A New Analytic Framework for Understanding and Promoting Judicial Independence in China

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This chapter develops a new analytical framework for understanding and promoting judicial independence in China. As noted in the previous chapter, general denunciations of the "lack" of (meaningful) independence in China fail to capture the complexity of the situation. Attributing the lack of meaningful independence primarily if not exclusively to the nature of the political system also misstates, and overstates, the role of the Party, and ignores more common sources of pressure on the courts. The likely *source* of interference, the *risk* of interference, and the *impact* of interference all differ depending on the *type of case*.

Given the diverse nature of the problems, there is no single solution – no silver bullet – that will ensure "meaningful" judicial independence in China (whatever that means in light of the substantive disagreements about just how independent courts *should* be at this stage of development). Reforms to facilitate judicial independence must be tailored to the particular circumstances and include a wide range of changes that affect not just the judiciary as an institution but substantive and procedural law, the balance of power among state organs, Party-state relations and social attitudes and practices. Judicial independence is however not an end itself, and the courts are not the sole, most effective or most appropriate venue for resolving all disputes. Thus, we also provide policy recommendations for each type of case, including in some cases recommendations that emphasize non-judicial mechanisms for resolving certain issues or limit judicial independence in an effort to reduce corruption, promote socio-political stability and enhance justice and judicial accountability.

Part I introduces the analytical framework and provides a summary of the results in table form. Part II discusses each type of case in more detail. Part III concludes.

I. The Analytical Framework

Types of cases

The first distinction is between (pure) political cases and politically-sensitive cases. The former are political in the straightforward sense of directly challenging the authority of the

ruling regime. These include for example cases involving Falung Gong, attempts to establish an independent China Democracy Party, corruption among senior government officials, and national security cases involving terrorism, secession, endangering the state and state secrets.

Politically-sensitive cases affect socio-political stability, economic growth, China's position in the world and international reputation or the broad public interest. They are political but less directly political than the type of case that challenges the authority of the ruling regime.

These cases include *socio-economic cases* such as land taking and compensation disputes, some entitlement claims (pension, unemployment, medical care, education), and some environmental and labor disputes. They also include *"class action"* suits or cases involving a large number of plaintiffs, which often lead to protests, many of them increasingly violent, and thus threaten social stability.[1] And they include some *new economic cases* or cases resulting from the transition to a market economy. Such economic cases present novel issues for the courts, and have broad ramifications for economic growth and development, poverty reduction, China's efforts to create a "harmonious society," and China's relationship with other global economic actors. They include shareholder litigation suits and other types of securities litigation, bankruptcy claims (particularly involving large state-owned enterprises), and anti-dumping, price-setting, anti-monopoly and other types of competition law cases.

Political or politically sensitive cases may take the form of criminal, civil or administrative cases. However, the PRC courts handle over 8 million first instance cases a year, including more than 700,000 criminal cases, 4 million plus civil cases, and almost 100,000 cases. Only a small fraction of them are political or politically sensitive in nature. Moreover, not every political or politically sensitive case results in direct interference. On the other hand, routine cases are not necessarily free from interference. But the risk, nature, source and impact of interference are different. Failing to draw these distinctions is likely to lead to misleading generalizations. Accordingly, we discuss separately routine criminal, civil and administrative cases.

[1] China allows for suits by multiple plaintiffs, although they differ in various respects from "class actions" in US federal courts.

In addition, we discuss labor cases as a separate category. Although they generally are a type of socio-economic dispute, and many are collective or mass plaintiff cases, there are also a significant number that are routine in nature, involve only individuals and present straightforward legal issues for which the courts are able to provide a remedy. Further, we treat them separately because of the unique nature of the labor dispute resolution process, which involves in most cases mandatory arbitration before parties can go to court.

Sources of interference

In general, interference may come from:

- Party organs: the Party Committee; Political-Legal Committee; Organizational Department; and Disciplinary Committee;
- the judiciary itself: the president of the court, head of division or other senior judges, the adjudicative committee, or higher level courts
- people's congresses and the procuracy;
- (local) government and administrative entities;
- the media, public and academics;
- social acquaintances (relatives, friends, classmates, colleagues, members of community, golf club etc.); and
- parties, their lawyers, and hired consultants and experts with an interest in the case.

In every legal system, judicial independence must be balanced against the need for judicial accountability. Thus, every legal system has various review mechanisms. Sources of interference may be classified as *systemic* and *non-systemic* depending on whether there is a legal basis for such intervention in particular cases.

As described in the previous chapter, the PRC legal system authorizes certain forms of systemic intervention in specific cases by higher level courts, the adjudicative committee within courts, people's congresses, and the procuracy: there is a clear constitutional and statutory basis for such intervention, although there may be controversy about the wisdom and value of such intervention or particular aspects of it, and detailed rules regarding procedures or key issues may be lacking.

In contrast, the Party's role is more controversial as there is no explicit constitutional or legal basis for the particular types of intervention in specific cases or in other ways.

Nevertheless, various forms of Party intervention are systemic and reasonably formalized, both through practice and through Party polices, directives and guidelines. They are part of China's "living constitution."[2]

Government officials and administrative entities have certain formal powers that affect the independence of the jury. For example, they are able to pass regulations, and under the current constitutional structure where the courts do not have the power to review abstract acts or strike down legislation for inconsistency with higher laws, they are often responsible for interpreting such statutes and maintaining consistency. Thus, in deciding cases, courts may have to refer certain issues to them and to defer to their interpretations.[3] Until recently, courts were funded by courts at the same level of government, although the government has recently announced that funding will be centralized. The ability to determine a court's budget clearly influences or affects the judiciary. Nevertheless, government entities and agencies have no general formal or systemic powers to interfere with courts in the handling of specific cases.

Similarly, the media, academics and citizens may comment on cases. Academics may take part in drafting laws or in some cases be asked to advise as experts on particular issues before the court. Lawyers obviously have a role in representing parties in particular cases. But the media, academics, social acquaintances, parties and lawyers do not have formal or systemic powers to interfere in the way courts handle specific cases.

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[2] The "living constitution" as used in American legal discourse usually refers to a method of statutory interpretation of the constitution that read the broad purposes and principles of the constitution in light of contemporary circumstances, and thus contrasts with the "original meaning" method that emphasis the framers' intent. See Michael Dorf, "Who Killed the Living Constitution?" (March 10, 2008), http://writ.news.findlaw.com/dorf/20080310.html. In this context, "living constitution" is used to refer to the existing constitutional order, including institutions, rules and practices, as they operate in practice.

[3] Courts rarely ask for interpretation of laws, and the NPC Standing Committee has rarely issued interpretations. The SPC has been delegated the authority to issue interpretations of laws, and often does. The SPC files its interpretations with the NPC Standing Committee Legal Affairs Committee and generally obtains its consent on key issues. For a general discussion of mechanisms for ensuring consistency of administrative regulations and rules, see Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press, 2002).

Not all systemic intervention is legitimate, and not all non-systemic interference is illegitimate. In general, systematic interference (or, more neutrally and accurately, "intervention"), is *legitimate* when the intervention is on behalf of the entity rather than in the personal capacity of an individual member of the organization, when the nature or substance of the intervention is within the scope authorized by law, and when the manner of intervention is consistent with legal procedures (i.e. when the intervention is carried out in accordance with proper procedures). Conversely, the intervention is *illegitimate* when an individual in one of the organs with power to intervene acts in his own capacity or for his own benefit, when the intervention exceeds the authorized scope or when procedures are not followed.

Non-systemic interference in specific cases is generally illegitimate, apart from public discussion of particular cases by the media, academics, citizens or government officials. Non-systemic intervention, particularly by parties, lawyers and social acquaintances is the most common source of corruption, although the various mechanisms of supervision also create opportunities for rent-seeking[4] Illegitimate (non-systemic) intervention by government officials in commercial cases, usually by local officials in lower level courts, is known as local protectionism.

Impact of interference

Just because intervention occurs does not mean that it has an impact on the outcome of the case. When it does, the impact can range from ensuring judges decide cases according to law to minor changes in the outcome consistent with law to a decision that is at odds with law. Judges may also react to outside pressure by refusing to accept controversial cases,[5] by or

[4] The various supervision channels create opportunities for rent-seeking but are increasingly difficult to invoke and the likelihood of success is very low, making them worth pursuing only when the amount in controversy is large.

[5] See, e.g., Chapters 7 and 9 in this volume. A Supreme Court training manual suggests some very general guidelines for determining whether a case should be accepted: "The merits of the case by the Courts must be measured against two criteria: (1) legal criterion: whether it falls within the scope of laws and regulations … (2) political criterion: for questions that involve national defense, foreign relations, state interest and other matters that go beyond the scope of the power of the judiciary and are not suitable to be adjudicated by the courts, cases should not be accepted. This is dictated by the place of the courts ... in the political system." Huang

trying to steer parties to higher level courts, to courts in other jurisdictions or to political, administrative or civil channels for resolving the dispute. They may also try to mediate a settlement. Courts have responded to public pressure and criticism by increasing efforts to explain legal issues to the public. In some courts, for example, the president of the court or a court spokesperson will hold press conferences or regular meetings open to the public. Courts have also taken to publishing court judgments and opinions or articles written by academics and even judges discussing important cases or major issues on their websites.

Some qualifications and caveats

Several general caveats are in order. First, there is some overlap in the types of cases. For instance, many socio-economic cases take the form of multi-party collective suits. In general, cases that fall into multiple categories are more likely candidates for intervention.

Second, these categorizations are ideal types. While most people will agree how to categorize most cases, reasonable people can disagree how to categorize cases closer to the margins – for example, whether a particular case is routine or raises issues that rise to the

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Lirong, "Guan yu minshi libiaozhun de fali sikao" [Legal Theory Considerations on the Standards of Case Filing in Civil Litigation], Case-filing Office of the Supreme People's Court, ed., *Guide on Case-Filing* , Beijing: People's Court Publishing House, November 2004 (China Trial Guide series), pp. 89-91, cited in Human Rights Watch, "Walking on Thin Ice", fn. 50, p. 21, (http://www.hrw.org/reports/2008/china0408/5.htm). The Supreme Court has limited jurisdiction with respect to land taking claims and securities litigation, as discussed below. One media report widely discussed on the Internet in China claims that Guangxi courts would not accept thirteen types of cases including securities litigation, land taking claims and compensation for resettlement, disputes arising out of illegal ponzi schemes and other chain sale scams, cases involving laid-off workers and retraining as a result of economic transition or as a result of bankruptcy, large scale government cancellation of rural responsibility system contracts, and remaining problems regarding how to divide collectively owned assets. These cases fall into the socio-economic and transition to a market economy categories discussed below. Many of them also involve large multi-party suits. In most if not all cases, the parties would have available a variety of political, administrative and private channels to pursue their claims, each of which has advantages and disadvantages, none of which ensures success. See "Guangxi fayuan bu shouli 13 lei anjian; shenggaoyuan cheng you guoqing jueding" [Guangxi courts refuse to accept 13 types of cases; High Court claims decision in accordance with national conditions], *Zhongguo nianqing bao, Zhongqing zai xian*, Aug. 24 2004.

level of politically sensitive.

