationally. And it raises the topic of centralized financing of courts, but proposes no specific steps toward this goal. The plan also states that courts should receive

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<sup>23</sup> Zhang Zhiming, *Sifa gaige xuyao geng kuankuo de shiye: dui Zuigao Fayuan wunian gaige gangyao de yidian pinglun* [Judicial Reform Needs a Broader View: Some Comments on the SPC's Five Year Reform Program], ZHONGGUO FAZI WANG [NATIONAL INSTITUTE OF LAW, CHINA], <http://www.iolaw.org.cn/showarticle.asp?id=256> (last visited Oct. 9, 2007).

<sup>24</sup> SUPREME PEOPLE'S COURT, *RENMIN FAYUAN WUNIAN GAIGE GANGYAO* [THE FIVE-YEAR PROGRAM FOR REFORM OF THE PEOPLE'S COURTS], Oct. 20, 1999, available at <http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=chl&gid=23701>.

<sup>25</sup> *RENMIN FAYUAN DIERGE WUNIAN GAIGE GANGYAO (2004-2008)* [THE SECOND FIVE-YEAR REFORM PLAN OF THE PEOPLE'S COURTS (2004-2008)], *supra* note 4.

<sup>26</sup> Although the plan covers the period 2004-2009, it was not made public until 2005. The delay may reflect internal division regarding the contents of the plan.

supervision from People's Congresses and reiterates that procurators may participate in court adjudication committees.<sup>27</sup> Given the constitutional status of the procuracy and the people's congresses,<sup>28</sup> such statements may simply be an acknowledgment that reform must take place within existing constitutional constraints, but they also may reflect the SPC's attempt to make clear that reform is not designed significantly to expand court power or autonomy, and that external oversight of and intervention in court work continues to be legitimate.

Despite the limited goals of the official plans, courts have undertaken significant reforms designed to strengthen both the competence of judges and the professionalism of the court system. Most significantly, the education levels of judges have improved dramatically. Media reports in mid-2005 stated that, for the first time, more than fifty percent of Chinese judges had university degrees.<sup>29</sup> This marks a sharp increase from 6.9 percent in 1995. Since 2002, all new judges in China have been required to possess bachelors degrees.<sup>30</sup> Likewise, in 2002 the Supreme People's Court stated that sitting judges who were below age forty would be required to obtain a degree within five years or would lose their jobs. Older judges who lacked a university education would be

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<sup>27</sup> Adjudication committees, which exist in all courts, discuss and resolve difficult or sensitive cases, sometimes upon their own instigation and sometimes when cases are referred to the committee by the panel hearing the case. Adjudication committee members – who generally do not hear the cases they decide – include court presidents and vice-presidents and other senior judges within a court. The provision in the Five Year Plan is notable because although courts have in the past had the discretion to include procuratorates in adjudication committee discussions (without voting power), it appears that in practice courts rarely do so.

<sup>28</sup> The PRC Constitution makes explicit that both the SPC and the Supreme People's Procuratorate are "responsible to the National People's Congress." XIAN FA arts. 128, 133 (P.R.C.). The Constitution also states that the courts, procurators and public security bureaux shall coordinate their efforts in handling criminal cases, thus perhaps providing support for the inclusion of procurators in court adjudication committees. Both the courts and the procuratorates are to exercise their power independently, defined as "not subject to interference by administrative organs, public organizations, or individuals." *Id.* arts. 126, 131, 135. Such phrasing is generally understood to permit supervision of the courts and procuratorates by people's congresses, the Party, and each other.

<sup>29</sup> *Woguo faguan he jianchaguan zhengti suzhi tigao benke bili guoban* [The Overall Quality of Our Nation's Judges and Procurators is Raised, More than Half are University Graduates], RENMIN RIBAO [PEOPLE'S DAILY], July 17, 2005, available at [http://news.xinhuanet.com/legal/2005-07/17/content\\_3228617.htm](http://news.xinhuanet.com/legal/2005-07/17/content_3228617.htm). The source of and methodology used to calculate the figure is unclear. It is likely that the fifty percent number includes not only graduates of four-year universities, but also graduates of evening classes, junior colleges, or *da zhuan* (大专), as well as judges who have received university degrees through correspondence courses. These degrees are not necessarily in law. Gao Yifei, *Xiaoxue biye dang faguan: wenti daodi zai nali* [Becoming a Judge with Only an Elementary School Education: What's the Problem?], JINGJI YU FA WANG [ECONOMICS AND LAW WEB], May 7, 2005, <http://www.jjyf.com/webpage/news/050218/fg.htm>.

<sup>30</sup> Judges Law, art. 9.

permitted to stay on only if they completed a six-month or one-year training course.<sup>31</sup> The courts have placed extensive emphasis on training judges, with tens of thousands of judges undergoing specialized legal training each year.<sup>32</sup> Many new judges, in particular at higher-level courts in major cities, now possess graduate degrees in law. New judges in China are also now required to pass the national unified judicial exam, which has had a pass rate of roughly ten percent in the past five years. Those who became judges before 2002, however, are not required to pass the bar exam.<sup>33</sup> Court presidents – who generally are the most powerful figures within courts and who take part in deciding major or sensitive cases – likewise are not required to be judges or to pass the bar exam.<sup>34</sup>

The SPC has also taken steps to improve the quality of court decisions. In 2005 the SPC issued a notice stating that opinions should include both accurate descriptions of the facts and evidence and logical arguments and legal reasoning.<sup>35</sup> In so doing, the SPC appeared to agree

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<sup>31</sup> *Wenping shangqu budengyu shuiping tigao, faguan peixun buneng zhi benzhe wenping qu* [An Advanced Degree Does Not Equal Enhanced Ability, Judge's Training Should Not Solely Aim at Degrees], XINHUA WANG [XINHUA WEB], Mar. 11, 2004, [http://news3.xinhuanet.com/newscenter/2004-03/11/content\\_1360136.htm](http://news3.xinhuanet.com/newscenter/2004-03/11/content_1360136.htm). Obtaining such training, however, appears relatively easy.

<sup>32</sup> *Id.*; Hua Xuan, *Zhiye faguan bailian chenggang* [Professional Judges Being Tempered Into Steel], RENMIN RIBAO [PEOPLE'S DAILY], Oct. 16, 2002, [http://www.snweb.com/gb/people\\_daily/2002/10/16/j1016003.htm](http://www.snweb.com/gb/people_daily/2002/10/16/j1016003.htm).

<sup>33</sup> An SPC notice implementing the Judges Law also states that persons who are not judges may not be appointed to positions on court adjudication committees or as heads of divisions within courts without first passing the bar exam.

<sup>34</sup> Su Zelin, *Zou you Zhongguo tese de jingying faguan zhi lu* [Taking the Route to Elite Judges with Special Chinese Characteristics], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], June 26, 2002, <http://www.chinacourt.org/public/detail.php?id=5672>; *Zuigao Renmin Fayuan guanyu guanche luoshi "Zhonghua Renmin Gonghe Guo faguan fa" de tongzhi* [Notice of the Supreme People's Court Regarding Implementation of the 'Judges Law' of the People's Republic of China], July 11, 2001, <http://law.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=38471>.

<sup>35</sup> Supreme People's Court, *Zuigao Renmin Fayuan guanyu zai quanguo fayuan minshi he xingzheng shenpan bumen kaizhan 'Guifan sifa xingwei, cujin sifa gongzheng' zhuanxiang zhenggai huodong de tongzhi* [Notice of the Supreme People's Court regarding implementing the 'Standardizing judicial acts, enhancing judicial justice' special alteration and correction movement in the civil and administrative divisions of courts nationwide], July 15, 2005, <http://china.findlaw.cn/fagui/gj/21/6677.html>. SPC President Xiao Yang likewise has stated that courts should give more attention to including legal reasoning in court opinions. *Xiao Yang zai Henan sheng kaocha fayuan gongzuo shi yaoqiu fayuan yaowei goujian hexie shehui tigong youli sifa baozhang* [While inspecting courts' work in Henan, Xiao Yang requests that courts provide effective judicial safeguards for the construction of a harmonious society], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], Feb. 24, 2006, <http://www.court.gov.cn/news/bulletin/release/200602240017.htm>. Similarly, both the SPC and local courts have issued statements on the importance of improving the quality of court opinions. *Quanguo fayuan jiang shixing anjian zhiliang guanli zhidu jianshao shenli chacuo* [Courts Nationwide will Implement a Quality Control System to Reduce Mistaken Decisions],

with arguments from scholars that improving the quality of court opinions would boost public confidence in the courts and facilitate court efforts to resist interference.<sup>36</sup> The Supreme People's Court has also taken repeated steps to crack down on corruption.<sup>37</sup>

The higher education levels of judges and the attention to well-reasoned opinions appear to be yielding results. Judges comment that greater competence in the judiciary increases the ability of courts to resist external pressure by relying on legal arguments or well-reasoned opinions.<sup>38</sup> In addition, judges say that whereas in the past such intervention might have come either formally, in the form of written instructions (*pi tiaozhi*) or through telephone calls, courts increasingly are swayed only by written instructions. Many such instructions tell courts to "emphasize" a case, or handle a particular case "according to law," rather than dictating outcomes, although even instructions in such form may make clear the desired outcome. It is difficult to assess whether interference in China's courts is increasing or decreasing. Some in China argue that external interference in the courts is actually growing, reflecting both falling confidence in the courts and the rise of the importance of popular opinion and social protest as means of influencing the courts. Others note that courts are playing more important roles than in the past – hence the greater need for intervention. But it does appear that courts confronted by such pressures are increasingly likely to try to use legal arguments to resist.

Most public discussion of interference on court decision-making focuses on the need to reduce corruption and opportunities for corruption, not intervention by Party officials.<sup>39</sup> But limited evidence does suggest

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YANGSHI GUOJI [CCTV INTERNATIONAL], June 30, 2004, available at [http://news.xinhuanet.com/legal/2004-06/30/content\\_1557006.htm](http://news.xinhuanet.com/legal/2004-06/30/content_1557006.htm); *Chengdu fayuan: tong an butong pan? kan kan 'yangban an'* [Chengdu Courts: Same Cases, Different Decisions? Look at 'Model Cases'], SICHUAN XINWEN WANG [SICHUAN NEWS NET], Apr. 23, 2005, available at <http://cn.news.yahoo.com/050423/159/2b82x.html>.

<sup>36</sup> For example, see Fu Yulin, *Minshi caipan wenshu de gongneng yu fengge* [Function and Style of Civil Cases Decisions], 2000 ZHONGGUO SHEHUI KEXUE [CHINA SOCIAL SCIENCES] 4, available at [http://article.chinalawinfo.com/article/user/article\\_display.asp?ArticleID=22445](http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=22445).

