

COURT REFORM WITH CHINESE CHARACTERISTICS

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Abstract: In *Court Reform on Trial: Why Simple Solutions Fail*, Malcolm Feeley identified a number of obstacles that undermine reforms of the United States court system. Feeley's proposed solution was to adopt a problem-oriented "rights strategy"—letting the courts themselves solve their problems through litigation. This is because litigation is a forum in which courts are well placed to identify specific problems and devise pragmatic solutions. This Article takes a look at this proposition in the context of court reforms in China and concludes that courts (and law) are also a reflection of national goals and identity. Any reforms to a court system must not only take into consideration expectations and realistic goals, but also the fundamental identity of a particular legal system. In a top-down society like China, national goals—and hence, national identity—are defined by the Chinese Communist Party. Chinese courts have come a long way in their reforms and court reforms in China have often been couched in the language of national goals. Any proposed court reforms that challenge national goals and identity are doomed to fail.

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I. INTRODUCTION

The primary problems of the courts are . . . due to changes brought about by raised standards and increased attention . . . politicians, the press, the scholarly community, and the courts themselves have . . . fostered unrealistic expectations, and promoted bold but often empty solutions that are guaranteed to bring about disillusionment and disappointment even in the face of significant improvements.¹

Can courts be agents of their own change? In his seminal book, *Court Reform on Trial: Why Simple Solutions Fail*, Malcolm Feeley identifies a number of obstacles that undermine reforms of the United States court system. These obstacles include diverse constituencies that have different and often conflicting expectations of the system, unattainable objectives, and the reality that courts in the United States lack a central authority or unified value system, and therefore are not easily susceptible to planned change. Feeley's proposed solution is to adopt a problem-oriented "rights strategy"—letting the courts themselves solve their problems through litigation because it is a forum through which courts are well placed to identify specific problems and devise pragmatic solutions. It is a cautious call to value the incremental change

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¹ MALCOLM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* 3 (2013).

courts themselves can make.

When viewed in the context of China, the question of whether courts can be agents of their own change is more complicated. Feeley's conclusions about court reforms ring true in some aspects, but raise questions in others. This Article examines the course of court reform in China and concludes that courts (and law) are also a reflection of national goals and identity. Any reforms to a court system must not only take into consideration expectations and realistic goals, but also the fundamental identity of a particular legal system. In a top-down society² like China, national goals—and hence, national identity—are defined by the Chinese Communist Party. Chinese courts have come a long way in their reforms, and court reforms in China have often been couched in the language of national goals. Any proposed changes that challenge national goals and identity set by the Party are doomed to fail.

Indeed, law and courts have been featured in every stage of China's transition from a planned to market economy. Each major law reform remains part and parcel of China's state building, containing provisions in each new version that reflect the current national goals. From the first wave of law reforms in 1979 reestablishing the court system to the latest iteration creating "circuit courts," each wave has been closely related to national goals and identities. For a top-down regime like China, understanding court reforms may require placing courts in their broader political context rather than using a problem-oriented "rights strategy." This is consistent with the Chinese socialist view of law as instrumental in achieving certain substantive ends.

As early as the 1970s, China resurrected its legal system as it moved from the chaos of the Cultural Revolution and its years of isolation to join the world market economy. At the start, China was very effective in bifurcating its legal system, with one track more consistent with international standards for commercial disputes involving foreign parties, and one more in line with Communist/traditional Chinese ideology for disputes involving domestic citizens.³ Because foreign trading partners

² The terms "top-down" and "bottom up" come from institutional economics. The top-down view of institutions sees them as determined by laws written by political leaders. The bottom-up view sees institutions as emerging spontaneously from the social norms, customs, traditions, beliefs, and values of individuals within a society, with the written law only formalizing what is already shaped by the attitudes of individuals. See generally William Easterly, *Institutions: Top Down or Bottom Up?*, 98 AM. ECON. REV. 95 (2008).