Third, non-systemic interference may lead to systemic interference. The PRC legal system allows various parties to seek "supervision" of individual cases by applying to the courts, the people's congress or the procuracy.[6] Interested parties or citizens may also take advantage of an extensive petitioning system to raise complaints and in some cases, albeit very few in practice, trigger the supervision mechanism.[7]

Fourth, reasonable people may at times also disagree about whether intervention is authorized or whether the particular intervention was within the authorized scope or in accordance with proper procedures. For example, there are no detailed national rules for intervention by people's congress, although some local congresses have passed implementing regulations. Many commentators take issue with some of the local provisions. In any event, the regulations are still vague on many key issues. Similarly, there is a great debate in China, as in many other countries, regarding media coverage on pending cases and trials.

Fifth, legitimate intervention may be unwise or counterproductive; conversely, illegitimate intervention may be desirable or beneficial. Determining whether a particular form of intervention is harmful or beneficial requires assessing the costs and benefits of specific instances of such intervention and of the practice as a whole.

Summary of results

In general, Party and government influence determines, either directly or indirectly, the results of political cases.

In politically sensitive cases, courts are subject to oftentimes intense pressure from various sources, including the media and public. The impact of the various forms of influence

[6] See Randall Peerenboom, "Judicial Accountability and Judicial Independence: An Empirical Study of Individual Case Supervision in the People's Republic of China," *The China Journal* vol. 55, p. 67 (2006).

[7] Carl Minzner, "Xinfang: An Alternative to the Formal Legal System" *Stanford Journal International Law* vol. 42, p. 103 (2006). A disgruntled party may complain about a court's handling of a case, including the refusal to hear the case, to many different entities, including higher level courts, the procuracy, the procuracy and government and party entities. All of these non-court entities may refer the complaints to the court to trigger supervision.

on the outcome is difficult to predict however because the cases are complicated and there is often no adequate remedy available. As a result, courts often seek to limit access to the courts in such cases, push the disputes toward other channels, or attempt to mediate a settlement.

Local protectionism has decreased in economically advanced urban areas, and is less of a factor in higher courts, but remains a concern especially in lower courts in rural areas. Judges are generally able to resist other forms of non-systemic intervention, particularly by parties, lawyers and social acquaintances, but also increasingly from senior judges within the court, as a result of improvements in education and professionalism, and an increase in their authority and stature. Judges are unlikely to decide a case in a way that is manifestly at odds with the law based on non-systemic influence, though they may reach a slightly different outcome that is consistent with law. Local protectionism and non-systemic interference from the parties appear to be more severe in lower level courts and in poorer areas.

Although non-systematic intervention generally does not have a significant impact on the outcome, it is the major source of corruption, and erodes public confidence in the court. While parties generally believe they prevail because they have the facts and law on their side – i.e. they won on the merits – they frequently believe they lost because of bias and influence by the other party (see, e.g., Chapter 11). Non-systemic intervention also adds to the burden of judges, who in responding to and warding off intervention must spend time and energy attending to the social and professional relationships involved.

The table attached as Appendix A provides a summary of the results and a roadmap for the ensuing discussion.

II. Detailed Discussion of Each Type of Case

Pure political cases

Pure political cases threaten, or are perceived to threaten, the authority of the ruling regime. These include cases involving Falung Gong, attempts to establish an independent political party, high level corruption, terrorism, secession, endangering the state and other national security cases.[8] Many of these cases involve the exercise of civil and political rights. They

[8] For a brief discussion of several such cases, see Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (New York and London: Oxford University Press, 2007), pp. 100-118; Peerenboom, *China's Long March*, pp. 91-102.

often involve “political dissidents,” social activists and their lawyers and representatives who are engaged in “political lawyering,”[9] including the more “radical” wing of *weiquan* lawyers.

Fu Hualing and Richard Cullen have provided a useful threefold classification scheme for lawyers in China who are part of the so-called *weiquan* movement, a loose term that refers to activist lawyers who are engaged in efforts to protect citizens’ rights and promote legal and political reforms. Activist lawyers can be moderate, critical or radical depending on the type of the cases they handle, their objectives, and their approach.

Moderate lawyers are not overtly political. They select cases involving consumer protection, labor rights, or discrimination that are not terribly politically sensitive. They operate within the limits of law and rely on legal arguments, and seek to promote rule of law.

Critical lawyers are often more critical of the political system, but they are also pragmatic in their acceptance of the lack of viable alternatives. They want to ensure that the system lives up to expressed ideals, often pushing for systemic reforms. They are willing to take on somewhat more politically sensitive cases involving free speech, religious freedom and freedom of association, but not cases that are politically prohibited such as Falun Gong or to represent dissidents calling for the overthrow of the CCP. They rely on both legal and political methods, including greater mobilization of the media, support from foreign NGOs and organizations, and the use of mass protests and sit-ins, though they are divided about mass protests and sit-ins. They “prefer gradual institutional transformation, hoping to end the endemic abuses of the authoritarian state through reforming it from within, avoiding any

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[9] Political lawyering emphasizes first generation, civil and political rights - the negative rights of freedom of speech, thought, religion, movement and association – and the political institutions of (primarily economically advanced western) liberal democracies that protect these rights. See Stuart Scheingold and Austin Sarat,“Something to Believe,” in S. Scheingold and A. Sarat eds. *Politics Professionalism and Cause Lawyering* (Stanford: Stanford University Press, 2004); Terrence Halliday et al., “Struggles for Political Liberalism: Reaching for a Theory of the Legal Complex and Political Mobilisation,” in T. Halliday et al. eds. *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Change* (Oxford: Hart Press, 2007).

direct confrontation with the CCP/state."[10]

Radical lawyers take on highly sensitive political cases involving dissidents and Falungong. Their methods are more extreme, including organizing mass demonstrations and social movements, or even advocating violence. Their goals may include overthrowing the Party-state. Radical lawyers "mobilize against the law and against the grain of mainstream politics."[11] As a result, they tend to alienate the general public and their fellow lawyers, and provide a pretext for the government to delegitimize and suppress the *weiquan* movement, as many less radical lawyers have pointed out.[12]

Not every political case gives rise to direct interference, though some form of intervention is likely in most such cases. These cases are generally decided through political channels or at least with heavy input from political entities. Party organs play a large and generally decisive role in determining the content of laws, in issuing policy statements or in some cases intervening in specific cases. There is a trial but the results are easily predicted in advance. In general, courts continue to impose severe limitations on civil and political freedoms when the exercise of such rights is deemed to threaten the regime and social stability. The lines of what is permissible and what is not are clear and fixed in some areas, but vague and fluid in others. The time, place and manner of expression are as important as the subject matter. What may be tolerated in some circumstances may be subject to greater restriction when there are certain aggravating factors present, such as attempts to organize across regions or to hook up with foreign organizations.

In addition, there are often serious due process violations, both before and after the trial.

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[10] Fu Hualing and Richard Cullen, "*Weiquan* (Rights Protection) Lawyering in an Authoritarian State: Toward Critical Lawyering," http://ssrn.com/abstract=1083925 (access 15 March 2008).

[11] Austin Sarat and Stuart A. Scheingold, "State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction," Sarat and Scheingold eds. *Cause Lawyering and the State in a Global Era* (Oxford: Oxford Socio-Legal Studies, 2001).

[12] Eva Pils, "Asking the Tiger for His Skin: Rights Activism in China," *Fordham International Law J.* vol. 30, p. 14 (2007).

Lawyers may be harassed, and in some cases arrested on trumped up charges. Some lawyers have also been beaten by thugs, in some cases linked to the authorities, or by police or members of the security bureau.[13]

The limitations on the independence of the courts in political cases reflect the nature of the regime, the current state of socio-political stability, the dominant conception of law/rule of law, China's model of development and the political contract between central and local governments.

A single party state is less likely than a democratic state to tolerate challenges to its authority, although the differences are easily overstated. Democratic states also react to social instability and perceived threats to national security. A number of quantitative studies demonstrate that the third wave of democratization has not led to a decrease in political repression, with some studies showing that political terror and violations of personal integrity rights actually increased in the 1980s.[14] Other studies have found that there are non-linear effects to democratization: transitional or illiberal democracies increase repressive action. Fein described this phenomenon as "more murder in the middle" – as political space opens, the ruling regime is subject to greater threats to its power and so resorts to violence.[15] More recent studies have also concluded that the level of democracy matters: below a certain level democratic regimes oppress as much as non-democratic regimes.[16] Moreover, the recent war

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[13] Fu Hualing, "When Lawyers are Prosecuted: The Struggle of a Profession in Transition," (2006), http://ssrn.com/abstract=956500 (accessed 15 March 2008).

[14] James McCann and Mark Gibney, "An Overview of Political Terror in the Developing World, 1980-1991," in David Cingranelli ed. *Policy Studies and Developing Countries*. (Greenwich, CT: Jai Press 1996); David Reilly, "Diffusing Human Rights: The Nexus of Domestic and International Influences" *Paper presented at the annual meeting of the American Political Science Association*, (2003), http://www.allacademic.com/meta/p62741_index.html.

[15] Helen Fein, "More Murder in the Middle: Life-Integrity Violations and Democracy in the World," *Human Rights Quarterly* vol. 17, p. 170 (1987).