<sup>37</sup> For an example, see *Zuigaofa jiuxiang cuoshi jiaqiang zhidu fanfu, jian 'si bu wei' jizhi* [Nine Measures of the SPC for Enhancing the Anti-Corruption System, Establishing the 'Four Forbidden Acts' Regime], ZHONGGUO PUFA WANG [CHINA LEGAL EDUCATION WEB], Mar. 30, 2005, available at [http://news.xinhuanet.com/zhengfu/2005-03/30/content\\_2762253.htm](http://news.xinhuanet.com/zhengfu/2005-03/30/content_2762253.htm).

<sup>38</sup> Interviews.

<sup>39</sup> Recent steps in Beijing to fight judicial corruption prohibit six forms of private contact between judges and lawyers, including private meetings, attending non-official activities together, or receiving payments. The regulations generated controversy, with some academics arguing that such conduct was already prohibited, that the regulations were too general, and that the regulations would fail to have any significant effect. Zhai Jingmin, Zhuo Zeyuan, He

that increased awareness of law and better training of judges may, over time, make it easier for judges to respond to some forms of external pressure. Likewise, judges in some intermediate and higher courts state that they now refuse to answer inquiries (*qingshi*) from lower-court judges about how pending cases in lower courts should be handled unless such requests are in writing. Some intermediate and higher courts now require such requests to come from court adjudication committees.

Intervention continues, however, and continues to be a legitimate action by Party officials. Decreased direct intervention in cases may reflect greater respect for the courts.<sup>40</sup> But greater political sophistication in the courts may also make direct intervention by officials outside the courts less necessary, because courts are well aware of the cases most likely to be of concern to Party leaders. Judges recognize the need to balance legal requirements with powerful interests. Officials seeking to pressure the courts may also have mechanisms for doing so other than direct intervention. Improvements have been greater in routine cases than in politically sensitive ones. For example, judges comment that they are rarely under pressure in intellectual property cases because these cases do not touch on core Party interests. But the scope of sensitive cases remains wide and can include not only major criminal or political cases, but also cases involving the financial interests of either the Party-state or individuals with Party-state ties, cases involving high profile companies, those involving a large number of potential plaintiffs, and cases receiving extensive media coverage.

Not all reforms have been as successful as the efforts to boost education and training. Notably, court leaders have repeatedly emphasized the need to address the problems courts face in enforcing their decisions. Nevertheless, lack of enforcement continues to be a major problem,<sup>41</sup> with one report stating that as many as thirty percent of

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Weifang and You Zhenhui, *Toushi Beijing shi Gaoji Renmin Fayuan 'liutiao jinling'* [*Perspectives on the Beijing High People's Court's 'six bans'*],

FAZHI RIBAO [LEGAL DAILY], Aug. 26, 2004, available at [http://www.legaldaily.com.cn/xwzx/2004-08/26/content\\_128630.htm](http://www.legaldaily.com.cn/xwzx/2004-08/26/content_128630.htm).

<sup>40</sup> Judges acknowledge that they may not always be aware of intervention in cases: officials or other interested parties seeking to influence courts often contact court presidents or vice-presidents, who then may exert influence over outcomes without indicating that there has been external pressure.

<sup>41</sup> *Zuigao Fayuan huiying sida jiaodian huati: sixing fuhe, zhixing nan...* [SPC Replies to Four Hot Topics: Death Penalty Review, Difficulty of Enforcement...], XINHUA WANG [XINHUA NET], Mar. 11, 2006, available at [http://news.xinhuanet.com/misc/2006-03/11/content\\_4289573.htm](http://news.xinhuanet.com/misc/2006-03/11/content_4289573.htm); *Zhongwai sifajie shouci xieshou yantao zhixing chengxu gaige* [The First Cooperation Between Chinese and Foreign Judiciaries on the Study of Reforms to the Enforcement Process], XINHUA WANG [XINHUA NET], July 12, 2005, available at [http://news.xinhuanet.com/legal/2005-07/12/content\\_3208267.htm](http://news.xinhuanet.com/legal/2005-07/12/content_3208267.htm).

all civil cases are not enforced.<sup>42</sup> The number of enforcement decisions issued by courts almost doubled between 1994 and 2004. The increase likely reflects greater court emphasis on enforcing decisions – but it may also be a sign of the continued tendency of many litigants to ignore court judgments against them. Local court judges acknowledge that enforcement of judgments continues to be a major challenge.<sup>43</sup>

Difficulties enforcing decisions reflect problems that courts cannot address on their own: local protectionism, continued intervention in cases by Party-state officials and administrative departments, an undeveloped credit system, and weak punishment for non-compliance with court orders. In an acknowledgement of the continuing difficulties in enforcement, the Party's Central Political-Legal Committee issued a notice in December 2005 calling for the cooperation of the police and the procuracy in the enforcement of court judgments and for the establishment of a comprehensive enforcement information system that involves government departments overseeing banks, real estate, vehicles and other sectors.<sup>44</sup> Similarly, repeated official statements regarding the importance of combating corruption in the judiciary suggest that corruption continues to be a major problem, one that reflects the difficulty of strengthening the authority of courts so long as they remain subject to extensive external influence.

One response of courts to problems in enforcement has been renewed stress on mediation by the courts.<sup>45</sup> In 2004, the SPC issued a notice emphasizing the importance of mediation.<sup>46</sup> The most recent SPC

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<sup>42</sup> He Cong, *Facilitating Property Execution*, CHINA DAILY WEB, Nov. 30, 2004, [http://www.chinadaily.com.cn/english/doc/2004-11/30/content\\_395807.htm](http://www.chinadaily.com.cn/english/doc/2004-11/30/content_395807.htm). One 2006 report stated that sixty percent of the enforcement cases in the Beijing Second Intermediate Court could not be enforced at all; another twenty percent could be enforced only in part. Zhao Lei, *Zuigaoyuan yanzhong de 'zhiben zhi ce' fuchu* [The SPC's 'Strategy for Addressing the Roots' Floats Out], NANFANG ZHOU MOU [SOUTHERN WEEKEND], July 6, 2006, available at <http://www.nanfangdaily.com.cn/zm/20060706/xw/szxw1/200607060008.asp>.

<sup>43</sup> Interviews.

<sup>44</sup> Zhongyang Zhengfawei: *Dongyuan shehui lilian, qieshi jie jue zhixing nan* [Central Political-Legal Committee: Mobilize the Resources of Society, Conscientiously Solve the Problem of Enforcing Judgments], XINHUA WANG [XINHUA NET], Jan. 23, 2006, available at [http://news.xinhuanet.com/legal/2006-01/23/content\\_4090238.htm](http://news.xinhuanet.com/legal/2006-01/23/content_4090238.htm).

<sup>45</sup> Similarly, the Ministry of Justice, which oversees People's Mediation Committees, has reemphasized the importance of mediation in serving the interests of building a "harmonious society." *Sifabu biao zhang mintiao gongzuo 'shuangxian'* [Ministry of Justice Commends the 'Two Advances' in People's Mediation Work], Mar. 1, 2005, available at [http://www.legalinfo.gov.cn/moj/jcgzzds/2005-05/17/content\\_133971.htm](http://www.legalinfo.gov.cn/moj/jcgzzds/2005-05/17/content_133971.htm).

<sup>46</sup> *Zuigao Renmin Fayuan guanyu renmin fayuan minshi tiaojie gongzuo ruogan wenti de jue ding* [Decision of the Supreme People's Court Regarding Some Questions Relating to Civil Mediation by People's Courts], Sept. 16, 2004, available at <http://www.dffy.com/faguixiazai/ssf/200409/20040916181153.htm>.



work report stated that courts are continuing to emphasize mediation as a means of reducing contradictions and conflict in society. The report stated that thirty percent of all civil cases were resolved through mediation in 2006, and that fifty-five percent of first-instance civil cases were mediated or withdrawn prior to judgment.<sup>47</sup> Many judges, in particular those in basic level courts, comment that the percentage of cases resolved through court mediation is now increasing, after declining throughout the 1990s. Judges cite two primary reasons for renewed attention to mediation: mediated decisions are more likely to be enforced than are adjudicated cases, and mediated cases are less likely to result in protests and complaints.

Some reforms may actually encourage intervention in decisions by higher-ranking judges or officials. For example, an SPC decision issued in 2001 stated that court presidents and vice-presidents will be forced to resign if their courts issue illegal decisions that harm state or public interests, fail to investigate or reveal serious cases of wrongdoing sufficiently, or fail to engage in oversight over their courts.<sup>48</sup> The rules reflect the fact that judicial independence in China refers to the independence of courts, not individual judges. Although courts are expected to be free from interference from other administrative actors, individual judges are not expected to decide cases in isolation. Court presidents are responsible for decisions in their courts, even though they generally do not hear such cases. Likewise, discussions about a pending case with judges who did not participate in hearing the case, or with superiors within courts, are legitimate. Nevertheless, scholars have criticized the regulations for encouraging court presidents – who often have close ties to local officials – to intervene in pending cases in their courts.<sup>49</sup>

Such reforms also highlight the continuing importance of court presidents, whose appointments generally continue to be controlled by the local Party-state. Many, and perhaps most, court presidents lack formal

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<sup>47</sup> 2007 SPC WORK REPORT.

<sup>48</sup> *Difang geji renmin fayuan ji zhuanmen renmin fayuan yuanzhang, fu yuanzhang yinjiu cizhi guiding (shixing)* [Rule Regarding Accepting Blame and Resigning for Presidents and Vice Presidents of All Levels of Local Courts and Special Courts (interim)], Nov. 6, 2001, available at [http://www.legaldaily.com.cn/gb/content/2001-11/07/content\\_26864.htm](http://www.legaldaily.com.cn/gb/content/2001-11/07/content_26864.htm).

<sup>49</sup> Su Li, *Zhongguo sifa gaige luoji de yanjiu: ping Zuigao Fayuan de 'yinjiu cizhi guiding'* [A Study on the Logic of Chinese Judicial Reform: Comments on the SPC's Rule Regarding Taking the Blame and Resigning], FALU SIXIANG WANG [LAW THINKER NET], Dec. 31, 2005, available at <http://law-thinker.com/show.asp?id=3023>. Scholars also argued that the rules violated the constitution – which vests control of appointment and removal of court presidents in people's congresses, not in superior courts. He Weifang, *Sifa gaige de kongjian tuozhan* [The Expanding Space of Judicial Reform], BEIDA FALU XINXI WANG [CHINA LAW INFO], Mar. 2, 2006, available at <http://www.chineselawyer.com.cn/pages/2006-3-2/s33846.html>.

legal training or experience in the courts. The failure to reform the system of appointments of court presidents continues to serve as a major impediment to strengthening the courts. Similarly, the court responsibility system, pursuant to which judges may be fined or removed from office for decisions that are altered or reversed on appeal, encourages judges to seek guidance on handling individual cases from their superiors – both within their court and in higher courts.<sup>50</sup>

### C. *Depoliticization?*

Courts continue to be subject to Party leadership. Nevertheless, prior to 2006 there appeared to be some steps toward reducing the political role of courts. Scholars in China have argued that the courts have gradually shifted from primarily serving as political tools in criminal campaigns in the early 1980s to focusing on providing justice in individual cases today.<sup>51</sup> These trends do not apply in politically sensitive cases, where courts often have little say in the final outcomes. But China's courts have at times appeared to signal that they are no longer solely political tools of the state. Court rhetoric has changed over the past decade, reflecting a modest attempt by the courts to shift from being a tool for enforcing Party policy to being a neutral forum for dispute resolution. Thus, for example, the SPC's 1996 Work Report emphasized the court's role in carrying out the Party's "strike hard" campaign against crime and noted a number of important cases in which defendants were sentenced to death. In contrast, the 2006 report, although stating that the courts continue to work to "uphold Deng Xiaoping Theory and the Three Represents under the leadership of Communist Party Secretary General Hu Jintao," also noted the importance of courts being impartial and protecting the human rights of criminal defendants.<sup>52</sup> Many judges have replaced their military-style uniforms with robes – a change viewed as a

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<sup>50</sup> The system may also discourage higher courts from fully addressing incorrect decisions on appeal, as they may be reluctant to take action that could result in punishment to lower court judges.

