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The Reform Path of the Chinese Judiciary: Progress or Stand-Still?

Jonas Grimheden*

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Abstract

In the later part of 2007 China will be at yet another watershed moment. The 17th Party Congress will be held, where new leaders of China will jockey into position. Will these leaders proceed on the slow and cautious trail set out by their predecessors? Will they regress to the demands of the ultra-conservative “left-wingers”? Or will the likely rejuvenated leadership be bold enough to face the many challenges with a more progressive agenda? This Essay addresses these questions by briefly describing and analyzing the development and the potential of the Chinese judiciary. In this analysis, the judiciary functions more generally as an indicator of legal and even political reforms. Part I of this Essay explains China’s current position and its possible avenues for the future. Part II briefly elaborates on the imperial history of the Chinese judiciary. Part III describes the reform process over the last twenty-five years, focusing on the more recent developments. Part IV analyzes the present situation, concluding with some thoughts on the future reform process as an indication of where the broader reform agenda is—or must be—heading.

ESSAY

THE REFORM PATH OF THE CHINESE JUDICIARY: PROGRESS OR STAND-STILL?

*Jonas Grimheden**

INTRODUCTION

In the later part of 2007 China will be at yet another watershed moment. The 17th Party Congress will be held, where new leaders of China will jockey into position.¹ Will these leaders proceed on the slow and cautious trail set out by their predecessors? Will they regress to the demands of the ultra-conservative “left-wingers”? Or will the likely rejuvenated leadership be bold enough to face the many challenges with a more progressive agenda?

This Essay addresses these questions by briefly describing and analyzing the development and the potential of the Chinese judiciary.² In this analysis, the judiciary functions more generally as an indicator of legal and even political reforms. Part I of this Essay explains China’s current position and its possible avenues for the future. Part II briefly elaborates on the imperial history of the Chinese judiciary. Part III describes the reform process over the last twenty-five years, focusing on the more recent developments. Part IV analyzes the present situation, concluding with some thoughts on the future reform process as an

* BA (in East and South-East Asian Studies/Chinese), LLB, LLM, LLD (all from Lund University, Sweden), Senior Researcher at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden. The author would like to thank Fu Hualing and Zhu Jingwen for stimulating discussions. The *Fordham International Law Journal* would like to thank Susan Tan, third-year J.D. candidate, for her invaluable assistance translating the Chinese documents associated with this piece.

1. Five years after that, in 2012, major changes in the very top leadership will likely take place. See Lyman Miller, *The Road to the 17th Party Congress*, 18 CHINA LEADERSHIP MONITOR 1, 7 (2006), available at http://media.hoover.org/documents/clm18_lm.pdf.

2. So far, this Essay has referenced “the judiciary,” irrespective of the Chinese language connotations. Judiciary is here limited to the system of courts, excluding the Procuratorate—the special form of prosecutors with a broad supervisory mandate in China. See George Ginsburgs & Arthur Stahnke, *The Genesis of the People’s Procuratorate in Communist China 1949-1951*, 20 CHINA Q. 1, 83 (1964).

indication of where the broader reform agenda is—or must be—heading.

I. CHINA OF TODAY: POSITION AND POSSIBLE AVENUES

The 2007 National Congress of the Chinese Communist Party,³ held every five years and upcoming in late 2007, is a time for assessment of the past and of future expectations. Formally—and increasingly—the National People's Congress ("NPC"),⁴ the supreme State body of the 1982 Constitution,⁵ is the highest decision-making political body. With the parliamentary system used in China, the some 3,000-member NPC is at the very highest echelon of politics. Over the last twenty years, reality is increasingly catching up with this theoretical construct, making the NPC a real power-entity, although theory is still way ahead. NPC delegates serve a five-year term and meet briefly every spring. The Spring 2007 NPC is the fifth and, consequently, the last session of the 10th NPC. The eleventh NPC will convene for the first time in Spring 2008.

Irrespective of the position of the NPC, the Chinese Communist Party ("CCP"), with some 2,000 delegates, dominates the political agenda with a predominant position in China generally as well as in the NPC. The CCP has some seventy percent of the seats in the NPC and thus exerts strong influence over non-members.⁶ The very fact that the new CCP National Congress takes place a few months before the new NPC every fifth year adds to its position of primacy. It is therefore highly important to observe the positioning and appointments that are made at the National Congress in 2007 to understand the developments and possibly predict direction and pace.

The last twenty-five years, viewed over time, show constant development in virtually all aspects of Chinese society: the econ-

3. *Zhongguo gongchandang quanguo daibiao dahui*.

4. *Quanguo renmin daibiao dahui*. See National People's Congress, Chinese People's Political Consultative Conference, <http://www.china.org.cn/english/chuangye/55414.htm> (last visited Mar. 19, 2007).