[16] Bruce Bueno de Mesquita et al., "Thinking inside the Box: a closer look at democracy and

on terror in the US, England and Europe demonstrates that even in consolidated democracies the legislative and executive branch, often supported by a compliant or intimidated judiciary, will not hesitate to restrict civil liberties when national security is perceived to be threatened.[17]

Ironically, the argument of many liberal critics that China is very unstable tends to undercut their opposition to restrictions on civil and political rights. China clearly faces a number of threats to stability, including increasing rural poverty, rising urban employment, a weak social security system, and a rapidly aging population that has pushed the elderly into the streets to protest for retirement benefits. The number of mass protests has risen rapidly, from 58,000 in 2003 to over 74,000 in 2004. Such protests, many of them violent, are a threat to social stability, and thus to sustained economic growth. According to the state media, over 1800 police were injured and 23 killed during protests in just the first nine months of 2005. The desire for greater autonomy if not independence among many Tibetans and Xinjiang Muslims, the rise of Islamic fundamentalism in the region, and the difficulty of separating Buddhism and politics in Tibet also present risks that cannot be dismissed, even if they should not be exaggerated.

In addition, ideological differences, including the dominant conception of rule of law, also play a role. The stated goal is a socialist rule of law state, not a liberal democratic rule of law. One of the key differences between the two lies in the conception of rights, and in particular how to resolve the inevitable tension between the exercise of individual civil and political rights and the need for social stability.[18]

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human rights," *International Studies Quarterly* vol. 49, p. 3 (2005); Christian Davenport and David Armstrong, "Democracy and the Violation of Human Rights: A Statistical Analysis of the Third Wave," (2002), http://apsaproceedings.cup.org/Site/abstracts/011/011002ArmstrongD.htms; Linda C. Keith and Steven C. Poe, "Personal Integrity Abuse during Domestic Crises", (2002) http://apsaproceedings.cup.org/Site/papers/046/046004PoeSteven0.pdf.

[17] Nor is the post-9/11 war on terror exceptional. For other examples, see Peerenboom, *China Modernizes*, pp. 99-100.

[18] See Peerenboom, *China's Long March*, pp. 71-109.

The tight restriction on civil and political rights also reflects the East Asian Model of development. Chinese leaders no doubt are aware that socio-political instability has inhibited economic development and led to the downfall of many regimes (whether democratic or authoritarian) in Asia and elsewhere. Conversely, the successful Asian countries have followed a two-track system that combines rapid development in the commercial law area with tight restrictions on civil and political rights.[19]

These cases are also influenced by an implicit political contract between the central and local governments. The central government has created an incentive structure for local officials that emphasizes, among other things, economic growth, social stability and the one-child policy. Yet it has failed to provide local governments the necessary funds to support the schools, hospitals, pension plans and other institutions needed to ensure social stability or to build the roads, factories and R&D centers needed to promote economic growth. As a result, local officials are given considerable leeway in how these goals are achieved. At times, they violate central laws or abuse their powers. The central government will prosecute local officials who cross the line – for example when police kill protestors or when local practices, such as use of child labor in factories or poor safety standards in mines leads to accidents, result in national scandals. But this only further encourages local officials to try to cover up the problems, oftentimes by harassing whistle-blowers or arresting or intimidating the leaders of mass protests. Thus, local government officials are directly or indirectly responsible for some of the worst abuses, including beatings and other serious due process violations.

Courts in all legal systems have various ways of avoiding conflict with other political organs. In the US for example, courts may rely on the political question doctrine to avoid hearing certain disputes. Even when they formally retain the right to hear cases and review executive or legislative decisions, courts may defer to the executive or legislative on issues, particularly in the area of national security.[20]

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[19] This is only one aspect of the East Asian Model. For a more in-depth discussion, see Peerenboom, *China Modernizes*.

[20] This is particularly true in Asia. See Peerenboom et al. eds, *Human Rights in Asia* (New York: Routledge, 2004). However, US courts have not been aggressive in reviewing executive and legislative actions in the post 9/11 War on Terror.

In China, the Party is responsible for major political decisions, including deciding the types of issues raised in these cases. The courts' role is to carry out the Party's decisions. In most cases, the Party line is clear and reflected in laws and regulations, so there is little need for Party organs to intervene in specific cases. But in some cases the outcome may be less clear because the law or policy is unclear, the facts are uncertain or the nexus between the facts and the type of harms contemplated in the law and policies is uncertain. Accordingly, Party organs may intervene.

To insist on judicial independence in these cases would be futile given the political system. Nor would it necessarily be wise as many of these issues are essentially political issues, and arguably best decided through political channels by political entities. Nevertheless, that does not mean that Party organs may do whatever they want or that there is no role for the court. While Party organs may be responsible for deciding the general law and policies that determine the outcome in these cases, they could (and should) leave the application of the law and policies in the particular case to the courts. If cases raise new issues, then the courts could seek interpretation on the laws and policies from the entities that passed them, as is now contemplated. These political organs could consult Party organs. Alternatively, the courts could seek clarification directly from Party organs such as the Political-Legal Committee on some issues, as now happens in practice in some cases. Either way, the respective roles of Party organs and the courts should be further clarified and formalized in law.

A greater role for the courts in applying laws and regulations to the facts in these cases would also require that the limits of civil and political rights be clarified in laws and regulations. For instance, a judicial interpretation of subversion and related charges, and a narrower definition of "state secrets," would go a long way toward clarifying the scope of impermissible activities and expanding the range of legitimate activities without detriment to state interests. Similarly, it makes little sense for the authorities to set up protest zones for demonstrators during the Olympics, and then refuse all or virtually applicationa for demonstrations and arrest or harass some of those who applied.[21]

Even without further clarification of laws and regulations, the courts could play a greater

[21] "China's Olympic pride and lessons learned," *South China Morning Post*, Aug. 25, 2008.

role in reviewing the facts, establishing a nexus between the acts and the alleged danger, and ensuring that the procuracy has met its burden of proof. The danger of relying on broad allegations of subversion or endangering the state is readily apparent in this era of heightened sensitivity to terrorism. Yet in some cases courts have not closely examined statements offered by the procuracy as evidence of subversion. Similarly, in deciding whether time, place and manner restrictions on freedom of assembly or speech are necessary in particular cases, the court could more closely scrutinize the likelihood that the anticipated harm will occur. While acknowledging the possibility of instability, many court decisions fail to provide any discussion of how the particular acts in question will lead to instability or endanger the state or public order. A more considered analysis of the nexus between the acts and disruptions of the public order or harm to the state would expand greatly the range of civil and political rights without harming national security or state interests.

Moreover, whatever the outcomes on the substantive merits, the many due process violations even under China's own laws - including incidents of torture, the lack of transparency and a public trial, and excessively long periods of detention - violate both international and domestic laws. Nor should lawyers be harassed and prosecuted for trying to protect the legitimate rights of their clients, or environmental organizations and human rights groups unable to register or shut down simply for raising issues of genuine public concern. Courts could and should play a greater role in holding government actors accountable by enforcing procedural law and strictly applying evidentiary rules.

In addition, the existing political contract should be revisited. Government officials and police who rely on excessive force in dealing with demonstrators, or who turn a blind eye to local thugs who beat and intimidate protesters, should be held liable and given stiff punishments as a deterrent to others. These cases should be handled by higher level courts or courts in other jurisdictions to ensure impartiality.

Politically sensitive socio-economic cases

Socio-economic cases include pension and other welfare claims, labor disputes, land takings

and environmental issues.[22] Like other politically sensitive cases, they attract the attention of Party organs, government officials, administrative agencies, the media, public and scholars. Because of their sensitive nature, the adjudicative committee is likely to be involved in the decision. Higher level courts are also likely to be involved, either on formal appeal, or when lower level courts seek advice on new or controversial issues.

Dispute resolution of socio-economic cases has been characterized by: (i) notably less effective resolution than the vast majority of commercial cases; (ii) a trend toward dejudicialization, in contrast to the judicialization of most commercial disputes as reflected in the rising rates of litigation and the expanded range of litigable commercial cases: that is, the government has steered socio-economic disputes away from the courts toward other mechanisms such as administrative reconsideration, mediation, arbitration, public hearings and the political process more generally, when it became apparent that the courts lacked the resources, competence and stature to provide effective relief in such cases; (iii) a sharp rise in mass-plaintiff suits; (iv) a dramatic rise in letters, petitions, and social protests in response to the inability of the courts and other mechanisms to address adequately citizen demands and expectations; (v) a reallocation of resources toward the least well off members of society as part of a government effort to contain social instability and create a harmonious society, combined with a simultaneous increase in targeted repression of potential sources of instability, including political dissidents, NGOs and activist lawyers.

China is not alone in having difficulties resolving socio-economic cases. These types of cases are difficult for low and middle income countries because expectations have risen, yet

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[22] For a discussion of pension and welfare claims, and land taking and compensation disputes, see Randall Peerenboom and He Xin, "Dispute Resolution in China: Patterns, Causes and Prognosis," in R. Peerenboom ed., *Dispute Resolution in China* (Oxford: Oxford Foundation for Law, Justice and Society 2008), http://www.fljs.org/section.aspx?id=1931. For an excellent study of various efforts to address environmental issues, ongoing problems and policy recommendations, see Benjamin van Rooij, *Land and pollution regulation in China: law-making, compliance, enforcement; theory and cases* (Leiden: Leiden University Press, 2006).

resources are scarce and institutions relatively weak. Citizen expectations have risen as a result of the human rights movement, and in particular the greater (albeit still secondary) emphasis on socio-economic rights in addition to civil and political rights. In the 1980s and '90s, the conception of development shifted from aggregate growth to sustainable, equitable, humane growth – i.e. growth that allows individuals, including socially vulnerable groups and individuals, to flourish and realize their capabilities. Amartya Sen's *Development as Freedom* championed this new, broader conception of development. The UNDP developed the Human Development Index, which measures health and longevity, education and literacy rates, and poverty. The World Bank and other international development agencies began to emphasize poverty reduction, legal empowerment and access to justice.

The capabilities approach promises citizens more than even traditional socio-economic rights, which have been and still are in most countries considered to be non-justiciable. In ratifying the International Covenant on Economic, Social and Cultural Rights for example, states agree only to seek to realize socio-economic rights to the maximum of their available resources with a view to progressive achievement. The capabilities approach pressures developing countries to deliver results immediately. Citizens have increasingly turned to the courts to pursue their individual socio-economic "rights" and broader social justice goals. Most developing countries have struggled to make good on these commitments.[23]

In Indonesia, for example, reformers, flush with optimism after the fall of Suharto, wrote into the constitution some of the most forward-leaning ideas of the human rights movement. Accordingly, the constitution now provides that each person has the right to physical and spiritual welfare, to have a home, to enjoy a good and healthy living environment and to obtain health services. Each person is entitled to assistance and special treatment to gain the same opportunities and benefits in the attainment of equality and justice. Unfortunately, the Megawati government in low income Indonesia was not able to live up to such broad

[23] Dam notes that the expansion of the 1988 Brazilian constitution to allow a wider range of plaintiffs to bring a wider range of constitutional rights claims, include social and economic guarantees, led to massive backlogs and calls for reforms to limit cases to those where the court could actually make a contribution. Kenneth Dam, *The Law-Growth Nexus* (Washington D.C., Brookings Institute, 2006), pp. 104-05.

commitments or even to effectively deal with terrorism and rising crime rates. Her successor is not doing much better.