<sup>51</sup> Yu Zhong, *Lun Zuigao Renmin Fayuan shiji chengdan de zhengzhi gongneng: yi Zuigao Renmin Fayuan linian 'gongzuo baogao' wei yiju* [On the Actual Political Function of the Supreme People's Court: Using the Annual "Work Report" of the Supreme People's Court as a Base], 7 QINGHUA FAXUE [TSINGHUA LEGAL STUDIES], available at <http://law-thinker.com/show.asp?id=2829> (last visited Sept. 27, 2007).

<sup>52</sup> 2006 SPC WORK REPORT. Other recent reports have used similar language. For a discussion of changes in the reports, see Chen Ruihong, *Sifa yu minzhu: Zhongguo sifa minzhuhua jiqi pipan* [Judiciary and Democracy: The Democratization of the Chinese Judiciary and its Critique] BEIDA FALU XINXI WANG [CHINA LAW INFO], available at [http://article.chinalawinfo.com/article/user/article\\_display.asp?ArticleID=2638](http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=2638) (last visited July 1, 2006).

step forward by some academics who praise such changes as a way of signaling that judges and courts are not simply another branch of the Party-state.<sup>53</sup> Likewise, the new education requirements for judges represent a shift away from primary reliance on political backgrounds in selecting members of the judiciary.<sup>54</sup>

It would be a mistake to read too much into these trends. Emphasis on the rights of defendants may represent a shift in Party policy, rather than a reduced political function for the courts. Depoliticisation in the courts also results from the broadening range of disputes in the courts; compared to the past, courts today confront a much greater number of cases that do not touch on sensitive issues. Courts do not appear more likely to challenge Party authority than in the past. Indeed, depoliticisation – to the degree it has occurred – may be possible precisely because courts are not a challenge to Party authority. Local Party organizations continue to oversee court appointments, court presidents are often primarily chosen for political reasons, and the overwhelming majority of judges continue to be Party members.<sup>55</sup> Within the Party hierarchy, the President of the Supreme People's Court ranks well below the Minister of Public Security, a pattern generally replicated at the local level.<sup>56</sup> Party leaders may desire that courts be fairer and more efficient, but there is little sign of intent to transform the courts' position in the Chinese political structure.

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<sup>53</sup> *Ganshou sifa zunyan: chuan fapao qiao fachui xingshi beihou de yi yi hezai* [Feeling the Honor of the Judiciary: What's the Meaning Behind the Actions of Wearing Robes and Hitting Gavels], XINHUA WANG [XINHUA NET], June 5, 2002, available at [http://news3.xinhuanet.com/newscenter/2002-06/05/content\\_425067.htm](http://news3.xinhuanet.com/newscenter/2002-06/05/content_425067.htm); *Renmin fayuan faguanpao chuanzhuo guiding* [People's Courts Rules on Wearing Judges' Robes], Jan. 24, 2002, available at <http://www.dffy.com/faguixiazai/ssf/200311/20031109141209.htm>; *Renmin fayuan fachui shiyong guiding* [People's Courts Rules on Using Gavels], Dec. 24, 2001, available at <http://www.dffy.com/faguixiazai/ssf/200311/20031109141310.htm>. Although the SPC originally called for all judges to adopt robes, basic level judges in many areas have not done so.

<sup>54</sup> Xin, *supra* note 9. For an argument that China's courts are transforming "from a military instrument of proletarian dictatorship to a professional legal institution," see Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Lower Chinese Court*, 31 LAW & SOC. INQUIRY 75, 75-106 (2006).

<sup>55</sup> One recent report stated that eighty percent of judges are Party members. Wang Mingyi, *Faguan duiwu dangyuan xianjinxing jianshe yao tuchu liangzhi jiaoyu* [The Advanced Construction of the Corps of Party-Member Judges Must Project Moral Education], ZHONGGUO FAGUAN WANG [CHINA COURT WEB], July 17, 2006, <http://www.chinacourt.org/html/article/200607/17/211694.shtml>.

<sup>56</sup> Similarly, the less ambitious nature of the second five-year plan may suggest that the courts, or court leaders, are less influential in the Party structure than they were even a few years ago. Within the government hierarchy, however, the reverse is the case: the SPC President has the rank of a Deputy Premier, while the Minister of Public Security has the lower rank of full minister.

Courts' loyalty to the Party was re-emphasized in 2006 with the launching of a new campaign on "socialist rule of law theory" in the courts, procuratorates, justice bureaux, and public security bureaux. Under the slogan of "Education on Socialist Rule of Law Theory," judges nationwide are being instructed in the importance of following Party leadership. The campaign began with a speech by Luo Gan (罗干), head of the Party's Central Political-Legal Committee, in which he stated that the goals of the campaign were to guarantee the legal and political system's "political color" and loyalty to the Party, the nation, the people, and the law. The five elements of the campaign include "ruling the country by law," "implementing law for the people," "maintaining fairness and justice," "serving the overall situation," and "following the leadership of the Party."<sup>57</sup> In the speech Luo appeared to be drawing a distinction between "rule of law" and "socialist rule of law," with the latter emphasizing the legal system's obligation to follow Party leadership, and in particular Hu Jintao's theory of a "harmonious society." The speech may also signal a renewed attempt to use law to reassert central control over local governments. The SPC has instructed all courts nationwide to educate judges in these principles.<sup>58</sup> In a follow-up speech, Cao Jianming, vice-president of the Supreme People's Court, linked the campaign to the need to avoid the "negative influence of Western rule of law theory"<sup>59</sup> – an apparent reference to those within and

<sup>57</sup> *Luo Gan zai shehui zhuyi fazhi linian yantaoban shang qiangdiao: shenru kanzhan shehui zhuyi fazhi linian jiaoyu, qieshi jiaqiang zhengfa duiwu sixiang zhengzhi jianshe* [Luo Gan emphasizes in a symposium on socialist rule of law theory: deepen education on socialist rule of law theory, enhance the ideological and political construction among workers in the political-legal system], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], 14 Apr., 2006, <http://www.chinacourt.org/public/detail.php?id=201753>. In a later speech, in November 2006, Luo again called for strengthening Party oversight of legal institutions. He also added a more direct critique of those advocating judicial independence and western-style legal reforms. Luo warned against underestimating the influence of such arguments, in particular arguments that deny the Party's leadership of legal and political institutions, on those working in the political-legal system. He also stated that "hostile forces" were trying to use legal institutions as an entry-point for westernizing and splitting China. Luo Gan, *Zhengfa jiguan zai goujian hexie shehui zhong danfu zhongda lishi shiming he zhengzhi zeren* [Political and legal institutions shoulder an important historical mission and political responsibility in the construction of a harmonious society], 2007 QIUSHI [SEEKING TRUTH] No. 3 (Feb. 1, 2007), available at <http://www.qsjournal.com.cn/qs/20070201/GB/qs%5E448%5E0%5E1.htm>.

<sup>58</sup> *Xiao Yang zai Zuigao Renmin Fayuan dangzu xuexihui shang qiangdiao: shenru kaizhan shehui zhuyi fazhi linian jiaoyu, qiebao fayuan duiwu shehui zhuyi zhengzhi bense* [Xiao Yang emphasizes in the study meeting of the Supreme People's Court party group: deepen education on socialist rule of law theory, ensure the socialist political colour of the court system], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], Apr. 27, 2006, <http://www.chinacourt.org/public/detail.php?id=203189>.

<sup>59</sup> *Cao Jianming zai shehui zhuyi fazhi linian yantaoban shang qiangdiao: renmin fayuan yao laogu shuli shehui zhuyi fazhi linian* [Cao Jianming emphasizes in the symposium on socialist

outside of China advocating Western-style judicial independence for China. The speech appeared to be a rare public instance of court officials explicitly warning of the need to avoid excessive Western influence in the courts.<sup>60</sup>

### III. NEW PRESSURES: POPULISM, TRANSPARENCY, AND INEQUALITY

The recent focus on reinforcing political orthodoxy in the courts reflects the modest reach of top-down court reform. The evolution of Chinese society and governance has also resulted in new challenges for the courts. Some of these pressures, notably greater public attention to and scrutiny of court actions, may over time result in courts that act more fairly and with greater competence. But new pressures on the courts also demonstrate that recent reforms have not fundamentally altered courts' roles or their relationships to other institutions. This section discusses five trends that reflect new pressures on the courts and that threaten to undermine their already fragile authority.

#### A. Media Pressure

Over the past decade China's courts have confronted increasingly aggressive and influential media. China's media have long been far more powerful actors in the Chinese political system than the courts, serving both as the mouthpiece and as the "eyes and ears" of the Party. The growth of commercial media in the 1990s allowed the media to combine their traditional official role with marketized mass appeal. This included expanded coverage of the legal system. Likewise, the growth of

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*rule of law theory: the people's courts must steadily establish socialist rule of law theory*], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], Apr. 14, 2006, <http://www.chinacourt.org/public/detail.php?id=201755>. Cao also spoke of the need to avoid "extreme 'left' thoughts" and the "remnants of feudalism." Cao's speech appeared primarily aimed at placing the courts in line with current Party ideology. Doing so may be designed to insulate the courts from criticism for excessive reliance on Western models. But such comments also reflect the SPC's move away from aggressively promoting court reform.

<sup>60</sup> Cao's language was, however, very similar to language used by Luo Gan in an article in the Party's flagship magazine, *Qiushi*, suggesting that Cao was simply using the language adopted by the Party's Central Political-Legal Committee. Luo Gan, *Shenru kazhan shehui zhuyi fazhi linian jiaoyu, qieshi jiaqiang zhengfa duiwu sixiang zhengzhi jianshe* [Deeply develop education on socialist rule of law theory, earnestly strengthen the construction of political thought among political and legal personnel], 2006 QIUSHI [SEEKING TRUTH] No. 12. Both Cao's speech and Luo's article appeared primarily aimed at placing the courts in line with current Party ideology. For Cao, doing so may also reflect a defensive move designed to insulate the courts from criticism for excessive reliance on Western models.

investigative journalism and “popular opinion supervision” by the still Party-controlled media included a significant volume of critical reporting on the courts. The internet has facilitated such coverage, with news on major cases spreading rapidly online and courts finding it more difficult to block critical reporting.<sup>61</sup>

The media are playing an important role in exposing injustice and in pressuring courts to behave fairly. Media coverage can force courts to address long-ignored cases and to follow procedural and substantive legal standards. Legal aid and public interest lawyers, for example, comment that having the media on one’s side is often the most important factor leading to a successful lawsuit. Judges comment that it is far more difficult to conceal incorrect or unfair decisions than in the past.