5. XIANFA arts. 2, 3, & 57 (1982) (P.R.C.), available at <http://english.people.com.cn/constitution/constitution.html>. *Zhonghua Renmin Gongheguo xian fa* [Constitution] is the Constitution of the People's Republic of China ("PRC").

6. Cf. *Congress Make-Up Needs Adjusting*, CHINA DAILY, June 24, 2003 (noting that the NPC includes 3,000 deputies); *China: Political Structure*, ECON. INTELLIGENCE UNIT (EIU), Dec. 4, 2006 (noting the dominance of the CCP in the NPC).

omy,⁷ the fight against poverty,⁸ construction of rule of law,⁹ and level of education.¹⁰ At the same time, certainly, many problems associated with rapid development are also apparent: corruption,¹¹ inequality,¹² and even popular protests, at times amounting to outright riots.¹³ In this development, the legal system has been central and increasingly important. A modernized legal as well as judicial system is necessary for smooth and continued progress. The questions that remain concern the pace and ultimately the goal. Will a stagnating development suffice; can the present course and speed appease the growing discontent; or will popular demand require stepping up the pace? Similarly, will a modest reform of the present system be enough? Such incremental reform might proceed along the spelled out lines of

7. The annual growth rate for China's gross domestic product is some eight percent, ranking it 94 of 177 countries listed in the U.N. Development Programme ("UNDP") Human Development Report of 2004. See UNDP, *CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD: HUMAN DEVELOPMENT REPORT 2004*, at 139, 143, http://hdr.undp.org/reports/global/2004/pdf/hdr04_HDI.pdf (last visited Feb. 3, 2007). The human development index ranks countries by life expectancy, adult literacy rate, GDP per capita, and school enrollment.

8. In the first twenty years after the opening up, China reduced the number of persons living below the international poverty line by 160 million according to U.N. statistics. See UNDP, *OVERCOMING HUMAN POVERTY: POVERTY REPORT 2000*, at 115, <http://www.undp.org/povertyreport/ENGLISH/ARprofil.pdf> (last visited Feb. 3, 2007).

9. From 1996 to 2005, China moved up in percentile rank from thirty-five to forty, according to the World Bank's governance indicators on the rule of law. See WORLD BANK, *WGI 2006: WORLDWIDE GOVERNANCE INDICATORS COUNTRY SNAPSHOT*, <http://info.worldbank.org/governance/kkz2005/> (last visited Feb. 3, 2007).

10. The adult (above age fifteen) literacy rate in 2004 was ninety-one percent, up from seventy-eight percent in 1990, according to the UNDP Human Development Index. See UNDP, *BEYOND SCARCITY: HUMAN DEVELOPMENT REPORT 2006*, at 263, 283, <http://hdr.undp.org/hdr2006/pdfs/report/HDR06-complete.pdf> (last visited Feb. 13, 2007).

11. China scored 3.3 out of 10, ranking it 70 on Transparency International's 2006 Corruption Perception Index. See Transparency International, *Corruption Perception Index*, http://www.transparency.org/policy_research/surveys_indices/cpi/2006 (last visited Feb. 3, 2007).

12. China has a Gini Coefficient approaching 0.5, ranking it 90 with only some thirty countries having larger income inequality. See UNDP, *CHINA HUMAN DEVELOPMENT REPORT 2005*, at 13, http://www.undp.org.cn/downloads/nhdr2005/NHDR2005_complete.pdf (last visited Feb. 13, 2007).

13. The number of officially registered riots is increasing in about the same percentage as the economy, nine percent, at least over the last decade, amounting to over 85,000 in 2005. See Geoffrey York, *Canada: China's Muse on Ethnic Harmony*, *GLOBE AND MAIL*, Dec. 18, 2006; see also Matt Nesvisky, *Will Super-High Chinese Growth Continue?*, *NAT'L BUREAU OF ECON. RES.*, <http://www.nber.org/digest/nov06/w12249.html> (last visited Feb. 3, 2007).

the present regime towards a more accountable system, yet with continued dominance of the CCP. On the other hand, will popular demand require a goal that is beyond the reach of the present political system, with introduction of a genuinely multi-party political system and a truly independent judicial system at the core of a legal system built on rule of law?

The Supreme People's Court ("SPC") has been at the forefront of legal and judicial reform, at times, according to some judges, pushing the envelope even beyond what has been "legal."¹⁴ Chief Justice Xiao Yang, President of the SPC, is expected to be replaced in 2008 and his successor will likely be announced by the CCP National Congress.¹⁵ The reform path of the judiciary and in particular of the SPC is particularly indicative of general progress. Before reviewing the last twenty-five years of modernization, however, this Essay must briefly cover a couple thousand years of legal history as a backdrop.