India offers another cautionary tale. The Bharatiya Janata Party government was voted out of office despite overseeing a period of rapid economic growth. The vote reflected a deep dissatisfaction with growing income disparities and widespread poverty amidst the growing wealth of some segments of society. The BJP's campaign slogan of India Shining only highlighted the discrepancies between the haves and the have-nots. By way of comparison, in wealthy South Korea, which has not made social rights justiciable, the government only made good on its promise to provide an equal education for all by providing nine years of compulsory education free of charge in 2003.

Citizen expectations have clearly risen in China. When the reform era began in 1978, people were equal – the Gini coefficient was remarkably low at around .20. But they were equally poor. In introducing market reforms, the authorities announced that "to get rich was glorious," and cautioned that some would get rich first. Nevertheless, China remains, at least in name, a socialist state. The central authorities could not simply ignore poverty, rapidly increasingly inequality or the plight of state-owned enterprise employees and the socially vulnerable who have not benefited from globalization and transition to a market economy. Accordingly, after years of focusing on aggregate growth, the government has now begun to emphasize social justice and sustainable growth as part of its commitment to create a "harmonious society." The government has also long promised citizens the rule of law and sought to raise legal consciousness and public awareness of rights through numerous legal education campaigns. Yet China remains a lower middle income country, with GDP per capita around $2500. In keeping with the general correlation between wealth and institutional development, governance institutions remain relatively weak, at least in comparison to developed country standards. According to the World Bank's recently announced World Governance Indicators, China ranks in the 42nd percentile of all countries on rule of law, slightly outperforming the average lower middle-income country on most indicators, including rule of law.[24]

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[24] Kaufmann, Daniel et al., Governance Matters III: Governance Indicators for 1996–2007,

The long-term solution to socio-economic cases is growth, although growth alone is not sufficient. As the government has realized, development raises many social justice issues, including how the wealth generated by development is to be distributed. Policy recommendations to mitigate some of the concerns must encompass at least seven major aspects.

First is prevention. Given the growing social tensions, the increasingly pluralism of society, and the inadequacy of current mechanisms for dealing with such tensions, there is a need to prevent disputes from arising in the first place. This entails improving the welfare system, and increasing resources to address some of the major social cleavages, including the rural-urban income gap, the regional income gap, and the intra-urban gap between those who have benefited from economic reforms and those who have lost out.

Second, the increasing pluralism of society means that there will be a growing number of issues over which reasonable people may disagree. Procedural mechanisms must be developed and strengthened to handle the increasingly diverse views in society. In particular, there needs to be greater political participation in the decision-making processes, whether through public hearings, consultative committees or participation in the nomination or election of officials. Empirical studies have found that procedural justice, including a sense of having had a say in the outcome, is frequently more important to determining perceptions of legitimacy than the substantive outcome.[25] This is borne out by village elections in China, which have demonstrated that people generally are more willing to compromise or accept decisions that are not in their interest when they believe they had a fair opportunity to be heard and participate in the decision-making process. This approach is also consistent with the efforts to expand public participation as reflected in the Law on Legislation, the drafting of an Administrative Procedural Law, the experiment with access to information acts and the increasing reliance on social consultative committees.

Third, given the courts inability to provide an effective remedy in what at bottom are economic cases, access to the courts should be limited. The Supreme Court should clarify

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http://www.govindicators.org.

[25] Tom Tyler, *Why People Obey the Law* (New Haven: Yale University Press 1990).

what cases the court will not accept, or which cases it will accept only after administrative remedies have first been exhausted. Standing rules should be clarified and where necessary limited to minimize the social impact of particular cases. Given concerns about the impact of these cases on social stability or the national economy, jurisdictional rules should be changed so that the cases are heard by higher level courts, with initial jurisdiction in intermediate courts at minimum depending on the type of case and the amount in controversy.

Fourth, when higher courts are allowed to hear cases, they should be given the authority to reach an effective decision by striking down where necessary local legislation that is inconsistent with higher level laws. In particular, higher level courts should be given the right to strike down local legislation that fails to provide minimal standards of protection with respect to poverty, education, minimum wage and safety standards and gross environmental violations. For instance, the central government has repeatedly prohibited schools from charging various fees, and yet the practice remains widespread. Many current laws and regulations set high standards – often as high as in the US or other developed countries with per capita incomes 10 to 20 times greater than in China – but then provide for local discretion in realizing these standards. For courts to play this role, there would have to be a clearer articulation of "the bottom line" – i.e. the minimum requirements in laws and regulations.[26]

Fifth, with access to the court and the courts' role restricted, non-judicial mechanisms for

[26] We are under no delusions that this will be an easy task or solve all of the problems. For instance, van Rooij has shown how the government first tried passing general but weak environmental laws, and then more specific and stricter laws. Neither approach worked all that well. Not surprisingly, national level laws often failed to adequately account for local circumstances, leading to low levels of compliance. A variety of other factors also undermined compliance: weak institutions, the lack of regulatory capacity, local power configurations, and the nature of the company involved, with small companies the most likely to violate environmental laws. However, the biggest factor was economic. Enforcement of national laws often meet fierce resistant by local government officials who are promoted based on their ability to achieve high levels of growth and by local residents dependent on the polluting industry for jobs.

addressing citizen concerns in these types of cases would have to be strengthened. In addition to increasing public hearing and increasing public participation in the law- and rule-making processes, these alternative channels include administrative reconsideration, the letter and petition system, supervision by the administration, people's congress and Party, mediation and arbitration. In addition, new governance mechanisms that rely on public-private hybrids and self-regulation should be increased, as discussed below.

Sixth, greater attention must be paid to procedural justice in mechanisms for resolving disputes, whether through mediation, the letter and visits system, court cases or other means. Participants must perceive the mechanisms to be fair, regardless of the outcome in the particular instance.

Seventh, greater efforts should be made to explain the proper role *and the limits* of the legal system and rule of law. The legal system is not the proper forum for resolving all contentious issues. Moreover, the traditional emphasis on substantive justice – expressed through the heavy reliance on letters and visits – leads to unrealistic expectations from the legal system. The unrealistic expectations undermine trust in the judiciary when the legal system then fails to resolve each and every social problem, to ensure social justice, or to provide a substantively just outcome in the eyes of all parties to a conflict.

In addition to these general recommendations, specific types of cases give rise to specific issues, and require specific policy responses and reforms.[27] For instance, reforms to address land taking and compensation disputes include increasing funding for local government so that they don't need to rely on revenues from the sale of lands to operate; requiring higher

[27] Van Rooij's policy recommendations for addressing environmental problems include more extensive empirical research prior to passing new laws; more participation from civil society in making law and monitoring compliance; introduction of an integrated permit system for pollution; adoption of a "mixed" system of enforcement that uses both a cooperative and deterrent approach; more tolerance of NGOs including allowing them to initiate public interest litigation; and adoption of a case precedent system, which would allow courts to take into consideration local circumstances when applying national laws and thus allow for the emergence of bottom-up norms. While most of these reforms are consistent with the general principles and recommendations we have proposed, we place relatively more emphasis on non-judicial mechanisms.

level of approvals for land taking with all funds from the sale to be paid to the provincial or central level government and then redistributed; strictly enforcing and improving the rules regarding public auctioning of law, and so on.

Politically sensitive class-action or multiple plaintiff suits

There were 538,941 multi-party suits in 2004, up 9.5% from 2003.[28] Many socio-economic cases involve multiple plaintiffs. Land takings, labor disputes and welfare claims are three of the major types of multi-party suits. In 2004 alone, Shanghai Intermediate Court No. 1 handled 21 multi-plaintiff cases, of which 17 involved land takings, relocations and real estate disputes. In 2006, there were 14,000 collective labor disputes, involving 350,000 workers, or just over half of the total number of workers involved in labor disputes.

While the courts obviously hear many multi-party suits, they have developed a number of techniques to reduce public pressure, including breaking the plaintiffs up into smaller groups, emphasizing conciliation, and providing a spokesperson to meet with, and explain the legal aspects of the case to, the plaintiffs and the media in the hopes of encouraging settlement or even withdrawal of the suit. Some courts also try to pacify the protesters by providing accelerated procedures to access government sponsored funds. Basic-level courts also often work closely with higher-level courts and other government entities through the Social Stability Maintenance Offices.

Worried about instability, the government will sometimes allocate more funds to a particular problem. However, this "oil the wheel that squeaks the loudest" approach creates the perverse incentive from the government's perspective of encouraging other disgruntled groups to engage in demonstrations and public protests. Accordingly, government officials have also sought to deter such efforts to organize and mobilize by detaining, intimidating and harassing the "ringleaders," and closed down or put pressure on some NGOs and law firms that have become too active in pressing for change.[29]

In a related move, in 2006, the All China Lawyers Association issued guidelines that seek to reach a balance between social order and the protection of citizens and their lawyers in

[28] Peerenboom and He, "Dispute Resolution in China."

[29] See Fu "When Lawyers are Prosecuted 2006."

exercising their rights.[30] The guidelines remind lawyers to act in accordance with their professional responsibilities. Lawyers should encourage parties and witnesses to tell the whole truth and not conceal or distort facts; they should avoid falsifying evidence; they should refuse manifestly unreasonable demands from parties; they should not encourage parties to interfere with the work of government organ agencies; they should accurately represent the facts in discussions with the media and refrain from paying journalists to cover their side of the story. And they should report to and accept the supervision of the bar association. On the other hand, bar associations shall promptly report instances of interference with lawyers lawfully carrying out their duties to the authorities, and press the authorities to take appropriate measures to uphold the rights of lawyers. Where necessary, local bar associations may enlist support from the national bar association.[31]

The policy recommendations for socio-economic cases also apply to multi-plaintiff cases since many multi-plaintiff cases involve socio-economic issues. To the extent that these cases raise freedom of assembly and speech issues, many of the recommendations for addressing pure political cases also apply. Additional policy recommendations include clarifying the rules regarding class actions and adjusting the reward structure for judges so that they no longer have an incentive to break up a large case into many smaller ones to meet year-end performance requirements based on the total number of cases resolved.