³ See generally PITMAN POTTER, CHINA'S LEGAL SYSTEM (2013); CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CHINA (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011) [hereinafter CHINESE JUSTICE];

were important to China's economic development, China created a system that gave foreign partners comfort and stability, while keeping domestic citizens carefully in check.⁴

Thus, to secure international investment, China developed an arbitral system for commercial disputes involving international parties that was based on international norms and customs and run by China's International Economic and Trade Arbitration Commission.⁵ The Chinese Arbitration Law adopted and promulgated in 1994 also drew upon international arbitration legislation and practices, especially provisions in the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards and the Model Law on International Commercial Arbitration ("UNCITRAL Model Law") promulgated by the international Nations Commission on International Trade Law ("UNCITRAL") in 1985.⁶ This arbitral system exists today for the adjudication of the majority of international and domestic commercial disputes, and mimicked the western system in its formality and relative transparency.⁷

Within the domestic court arena, however, it has been a different matter.⁸ This Article focuses on China's domestic court reforms, specifically on its civil justice system. While criminal justice involves the power of the state against individuals, civil justice is where ordinary citizens can access the legal system and be the initiators of law enforcement. A robust and fair civil justice system can empower individuals to assert their rights and, through seemingly technical rule changes such as in civil

STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (1999); Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NORTHWEST J. INT'L L. & BUS. 383 (2000).

⁴ See Donald Clark, *Legislating for a Market Economy in China*, 191 CHINA QUARTERLY 567–85 (2007).

⁵ *The State Council's Reply Concerning the Renaming of the Foreign Economic and Trade Arbitration Commission as the China International Economic and Trade Arbitration Commission and the Amendment of its Arbitration Rules*, LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (June 21, 1988), <http://www.asianlii.org/cn/legis/cen/laws/tscorctrotfeatacatcieataoiaar1932/>. On December 2, 1986, the NPC of China declared it would adhere to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958. See also SCOTT WILSON, *REMADE IN CHINA: FOREIGN INVESTORS AND INSTITUTIONAL CHANGE IN CHINA* 104 (Oxford Uni. Press 2009).

⁶ See Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 428 (2006).

⁷ See The Republic of China Arbitration Law, amended July 10, 2002, effective July 10, 2002, <http://www.arbitration.org.tw/english/image/Arbitration/Arbitration%20Law%20of%20the%20Republic%20of%20China.pdf>.

⁸ See generally Fan Kun, *Arbitration in China: Practice, Legal Obstacles and Reforms*, 19 ICC INT'L CT. ARB. BULL. 25 (2008).

procedure rules, can serve as the basis for rule of law developments. Facing problems with overburdened courts and increasing caseloads, Chinese court reformers have aimed to secure efficiency and consistency in their systems much as any other court reformers.

Yet, even as Chinese court reformers have battled issues of efficiency and consistency, they have had to plan their incremental suggestions to coordinate them with national goals and identity. Domestic civil procedure and court reforms are more likely to succeed if couched in support of China's changing national goals—first, economic development; then, harmonious society; and today, the Chinese dream. As will be discussed below, Chinese court reforms have been timed and shaped in accordance with CCP stated national goals in ways that give these reforms a uniquely Chinese flavor, rendering them “court reform with Chinese characteristics.”⁹

II. LAW TO FACILITATE ECONOMIC DEVELOPMENT

As an initial matter, the Chinese domestic legal system is structurally based on a civil law model borrowed from the German system.¹⁰ Internally, China's courts retain aspects of its own centuries-long tradition as a bureaucratic empire bolstered by concepts of socialist legality.¹¹ Compared to United States courts, Chinese courts have limited authority and, according to many observers, judges are more like bureaucratic actors or civil servants within a tightly party-controlled hierarchy than independent adjudicators.¹² This led Xiao Yang, then president of the SPC, to lament, “[c]ourts have often been taken as branches of the government, and judges viewed as civil servants who have to follow orders from superiors, which prevents them from exercising mandated legal duties.”¹³ Until recently, Chinese judges decided cases in collegiate panels and controversial decisions had to be approved by the court president or reviewed by the adjudication committee (an internal

⁹ This is a play on Deng Xiaoping's “Socialism with Chinese Characteristics.” See DENG XIAOPING, BUILD SOCIALISM WITH CHINESE CHARACTERISTICS (Foreign Languages Press 1985). General Secretary Xi Jinping in the Decision of the Fourth Plenum of the 18th Central Committee also emphasized the importance of “rule of law with Chinese characteristics,” as keeping to CPP leadership. *Id.*

¹⁰ See Margaret Y.K. Woo, *Justice*, in HANDBOOK OF CHINA'S GOVERNANCE AND DOMESTIC POLITICS 53–66 (Chris Ogden ed., 2013).