II. *THE IMPERIAL ERA*

Discussion of the Chinese legal system requires that this Essay at least touch upon the long history of legal development in China. As Professor Jerome Cohen has put it:

It is a commonplace that the writing of foreign observers often reveals as much about the assumptions of their own society as it does about those of the society they observe. Certainly, five centuries of Western commentary on the administration of justice in China support this proposition.¹⁶

Cohen elaborates with examples of Portuguese merchants and Spanish missionaries who had already noted in the latter

14. See Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 165-66 (1994) (discussing how since the 1980s the Court has increasingly used its power to interpret law where existing law was not existent or insufficient to handle fast economic and social changes and where the National People's Congress had not even passed legislation on certain legal issues).

15. *Xiao Yang Re-elected China's Chief Judge*, CHINA DAILY, Mar. 16, 2003, available at http://english.people.com.cn/200303/16/eng20030316_113375.shtml. The 2007 CCP National Congress will likely give indications of who will succeed the then sixty-nine year-old Xiao Yang. The informal age limit for Party officials is seventy, and without his Party status he would arguably not be able to continue as SPC President. See Lowell Dittmer, *Leadership Change and Chinese Political Development*, 176 CHINA Q. 903, 914 (2003).

16. Jerome Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 HARV. L. REV. 967, 967 (1969).

half of the sixteenth century that the Chinese judges were much better and fairer than their European counterparts.¹⁷ Over time, the depiction in Europe evolved so that by the mid-eighteenth century, Chinese justice was understood as a product of the Son of Heaven guided by Confucian morals.¹⁸ Europeans constructed an idealized perception of the Chinese justice system that “nicely contrasted with a situation at home that cried out for reform.”¹⁹ This is a lesson that is still highly relevant for contemporary discussions of legal and judicial reform and potential in China.

The last two millennia have seen various forms of courts in China. In courts at the lowest level, the most commonly described, a magistrate was in charge of multiple tasks apart from adjudication and acted as a local representative of the Empire.²⁰ The magistrate, far from being a specialized, independent adjudicator as understood in its contemporary meaning, exercised many responsibilities other than adjudicative functions.²¹ This apparent lack of judicial autonomy was, however, increasingly addressed over the centuries by efforts to enhance independence and improve the delivery of justice.

Originally, most magistrates were authorized to finally settle only minor crimes. All other offenses were automatically appealed through an elaborate process depending on severity.²²

17. As opposed to Western judicial proceedings that were often secretive, cruel, and inquisitorial, Chinese trials were conducted in public; and the judges were courteous, diligent, and fair-minded. *See id.* at 967-68.

18. *See id.* at 968 (discussing idealized perception of the Chinese justice system that was prevalent in eighteenth century Europe).

19. *Id.*; see JOHN H. WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS 154-57, 177-78 (Washington Law Book Co. 1936) (1928) (providing first hand accounts of early foreign observers of the Chinese justice system that express candid admiration for early Chinese procedures and practitioners).

20. The magistrate was also a public official who acted on routine administrative matters and orders issued by superior officials. The duties of a magistrate included maintaining order, collecting taxes, overseeing the postal service, salt administration, police, public works, granaries, social welfare, education, and religious and commercial functions. *See generally* T'UNG-TSU CHÜ, LOCAL GOVERNMENT IN CHINA UNDER CH'ING 14-16 (1962).

21. *See id.*

22. Civil cases and minor criminal cases where punishment was no more than beating or imposing the cangue were usually referred to as *tzu-li tz'u-sung* (lawsuits under a magistrate's jurisdiction). Serious cases had to be reported to the magistrate's superiors and his judgments were subject to their approval. The case would then be retried by at least two superior authorities and reported to the Board of Punishment by the governor and governor-general. The most serious cases were then retried by the pro-

For the most severe punishments, the appeal process went all the way to the upper echelon—a system recently reestablished by the SPC, again giving it the sole power to decide on the application of the death penalty.²³

From the Tang Dynasty in the seventh century continuously until the end of the imperial dynasties one hundred years ago, the magistrates' decisions for all more serious punishments had to be appealed to higher levels. They were also scrutinized by censors, called intendants (*daotai*),²⁴ who fell under the special ministry-level entity called the Censorate.²⁵ The censors were mandated to oversee the correct implementation of law by reviewing decisions, recommending promotions and demotions, and, in some instances, adjudicating cases.²⁶

A recusal system (*huibi*) was also in place throughout the centuries, aimed at preventing corruption, local protectionism, and bias from taking root. Magistrates were rotated between posts and prevented from serving where they had an interest, such as locations with relatives in high positions or in or near their home region.²⁷

Even though magistrates were most commonly trained in the Confucian classics, they acquired experience in law and also typically had legal specialists drafting decisions before adjudication.²⁸ Law was the basis for adjudication, but often references

vincial judge and each case reported individually to the board by the governor and governor general. *See id.* at 116-17.