Politically-sensitive new economic cases

New economic cases result from the transition to a market economy, and raise novel issues

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[30] Guidance Notice of the All-China Lawyers Association regarding Lawyers' Handling of Multi-party Cases, March 20, 2006.

[31] The passage of this notice produced a hailstorm of criticism from human rights organizations and liberal critics, who dramatically condemned China for the "lack of rule of law." Yet the notice appears to have had little impact according to one's of Chinese leading activist lawyers. Li Heping, "The river turns eastward to the sea: my views on the amended Lawyers Law," *Chinese by China Human Rights Lawyers Concern Group* (November 2007), http://www.chrlcg-hk.org/?p=214 (noting that the notice, denounced as destructive to rule of law and humanity, has not been implemented, much less undermined rule of law).

that have a significant impact on the national economy. As a result, they attract the attention of Party organs, government officials, scholars, media and the public. However, given their oftentimes technical nature, there is a greater role for administrative agencies responsible for economic matters, and more input on policy issues from technocratic advisers, including international development agencies, and foreign and domestic academic experts, advisers, and business associations. Examples of such cases include securities litigation, bankruptcy, anti-dumping, anti-monopoly and other competition law cases.

For instance, shareholder rights were until recently mainly protected through criminal sanctions and fines.[32] The 1993 Company Law appeared to limit private shareholders to injunctive relief rather than damages. In 2001, the SPC issued an interpretation preventing shareholders from bringing suits, and then four months later issued another interpretation allowing shareholders the narrow right to sue for misrepresentation where the China Securities Regulatory Commission had issued a report finding misrepresentation. The restrictions were justified on a variety of policy grounds, including that the judges lacked experience handling such cases, jurisdictional rules had yet to be worked out that would prevent different courts from issuing different awards for suits arising out of the same cause of action but brought by shareholder plaintiffs located in different areas, and large damage awards against listed state-owned companies would result in significant loss of state assets.

In 2003, the SPC issued a third, much more detailed, interpretation. Although the interpretation did not expand the subject matter for litigation, it did clarify a number of procedural and evidentiary issues. After experience had been gained from further study of the issues and the handling of several cases, the Company Law was amended in 2005 to strengthen the rights of minority shareholders to bring suit, as discussed in detail in the next chapter.

Bankruptcy provides another example of the interplay between litigation and

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[32] Wang Jiangyu, "Rule of Law *and* Rule of Officials: Explaining the Different Roles Played by Law in Shareholders' Litigation and Anti-dumping Investigation in China," in Randall Peerenboom ed. *Dispute Resolution in China* (Oxford: Oxford Foundation for Law, Justice and Society 2008).

government policy.[33] The 1986 Enterprise Bankruptcy Law was limited to state-owned enterprises, and not very effective in practice. There were on average only 277 bankruptcies a year from 1989 to 1993. Banks objected to provisions that gave priority to workers; local government officials were worried about social unrest from laid-off employees; judges lacked independence and the specialized training in bankruptcy proceedings; and the support network of trained accountants, lawyers and bankruptcy specialists was lacking.

Rather than relying on creditor-initiated bankruptcy proceedings to resolve the problem of insolvent SOEs, the government opted for an administrative approach, with the State Council encouraging the merger of weaker SOEs with stronger ones, and carefully allowing selected SOEs to go bankrupt based on a regional quota that allowed government officials to factor in the likelihood of social unrest in deciding which companies could enter bankruptcy proceedings. The government also reversed the preference for workers by reassigning the priority for the proceeds from the sale of secured land use rights to the secured parties, in most cases PRC banks.

Over time, the vast majority of state-owned enterprises were sold off, with many of the remaining ones, having been exposed to increasing competition, less of a burden on the state. More generally, the private sector (including collective enterprises) played an increasingly dominant role in the economy. These changes were reflected in the 2006 Enterprise Bankruptcy Law (EBL), which applies to both state-owned and non-stated-owned companies, except for 2,116 SOEs that are either at particular financial risk or in a sensitive industry and small unincorporated private businesses. The courts oversee bankruptcies, aided by the private professions of lawyers, accountants and other bankruptcy specialists.

While the government's role has been diminished, there are still various opportunities for the government to intervene to pursue non-economic policy goals such as social stability. These include special approvals for certain SOEs and financial companies to commence bankruptcy proceedings, possible pressure on courts from local governments to decide that

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[33] Terrence Halliday, 'The Making of China's Bankruptcy Law", in Randall Peerenboom ed. *Regulating Enterprise: The Regulatory Impact on Doing Business in China* (Oxford: Oxford Foundation for Law, Justice and Society, 2007), http://www.fljs.org/section.aspx?id=1880.

companies are not technically insolvent or to simply refuse to accept the case, and government pressure on banks to issue policy loans to prop up ailing SOEs. Nevertheless, the 2006 EBL provides creditors the means to initiate bankruptcy proceedings, and, on the whole, represents a large step forward in clarifying and strengthening their rights.

Whereas the general trend in securities litigation and bankruptcy proceedings has been to provide a more rule-based system that strengthens the hand of private actors, antidumping remains an area that is much more politicized and dependent on administrative discretion.[34] China is one of the most frequent targets of antidumping claims, and appears to pay a rising-power premium.[35] On the other hand, China has increasingly turned to antidumping actions against others doing business in China. The Ministry of Commerce (MOFCOM) is charged with both investigating the existence of dumping and recommending whether duties should be imposed. Antidumping proceedings remain shrouded in mystery. Parties are not allowed access to confidential information subject to protective order, to staff reports in particular cases, or even to MOFCOM's standards for calculating the dumping margin and industry damage. As in other countries, decisions appear to be driven by domestic political concerns to protect certain vulnerable industries rather than by principles of free trade or legal considerations.

The handling of new economic cases shows signs of two conflicting regulatory trends. On the one hand, there is a large role for administrative agencies, which is both a reflection of the historically powerful role of agencies in China's centrally planned economy and typical of East Asian development states.[36] At the same time, the role of agencies has clearly changed and become more limited as a result of the transition to a market economy, a more comprehensive and invasive international trade regime that has prohibited or restricted many

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[34] Wang, "Rule of Law *and* Rule of Officials."

[35] Chad Bown and Rachel McCulloch, 'U.S. Trade Policy Toward China: Discrimination and its Implications,' (2005), http://ssrn.com/abstract=757124.

[36] See John Gillespie and Randall Peerenboom, "Pushing Back on Globalization: An Introduction to Regulation in Asia," in Gillespie and Peerenboom, eds., *Regulation in Asia: Pushing Back on Globalization* (New York and London: Routledge, 2009).

of the tools used by East Asian development states in the past,[37] and a global trend toward new governance and a post-regulatory state characterized by polycentric governance. Thus, there is a greater role in economic matters for commercial and administrative litigation as well as various forms of alternative dispute resolution (mediation, arbitration), public-private hybrids (corporatist and negotiated rulemaking approaches that involve key stakeholders in the lawmaking and implementation processes negotiated rule making) and a greater role for non-state state actors including business associations, standard setting agencies, consumer protection groups and NGOs as part of the "contracting out of the state."

For the moment, the authorities continue to lean toward administrative agencies and decision-making by technocratic elites, although there is also a tendency to provide private parties greater rights to litigate commercial suits and to diversify and open-up the policy-making and implementation processes. As in other politically-sensitive cases, more must be done to clarify which institutions will be responsible for resolving which type of disputes. In many cases, different agencies compete with each, often passing conflicting regulations that promote their own institutional interests. Both the Securities Law and the Anti-Monopoly Law took over a decade to pass in part because of turf-struggles between agencies seeking to claim enforcement powers.

Similarly, rules regarding when parties have a private right of action must be clarified. The SPC, in conjunction with other branches, should (and no doubt will at some point) issue judicial interpretations on key issues raised by the Bankruptcy Law, the Anti-Monopoly Law and other laws and regulations, as it has done for securities litigation. The SPC could also decide and publish key cases to serve as models for lower level courts.

Criminal cases

As noted, some political and politically sensitive cases are prosecuted as criminal cases. Political criminal cases include, for example, cases that involve parties that seek to overthrow the state or endanger the state and major corruption scandals involving high level officials or

[37] See generally, Ha-Joon Chang, *Bad Samaritans: The Guilty Secrets of Rich Nations & the Threat to Global Prosperity* (London: Random House, 2008). Chang discusses various ways rich nations have "kicked away the ladder" by prohibiting many of the policies and techniques used by rich nations to get rich.

a large number of people. Politically sensitive criminal cases include citizens and lawyers charged in relation to socio-economic disputes and class action suits; lesser corruption or government malfeasance; and high-profile cases that capture the public's attention and have an impact on general policies or social issues such as capital punishment cases; the BMW case where a woman from an allegedly influential family drove her car into a crowd, killing one and injuring twelve;[38] the Liu Yong case, where a former NPC delegate depicted as a mafia boss was sentenced to death subject to a two-year suspension, resulting in a public outcry demanding the death penalty;[39] and the tainted milk scandals that left several children dead and thousands injured, resulting in several death sentences and the imprisonment for life of the head of one of the major milk companies implicated in the scandal. However, such cases account for only a tiny fraction of most criminal cases. For instance, endangering the state accounts for less than 0.5% of crimes.[40]

In general, while the same entities are involved in political and politically-sensitive criminal cases as other political and politically sensitive cases, the public security and the

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[38] The woman received a suspended sentence for negligence rather than a much harsher penalty, including perhaps the death penalty, for intentional murder. Many people believed she received the lighter sentence because of her family connections. Indicative of the special nature of the case, the government established a committee to review the decision. "'BMW Case' Reinvestigation Ends," *China Daily*, Mar. 28, 2004, http://www.chinadaily.com.cn/english/doc/2004-03/28/content_318657.htm; *see also* Christopher Bodeen, "China's 'BMW Collision Affair' Draws Out Anger, Suspicions Against Newly Wealthy," *Associated Press*, Apr. 6, 2004.

[39] In a highly unusual move, the SPC retried the case, found Liu guilty, and imposed the death penalty. See generally "Chinese Agency Gives Details of Alleged Crime Boss' Trial, Execution," *BBC INT'L REP. (ASIA)*, Dec. 23, 2003, (discussing the unusual court procedure).