At the same time, media coverage also reinforces Party oversight of the courts. Media coverage of cases and media efforts to stir-up and claim to represent popular opinion can lead officials to intervene in cases. Officials do so either formally, through written instructions, or informally, through telephone calls and discussions with court leaders. This is particularly true in criminal cases, where media coverage and claims to represent populist demands for justice can lead courts to treat criminal defendants harshly. Judges complain that there is little they can do to resist media pressure, even when media views are inconsistent with substantive or procedural law.

The ability of the media to influence the courts reflects the fact that the media have long been more influential actors than the courts. When media and court views diverge, Party leaders appear to continue to trust the media more than they do the courts. In a system in which intervention in individual cases by Party officials remains legitimate – Party officials are supposed to intervene in cases where the courts appear to be going astray, a point made by positive media coverage of intervention in the official Party press – even the threat of intervention can be sufficient to affect cases. Deference to media views is accentuated by concern for social stability: the fact that a case is attracting significant media and popular attention is often sufficient reason to justify intervention, regardless of the underlying dispute. Media pressure may be particularly influential in part because media content remains subject to extensive Propaganda Department oversight. New technologies are making such control more difficult for the Party, but in major or sensitive cases the media often continue to speak with one voice. The media’s ability to influence the courts, and to do so by stirring-up popular

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<sup>61</sup> For analysis of court-media relations, see Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 1-157 (2005).

sentiment online, reflects the degree to which assuaging popular demands for justice remains more important than deciding cases according to legal and procedural norms.

### B. *Petitions and Protests*

Courts have also increasingly come under pressure from petitioners and protestors. As Table 1 shows, courts reported handling just under four million “letters and visits” in 2005. The figure includes only letters and visits to the courts – and thus excludes complaints about the courts raised with other Party-state actors or institutions.<sup>62</sup> The 2004 figure is less than half of the ten million letters and visits handled five years earlier, in 1999. Court officials have suggested that the decline in the number of letters and visits reflects improvements in the courts. In fact, the decline likely reflects court concerns with reducing the volume of complaints. In his 2007 Work Report, for example, SPC President Xiao Yang noted that letters and visits to lower courts had declined by eleven percent in 2006.<sup>63</sup> In some local courts the annual evaluation of judges’ performance and bonuses now are based in part on the volume of letters and visits resulting from individual judges’ cases.<sup>64</sup> In other jurisdictions, courts have made it harder for petitions and complaints about the courts to be filed, stating that petitions may only be filed with higher-level courts.<sup>65</sup>

<sup>62</sup> Complaints raised with the courts generally concern court actions, and in particular cases that courts have adjudicated. Complaints regarding the courts may also be raised with letters and visits offices of other Party-state institutions.

<sup>63</sup> 2007 SPC WORK REPORT. Xiao also stated that letters and visits to the SPC decreased by nearly five percent. The report did not provide total figures for letters and visits to the courts in 2006.

<sup>64</sup> *Beijing fayuan dui zhongda shesu xinfang an jiang shixing lingdao baoan zhidu* [Beijing courts will implement a system making court leaders responsible for the resolution of major litigation-related letters and visits], ZHONGGUO XINWEN WANG [CHINA NEWS NET], July 28, 2005, <http://news.qq.com/a/20050728/000926.htm>; *Shandong fayuan chuanguan jizhi jiejue shesu xinfang tuchu wenti* [Shandong courts’ innovative system for resolving outstanding problems in litigation-related letters and visits], XINHUA WANG SHANDONG PINDAO [XINHUA NET SHANDONG CHANNEL], July 28, 2005, <http://news.sdinfo.net/72339069014638592/20050728/1384196.shtml>; *Yiqie weile laobaixing: Jiangsu sheng Suqian Shi Zhongji Renmin Fayuan xinfang gongzuo jishi* [All for the ordinary people: Jiangsu province Suqian Municipality Intermediate People’s Court’s work on letters and visits], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], Mar. 10, 2006, <http://www.chinacourt.org/public/detail.php?id=197942>.

<sup>65</sup> *Jianshao xinfang fasheng, Hebei fayuan shensu anjian shangti yiji guanxia* [To minimize letters and visits, Hebei courts shift the jurisdiction for handling rehearing petitions to higher-level courts], XINHUA WANG [XINHUA NET], Jan. 10, 2006, [http://www.ce.cn/xwxw/gnsz/gdxw/200601/10/t20060110\\_5781631.shtml](http://www.ce.cn/xwxw/gnsz/gdxw/200601/10/t20060110_5781631.shtml). In some courts

Despite these statistics and the fact that most petitions and visits fail to have any effect on the courts or Party leaders, judges say that pressure from letters and visits has increased in recent years and that courts are often under pressure from court and Party superiors to resolve petitioners' grievances. This is the case even when, according to judges, such complaints lack legal merit. Court officials have repeatedly noted that dealing with petitions and visits is distracting them from their work handling cases and that courts handle nearly as many petitions as they do actual cases.<sup>66</sup>

Much of the press coverage of the issue in China highlights how letters and visits have led courts to alter incorrect decisions or have assisted in compelling parties to implement court judgments.<sup>67</sup> Judges confirm that some petitions and protests do result in courts reexamining and correcting erroneous cases.<sup>68</sup> Other accounts, however, note that courts have paid petitioners themselves when court decisions fail to provide sufficient funds to petitioners.<sup>69</sup> Reports have also noted judges' emphasis on solving cases likely to have a major "social impact" so as to prevent possible public disruption.<sup>70</sup> Commentators have argued that

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figures on letters and visits include only complaints regarding closed cases, not those still pending.

<sup>66</sup>2003 SPC WORK REPORT; 2004 SPC WORK REPORT. For an argument that petitions distract courts from working on cases, see Zuo Weimin & He Yongjun, *Zhengfa chuantong yu sifa lixing: yi Zuigao Fayuan xinfang zhidu wei zhongxin de yanjiu* [Politics and law, tradition and judicial rationality: research centred on the SPC's letters and visits system], 2005 SICHUAN DAXUE XUEBAO: ZHESHE BAN [JOURNAL OF SICHUAN UNIVERSITY: PHILOSOPHY AND SOCIAL SCIENCE EDITION] No. 1, available at [http://www.usc.cuhk.edu.hk/wk\\_wzdetails.asp?id=4523](http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4523).

<sup>67</sup> *Jiangsu Hebei deng sheng bufen qunzhong yueji xinfang shijian diaocha* [An investigation of skipping-level letters and visits by masses from Jiangsu, Hebei and other provinces], LIAOWANG XINWEN ZHOUKAN [OUTLOOK WEEKLY], Oct. 30, 2004, available at [http://news.xinhuanet.com/newscenter/2004-10/30/content\\_2156474.htm](http://news.xinhuanet.com/newscenter/2004-10/30/content_2156474.htm);

Zhai Hao, *Yu xinfang yu jiandu zhizhong* [Put letters and visits under supervision], SHANGHAI RENDA [SHANGHAI PEOPLE'S CONGRESS], Feb. 17, 2006, <http://npc.people.com.cn/GB/25015/4116961.html>; *Gaohao xinfang nuan minxin* [Warm the people's hearts by resolving letters and visits well], YANGSHI GUOJI [CCTV INTERNATIONAL], Nov. 20, 2005, <http://www.cctv.com/program/fzbjb/20051216/101554.shtml>.

<sup>68</sup> Interviews.

<sup>69</sup> "Jinhua Intermediate Court works hard on litigation-related letters and visits." Courts have also created "judicial relief" funds to assist poor litigants who are unable to enforce judgments in their favor. *Zuigao fayuan tan tuidong quanguo fanwei nei jianli zhixing jiuzhu jijin* [Supreme people's court discusses promoting the establishment of an enforcement relief fund nationwide], Jan. 21, 2007, <http://news.sina.com.cn/c/2007-01-26/114912148273.shtml>.

<sup>70</sup> *Id.* Likewise, some courts have issued instructions stating that all letters and visits must be "resolved" by the judges handling the case – thus resulting in even greater pressure on judges. *Renmin Fayuan jiang tuixing faguan panhou dayi zhidu: chengban faguan dui dangshiren yiyi jingxing jieshi shuoming* [The courts will implement a system of judges answering questions after decisions: judges who handle cases will be responsible for explaining their decisions to



courts are being forced to change decisions to protect social stability and that the letters and visits system is weakening judicial authority.<sup>71</sup> Judges comment that they sometimes alter decisions, pay parties from court funds, or pressure losing parties to pay more money than ordered by the court in order to assuage protestors.<sup>72</sup>

The ability of protests and petitions to influence court decisions is a vicious circle. Judges know that the more they respond to protests, the more they will encourage similar actions by others. As with media influence, courts' inability to resist popular pressure reflects concern with social stability by Party-state officials. Fear that popular discontent may result in unrest encourages officials to respond to such complaints. China's absence of democracy also plays a role: the lack of alternative mechanisms for voicing public views encourages those with grievances to resort to the letters and visits system and to the media. Given such concerns, convincing protestors to terminate their protests becomes more important than following legal and procedural standards.

Media coverage, protests, and petitions serve to highlight injustice in the legal system, and in some cases result in decisions being changed and aggrieved parties receiving redress. But the influence of both the letters and visits system and the media sends a powerful message to others with grievances that the courts are often not the ultimate arbiters of legal disputes. In sensitive or controversial cases, Party leaders still hold sway. Such influence also undermines courts' claims to be authoritative or to deserve public respect. Courts are confronting new sources of pressure just as they are attempting to broaden their autonomy. Yet increasing court authority and autonomy will require courts to develop the ability to resist precisely these forms of pressure. Many in the courts are aware of these trends, and acknowledge that courts must develop the ability to resist popular pressure, but at present there are insufficient incentives or opportunities for courts to do so.

### C. *Controlled Transparency*

Although courts have made significant rhetorical commitments to openness, courts and the legal system continue to lack transparency.

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parties to cases], ZHONGGUO FAYUAN WANG [CHINA COURT WEB], Nov. 3, 2005, <http://www.chinacourt.org/public/detail.php?id=183759>.

<sup>71</sup> *Woguo xinfang zhidu xianru sichong kunjing mianlin fazhi tiaozhan* [Our nation's letters and visits system encounters four difficulties, faces challenges from rule of law], XINHUA WANG [XINHUA NET], June 30, 2004, <http://news.sina.com.cn/c/2004-06-30/12143565398.shtml>.