23. *See Supreme Court to "Strictly Control" Death Penalty*, CHINA DAILY.COM, Dec. 12, 2006, http://www.chinadaily.com/cn/china/2006-12/28/content_770205.htm (last visited Feb. 3, 2007) (reporting that as of January 1, 2007, the Supreme People's Court of China took back the power of death penalty review); *see also* FYRP, *infra* note 47, ¶ 2.

24. Judicial censors regularly participated in the process of judicial review, which consisted of five basic steps: (1) inspection of the case record; (2) consultation with the senior local official; (3) consultation with the official in charge of the original trial; (4) consultation with police officers and witnesses; and (5) consultation with and observation of the offender. *See* CHARLES O. HUCKER, *THE CENSORIAL SYSTEM OF MING CHINA* 237-39 (1966).

25. The Censorate, called *Duchayuan* under the Tang Dynasty and *Yushitai* under the Ming, was a supervisory organ of the Emperor that also acted as a judicial agency. Meiji Japan borrowed the institution of the Censorate from China in 1869. *See* PAUL HENG-CHAO CH'EN, *THE FORMATION OF THE EARLY MEIJI LEGAL ORDER: THE JAPANESE CODE OF 1871 AND ITS CHINESE FOUNDATION* 53 (1981).

26. *See* BRIAN E. MCKNIGHT, *LAW AND ORDER IN SUNG CHINA* 234 (1992); *see also* William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL. L. REV. 1180, 1228 (1984).

27. *See* CHÜ, *supra* note 20, at 21-22.

28. *See* GEOFFREY MACCORMACK, *TRADITIONAL CHINESE PENAL LAW* 11 (1990).

were made to Confucian elaborations as further justification of a verdict or to cover lacunae in the law.²⁹ Overall, it is important to recall that history was written by Confucian scholars, who were likely to stress the Confucian ethics rather than the law.³⁰

As the Imperial era came to a close in the late nineteenth century, efforts were made to import legal institutions from Japan and several European countries.³¹ The ensuing unrest after the collapse of the Empire left few reforms fully implemented, and the counter-reaction of the Marxist-Leninist era after the proclamation of the People's Republic of China was certainly less conducive to the establishment of a modern form of rule of law. The reasons for many contemporary shortcomings can be found in more recent history rather than in the Imperial traditions.

III. *JUDICIAL REFORM*

The reform and opening up of the late 1970s enabled China to absorb ideas and experiences from abroad once again. Initially, China focused on revising fundamental legislation covering substance and procedures, such as the Marriage Law and the Criminal Procedural Law.³² At times, drafts were taken off dusty shelves from drafting efforts of the 1950s with minor revisions. At least the initial urgent demands for a rudimentary legal system were met. Since then, furious legislative efforts have been made to update and continue to update laws. The quality, consistency, and effects of the legislation have also recently become of central concern, shifting the focus from the mere draft-

29. See Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System,"* 2 *WASH. U. GLOBAL L. REV.* 37, 50-51 (2003).

30. See Chinese Cultural Studies: Chinese Literature, <http://acc6.itsbrooklyn.cuny.edu/~phalsall/texts/chinlit.html> (last visited Feb. 3, 2007).

31. See, e.g., JIANFU CHEN, *CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT* 17-19 (1999).

32. See Xiaoqing Feng, *A Review of the Development of Marriage Law in the People's Republic of China*, 79 *U. DET. MERCY L. REV.* 331, 331-35 (2002); Stanley Lubman, *Bird in a Cage: Chinese Law Reform After 20 Years*, 20 *Nw. J. INT'L L. & BUS.* 383, 383-87 (2000); see also Robert Bejesky, *Political Pluralism and Its Institutional Impact on Criminal Procedure Protections in China: A Philosophical Evolution from "Li" to "Fa" and from "Collectivism" to "Individualism"*, 25 *LOY. INT'L & COMP. L. REV.* 1, 1-13 (2002) (describing the impact of political pluralism on Chinese criminal procedure protections); Robert Lancaster & Ding Xiangshun, *Addressing the Emergence of Advocacy in the Chinese Criminal Justice System: A Collaboration Between a U.S. and a Chinese Law School*, 30 *FORDHAM INT'L L.J.* 356 (2007).

ing of a great number of laws. This process is similar at the central level as well as on the various local levels in the Chinese administrative hierarchy.³³