[40] Robin Munro, "Judicial Psychiatry in China and Its Political Abuses," *Columbia Journal Asian Law* vol. 14, p. 67 (2000). Similarly, only a tiny percentage of administrative detention cases involve political or politically-sensitive issues. Less than 1% of those subject to Education Through Labor could be considered political prisoners, excluding Falun Gong disciples charged with violations under the generally applicable criminal laws. Including all Falun Gong cases, the percentage of political prisoners subject to ETL is around 2%. See Peerenboom, *China Modernizes*, pp. 98-99.

procuracy also play a significant role. Party influence in such cases is primarily through general policy guidance rather than intervention in particular cases. However, the Political-Legal Committee may be involved in high-profile cases, particularly when they lead to an investigation, as in the BMW case. In addition, the Party Discipline Committee will be involved in cases involving corruption by senior government officials. In fact, it will generally take the lead in the investigation, often relying on the legally dubious "*shuanggui*" (non-judicial detention) procedure.[41] The case will be turned over to the courts only after the Committee has collected ample evidence to determine that a crime has been committed.

The media, public and legal scholars may also take an active interest in these cases, which are often widely discussed on the Internet. Public pressure is at times effective in politically-sensitive cases, though it rarely seems to have much effect in political cases other than perhaps to secure a lighter sentence for the accused. In the Sun Zhigang case, for example, a college graduate died while in detained pursuant to a form of administration detention known as Custody and Repatriation. The State Council eliminated this form of compulsory detention, retaining only the social service functions, in part in response to widespread public criticism and a petition signed by prominent legal scholars. Several officials were also arrested.

In contrast, Du Daobin was arrested for posting twenty-eight articles on the Internet, including some that opposed limitations on democracy and civil liberties in Hong Kong, and for receiving funding from foreign organizations.[42] His arrest also led to a petition, signed by over 100 writers, editors, lawyers, philosophers, liberal economists and activists, calling for a judicial interpretation to clarify the crime of subversion. Nevertheless, Du was convicted of inciting subversion, although his three-year sentence was commuted to four years of probation.[43] The detention of Liu Di, a student at Beijing Normal University known by her

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[41] Flora Sapio, "*Shuanggui*: Extra-legal detention by Commissions for Discipline Inspection". *China Information* vol. 22, p.1 (2008).

[42] "Security Official Confirms Chinese Man Arrested for Internet Subversion," *BBC MONITORING ASIA PAC.*, Feb. 17, 2004.

[43] "Internet Dissident Found Guilty of Subversion, but Given Probation," AGENCE

Internet name as the Stainless Steel Rat, led to two online petitions signed by over 3000 people. Liu was detained for operating a popular Web site and posting satirical articles about the Party. She was later released.[44]

Public opinion is a double-edged sword. While the public outcry over the Sun Zhigang case may have played a role in ending Custody and Repatriation, the public's demand to strike hard at crime simultaneously supports a harsh penal system and administrative detentions. Over 99% of Chinese favor the death penalty, with over 20% thinking there should be more executions.[45] In the Sun Zhigang case, two officials were given the death penalty. There are many cases in addition to the Sun Zhigang and Liu Yong cases where courts have cited the anger of the public and the demand for vengeance to justify death sentences. Many judges have complained that public uproar over cases interferes with judicial independence and undermines rule of law, either directly by putting pressure on judges to decide a certain way or indirectly by inducing political actors to take up the issue and interfere with the court.

As in most countries, most criminal cases are routine. While media coverage in China as elsewhere would suggest otherwise, most crimes are property crimes, with most murder, rape and other violent crimes committed not by strangers but by persons known to the victim. China's crime rates are relatively low by world standards, even allowing that they have increased significantly over the last twenty years.[46] The percentage of defendants receiving heavy punishments of five years or more (including life sentences and death penalty) has also decreased from a high of 43% in 1996 to 19% in 2004.[47] Nevertheless, the public continues

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FRANCE-PRESSE, June 11, 2004.

[44] Philip P. Pan, "China Releases 3 Internet Writers, but Convicts 1 Other," *Washington Post Foreign Service*, Dec. 1, 2003, at A14.

[45] Hu Yunteng, "Application of the Death Penalty in Chinese Judicial Practice," in Chen Jianfu et al. eds. *Implementation of Law in the People's Republic of China* (The Hauge: Kluwer Law International, 2002).

[46] Borge Bakken, "Comparative Perspectives on Crime in China," in Borge Bakken ed. *Crime, Punishment, and Policing in China* (Lantham, MD: Rowman and Littlefield, 2005).

[47] Zhu Jingwen ed., *Zhongguo falü fazhan baogao (1979-2004)* [China Legal Development

to list rising crime as one of the major issues confronting society, and supports the government's relentless "strike hard" campaigns against crime.

There is limited systemic interference from Party organs in routine criminal cases. The procuracy is given the right to supervise and challenge court decisions in both criminal and civil cases pursuant to a procedure known as *kangsu*. As noted in the previous chapter, the number of criminal cases retried through adjudicative supervision has decreased, while the number of civil and economic cases has grown. Criminal cases account for less than 10 percent. In most criminal review cases, the procuracy seeks heavier sentences. However, the procuracy loses the vast majority of the time. Nevertheless, many commentators recommend eliminating the *kangsu* procedure, or at least prohibiting the procuracy from challenging sentences imposed by the court that are within the range stipulated by law.

Non-systemic interference in criminal cases is most likely to come from public security officials or prosecutors who informally contact judges to press their case and from relatives, friends and legal representatives of the accused or the relatives and friends of the victims. In general, such interference is unlikely to have a significant impact. However, it does open the door to corruption, which may in some cases result in some of the accused receiving a different sentence (usually lighter), or in the rare case in a wrong outcome (usually an innocent verdict), or more likely in favorable treatment while in prison.

Policy recommendations for how to deal with politically sensitive criminal cases differ from those for other politically sensitive cases because of the limited involvement of Party organs; the problems in criminal cases are not fundamentally due to scarce resources; such cases do not involve multiple parties that threaten social stability; and they clearly fall within the proper scope of the courts. Thus, the main policy recommendation is to improve the criminal justice system more broadly. As is well-known, the criminal justice system is beset by problems. A by-no-means-exhaustive list of reforms would include:

- improve laws and regulations, including the criminal law, criminal procedure law and evidentiary rules; in particular, clarify the rights of the accused to access the dossier and the obligation of the procuracy and police to provide exculpatory

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Report] (1979-2004) (Beijing: People's University Press, 2007).

evidence; improve the rights of the accused to access witnesses and strengthen the court's power to compel in-course testimony

- strengthen the role of, and protections for, defense counsel;[48]
- elevate the status of the courts relative to the public security; appoint a member of judiciary, rather than the public security, as a member of politburo; eliminate or limit the right of the procuracy to challenge court decisions (*kangsu*) in both civil and criminal cases
- build support from criminal law reforms by educating the public about rising crime rates, the rate of violent crime, the likelihood of being subject to crime by strangers, etc.
- limit media coverage of ongoing trials or ensure more balanced coverage by greater reliance on experts to cover stories or appear on tv and radio programs.

In addition, proposals to deal with non-systemic interference from the interested parties would include strictly enforcing ex parte rules, promoting judicial ethics, and punishing judges found guilty of corruption and changing social norms to discourage. More generally, the recommendations to combat corruption and increase judicial independence in the previous chapter should also be adopted.

Civil cases

Politically sensitive civil cases include the socio-economic, mass plaintiff and new economic cases discussed above. They too are but a small fraction of the more than 4 million civil cases handled by the courts every year. There is little systemic interference in the vast majority of routine civil cases. Party organs rarely take a formal interest in such cases. Supervision by the people's congress and procuracy is extremely rare, with very few cases resulting in the overturning the original decision. Supervision by people's congress and procuracy may however in some cases lead to corruption or abuse, usually when the amount at stake is high and the parties involved are well-connected.

There is a much greater likelihood of non-systemic interference in civil cases than

[48] The recent amendments to the Lawyers Law do afford defense counsel greater protection against harassment and liability. However, additional steps are likely to be necessary.

systemic interference. Such interference may take various forms, including local protectionism, particularly in lower level courts in rural areas; illegitimate interference by individual Party members or government officials who take a personal interest in the case because the case involves their own company or the company of a friend or relative, or because they have been bribed or influenced in other less direct ways; and attempts by parties, lawyers, friends and acquaintances who seek to bribe or influence judges, or simply seek to meet ex parte with judges to persuade them of the merits of their case without any quid pro quo (see Chapters 10 and 11 for further details).

Empirical studies have demonstrated that local protectionism is not a significant factor in urban courts in economically advanced areas.[49] Similarly, enforcement has improved in urban areas.[50] Moreover, the main reason for non-enforcement is that defendants are judgment proof: they are insolvent or their assets are encumbered.[51] No legal system is able to enforce judgments in such circumstances.

Conversely, the main reasons for the improvement in enforcement and the decrease in local protectionism are changes in the nature of the economy;[52] general judicial reforms

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[49] He Xin, "The Enforcement of Commercial Cases in the Pearl River Delta," *Journal of Justice* 72 (2007) (finding high rates of enforcement, comparable if not superior to other countries, in urban courts in the Pearl Delta, which includes Guangdong Province where the courts in this case are located); Peerenboom, "Seek Truth from Facts: An Empirical Study of the Enforcement of Arbitral Awards in the People's Republic of China," *American Journal of Comparative Law* vol. 49, p. 249 (2001) (an empirical study of enforcement of arbitral awards found that local protectionism was not a statistically significant factor in the final outcome and that enforcement was more likely in economically wealthy urban areas); Mei Ying Gechlik, "Judicial Reform in China: Lessons from Shanghai," 19 *Columbia Journal of Asian Law* 100 (2006) (study of more than twenty thousand cases in Shanghai found that less than 0.14% involved attempts to use outside connections to interfere with the court; interviews conducted by a foreign legal scholar corroborated the results of the study).

[50] He Xin, "Enforcing Commercial Judgments."

[51] Peerenboom, "Seek Truth from Facts."

[52] On the general relationship between improvements in the legal system and development,

aiming at institution building and increasing the professionalism of the judiciary; and specific measures to strengthen enforcement.[53] The economy in many urban areas is now more diversified, with the private sector playing a dominant role. The fate of a single company is less important to the local government, which has a broader interest in protecting its reputation as an attractive investment environment. As a result, the incentive for governments to engage in local protectionism has diminished.