<sup>72</sup> Interviews.

Despite repeated statements that opinions will be publicly available,<sup>73</sup> including online, very few courts have actually made all or even sizeable numbers of opinions available online.<sup>74</sup> Most courts that do so select only a small percentage of cases for publication. In general, decisions remain difficult to obtain except through parties to cases, unless they have been reported in the media.

Courts have also imposed new restrictions on the media's ability to report on cases. Although most cases are technically open to the public and to the media, courts frequently restrict access in sensitive cases or those that have attracted public attention. Journalists must obtain permission from the court prior to covering a case – meaning that in practice courts have discretion to deny entry. Journalists complain that it remains difficult to obtain access to trials and decisions, in particular in sensitive or high-profile disputes.

Rather than embracing transparency, or attempting to balance positive and negative consequences of public scrutiny of the courts, China's courts are trying to control media coverage. Some advocates of limited transparency appear to be concerned that too much openness might further undermine confidence in the courts, because greater transparency would also make clear the severity of problems in China's courts.<sup>75</sup> Hence court officials have spoken of the need to increase their openness at the same time that they have encouraged court propaganda officials to work with the media to ensure positive coverage of the courts.<sup>76</sup> In Guangdong, for example, a notice from the Provincial High People's Court and Provincial Propaganda Department bans reporting on cases prior to court decisions and prohibits the media from publishing views on cases that differ from those of the courts, in effect barring criticism.<sup>77</sup> Such efforts are not unusual among Chinese Party-state

<sup>73</sup> See, e.g., Wu Jing, *Woguo sifa toumingdu chixu tigao* [The continual increase in judicial transparency in our nation], RENMIN RIBAO [PEOPLE'S DAILY], Dec. 8, 2005, available at <http://www.chinacourt.org/public/detail.php?id=188304>.

<sup>74</sup> He Weifang, *Panjueshu shangwang nan zai hechu* [What's the difficulty in putting court decisions online], FAZHI RIBAO [LEGAL DAILY], Dec. 15, 2005, available at <http://law-thinker.com/show.asp?id=3025>.

<sup>75</sup> For criticism of such arguments, see *id.*; Jiang Ming'an, *Panjueshu shangwang: yao jiji tuijin erbushi huanxing* [Putting decisions online: it should be pushed actively rather than postponed], Apr. 11, 2006, <http://www.chinalawedu.com/news/21601/21626/2006/4/zh286412202911460024004-0.htm>.

<sup>76</sup> In September 2006, for example, the SPC issued new rules restricting court officials' contact with the media and giving courts the authority to ban media coverage of a range of court cases. Vivian Wu, *Press quiet on changes to reporting court cases*, SOUTH CHINA MORNING POST, Sept. 14, 2006.

<sup>77</sup> Journalists who have violated the rules have been banned from reporting on courts in Guangdong. *Fayuan 'fengsha' liu jizhe, yinfa xinwen baodao yu sifa touming taolun* [Six journalists are 'blocked' by court, triggering discussion about judicial transparency],

institutions, but they are in direct contrast to court claims to be embracing greater openness.

Efforts by the courts to restrict media coverage highlight the fact that courts are not passive in the face of external pressure. Courts have also directly retaliated against the media through defamation litigation – most often in cases brought by individual judges, but sometimes in cases brought by courts themselves. Such actions show that courts may be using their existing authority in new ways so as to resist external pressure.

#### D. Court Inaction

Courts increasingly deal with difficult or sensitive cases by inaction: cases are refused or left unresolved. In such cases courts appear to hope either that some other state actor will resolve the case or that the case will disappear. Courts have also formally closed their doors to certain classes of disputes. Thus, for example, the Guangxi High People's Court issued a notice in 2004 listing thirteen categories of cases that courts in Guangxi will not accept.<sup>78</sup> These include real estate disputes resulting from government decisions or institutional reforms, claims brought by laid-off workers resulting from corporate restructuring, and lawsuits resulting from a party's failure to implement a government decision regarding ownership or usage rights in property. Most of the categories relate to government reforms of industry, agriculture, and land; some, such as a ban on some classes of securities lawsuits, mirror decisions by the Supreme People's Court. In practice, courts have long refused to accept certain categories of cases; the Guangxi decision is unusual primarily because the court made the list of such cases public. The decision drew criticism in China from scholars who argued that the

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JIANGNAN SHIBAO [JIANGNAN TIMES], Dec. 10, 2003, available at [http://news.xinhuanet.com/newmedia/2003-12/10/content\\_1223333.htm](http://news.xinhuanet.com/newmedia/2003-12/10/content_1223333.htm); He Weifang, *Fayuan ruhe duli yu meiti yingxiang* [How will the court be independent from influence of the media], ZHONGGUO FUNÜ BAO [CHINA WOMEN'S NEWS], Jan. 19, 2005, available at [http://article.chinalawinfo.com/article/user/article\\_display.asp?ArticleID=27893](http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=27893); He Weifang, *Weishenme fayuan buke fengsha jizhe* [Why courts may not block journalists], XINHUA WANG [XINHUA NET], Dec. 10, 2003, <http://www.legal-history.net/articleshow.asp?id=736>; Zhou Jialu, *Chuanmei yu sifa guanxi de zhidu goujian* [Establishing the relationship between the media and the judiciary], XINWEN JIZHE [NEWS JOURNALIST], <http://xwjz.eastday.com/eastday/xwjz/node71701/node71703/userobject1ai1247619.html> (last visited Nov. 3, 2007).

<sup>78</sup> *Guangxi bu shouli 13 lei ruoshi qunti an, sheng gaoyuan cheng you guoqing jue ding* [Guangxi refuses to accept 13 categories of cases relating to disadvantaged people, high court asserts it is decided by the situation of the country], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Aug. 24, 2004, available at <http://news.qq.com/a/20040824/000070.htm>.

courts cannot refuse claims and cases that are permitted by law. The fact that most of the categories of cases touch on areas of potential social unrest is an echo of court concerns with popular pressure through protests and the media: faced with such pressure, courts have apparently decided that they may be better off not hearing such cases and leaving decisions to other Party-state departments.

Courts' decisions to leave contentious or sensitive issues for other actors to resolve are understandable. Many disputes that courts refuse to accept are cases that they in practice either could not resolve on their own or are cases in which courts would not be able to implement any decisions they did make. Courts would appear to gain little from hearing such cases – even if technically such claims are allowed under existing laws. Refusing to hear controversial claims also protects the courts from the more extensive criticism or pressure they might receive if they ruled in such cases. But doing so reinforces courts' limited power to resolve significant public grievances.

### *E. Inequality and Shortages of Judges*

Growing inequality within the courts threatens further to undermine popular confidence in the courts. Widening inequality in Chinese society is being reflected in the courts. Despite major efforts to attract better qualified judges, many courts in China's interior are finding it difficult to attract qualified personnel and are losing existing judges to higher paying jobs as lawyers, in particular in more developed areas.

Although the total number of judges remains large, more than 200,000,<sup>79</sup> court officials have identified the loss of personnel in courts in China's less developed areas as a major problem.<sup>80</sup> In Guizhou, for example, the President of the High People's Court reported that more than 200 judges resigned between 2001 and 2005 while only eighty new personnel passed the bar exam. The loss of personnel, combined with large numbers of judges approaching retirement age, is making it increasingly difficult to staff courts: the judge stated that many courts in

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<sup>79</sup> Estimates of the total number of judges vary, depending on precisely who is counted as a judge. Nevertheless, most figures in recent years have appeared to be in the range of 200,000. Some Chinese scholars have argued that China has far too many judges, noting that Chinese judges on average handle vastly fewer cases per judge than do their Western counterparts – although many Chinese judges are not involved in hearing cases. See, e.g., Zhang Wusheng, *Woguo faguan de chongzu yu fenliu yanjiu* [Research into the reorganization and repositioning of our nation's judges], 2004 FALŪ KEXUE [LEGAL SCIENCE] No. 3.

<sup>80</sup> 2006 SPC WORK REPORT.

Guizhou now find it difficult to form a three-judge panel to hear cases.<sup>81</sup> Some commentators have argued that people without university degrees should be permitted to take the bar exam in less developed areas in order to ensure sufficient numbers of lawyers and judges.<sup>82</sup>

Some courts lack sufficient funds to pay new judges. In Hubei, for example, local government budgets allocate only 200 yuan per month per judge in salaries in some courts.<sup>83</sup> Even in Beijing, judges' pay has decreased in recent years as a result of reforms that eliminated bonus payments to judges for handling specified numbers of cases. In the past judges in Beijing were better paid than those working in other state institutions, a reflection of courts' ability to generate income from charging filing and other fees to litigants.<sup>84</sup> Such reforms are designed to minimize incentives to courts to overcharge litigants and to equalize pay among all civil servants. But they have also resulted in judges leaving to pursue more lucrative careers.

Unequal development in and staffing of the courts risks further weakening court attempts to increase their authority. Courts that lack personnel complain of being overburdened by rising caseloads; some say

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<sup>81</sup> Zhang Linchun, *Zhongxibu diqu sifa jigou rencai liushi wenti yanzhong* [The serious problem of personnel loss in judicial institutions in central and western regions], XINHUA WANG [XINHUA NET], Mar. 13, 2006, <http://www.lianghui.org.cn/chinese/zhuant/2006lh/1151637.htm>. The report stated that there are only 900 judges in the 400 basic level courts in Guizhou province, meaning that on average local courts have fewer than 2.5 judges. For a discussion of similar problems in Sichuan province, see *Daibiao tan falü rencai duiwu jianshe* [Representatives discuss construction of legal personnel system], TENGXUN WANG [TENCENT WEB], Mar. 10, 2006, [http://www.chinalawjob.com/service/hr/11\\_29\\_11\\_372.shtml](http://www.chinalawjob.com/service/hr/11_29_11_372.shtml). For a discussion of shortages of judges in Hubei, see *Faguan duanceng zhuangkuang lingren danyou: Yu Lü Zhongmei daibiao duihua faguan duanceng wei* [The shortage of judges makes people concerned: dialog with representative Lü Zhongmei on the crisis of the shortage of judges], FAZHI WANG [LEGAL DAILY WEB], [http://www.legaldaily.com.cn/zt/2006-03/08/content\\_279135.htm](http://www.legaldaily.com.cn/zt/2006-03/08/content_279135.htm) (last visited Nov. 3, 2007).

<sup>82</sup> *Guojia tongyi sifa kaoshi bubi yikao ding qiankun* [It's not necessary for the national bar exam to be finally decisive], XINJING BAO [THE BEIJING NEWS], Dec. 1, 2005, available at <http://www.chineselawyer.com.cn/pages/2005-12-1/s32650.html>.