More specifically, judiciary reform took off with the adoption of a law on the organizational structure of courts in the late 1970s.³⁴ Although this law dealt to some extent with judges through, for example, provisions on appointment, there was a clear need to lay down further details. A Judges Law was adopted in 1995,³⁵ along with a Public Procurators Law,³⁶ and a law on lawyers in 1996.³⁷ Reform of the Criminal Procedural Law also came in 1996, introducing numerous modernizations to the procedures that largely had been based on a Soviet-inspired version from the 1950s.³⁸ Specifically, the Judges Law introduced the foundation for a more specialized, professional judiciary, distinct from the administration by, for example, establishing a salary system separate from that of the administration.³⁹ The Judges Law also emphasized justice⁴⁰ and professional eth-

33. See Lubman, *supra* note 32, at 384-86. Administratively, there are three levels of government in urban and five levels in rural areas, with People's congresses at these levels. See generally Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 388-93 (2002) (explaining Chinese legislative structures and procedures).

34. Organic Law of the People's Courts (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective Jan. 1, 1980, revised Sep. 2, 1983), translated in ISINOLAW (last visited Feb. 1, 2007) (P.R.C.). The Organic Law of the People's Courts was adopted in 1979 and revised in 1983 to conform to the 1982 Constitution. This law addresses the general structure and organization of the court system as well as the procedure for judicial and administrative appointments.

35. Judges Law (promulgated by the Standing Comm. Nat'l People's Cong., Feb 28, 1995, effective July 1, 1995, revised June 30, 2001), translated in ISINOLAW (last visited Feb. 1, 2007) (P.R.C.).

36. Public Procurators Law (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995, amended June 30, 2001), <http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=2204&articleId=345078> (last visited Feb. 1, 2007) (P.R.C.).

37. Lawyers Law (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997, revised Dec. 29, 2001), translated in ISINOLAW (last visited Feb. 1, 2007) (P.R.C.).

38. Criminal Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong.), translated in ISINOLAW (last visited Feb. 1, 2007) (P.R.C.); see also Harold J. Berman et al., *A Comparison of Chinese and Soviet Codes of Criminal Law and Procedure*, 73 J. CRIM. L. & CRIMINOLOGY 238, 238 (1982) (stating that Soviet texts served as a model for Chinese criminal law texts).

39. Judges Law, *supra* note 37, arts. 36-38.

40. *Id.* art. 1.

ics,⁴¹ as well as various reinforced measures aimed at improving qualifications and preventing bias. The use of the term “judge” (*faguan*) itself, as opposed to “adjudicator” (*shenpanyuan*), which had been used in the organizational law is also indicative of the change. Revisions to the Judges Law as well as the Procuratorate Law in 2001 included an entrance requirement that had already been in place for lawyers for some years: a bar exam.⁴² The new Unified Judicial Exam has been administered almost annually with a very high threshold inspired by the Japanese Bar Exam, aimed at enhancing the quality of the staff and boosting credibility.⁴³ Later in 2001, the SPC also introduced a Code of Judicial Ethics for Judges, emphasizing in particular the impartiality of judges.⁴⁴

In 1999, the SPC also adopted a Five-Year Reform Platform (“FYRP”) with some fifty proposed reform measures.⁴⁵ In the Spring 2000, the SPC President presented the platform to the NPC, and the Central Committee of the CCP approved the FYRP later that year.⁴⁶ The FYRP recognized restraints on judicial independence based on four widely recognized problems: local protectionism, low professional and moral standards, the bu-

41. *Id.* art. 7(5).

42. See ZOU KEYUAN, CHINA’S LEGAL REFORM: TOWARDS THE RULE OF LAW 209-10 (2006). There are expectations that the Judges Law will have to be revised again within the near future. See Qianfan Zhang, *The People’s Court in Transition: The Prospect of the Chinese Judicial Reform*, 12 J. CONTEMP. CHINA 69, 89 (2003).

43. See ZOU, *supra* note 42, at 218-19, 222.

44. See J.J. Spigelman AC, C.J. New South Wales, *Convergence and the Judicial Role: Recent Developments in China*, Address at the China Education Centre, University of Sydney (July 11, 2002), available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_110702 (noting that SPC promulgated a Code of Judicial Ethics for Judges on October 18, 2001).

45. *Renmin Fayuan Wunian Gaige Gangyao* [*Outline of the Five-Year Reform Plan of the People’s Courts*], Zuigao Renmin Fayuan Yanjiushi [Research Office of the Supreme People’s Court], Beijing: Renmin Fayuan Chubanshe [Supreme People’s Court Publisher], 2000 (noting that the Plan discusses fifty points total under three large categories and seven sub-categories). The central reform platforms are also coupled with local reform initiatives at the level of High Courts at the provincial level. See also Yuwen Li, *Court Reform in China: Problem, Progress and Prospects*, in IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA 55, 74 (Jianfu Chen et al. eds., 2002) (“[The Reform Program] contains a total of fifty articles, of which thirty-nine concern specific measures of reform.”).