The ability of particular individuals to influence the outcome depends on the individual, the parties involved, the nature of the case, the amount at stake, the level of the court and the professionalism of the judges involved. One notable phenomenon has been several corruption cases involving the presidents of High Courts. This may represent a rational strategy for those seeking to influence the outcome of the case. Most cases will be handled by three judges. If there is disagreement or the case is complicated, the adjudicative committee might become involved. To influence the outcome of the case, a party would have to influence at least two members of the panel and key members of the adjudicative committee. Parties may believe that they get the most "bang for the buck" by trying to influence the president of the court, particularly the higher level court that will hear the appeal or have the discretionary authority to supervise the final decision.[54] Of course parties may be wrong about the president's influence. Recent changes have strengthened the autonomy of the panel of judges that hears cases, and adjudicative committees decide by majority vote, with the president only having

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see Zhu, *China Legal Development.*

[53] For instance, the 2007 amendments to the Civil Procedure Law have strengthened enforcement by, among other things, increasing penalties for people who obstruct enforcement. The number of people detained during compulsory enforcement proceedings reached a high in 1999, the same year the number of people refusing to comply with court judgments peaked. Since then, both the number of cases in which parties refuse to voluntarily comply with the judgment and the number of people detained have decreased. Zhu, *China Legal Development*, at 248-249.

[54] They may also feel that the president is most susceptible. Others have noted that senior government officials who are close to retirement are most likely to accept bribes. Although there has been a trend to appoint younger people as president, particularly in lower level courts, the president of the court in higher level courts is likely to be somewhat older.

one vote. Moreover, even where the president is able to exercise influence, there will always be other review mechanisms available to thwart efforts to influence the decision – as evidenced by the prosecution of several court presidents. In any event, Li Ling shows in her chapter that most presidents have been convicted for behavior such as accepting kickbacks to build courthouses or bribes to support the promotion of judges rather than to influence the outcome of a particular case.

Attempts by parties, lawyers and acquaintances to influence judges are not likely to result in a manifestly wrong decision given all of the possibilities for review. However, illegitimate influence may have an impact when the law is unclear or judges have discretion. In other cases, corrupt judges may first decide the case on the merits, but then still seek benefits from the prevailing party.

A portrait of the legal system as so riddled by corruption and other problems that citizens have lost faith in the judicial system is however at odds with opinion surveys that show people generally trust in the courts.[55] One large survey using GPS readings to generate a representative sample concluded: "Courts are generally perceived as effective and fair, despite the popular lore about corruption." In a survey of business people in Shanghai and Nanjing between 2002 and 2004, almost three out four gave the court system a very high to average rating, compared to 25% who rated the system low or very low. Still another survey found that Beijing respondents are more trusting of the courts than their Chicago counterparts, and evaluate the performance of the courts more positively. Respondents in Beijing were twice as likely as Chicago residents to agree with the claim that courts are "doing a good job." Moreover, whereas over 40% of Chicago residents *disagreed or strongly disagreed* that the courts generally guarantee everyone a fair trial, only 10% of Beijing residents and 28% of rural residents held similar negative views. And whereas 43% of Chicago residents disagreed or strongly disagreed with the statement that judges are basically honest, only 9% of Beijing residents and 29% of rural residents held similar views.

To put these numbers in a broader comparative context, barely half of Belgians believe court decisions are just, while 60% lack confidence in the judiciary. Over 40% of British

[55] For this and the next paragraph, see Peerenboom and He, "Dispute Resolution in China."

citizens have little or no confidence in judges and the courts. In France, only 38% of the public trusts the judiciary, with only 21% believing judges are independent from economic circles and only 15% believing they are independent from political powers.

Moreover, if PRC courts generally failed to provide an adequate forum, then there would not be over 4 million civil cases a year, as there now are, given the availability of mediation, arbitration and other mechanisms for resolving disputes.

Labor cases

The transition to a market economy, the jarring process of SOE reform, and the pressures of economic globalization have resulted in a rapid rise in labor disputes. Labor disputes grew from under 20,000 in 1994 to over 300,000 in 1996.[56] Once again, there are significant regional variations. The more economically advanced areas such as Guangdong, Shanghai, Beijing, Jiangsu, Zhejiang and Shandong have more disputes, as do the areas with significant heavy industry and a large number of SOEs, such as Liaoning, Hubei, Fujian and Chongqing. The subject matter of labor disputes ranges, in descending order, from wages, to termination, insurance and work injury.

The resolution of labor disputes involves voluntary mediation, mandatory labor arbitration, and litigation if the parties are unsatisfied with the results of arbitration. While still common, mediation has declined in importance. Workers do not trust mediators, who are usually dominated by the union, which is closely allied with the employer.

Workers win the vast majority of arbitration cases: they prevail in nearly four cases for every one by the employer and partially win a majority of the other cases.[57] Nevertheless, employees are also the most likely to appeal, either because they were not satisfied with the arbitration result or the arbitration award was not enforceable.

Litigation of labor disputes plays a role somewhere between the role of litigation in commercial disputes and in other socio-economic disputes. On the one hand, litigation has become increasingly prevalent and effective, as in commercial law. Litigation cases increased to 122,405 in 2005. Whereas in the past, plaintiffs in labor suits often lost, with the court

[56] Ronald Brown, "China Labor Dispute Resolution", in *Dispute Resolution in China*.

[57] Brown, "China Labor Distpute Resolution."

upholding the decision of the labor arbitration committee, today, the majority wins in court – with plaintiffs enjoying a higher success rate in courts than in arbitration.[58]

On the other hand, the courts are often unable to provide effective relief for many of the same reasons that apply to other socio-economic disputes. Cases involving back pay and pension claims are particularly difficult to enforce in large part because many companies are operating on very thin margins or even insolvent. Not surprisingly, many disputes are resolved through mediation at various stages of the process. In addition to the disputes resolved through enterprise mediation, about one-third of the disputes brought to arbitration are resolved through mediation, while about one-quarter of the cases resolved through litigation are mediated settlements. The courts will often work with government officials to resolve labor cases, particularly those that involve pension or unemployment benefits and affect many people, as demonstrated in the wake of the global economic crisis that led to widespread company closures, a sharp rise in unemployment and many public demonstrations.

The inability of the courts to provide effective relief may also explain the reluctance to do away with the requirement that workers first go through arbitration before going to court. Although labor advocates have long called for the abolition of mandatory arbitration, a Supreme Court interpretation in 2006 provided only limited relief, allowing workers to go directly to court in wage arrears cases where they have written proof of unpaid wages from the employer and no other claims are raised.[59] In contrast, the 2007 Labor Dispute Mediation and Arbitration Law went the other way, providing for "binding" arbitration in certain cases including failure to pay wages or worker's compensation. Whether the law will provide relief for the courts remains to be seen. The law also emphasized mediation; the range of cases subject to "final" arbitration is limited; and, rather oddly, the law still allows workers and

[58] Ethan Michelson, "The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work, *Law & Society Review* vol. 40(1) p. 1 (2006).

[59] Several Issues Concerning the Applicable Law for the Trial of Labor Disputes Cases, August 14, 2006. Granted, one should not expect the SPC to forge new rights. Even the limited change in the SPC's interpretation would appear to be at odds with the Labor Law and thus technically invalid.

even employers to challenge the limited range of cases subject to “final” arbitration in the courts.

In general, influence is most likely in collective labor cases involving many parties, and comes from the same sources as other socio-economic cases, although the Labor Bureau, Labor Arbitration Commission and All China Federation of Trade Unions may play more significant roles in policy setting and dispute resolution. Policy recommendations generally track those for other socio-economic cases. Thus, disputes could be prevented by allocating more resources to address the fundamental problems, including the need for a better welfare system (unemployment insurance, retraining expenses, medical care and retirement benefits). Non-judicial mechanisms for dealing with labor issues should also be further developed, including strengthening mediation arbitration and administrative supervision, as should post-regulatory mechanisms including greater reliance on the private sector and self-regulation by businesses (including promoting corporate responsibility acts).

At the same time, and in contrast to other types of socio-economic disputes, workers should be able to directly access the courts in an expanded range of cases, including for back pay, excessive mandatory overtime, dangerous work conditions, wrongful termination, worker’s compensation, sexual harassment and discrimination claims. Most of these claims involve individual employees or else dangerous conditions that require immediate action.

In addition, workers’ right to bring collective action suits should be further developed by strengthening unions and requiring collective labor contracts. Allowing parties to collect legal fees if successful would help in both individual and collective cases, as many workers cannot afford lawyers. Providing for initial jurisdiction in intermediate court for collective action cases would also help overcome pressure on judges from local government officials who want to maintain high growth rates and an investor friendly business environment. Because local governments produce most of the regulations relating to workers, higher level courts should also be given the right to review normative acts for consistency with higher level legislation and to enforce minimal standards.

Administrative cases

The number of annual administrative litigation cases has ranged from 80,000 to 100,000 over the last decade. Determining how often the plaintiff “wins” is difficult because about

one-third of the cases are settled in other ways, such as rejecting the suit or mediation. However, even counting all such results, as well as all cases where the plaintiff withdrew the suit as a loss for the plaintiff, and setting aside all plaintiff victories on appeal or through retrial supervision, the plaintiff would have prevailed in 17 to 22% of cases between 2001 and 2004. These success rates stand in sharp contrast to success rates in the United States, Taiwan (both 12%), and Japan (between 4 and 8%).[60]

As in other areas, although there are politically sensitive administrative cases, the majority of administrative cases are now routine. Although routine cases are more likely than civil cases to give rise to interference from government officials whose decisions are being challenged, over time officials have become more comfortable and less threatened by judicial review of their actions. Again, the nature and severity of the problems differs by region, level of court and type of case. It is more difficult to file cases and prevail in basic level courts, and then to enforce decisions against the government, in less developed areas where the local governments exercise more control over the courts.

Higher level courts are also less likely to be influenced by pressure from local governments. Not surprisingly, the number of administrative litigation cases appealed has risen steadily to almost 30,000 per year, or about 30% of all such cases.[61] Plaintiffs prevail, as measured by decisions quashed or cases remanded to the lower court, in approximately 17% of appellate cases.[62] Ever after appeal, parties may petition for retrial pursuant to a discretionary supervision procedure. Rates of success, measured by reversal of the appellate decision or remand for retrial, ranged from 27 to 36% between 2002 and 2004.[63]

All else being equal, cases that involve commercial issues such as the denial of a license or imposition of excessive fees are easier for the courts to handle than socio-economic cases. Plaintiffs in the former type of case might still run into problems with local protectionism,

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[60] Peerenboom, *China's Long March*, p. 400.