¹¹ See generally LUBMAN, *supra* note 3; CHINESE JUSTICE, *supra* note 3.

¹² See KENNETH W. DAM, THE LAW GROWTH NEXUS: RULE OF LAW AND ECONOMIC DEVELOPMENT 250 (Brookings Institute 2007); Vernon Mei Ying Hung, *China's TWO Commitments and Independent Judicial Review: Import on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 124 (2004).

¹³ Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review (Political Reform and Legal Project, China Program, Carnegie Endowment Working Papers No. 32)*, <https://www.scribd.com/document/113903735/China-s-commitment-on-independent-judicial-review>.

committee composed of leadership of the court responsible for resolving difficult and sensitive cases).¹⁴ This treatment of the judiciary as a bureaucracy rather than as an independent institution is not only consistent with China's socialist dictates but also with its historical tradition of developing a centralized bureaucracy to govern its population.¹⁵

One of the first codes promulgated for the adjudication of domestic civil cases was the Chinese Civil Procedure Code, enacted for trial implementation in 1982 and then formally in 1991.¹⁶ Blending Maoist, socialist, and civil law traditions, the civil procedure code emphasized conciliation, rather than adjudication. Under Maoist/socialist thought, domestic civil disputes were those in which no "enemies" stood out and therefore were most suitable for informal dispute resolution by the neighborhood or mediation committees.¹⁷ This emphasis on conciliation and mediation was also consistent with the historic Confucian tradition that placed a preference on harmony. Thus, domestic disputes were often "resolved" by mediation, with formal trials being quite rare. If a case was unresolved by mediation and reached the courts, it was resolved using an inquisitorial mode of civil procedure in which the court took control of everything from investigation to structuring the parties' claims.¹⁸

During this initial period, Chinese judges retained tremendous responsibility in civil cases. As in the inquisitorial system on which the Chinese system was based,¹⁹ there was judicial rather than party control of litigation. The judge's broad authority was further bolstered by the Chinese

¹⁴ See Xin He, *Black Hole of Responsibility: The Adjudication Committee's Role in the Chinese Court*, 416 L. & SOC'Y REV. 681 (2012).

¹⁵ Francis Fukuyama, *The Patterns of History*, 23 J. DEMOCRACY 14, 15 (2012).

¹⁶ ZHONGHUA RENMIN GONGHEGUO MINSHI SUSONG FA (中华人民共和国民事诉讼法) [CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991) [hereinafter CHINA CIV. P. LAW OF 1991], translated at <http://www.china.org.cn/english/government/207339.htm>. The 1991 Civil Procedure Law was amended in 2007, and again in 2012. See QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUANHUI GUANYU XIUGAI "ZHONGHUA RENMIN GONGHEGUO MINSHI SUSONG FA" DE JUEDING (全国人民代表大会常务委员会关于修改《中华人民共和国民事诉讼法》的决定) [DECISION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS ON AMENDING THE "CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA"], http://law.chinalaw.info/fulltext_form.aspx?Db=chl&Gid=98762.

¹⁷ For a classic article on Chinese mediation during the early reform years, see Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1201 (1966) (citing Mao Tse-dong's famous special on the correct handling of contradictions amongst the people).

¹⁸ See generally CIVIL LITIGATION IN CHINA AND EUROPE: ESSAYS ON THE ROLE OF THE JUDGE AND PARTIES (C. H. van Rhee & Fu Yulin eds., 2014).

¹⁹ For a classic description of the civil law inquisitorial system, see KONRAD ZWEIGART & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW (3d ed. 1998).

socialist principle under which a judge is obligated “to seek truth from facts, and correct error whenever discovered.”²⁰ There was a belief that litigation should be resolved based on an objective truth rather than a legal truth, and that litigation should end with a determination of who was truly at fault, rather than who had proven their case.²¹ Under this approach, the court was responsible for collecting, investigating, and confirming the evidence to unearth the truth.