46. Shigui Tan, *Zhongguo Sifa Gaige Yanjiu* [*Research on Judicial Reform in China*], Beijing: Falu chubanshe [Law Publisher], 2001, at 55. For a general description of the Reform Programme, see Li, *supra* note 45, at 74-77.

reaucratic management model, and lack of resources.⁴⁷ The FYRP emphasizes selection criteria for judges as well as increased independence of those actually involved in the adjudication of specific cases.⁴⁸ Details included: establishing more independent panels of judges (*heyi*, *durenting*);⁴⁹ reducing the powers of the “adjudicative committees” (*shenpan weiyuanhui*), as well as those of the court leaders in case specifics;⁵⁰ introducing authoritative and highly qualified presiding judges (*shenpanzhang*);⁵¹ and making the adjudicative personnel of the courts more distinct from other staff, such as court clerks.⁵²

The stated goal in the FYRP was to make the judiciary fair and more efficient.⁵³ This was reiterated in a Second FYRP introduced in 2005,⁵⁴ which again stressed reforming the “adjudi-

47. See Renmin Fayuan Wunian Gaige Gangyao [Five Year Reform Platform], <http://www.dffy.com/faguixiazai/xf/200511/20051128111114.htm> (last visited Feb. 5, 2007) [hereinafter FYRP]; see also Zhang, *supra* note 39, at 87.

48. See FYRP, *supra* note 47, ¶¶ 18, 20; see also Zou Keyuan, *Judicial Reform in China: Recent Developments and Future Prospects*, 36 INT’L LAW. 1039, 1045-46 (2002) (discussing selection criteria for judges).

49. See FYRP, *supra* note 47, ¶ 20; see also Jerome A. Cohen, *China’s Legal Reform at the Crossroads*, FAR. E. ECON. R., Mar. 2006 (noting the FYRP’s “cautious awareness of brining greater professionalism, independence and integrity to the judiciary”).

50. See FYRP, *supra* note 47, ¶ 21; see also ZOU, *supra* note 48, at 1046 (noting that “[f]or the purposes of safeguarding judicial fairness and integrity, the Reform Programme stressed the importance of establishing an internal check-and-balance mechanism to strengthen the adjudicating supervisory system”).

51. See FYRP, *supra* note 47, ¶ 18; see also ZOU, *supra* note 48, at 1046.

52. See FYRP, *supra* note 47, ¶ 22; see also ZOU, *supra* note 48, at 1046.

53. The first FYRP was presented to the NPC only in Spring 2000 and approved by the Party later that year. See Susan Finder, *Court System*, in *DOING BUSINESS IN CHINA* 1, 3 (Freshfields, Bruckhaus, Deringer ed., 2002).

54. See Renmin Fayuan Dierge Wunian Gaige Gangyao [2nd Five Year Reform Platform], <http://www.dffy.com/faguixiazai/xf/200512/20051214221735.htm> (last visited Feb. 5, 2007) [hereinafter 2nd FYRP]. On March 9, 2005, the SPC Work Report released to the NPC an outline of Chinese judicial reform goals for 2005 and announced that a more detailed second FYRP would soon follow. See Congressional-Executive Commission on China (“CECC”), SPC Work Report Reveals Direction of Judicial Reform for 2005, <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingel=9030> (last visited Feb. 7, 2007). It was not until October 2005, however, that the second FYRP was actually issued. See Susan Finder, *Reforming the People’s Courts*, CHINA LAW & PRACTICE, June 2006, <http://www.chinalawandpractice.com/default.asp?Page=5&F=F&SID=5052&M=6&Y=2006> (last visited Feb. 7, 2007). For a partial translation of the text into English, see CECC, Second Five-Year Reform Program for the People’s Courts (2004-2008) (CECC Partial Translation), <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingel=38564> (last visited Feb. 3, 2007). CECC was created by Congress in October 2000, with the legislative mandate to monitor human rights and the development of the rule of law in China, and to submit an annual report to the President and the Congress. See Pub. L. No. 106-286, §§ 301-309, 114 Stat. 880 (2000).