<sup>83</sup> *Sifa gaige renzhong daoyuan fayuan jingfei "qianjing" jianming* [Judicial reform shoulders heavy responsibilities, the "future" of court funds becomes bright], DIYI CAIJING RIBAO [CHINA BUSINESS NEWS], Nov. 14, 2005, available at <http://news.sina.com.cn/c/2005-11-14/12258293328.shtml>; Li Shourong, *Guanyu nongcun jiceng fayuan jianshe de diaocha yu sikao* [Investigation and thoughts on the construction of countryside local courts], Changsha Fayuan wang [Changsha Court Web], Aug. 25, 2005, <http://cszy.chinacourt.org/public/detail.php?id=197>.

<sup>84</sup> *Beijing gongwuyuan gongzi gaige, "feichai bumen" da shou yingxiang* [Civil servants salary reform in Beijing: "profitable departments" are impacted in a major way], LIAOWANG DONGFANG ZHOUKAN [OUTLOOK ORIENTAL], Sept. 8, 2004, available at [http://news.xinhuanet.com/newscenter/2004-09/08/content\\_1956812.htm](http://news.xinhuanet.com/newscenter/2004-09/08/content_1956812.htm).

they can barely manage to handle all of the cases before them.<sup>85</sup> Many courts appear unable to attract well-qualified personnel to serve as judges, which in turn may harm courts' ability to resist external pressure and to increase public confidence. A brain drain in the judiciary risks furthering popular beliefs that courts are not effective mechanisms for vindicating individual rights or redressing grievances.

Courts should perhaps not bear too much of the blame for the range of new problems that are undermining their authority. The problems reflect the institutional framework in which courts operate. These new problems have arisen as officials within the courts have called for courts to play greater roles, but reflect the lack of support for broader changes from leaders outside the courts.

#### IV. DEVELOPMENT AND INNOVATION

Despite these problems, significant change is occurring in China's courts. But the most important recent developments in China's courts are coming from lower courts, rather than at the behest of the SPC. Three trends are particularly noteworthy: increased horizontal interactions among judges and the use of informal precedent; growing innovation by judges; and the use of courts as fora for raising rights-based grievances.

First, lower courts are increasingly looking to other courts for guidance when they encounter new or difficult legal questions.<sup>86</sup> In the past, courts generally had little option but to consult higher level courts. In recent years, however, judges have increasingly looked horizontally, to courts of equal rank outside their jurisdictions, for guidance. Judges from a range of regions comment that they routinely consult the internet to assist them when they encounter new questions, to learn how courts elsewhere have handled similar issues. In particular, judges in less developed areas note that they frequently look to online media reports, case summaries, and in some cases decisions posted to court websites to learn how other courts have handled cases. Judges encountering a novel question likewise may telephone judges in other courts to discuss how they have handled similar cases. Some judges say that they use email to seek advice on pending cases from academics. Others, in particular those in intellectual property tribunals, say that they use the internet to consult materials about foreign law and to access foreign cases.

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<sup>85</sup> Liu Lan & Ying Qiming, *Jiceng faguan xinli yali you duoda?* [How serious is the mental pressure facing local judges?], RENMIN FAYUAN BAO [PEOPLE'S COURT NEWS], Feb. 2, 2006, available at <http://oldfyb.chinacourt.org/public/detail.php?id=93729>.

<sup>86</sup> Benjamin L. Liebman & Timothy Wu, *Chinese Network Justice*, 8 CHI. J. INT'L L. 257 (2007).

Such judicial networking, and the development of informal patterns of precedent, may lead to more consistent application of the law. The growth of the internet may also be facilitating the development of professional identity among judges, who increasingly interact online, and who appear ever more aware of the challenges similarly situated judges face elsewhere in China.<sup>87</sup> Greater professional identity among judges is unlikely to alter how judges decide sensitive cases, but it may be assisting judges as they seek to combat interference from higher-ups both within and outside the courts. Increased professional identity may also result in greater frustration among judges who face external interference.

The growth of horizontal interactions among judges is particularly significant because it contrasts with top-down court reform. Top-down reform has been largely technical, designed to improve the quality of courts without altering institutional relationships with other state actors. The growth of horizontal relationships suggests that courts may be able to expand their own autonomy by looking to other courts for guidance rather than to Party-state officials or court superiors.

Second, judicial networks may foster innovation. A small number of local courts have engaged in significant legal innovation. Courts in China have long engaged in experimentation. In recent years, however, some courts have issued decisions that appear directly to challenge existing legal norms or consciously to break new legal ground. Thus, for example, local courts have experimented with creating a plea bargaining system for criminal cases and with the creation of a system of local precedent – despite the fact that neither is explicitly permitted under existing law. In another example of innovation, a court in Henan ruled, in what became known as the “Seed Case,” that a provincial pricing regulation was “spontaneously invalid” because it conflicted with the national Seed Law. The court thus challenged norms that dictate that courts lack the power to invalidate laws or regulations. The case generated a backlash from the provincial People’s Congress, which sought to have the judges responsible for the case removed from office. The judges initially lost their jobs, but regained their positions after the national media reported on the case.<sup>88</sup>

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<sup>87</sup> Similar observations have been made regarding the growth of trans-national judicial networks. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65-103 (Princeton University Press 2004).

<sup>88</sup> For a discussion of the case, see Zhao Lei, *Li Huijuan: tiaozhan difang lifa [Li Huijuan: challenging local legislation]*, July 25, 2004, <http://www.dffy.com/fayanguancha/fangyuan/200407/20040725162155.htm>. Some scholars in China have argued that the *Seed Case* should not be understood as novel or innovative, because it is well-established that judges should not apply local or provincial regulations that conflict with higher-level laws or regulations. But the *Seed Case* did appear innovative in

Likewise, courts in Shanghai, Beijing, and Guangzhou have innovated by finding for the media in defamation cases brought by famous persons. The courts have directly or indirectly suggested that famous persons should withstand a higher degree of scrutiny than ordinary persons – despite the absence of any distinction between ordinary and “public persons” in Chinese defamation law.<sup>89</sup> And in a series of cases brought by university students, courts have held that universities may be sued under China’s Administrative Litigation Law – despite the widespread presumption that the law did not apply to universities.<sup>90</sup> The cases have been interpreted as efforts by Chinese courts to expand their jurisdiction in administrative litigation, a noteworthy trend given that commentators have argued that courts have been reluctant to undertake administrative cases given the often influential positions of defendants in such cases.<sup>91</sup>

Some judicial innovation is the consequence of the wide discretion Chinese judges have in resolving cases. Unclear legal standards mean that courts frequently must fill gaps. Despite an enormous volume of legislation over the past two decades, judges continue to have extensive discretion in interpreting legal standards. Increased use of this discretion may largely reflect practical necessity, not increased court authority. Such discretion may also result in inconsistent application of the law, a problem that has drawn attention, and significant criticism, in recent years. Nevertheless, in some recent cases courts have gone further than simply filling the gaps of unclear laws, directly challenging norms, as in the *Seed Case*, or creating legal standards that lack statutory support.

Court experimentation and innovation occurs in politically safe cases, and outcomes are usually consistent with the interests of important Party-state actors. Such decisions rarely challenge the authority of other state actors. Indeed, it may be that innovation is only possible in cases in which outcomes are consistent with powerful interests or there are no strong adverse interests. Thus, for example, the first case to find a public person standard resulted in a judgment in favour of a newspaper that was a subsidiary of the official mouthpiece newspaper of the Shanghai

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that the court chose to declare the local regulation invalid, rather than simply ignoring the local regulation and applying the national law.

<sup>89</sup> Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT’L L. J. 33, 33-177 (2006).

<sup>90</sup> For analysis of the cases, see Thomas F. Kellogg, “Courageous Explorers”?: *Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141 (2007).

<sup>91</sup> For an example of such arguments, see Li Fujin, *Xingzheng shenpan de kunjing yu chulu* [The difficulties in and remedies for administrative adjudication], Sept. 19, 2003, <http://www.dffy.com/faxuejiyeti/xz/200311/20031119203349.htm>.



Municipal Communist Party Committee. Even in the *Seed Case*, where the court directly challenged the authority of the Provincial People's Congress, the court found in favour of applying a national law.

The modest reach of judicial innovation in China highlights a key element of court reform. With a very small number of exceptions, top-down reform has focussed on improving the efficiency and fairness of courts as adjudicators of disputes, not on shifting the role or power of courts within the system. The SPC does from time to time issue judicial interpretations that appear to go well beyond the text of laws the National People's Congress has passed, but such interpretations rarely result in direct challenges to the authority of other institutions. When courts do appear to be seeking to expand their authority, including in defamation litigation, the *Seed Case*, and some aspects of administrative litigation, such steps have come from lower courts.<sup>92</sup> Higher courts may directly or indirectly support or acquiesce to such actions, and the SPC itself has been responsible for a number of important reforms.<sup>93</sup> Nevertheless, significant institutional change is not the direct result of top-down reform.

China's courts have not begun to function as significant fora for the adjudication of public rights. Indeed, the limited rise in caseloads and the other modest steps toward reform suggest that China's courts are still some way from being effective adjudicators of private rights or even a primary mechanism for resolving individual grievances. In many respects, recent developments in China thus contrast with experiences in many other countries, which have witnessed a "global expansion of judicial power."<sup>94</sup> This is not surprising; with limited exceptions, this expansion of judicial power has largely occurred in democratic states in which courts have the power of judicial review.<sup>95</sup> Moreover, Chinese courts are still struggling to become significant fora for adjudicating and enforcing private rights; doing so may be a predicate to serving a broader role in adjudicating public rights. Recent developments in China's courts also appear to contrast with other countries in which significant

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<sup>92</sup> One exception to this pattern was the Qi Yuling case, in which the Supreme People's Court in 2001 seemed to suggest that a case could be brought directly under the PRC Constitution. The decision was both opaque and controversial, and no subsequent cases have endorsed or acknowledged the principle.

<sup>93</sup> One recent example is the SPC's decision to reform death penalty procedures and to hear all final appeals itself. A consequence of the reform will be a major expansion of the size of the SPC, with as many as 300 new judges being added to the court.

<sup>94</sup> C. NEAL TATE & TORBJORN VALLINDER, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 1-11 (New York University Press 1995).

<sup>95</sup> *Id.*; TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 6 (Cambridge University Press 2003).

innovation or expansion of judicial power has often come from the top, in particular from new or revamped constitutional courts. In China, the most significant innovations appear to be coming from lower courts.

Reliance on local experimentation has been a characteristic of China's reform process more generally, and thus the courts are not unique in relying on ground-up development. The nature of such reforms also may reflect the fact that there is not a clear consensus on the role courts should play in China; gradual and piecemeal reform may serve to delay such questions. But recent trends also suggest that courts may come to play broader roles and that such roles may be determined by lower courts and litigants as well as by SPC edicts.