The early 1990s saw an acceleration of economic development, beginning with the Resolution on Marketization of the Fourteenth National Congress of the Chinese Communist Party.²² Then Premier Deng Xiaoping, after a “southern tour” during which he saw how much residual poverty still existed in rural China, determined that further acceleration of market reforms was imperative.²³ For this next stage of economic development, as increased economic development spurred greater disputes, China deepened market reforms and encouraged the use of the courts. As will be explained below, there were efforts at further court reform and amendments to the civil procedure law in 1991 that gave greater importance to the role of courts in resolving domestic civil disputes. In 1997, the Chinese Communist Party at its Fifteenth National Congress reiterated a ten-year target for national economic and social development that was to be achieved with a basic strategy of “managing state affairs according to law” and “build[ing] a socialist country ruled by law.”²⁴

²⁰ “Seeking Truth from Facts” is a key element of Maoism, first quoted by Mao Zedong and later promoted by Deng Xiaoping as a central ideology of socialism with Chinese characteristics. This goal is codified in China Civ. P. Law of 1991, arts. 2, 7. See CHINA CIV. P. LAW OF 1991.

²¹ CHINA CIV. P. LAW OF 1991 art. 2. See also Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT’L L. & POL’Y. 393, 400–01 (2004).

²² ZHONGGONG ZHONGYANG GUANYU JIANLI SHEHUI ZHUYI SHICHANG JINGJI TIZHI RUOGAN WENTI DE JUEDING (中共中央关于建立社会主义市场经济体制若干问题的决定) [NATIONAL CONGRESS OF THE CHINESE COMMUNIST PARTY RESOLUTION ON ESTABLISHMENT OF A SOCIALIST MARKET ECONOMIC SYSTEM] (Nov. 14, 1993), http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=7590.

²³ See JIANG ZEMIN (江泽民), JIAKUAI GAIGE KAIFANG HE XIANDAIHUA JIANSHE BUFA DUOQU YOU ZHONG GUO TESE SHEHUI ZHUYI SHIYE DE GENG DA SHENGLI (加快改革开放和现代化建设步伐夺取有中国特色社会主义事业的更大胜利) [ACCELERATING THE REFORM, THE OPENING TO THE OUTSIDE WORLD AND THE DRIVE FOR MODERNIZATION, SO AS TO ACHIEVE GREATER SUCCESSES IN BUILDING SOCIALISM WITH CHINESE CHARACTERISTICS] (1992), http://www.bjreview.com.cn/document/txt/2011-03/29/content_363504.htm.

²⁴ See JIANG ZEMIN (江泽民), GAOJU DENG XIAOPING LILUN WEIDA QIZHI, BA JIANSHE YOU ZHONGGUO TESE SHEHUI ZHUYI SHIYE QUANMIAN TUOXIANG ERSHIYI SHIJI (高举邓小平理论伟大旗帜, 把建设有中国特色社会主义事业全面推向二十一世纪) [HOLD HIGH THE GREAT BANNER OF DENG XIAOPING THEORY, ADVANCEMENT OF THE CAUSE OF BUILDING SOCIALISM WITH CHINESE CHARACTERISTICS INTO THE 21ST CENTURY] (1997), <http://www.china.org.cn/english/features/45607.htm>.

During this period, Chinese reformers encouraged the greater use of law and law enforcement by ordinary citizens. No longer was legal informality tolerated. China proclaimed itself “a country ruled by law,” and encouraged citizens to enforce the law.²⁵ Economic policies and economic-related policies were increasingly put into legal form.²⁶ Increased domestic market and economic activity required the stability that a legal system could provide in setting and enforcing predictable norms.