cative committees,” furthering the reform initiated in the first FYRP,⁵⁵ and regularizing the use of lay judges (*peishenyuan*).⁵⁶ The second FYRP also sought to reform the “rehearing” (*zaishen*) system, enabling final decisions to be reopened,⁵⁷ and to strengthen enforcement of decisions,⁵⁸ focusing on the branch-courts,⁵⁹ tribunals (*fating*) sitting below the local courts (*jiceng fayuan*).⁶⁰ It featured the well-known plan to take back final decision-making power from the provincial level high courts (*gaoji fayuan*) in death penalty cases.⁶¹ More detailed reforms address the method of assigning cases to the various courts and judges⁶² and make the appellate process more transparent and more distinct from first level hearings.⁶³ In another fundamental reform, higher levels of government would supplement corresponding levels of funding of judges’ salaries and court finances if current levels do not reach a minimum threshold.⁶⁴ Incidentally, higher level funding, even though only partially available, may prove to dramatically shift power in favor of a stronger and more independent central judiciary, if the funding is at all realizable. The second FYRP limited its proposals to a handful of areas, even though it has implications for numerous more detailed issues. The second FYRP may be more realistic, dealing more with internal matters of the judiciary,⁶⁵ prescribing

55. See 2nd FYRP, *supra* note 54, ¶¶ 23-25.

56. See *id.* ¶ 27 (noting the goal of improving the people’s jury system).

57. See *id.* ¶ 9.

58. See *id.* ¶ 20 (noting the objective of improving enforcement efficiency, decreasing costs, excluding interferences and assuring that the winning party can timely realize legal rights).

59. The first FYRP purported to limit the number of tribunals, and it seemed as if their importance was diminishing. See FYRP, *supra* note 47, ¶ 27. In the second FYRP, such diminution is not as clear or at least is not formulated as explicitly. See generally 2nd FYRP, *supra* note 54.

60. See 2nd FYRP, *supra* note 54.

61. See *id.* ¶ 2.

62. See *id.* ¶ 30 (noting the goal of developing and perfecting a random case distribution system which considers the type and difficulty of each case).

63. See *id.* ¶¶ 10, 12.

64. See *id.* ¶ 48.

65. See Cohen, *supra*, note 49 (noting of the FYRP that “[o]ther goals involve internal reforms that are less observable to outsiders or even lawyers”). But see Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 *COL. J. ASIAN L.* 97 (2005) (noting that “[i]nterviewed experts believe that current Chinese leaders, though seen as moderate reformers, are not ready to allow fundamental reforms in these areas.”) (citations to Chinese academics omitted).

what some judges call “reforms” that are within the ambit of the law.

IV. FUTURE REFORMS

The Chinese judiciary centralized under the SPC is a challenging structure, with its four-tiers, 3,500 courts,⁶⁶ and 170,000 judges. The SPC’s problematic position concerns its relationship with horizontal entities such as the NPC and the Procuratorate. At the vertical level, the judiciary lacks the powers of funding and allocation of resources. This stems from the fact that corresponding levels of congress and government approve prospective judges.⁶⁷ Compounding this is the omnipresence of the Party at all levels, influencing selection and approval of judges, promotions and work allocation, and at times, directly and indirectly, the outcome of specific adjudications.⁶⁸ Party influence at the local level is not always the central Party line but can also be that of the local government or other local interests. This influence and its weakness in relation to the center are not necessarily negative from a narrow perspective, but viewed from a broader perspective, local influence may still undermine the credibility of the judiciary.⁶⁹

The reform platforms, along with more regular updates of the basic legislation, seek to resolve some of these fundamental issues. It is not a simple task. The SPC is often at the front line of reform, but is not always in agreement or in pace with—typically ahead of—the rest of the legal and political reforms—overall, or as seen by other entities. The SPC and the various compo-

66. See Jean-Pierre Cabestan, *The Political and Practical Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China*, 10 J. CHINESE POL. SCI. 43, 52 (2005) (noting that “[i]n 2004, there were 220,000 judges (against 70,000 in 1988), including 30,000 senior judges, working in some 3,500 courts”). If the branch-courts or People’s Tribunals (“PTs”) of the basic courts are included, the number increases to more than ten thousand. See Donald C. Clarke, *Empirical Research in Chinese Law*, in RULE OF LAW: LEGAL AND JUDICIAL REFORM IN DEVELOPING AND TRANSITION COUNTRIES 164, 180 (2003) (specifying the number of People’s Tribunals as 12,000 by the end of 1999) (citing LAW YEARBOOK [*falü nianjian*] 135 (2000)). According to other sources, the number of PTs is much higher. See, e.g., CHOW, *supra* note 44, at 200 (citing the number of People’s Tribunals as over 30,000).

67. See, e.g., Susan Finder, *supra* note 53, at 13, 14; see also Randall Peerenboom, *Judicial Independence in China* (unpublished manuscript 2006) (on file with author).

68. See Susan Finder, *The Supreme People’s Court of the People’s Republic of China*, 7 J. CHINESE L. 145, 149 (1993); see also Peerenboom, *supra* note 67, at 2.