[61] Zhu, *China Legal Development*, p. 236.

[62] This number has declined over the last ten years, as has the success rate for appeals in criminal and civil cases, suggesting perhaps that judges in first instance cases are becoming more qualified.

[63] Zhu, *China Legal Development*, p. 242.

government interference or retaliation. While such problems might also affect administrative litigation cases involving politically sensitive socio-economic issues, plaintiffs are also likely to confront all of the additional obstacles that arise when courts handle socio-economic cases, including conflicting policy goals, central-local tensions, an insufficiently developed regulatory framework, and most fundamentally lack of resources to provide an adequate remedy. Once accepted, judges are often pressured to resolve such cases through mediation. Mediation of administrative litigation cases has not been allowed under the Administrative Litigation Law (ALL) because of the fear that government officials would intimidate plaintiffs into settlement. However, in recent years, mediation of administrative litigation cases grew despite the prohibition, and an amendment of the ALL is being considered that would permit mediation.

Another response to problems in administrative litigation suits has been to emphasize administrative reconsideration and other political or administrative channels as an alternative. Unlike in some countries, China allows parties to initiate an administrative litigation suit without first exhausting administrative remedies, except in a narrow range of circumstances. Regulations now require parties to first seek administrative reconsideration of the amount of compensation in land taking cases before turning to the court. More generally, the government has sought to encourage administrative reconsideration by making it more appealing.

Despite the relatively high plaintiff success rates by world standards, there remain serious problems with administrative litigation. Some are due to doctrinal limitations. For instance, parties may only challenge specific acts that infringe their "legitimate rights and interests," which has been interpreted to mean personal or property rights. Other important rights are thus excluded, most notably political rights such as the rights to march and to demonstrate, freedom of association and assembly, and rights of free speech and free publication. Moreover, the requirement that one's legitimate rights and interests be infringed has also been construed narrowly to prevent those with only indirect or tangential interests in an act from bringing suit. The narrow interpretation prevents interest groups or individuals acting as "private attorney generals" to use the law to challenge the administration.

The main limitations however are systemic, and thus addressing them will require far-reaching changes that will alter the nature of Chinese society and the current balance of

power between state and society, Party and government, the central government and local governments, and among the three branches of government.

Market reforms have already shifted the balance of power away from the state toward society to some extent. The balance will continue to shift with the further separation of government and enterprises, the elimination or reduction of administrative monopolies, and the creation of a professional civil service in which government officials serve the public as regulators rather than extracting rents or competing with private companies in the marketplace. At present, most economic and social activities continue to be subject to licensing requirements, despite the passage of the Administrative Licensing Law and the streamlining of the approval process and registration requirements set out in the many lists issued by various government entities to comply with the Licensing Law. However, the general trend is toward less regulation. Laws such as the Administrative Licensing Law are helping to delineate the boundaries of individual autonomy and freedom. Holding government officials to clearly defined substantive and procedural standards allows citizens to take full advantage of whatever freedoms they are granted.

Administrative law reforms have empowered society to some extent by giving citizens the right to challenge state actors through administrative reconsideration, administrative litigation and administrative supervision. The next step is to increase public participation in the rulemaking and decision-making processes. The Law on Legislation opens the door slightly for greater public participation in the making of national laws. Local congresses are now actively experimenting with hearings. The Administrative Procedure Law may go even farther in providing the public access to administrative rulemaking and decision-making. A more robust civil society, a freer media, and greater reliance on private actors would all benefit the cause of administrative law reform but would require a further shift in power toward society. A more robust civil society would provide the interest groups that play such a central role in bottom-up alternatives to command and control regulation. Along with a more independent media, interest groups could shoulder more of the responsibility for monitoring administrative behavior.

Administrative litigation could be strengthened in a variety of ways. In addition to allowing courts to review abstract acts and enhancing the independence of the courts, the

scope of review could be expanded to include rights other than personal or property rights, such as political rights. While China need not adopt a private attorney general theory of standing, a clearer and more liberal interpretation of standing would be useful. Enhancing the stature of the judiciary will help the courts overcome their reluctance to take full advantage of the Administrative Litigation Law's rather broad review standards. For example, they may take a broader view of what counts as inconsistent and use the abuse of power standard to examine purpose, relevance, reasonableness, proportionality and so on. A more expansive interpretation and aggressive application of the current standards would go a long way toward achieving a review of the appropriateness of agency decision-making without substituting the judgment of the court for that of the agency. While beyond the scope of this chapter, other mechanisms for controlling administrative behavior could also be strengthened in various ways, including legislative oversight, administrative supervision, and administrative reconsideration.

III. Conclusion

When commentators, particularly human rights organizations, claim that courts lack (meaningful) independence in China, they usually have in mind political cases, with the dominant role for Party organs, the tight restraints on civil and political rights, and the limited power of the courts even to uphold procedural rules. A number of reforms have been suggested to improve the handling of these cases. Yet the experiences of authoritarian regimes in East Asia and elsewhere suggest that the outcomes in these cases will continue to be determined by political organs, in this case, for better or worse, Party organs.

Politically-sensitive cases raise concerns about the proper role of courts in developing countries, and whether the global trend toward judicialization of controversial economic and social policy issues is appropriate given the weak state of the courts and their limited ability to provide an effective remedy given scare resources. As such, they shed light on the general relationship between law and development, and are of particular importance for international financial institutions and donor agencies in the development and rule of law promotion industry.

Whether courts are the proper forum for resolving certain disputes will depend on a number of factors, including the level of economic development, the status of the court, the

relation of the judiciary to other political organs and the competence and integrity of judges. In general, forcing the courts to hear socio-economic cases for which they are unable to provide an effective remedy does not help the parties and undermines trust and confidence in the judiciary. While the long-term solution is to outgrow such problems, in the meantime non-judicial channels for addressing citizen needs must be strengthened. Nevertheless, the courts will still play a role, enforcing minimal standards and reviewing decisions by administrative or government agencies after parties have exhausted their judicial remedies or sought to resolve their disputes through mediation or other political and administrative channels. Over time, the role of the courts may be increased.

Most cases however are neither political nor politically sensitive. There is therefore still considerable room to improve the courts' handling of such cases, although the reforms required go far beyond the prescriptions for increasing judicial independence.

Appendix A: Table of Cases

Type of case	**Source of interference**	**Impact**	**Policy recommendation**
Political	Party organs	generally decisive; result usually restriction of rights, criminal punishment	i allow political organizations to resolve key issues ii clarify role of party iii clarify civil and political rights and limits iv if cases go to court, provide due process v better central control of local government
Politically sensitive	Party organs; government (ministry in charge; local government); higher level courts (limit access for certain claims but may also hear appeals) Adjudicative committees within court Media and scholars	depends on particular circumstances but party and government intervention often decisive with SPC following their lead; media and academics may have some impact. Results can range from plaintiffs obtaining no relief to a court judgment in their favor to a mediated result.	i prevention: more resources; strengthen welfare system ii strengthen non-judicial mechanisms, including public hearings and mediation iii increase political participation and procedural fairness iv limit access to court: tight standing requirements; jurisdiction to IPC or HPC v strengthen court vis-à-vis executive agencies; power of review over abstract acts for higher courts vi more public education about issues and role and limits of courts
-socio-economic	Same; public security if social protests	Courts often respond to external pressure by limiting access and trying to mediate disputes; government sometimes intervenes to provide remedy/ resources	i same as above; ii specific actions for specific types of cases: eg land taking – increase funding for local govt so don't need to rely on land takings; require higher level of approvals with funds from sale paid to higher level; enforce auction requirements; etc
- class action	Same; public security if social protests; MOJ to coordinate with lawyers and parties to ensure stability	Courts often try to break down into individual cases or cases with fewer plaintiffs; court leaders meet with media and parties to explain legal aspect of cases or elicit opinions from legal scholars; but parties more likely to be successful if number of plaintiffs large and media attention	i same as above ii clarify standing rules and rules regarding class actions
- new economic cases	Same but with	Ministries often interfere;	i same as above (except lack of resources is not the

	greater role for agencies dealing with economic issues, and more input from technocratic advisers, including academics, foreign business associations, international donor agencies on policy issues	ostensibly to further public interest but often to protect own interests; courts must seek interpretations from agencies who pass rules; often conflicting views resulting in delays; cases often resolved through mediation	issue) ii clarify when parties have right to private action iii SPC in conjunction with other branches provide judicial interpretation of key issues iv SPC decide key cases to serve as models for lower level courts
Criminal: *politically sensitive* There are relatively few such cases. Such cases include citizens and lawyers charged in relation to socio-economic disputes and class action suits; cases involving corruption or govt malfeasance; major cases that capture the public's attention and have an impact on general policies or social issues such as capital punishment cases, the BMW case, Liu case	Same as other politically sensitive; greater role for public security, procuracy, political-legal; Party discipline committee if case involves corruption; media and legal scholars	Party influence mainly through general policy guidance rather than intervention in particular case. Influence in particular case of Party or government depends on particular circumstances, rare but if occurs often decisive; corruption cases involving Party members/government officials generally decided by Party discipline committee and then turned over to court for formal ratification; media and academics may have some impact; sometimes both point out problems but often media reflects popular desire for harsh punishments and scholars call for more respect for due process	not the same as other politically sensitive cases; most of reforms are just to deal with shortcomings in criminal justice system (see below)
Criminal: routine	Limited or no systematic interference from Party organs; some systemic intervention from	limited impact on outcome; interference by parties or acquaintances may be corruption; if so, impact may on occasion result in	i improve criminal procedure laws and criminal law, including rights of parties to access dossier and obligation of procuracy and police to provide exculpatory evidence; access to witness and power to compel to testimony ii strengthen role of, and protections for defense counsel

	Procuracy through *kangsu* procedure Non-systemic interference from public security or procuracy Interference from social acquaintances who know defendant	wrong outcome (usually innocent) but more likely reduced (or more severe) punishment	iii elevate the status of the courts relative to the public security; appoint member of judiciary as member of politburo; eliminate or limit right of procuracy to see review of court decisions in both civil and criminal cases iv increase support from criminal law reforms by educating public about rising crime rates, rate of violent crime, likelihood of being subject to crime by strangers, etc. v limit media coverage of ongoing trials or ensure more balanced coverage by greater reliance on experts to cover stories or appear on tv and radio programs In addition, to deal with non-systemic interference: see also general recommendations to combat corruption and increase judicial independence in Chapter 5