Third, although China's courts are not fora for adjudicating public rights, they have become fora for airing a range of grievances.<sup>96</sup> Over the past decade, litigants have brought a widening array of what might be thought of as public grievances into the courts – including class actions, public interest lawsuits on such issues as women's and environmental rights, and constitutional claims.<sup>97</sup> Many such cases are being brought with the assistance of lawyers who are explicitly seeking to use litigation to bring social change. Courts have not always been receptive to such claims; many such cases go unheard, unresolved, or, where decisions are actually made, unenforced. The Party-state also appears increasingly wary of such efforts, and has imposed new restrictions on lawyers and on public interest litigation.<sup>98</sup> But the fact that these claims have been permitted and at times even encouraged is particularly notable given China's political system: the combination of class actions, contingency fees, administrative litigation, constitutional litigation, and cause lawyering is not common in authoritarian systems (or in many systems of any type outside the United States).

Such claims also highlight a characteristic of public litigation and cause lawyering in China: when such claims succeed it is rarely because of court decisions. The primary goal of many such lawsuits is to generate

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<sup>96</sup> Liebman, *Innovation through Intimidation*. For example, the total number of labour cases heard by the courts more than doubled between 2000 and 2004, increasing from 76,378 to 164,994. LAW Y.B. CHINA 2001-2005.

<sup>97</sup> Benjamin L. Liebman, *Note, Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998).

<sup>98</sup> For example, in March 2006 the All-China Lawyers Association issued a notice requiring lawyers handling collective (defined as involving ten or more people) or sensitive disputes to report such representation to, and accept "guidance from," the local lawyers' association and justice bureau, *Zhonghua quanguo lishi xiehui guanyu lishi banli quntixing anjian zhidao yijian* [Guidance notice of the All-China Lawyers Association regarding lawyers' handling of group cases], Mar. 20, 2006, <http://www.dffy.com/faguixiazai/ssf/200606/20060620110110.htm>.

public, and in particular media, attention sufficient to compel official action. When change does result, it is more often from the intervention of Party-state officials than from a court opinion. Litigants may hope for a binding court decision, but using the courts as a forum for generating public pressure is often equally, if not more, important in cases in which claims succeed. The use of litigation to create public pressure and to compel extra-judicial action is not unique to China, but China may be distinct in its extreme reliance on extra-judicial responses to major public disputes in the courts.

Recent steps by China's courts to hear a broader range of grievances are largely reactive: the use of courts to pursue public grievances reflects rising expectations among ordinary people toward the courts. These expectations and efforts are at least partially a consequence of attention to the law and the legal system in the Chinese media. Such trends also reflect the development of the Chinese legal profession. The fact that China now has more than 150,000 lawyers<sup>99</sup> is resulting in greater incentives to lawyers to bring a wider range of cases.

Measuring popular confidence, or disillusionment, in the courts is difficult. Courts have been subject to widespread criticism in the media, for reasons ranging from corruption and biased decisions to inconsistent application of legal standards.<sup>100</sup> Greater use of the courts may suggest greater confidence in the courts among ordinary people, but it may also reflect the rising volume of grievances and the lack of alternative mechanisms for resolving complaints. Thus individuals may resort to the courts not because they believe the courts will be more effective than administrative actors but rather because they believe that they lack the ability to obtain redress through administrative means. Regardless of why individuals turn to the courts, growing media coverage and greater use of the courts risk increased disillusionment, and thus decreased reliance on the courts, if such expectations are not met.

<sup>99</sup> LAW Y.B. CHINA 2006, at 1001.

<sup>100</sup> Liebman, *Innovation through Intimidation*. For example, Teng Biao advocates media oversight of the courts on the grounds that the judiciary is not independent, fair, or efficient, and that the courts are widely distrusted. Teng Biao, *Sifa de gui sifa, yulun de gui yulun? - cong Zhang Jinzhu an dao Huang Jing an* [Give the judiciary what belongs to the judiciary, give public opinion what belongs to public opinion? - From the Zhang Jinzhu case to the Huang Jing case], [http://www.boxun.com/hero/tengb/20\\_1.shtml](http://www.boxun.com/hero/tengb/20_1.shtml) (last visited Nov. 3, 2007). For an argument that continued people's congress supervision of the courts is necessary to correct court violations of the law, see Zhang Hanchang & Gao Lixia, *Guanyu fayuan xiang renda jiqi changweihui baogao gongzuo zhidu de falü sikao* [Thoughts about the legal system of courts' reporting to people's congresses and their standing committees], July 19, 2002, RENDA JIANSHE [PEOPLE'S CONGRESS CONSTRUCTION], available at <http://kbs.cnki.net/Forums/PrintThread.aspx?PostID=27231>.

The developments discussed here do not reflect the full reach of court reform in China. Important reforms have also been undertaken in developing rules of evidence, in clarifying oversight systems within courts, and in providing judges with better access to legal information. In addition, recently announced reforms to procedures in capital cases may have a significant effect on the criminal process. But few, if any, such changes touch on the courts' power relative to other state actors. Nevertheless, the diverging expectations toward courts among senior officials, local judges, and ordinary litigants also reflect a system in which the proper and potential roles of the courts are increasingly contested and in which courts are increasingly coming into conflict with other state actors.

## V. IMPLICATIONS: RESTRICTED REFORM?

The fact that much of the important change is coming from the bottom shows that assessing reform in China's courts may be difficult. It also reflects the need to distinguish between changes in courts' roles and steps that make the courts more efficient and fair in their existing roles. This section first examines in more detail whether recent developments suggest changes in court's formal authority, and then returns to the two questions posed at the start of this essay.

### A. *Reformed Authority?*

Recent developments do not suggest fundamental changes in courts' power relative to other state actors. This is not surprising: most court reform has come from the courts themselves, but strengthening court power is not something that the courts can do on their own. As Part I argues, courts have engaged in significant reforms in recent years and are better positioned than in the past to resist some forms of external pressure. But reforms have largely addressed technical or administrative problems: improving education and training of judges, raising qualifications of new judges, fighting corruption, and taking modest steps to reduce the political emphasis in court work. Central Party leaders have not emphasized reform or strengthening of the courts; indeed courts received only modest attention in the reports of the 15<sup>th</sup> and 16<sup>th</sup> Congresses of the Communist Party, in 1997 and 2002.

Nevertheless, significant change is coming from the courts. Courts have taken steps to increase their own autonomy and authority, by raising education standards and by increasingly using legal arguments to resist external pressure. A small number of lower courts have begun to

engage in significant innovation. Such developments suggest that, despite the formal limitations on court authority, the future role of courts may be significantly influenced by how courts define their own roles and by how litigants use the courts. There is significant room for ground-up evolution.

Such evolution reflects necessity: courts are confronting a widening range of cases and cases of increased complexity. Courts are under pressure to resolve disputes that come before them in ways that prevent claims from escalating but often lack clear legal guidance as to how to do so. They thus have both the incentive and the space to engage in innovation and experimentation. As Part III explains, most such cases result in outcomes that are consistent with powerful interests; there are few signs of courts doing so in ways that diverge from the interests of powerful parties.

Ground-up developments in the courts may, however, also be resulting in courts that are increasingly in conflict with other Party-state and official institutions. This is particularly apparent in court interactions with the media, where courts have responded to media oversight by imposing limits on reporting and filing defamation lawsuits. But courts also appear to be increasingly in conflict with people's congresses and procuratorates, both of which have attempted to strengthen their supervision of the courts, and also with administrative departments. Thus although courts have not expanded their authority over other state actors, it does appear that court decisions are likely to result in greater friction with such actors.

### *B. Explaining New Roles*

Recognizing the limitations of court reform in China is not meant to trivialize the changes thus far. Given that there was virtually no functional legal system when legal reforms commenced in 1978, and the political context in which China's courts operate, it would have been unrealistic to expect a faster rate of change. Indeed, asking why China's courts are not more independent or more powerful may be less important than understanding why courts have been permitted to develop as they have. Why have courts been permitted to hear a wider range of grievances and to take even modest steps in the direction of increased authority and autonomy? Put differently, why has China's leadership tolerated developments such as administrative litigation, class actions, contingency fees, and a widening sphere of public interest litigation? Courts have been permitted to innovate, in some cases by directly looking to Western precedent. The state itself has devoted significant resources to

developing a legal aid system and to legal education, encouraging not only greater awareness of law but also more frequent use of law to challenge official actors.

Western writings on the roles of courts have largely focused on the question of why a democratic regime would create independent courts.<sup>101</sup> Theories include the desire to make political bargains credible,<sup>102</sup> the usefulness of courts to politicians who wish to shift blame from unpopular government policies,<sup>103</sup> and courts' roles in keeping administrative bureaucracies in line with government policy.<sup>104</sup> Others have argued that independent courts are a product of political competition and are attractive to political parties that may one day find themselves out of power,<sup>105</sup> or that judicial review is attractive to new democracies because it serves as "insurance to potential electoral losers."<sup>106</sup> Such theories have limited applicability in China, where a non-democratic regime has encouraged development of the courts, and where courts have limited powers over other administrative actors.

Another common explanation for the creation of a functional legal system is that such institutions are necessary for economic development. An interest in economic development has certainly played a role in China's legal reforms, and reforming legal institutions may be a more important justification for court reform going forward. But this explanation appears unsatisfactory in China, where economic development has progressed despite the absence of a legal system that provides effective guarantees of property rights. A desire to conform to international norms may play some role – but also seems a weak explanation for China's recent experiences, in particular the encouragement of class actions and cause lawyering. Three alternative theories are more plausible.

First, courts are one of a number of Party-state institutions serving as a safety valve for a widening range of popular complaints. Permitting grievances to be raised through class actions, administrative litigation, or

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<sup>101</sup> The list provided here is not exhaustive. For more detailed analysis, see Stephenson, *When the Devil Turns...*, *supra*, note 2.

<sup>102</sup> William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J. L. & ECON. 875, 875-901 (1975).

<sup>103</sup> Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary*, 13 INT'L REV. L. & ECON. 349, 349-79 (1993).

<sup>104</sup> Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 American Journal of Political Science 165, 165-179 (1984).

<sup>105</sup> J. Mark Ramseyer, *The Puzzling (In) Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 721-47 (1993); J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE 122-168 (University of Chicago Press 2003); Stephenson, *When the Devil Turns*, at 83-86, *supra*, note 2.

<sup>106</sup> GINSBURG, *JUDICIAL REVIEW*, *supra* note 96, at 24.

even (in a small number of cases) constitutional litigation may be preferable to such complaints not being heard at all – or being raised on the streets. The safety valve function of courts also explains why courts may accept but then not decide some difficult cases: the hope may be that once cases are filed, grievances will dissipate over time. The courts are not unique, or even particularly prominent, in this role. The letters and visits system plays a broader, and arguably more significant, function as a safety valve. Courts are thus one of a number of fora for raising grievances and courts that permit such grievances to be raised act in the interests of social stability.

Concern with social stability also helps explain inconsistent trends in court reform. The Party-state has emphasized the role of the courts and has given tremendous attention to courts and law in the media. At the same time, Party-state leaders continue to tolerate, and even encourage, a range of official and quasi-official actors to intervene in court decision-making. Concerns with social stability force Party-state officials to strive to be even more responsive to public views than might be the case in a democratic system. The fact that all actors in the system know that Party-officials have the power to intervene and are evaluated in significant part based on whether or not they maintain stability in their regions makes it difficult for officials to ignore protests on the grounds that the authority of the courts must be respected.