69. See Peerenboom, *supra* note 67, at 2, 32-33.

nents of the judiciary are pushing ahead reforms that are possible at present.⁷⁰ The proposed reforms leave out, however, many of the overarching issues that lie beyond the control of the judiciary that would have to be included in a viable reform plan. The SPC President has stated that the reforms so far have dealt with pressing problems, but the future requires larger scale reform.⁷¹

In 2003, the Standing Committee of the Politburo appointed a coordinating group for judicial institutional reform (*zhongyang sifa tizhi gaige lingdao xiaozu*, the Central Reform Group, "CRG"), under the leadership of State Councillor, Luo Gan, with other prestigious positions also going to Party members.⁷² The Group coordinates the reform measures between the judiciary, the procuratorate, and other actors in the legal sphere. The name of this group includes not only the term "judicial," but also "institutional." The initial, simply labeled "judicial reform" (*sifa gaige*) was changed to "judicial institutional reform" (*sifa tizhi gaige*) by the Sixteenth Party Congress in 2002, a significant change in the context. In October 2006, during the most recent session of the Central Party Committee (sixth session of the 16th Congress), they added to judicial institutional reform, the word "mechanism" (judicial institutional reform, *sifa tizhi jizhi gaige*).⁷³ Apparently, the People's Congresses do not wish to give up their power to appoint judges for the benefit of a more centralized judicial system.

Nevertheless, the FYRPs are on the table. The reform measures may be facing tough battles to be implemented as the evolving phraseology seems to suggest. Reform platforms may be put in place simply to please the central level demands for action with more symbolic plans, without willingness to really

70. See, e.g., Speech of Xiao Yang, Fayuan, faguan yu sifa gaige [The Courts, Judges, and Judicial Reform], 1 FAXUEJIA [JURISTS REVIEW] 2003 (discussing constitutional and legal reforms as necessities for further reform).

71. See Xiao Yang: *Faguan Meiyou Sili; Kaichuang Sifa Weimin Xin Jingjie (dawan)* [Xiao Yang: *Judges without Personal Interests; Creating a New Horizon of Justice to the People* (interview)], ZHONGXIN WANG [CHINA NEWS NET], Oct. 15, 2003.

72. *Zhongyang Sifa Tizhi Gaige Lingdao Xiaozu* [Prospects for the Judicial Reform of 2005, Preventing the Judiciary from Causing Public Outcry], SOHU.COM, Jan. 7, 2004.

73. See *Zhongguo Gongchangdang Di Shiliuju Zhongyang Weiyuanhui Di Liuci Quantu Huiyi Gongbao* [Meeting Report of the 6th Plenary of the CCP's 16th Central Committee], XINHUA WANG [NEW CHINA NEWS AGENCY], Oct. 11, 2006, available at http://news.xinhuanet.com/politics/2006-10/11/content_5190605.htm

change much on the ground. Reform plans may also be launched to test the extent of actual reform possible by pushing the agenda. A combination of these explanations is likely behind the reform scheme. For more effective reform, the CRG, the Party coordinating group, would have to take a stronger lead. With increasing unrest in China and calls for a “harmonious society,” incentives for the Party to boost the credibility of the legal system with a more independent judiciary at its core may be forthcoming.⁷⁴ The 2007 National Congress, at which the SPC President’s replacement like will be positioned, may be an essential catalyst for further reform. Candidates for the position are likely closer to the Party than to the SPC. At first, this may seem to be a regression of the reform process, and that may be the case; but the change may also give the SPC the higher status needed for the reform process to be more effective against the horizontal and vertical challenges. As Professor Randall Peerenboom has argued, the clear advantage of the Chinese Communist Party is the coordinating powers they have, which enable diverging agendas to merge.⁷⁵

The reform process of the Chinese judiciary in particular over the last twenty-five years and even more so in the last decade is impressive. Within—and at times beyond—the scope of what seems possible, the judiciary has been making headway towards enhanced professionalization, stature, and independence. Reform in the future is likely to continue along these same tracks. Nevertheless, with stronger incentives to resolve societal problems, a more progressive development is not unlikely. A case in point is the now well-known return to the SPC of the final adjudicative power in death penalty cases—a possible first effort to take back more power from local courts. The reform process continues, and even though all problems will not be solved by 2008, the development, albeit slow, is quite positive.

74. See Joseph Kahn, *China Makes Commitment to Social Harmony*, N.Y. TIMES, Oct. 12, 2006, at A14; Maureen Fan, *China’s Party Leadership Declares New Priority: “Harmonious Society,”* WASH. TIMES, Oct. 12, 2006, at A18.

75. See generally Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China*, 19 BERKELEY J. INT’L L. 161 (2001).