Authoritarian regimes may have a greater stake in being responsive to public demands regarding the courts than democratic states, where the political process provides a mechanism for public grievances to be aired and resolved. The legitimacy of China's leadership depends on its ability to both channel and contain populism; concerns that popular expressions of outrage may spin out of control encourage rapid intervention in the legal system. The counter-majoritarian function of courts thus may be harder to accept in a non-democratic society, where courts lack authority and public confidence, than in a democracy. This is particularly the case in China, where the rise of social unrest makes officials particularly sensitive to public opinion and where the courts lack a history of being viewed as either authoritative or neutral.

Such developments pose risks to the courts. The courts and the Party-state are fostering increased expectations that the courts can and should be used as a vehicle for protecting legal rights. The risk is that, absent greater change in and to the courts, such expectations will not be met and trust and confidence in the courts will be further eroded –

sending those with grievances to other institutions in even greater numbers.<sup>107</sup>

Second, the evolving roles of courts, including increasing conflicts with other Party-state institutions, reflect the development of institutional competition in the Chinese political system. The central Party-state has encouraged a range of official actors – including courts, the media, letters and visits bureaux, the procuratorates, Party discipline authorities, and peoples' congresses – to play oversight roles, often over each other. Attempts by the courts to expand their autonomy and authority are consistent with similar steps being taken by other actors. This reflects an emerging characteristic of institutional relationships in China, one that appears to be a crucial part of the institutionalization of the Party-state that has helped to explain its resilience.<sup>108</sup> The aim appears to be to encourage a range of official actors to expand their roles in resolving grievances and fighting abuses, and to serve as checks on each other. Some greater transparency is encouraged, but within the limits of Party oversight and primarily by Party-state actors. Courts are one of many institutions playing such complimentary roles. Others include procuratorates, the media, people's congresses, and Party discipline commissions. Thus any expansion in court roles or authority may reflect the increased attention to resolving grievances and expanding oversight in the Chinese system, not greater authority of the courts. Wrongdoing is addressed, and Party-state legitimacy is maintained, without fostering the development of non-state checks on official action. Chinese courts thus serve not as an arbiter among different interests in the political system, but rather as one of many institutions playing parallel roles. China's leadership is sensitive to the possibility that allowing more prominent roles to non-state actors may undermine central authority. In the legal system, however, allowing a widening range of grievances to be brought by individuals and organizations may also be an effective tool for asserting state control.

Similarly, the permissive attitude toward some developments in the courts reflects the fact that courts are not viewed as rival sources of power. Party officials are not worried that courts may become significant checks on official action. Instead, development of the courts serves state

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<sup>107</sup> Cf., Liang Jianbin, *Renmin weishenme dui fazhi xianzhuang bu manyi?* [Why are people dissatisfied with the current situation in the legal system?], Feb. 8, 2006, <http://www.acla.org.cn/forum/showflat.php?Cat=&Number=667728&Main=666892>. Liang argues that the greater promises the courts make, the greater disillusionment that will result when courts fail to meet such standards.

<sup>108</sup> Andrew J. Nathan, *Authoritarian Resilience*, 14 JOURNAL OF DEMOCRACY 6, 6-17 No. 1 (Jan. 2003).



interests in curbing abuses, maintaining control, and using the development of the legal system to reinforce state legitimacy.

Third, ground-up development of the courts may be a source of judicial power. The ability of judges to network horizontally may lead to greater authority and autonomy of the courts. The trajectory of court development may not be entirely determined by top down edicts, or constitutional structure. Chinese judges themselves are increasingly looking to the roles judges play in other countries as they seek to define their own positions. Likewise, litigants' aspirations for the legal system appear to derive from both rising attention to the role of law and courts and from international norms. This explanation for recent developments in China's courts is one perhaps not fully explored in recent writings about judicial power.

Many countries have experienced an expansion of judicial power in recent decades, often from constitutional courts, from the top-down. It remains too soon to speak of fundamental changes to the power of China's courts. But China may be unusual in the importance of ground-up developments.

### *C. Future Roles: Fairness without Independence?*

Understanding why the Chinese Party-state has permitted even the level of court reform experienced thus far yields insight into a central question facing China's courts: what are the possible limits of court development in a non-democratic society? Many in the West and in China have looked to China's courts in the hope that they may play a transformative role in the Chinese political system. But the more pertinent question, at least at present, may be what role courts can play within the current system. Can courts play a significant non-transformative role – can they serve as fair and efficient adjudicators of private disputes, and perhaps as checks on some forms of official action, without political change? And, if they do so, will they legitimize Party rule, or will the development of a more professionalized judiciary inevitably lead to courts that challenge Party authority?

Recent developments and debates in China have largely avoided this question.<sup>109</sup> Many in China seeking greater authority for the courts have been heavily influenced by Western, and in particular American, writings on courts. Some of the discussion in China echoes debates

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<sup>109</sup> One exception is the work of "new-left" scholars such as Pan Wei, who have argued that China can and should establish rule of law without democracy. See, e.g., Pan Wei, *Fazhi yu weilai de zhongguo zhengti* [Rule of Law and China's Future Political System], 1999 ZHANLÜE YU GUANLI [STRATEGY AND MANAGEMENT], No. 5, at 30-6 (1999).

concerning the role of the judiciary in democracies: what is the relationship between courts and legislatures, do courts have too much discretion to interpret vague laws, are courts subject to excessive popular, and in particular media, pressure? But the questions facing China's courts and judges may also be very different from those faced by their counterparts in the West. Can judges develop the capacity to resolve non-sensitive cases fairly? Can the range of cases subject to external intervention be reduced? Can courts be encouraged to do so without at the same time prompting courts to play broader roles? Does the fact that the Chinese courts operate in a non-democratic context suggest that they should have a greater, or lesser, role in resolving important questions facing Chinese society?

China's effort to create courts that act fairly without challenging single-Party rule is not unprecedented. Other single-party states – including Spain under Franco, and modern Singapore – have had courts that commentators have viewed as largely fair and independent in their handling of non-sensitive or non-political cases.<sup>110</sup> Parallels may also be drawn to Japanese courts, which were largely independent both in the late imperial period and also, after democratization, during the long period of Liberal Democratic Party rule.<sup>111</sup> Similarly, recent writing on Egypt has explored why that authoritarian regime has created an independent constitutional court.<sup>112</sup>

Recent Chinese experience does not fit squarely into any of these models. In contrast to Singapore and Japan, for example, the range of cases deemed to be sensitive in China is extraordinarily wide – and includes not only direct challenges to Party authority or major criminal cases, but also a wide range of cases attracting public attention, as well as cases involving litigants with ties to Party-state officials. In contrast to Franco's Spain, where a degree of independence was possible because courts' powers were extremely limited and courts played little role in

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<sup>110</sup> Jose J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 LAW & SOC'Y REV 475, 475-96 No. 3 (1975).

<sup>111</sup> John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, at 16-19 (Washington University in St. Louis School of Law, Faculty Working Papers Series, Paper No. 05-10-01) (forthcoming in DANIEL J. FOOTE, ed., *LAW IN JAPAN: A TURNING POINT* (University of Washington Press forthcoming 2007)). Haley notes a long tradition of judicial independence in Japan stretching back to the 19<sup>th</sup> century. In contrast to Haley, Mark Ramseyer and Eric Rasmusen argue that courts in democratic Japan, although generally independent, have yielded to LDP interests in certain sensitive cases. J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* 122-3 (University of Chicago Press 2003). Haley, in contrast, finds no evidence of such political influence on modern Japanese courts.

<sup>112</sup> Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 2003 LAW & SOC. INQUIRY 883, 883-930.

creating legal values, China's courts have become significant fora for the airing of rights-based grievances. And in contrast to Egypt, where the constitutional court was established and developed in significant part due to its role in furthering economic development, courts in China have developed into significant fora for the airing of rights-based claims even absent their serving as effective guarantors of property rights.<sup>113</sup> Moreover, the most significant changes in Chinese courts' roles appear to be coming from lower courts, not the Supreme People's Court.

Those looking for China's courts to be agents of change are likely to be disappointed. The fact that a widening range of cases – including labour rights, constitutional claims, and environmental disputes – is finding its way into court does not necessarily mean that courts are playing a greater role in enforcing rights protections. Courts' roles remain largely reactive, and their reactive capacities remain weak. Courts are still struggling to develop the functional ability to resolve individual cases. In the short term, the crucial question for the courts is whether they can further develop the capacity to serve as neutral and efficient decision-makers in routine, private cases.

Developing the capacity of China's courts to handle routine cases fairly would be a significant accomplishment. Doing so would also be consistent with two of the three explanations offered above for the development of the courts to date: serving as a safety-valve for discontent and grievances, and institutionalizing the operation of the Party-state. But the third explanation for court development, that horizontal and ground-up development of the courts may lead to greater court autonomy, suggests that further development of the courts may also give rise to increased tensions with other Party-state actors. As courts continue to develop horizontally, and as judges develop professional identities, it may become increasingly difficult to constrain court development. By encouraging the development of more professional judges, the Party-state may also be fostering greater challenges.

Debate over the proper role of courts is a characteristic of most societies, and in particular of democratic societies. What is particularly noteworthy about recent developments in China is that such debates have become open, with scholars, judges, and other commentators arguing for expanded judicial power, for fundamental changes to the structure of courts, and even for court oversight of the Communist Party. Debates in China about the role of courts thus resonate with debates in the West –

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<sup>113</sup> In Egypt, as Moustafa describes, the Constitutional Court has developed into a forum for challenging the regime. In China, in contrast, courts have neither challenged single-Party rule nor served as fora for those seeking to do so.

where there is of course also significant ambiguity and controversy about the proper roles of courts acting in counter-majoritarian fashion in democratic societies. China's courts continue to face many problems that have undermined their effectiveness for decades; but they also appear increasingly to be confronting the types of questions and challenges that are faced by courts in other societies, albeit in a very different political context.

Recent developments suggest that courts' ability to serve broader aims may depend on their developing greater authority, either on their own or at the behest of the Party-state. Courts' ability to do so will be shaped by Party-state policy, but will also reflect the continued ground-up development of the courts. The roles of courts and judges are no longer solely defined by top-down pronouncements; courts, judges, litigants, and the media are all shaping expectations about the roles that the legal system can and should play. Judges appear to be looking to the roles judges play in other countries as they seek to define their own positions; litigants' aspirations likewise appear to derive both from rising attention to the role of judges and from international norms. Recent attempts to steer judges away from "Western rule of law theories" are a tacit acknowledgment of such trends. Continued ground-up development of the courts may be crucial to courts' serving the Party's interests – but may also promote new challenges. The central question remains whether courts can become fair arbiters of individual disputes without inevitably questioning and challenging the political power of the state. The most significant development regarding China's courts is that their role is increasingly contested.