It is under this setting that Xiao Yang, then president of the Supreme People’s Court, took helm to systematize and accelerate court reforms with an eye towards increased efficiency and promotion of procedural justice. Between the late 1990s and the early 2000s, the Supreme People’s Court issued several reform documents that placed a greater emphasis on separation of functions, professionalizing the judiciary, and on trials and adjudication. In June 1998, the SPC promulgated the Several Rules on Civil and Economic Trials, which formally placed the burdens of providing proof on the parties, rather than on judicial investigation, and allowed for limited discovery.²⁷ Additionally, in 1998, Xiao Yang, then-president of the Supreme People’s Court, ordered a separation of functions (filing, adjudicating, and supervising) and required every court to establish a case filing division separate from the trial division.²⁸ All these reforms were bolstered by the Court’s First Five Year Reform Program (1999–2003), which placed emphasis on improvement of the judiciary and the adjudication process.²⁹

And so, heightened qualifications for judicial officers were established, with a National Judicial Exam to follow. It was also a time when more separation of functions was encouraged. A case filing division was established which was responsible for the more routine tasks of examining

²⁵ Fu Hualing & Richard Cullen, *From Mediatorial to Adjudicatory Justice: The Limits of Civil Justice Reform in China*, in CHINESE JUSTICE, *supra* note 3, at 25.

²⁶ See generally Jacque de Lisle, *Law and the Economy in China*, in ROUTLEDGE HANDBOOK OF THE CHINESE ECONOMY: LAW AND THE ECONOMY IN CHINA 255–79 (Gregory Chow & Dwight Perkins eds., Routledge 2014).

²⁷ See Guanyu Minshi Jingji Shenpan Fangshi Gaige Wenti de Ruogan Guiding (关于民事经济审判方式改革问题的若干规定) [Several Rules on the Reform of Civil and Economic Trials] (promulgated by the Sup. People’s Ct. Judicial Comm., July 11, 1998) (clarifying parties’ burdens of proof, the trial function, and the judicial panel’s responsibilities), http://law.chinalawinfo.com/fulltext_for m.aspx?Db=chl&Gid=20233; see also Jiang Wei (江伟) & Wu Zeyong (吴泽勇), *Zhengju Fa Ruogan Jiben Wenti de Fazhexue Fengxi* (证据法若干基本问题的法哲学分析) [A Jurisprudential Analysis on Several Basic Issues of Evidential Law], 2 ZHONGGUO FAXUE (中国法学) [CHINESE JURIS.] 24, 45–46 (2002).

²⁸ See RENMIN FAYUAN DIYIGE WUNIANGAIGE GANGYAO (1999–2003) [FIRST FIVE-YEAR COURT REFORM PROGRAM (1999–2003)] (Oct. 20, 1999), <http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=chl&gid=23701>.

²⁹ *Id.*

and registering cases and appeals, delivering the complaint and other litigation documents, appointing a presiding or responsible judge and other members of a collegial panel, fixing the date of court sessions, issuing notices, and preserving property and evidence before trial.³⁰ The adjudication panel theoretically would not have access to a case file until the case was cleared by the case filing tribunal. The separation of functions was expected to streamline the processing of litigation, leaving judges room to preside over hearings and be more unbiased in adjudicating cases.³¹

Later amendments to the civil procedure code also added pre-trial procedures during which parties were to exchange evidence. This, combined with a more robust hearing, brought about the so-called two-stage trial structure. The underlying purpose for all these reforms was to increase efficiency by scheduling a case for substantive hearing only when it was ready and to assure greater impartiality of judges by isolating the trial judge from the case until the substantive hearing.³² It was an effort to professionalize the judiciary and clarify its functions as court procedures became increasingly complex, in part because the judiciary had suffered from inexperience and corruption in the past.³³

The SPC also set a goal of establishing an open and public trial system in an effort to legitimize the work of the courts through increasing transparency. During this period, Chinese reformers wavered between promoting judges as independent adjudicators and retaining them as bureaucratic actors, as well as between giving greater power to litigants to shape their litigation and placing that responsibility primarily on judges. Anticipating greater use of the courts from disputes that naturally arise from more economic transactions, China experimented with western legal concepts and the adversary system.³⁴ The idea was to give more control over litigation to the parties in an effort to ease the workload of judges and encourage greater party autonomy.³⁵

³⁰ See Zuigao Renmin Fayuan Guanyu Renmin Fayuan Lian Gongzuo de Zhanxing Guiding (最高人民法院关于人民法院立案工作的暂行规定) [Interim Provisions of the Case Filing Division of the Supreme People's Court] (promulgated by Sup. People's Ct., Apr. 21, 1997), http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=17120.

³¹ Nanping Liu & Michelle Liu, *Justice Without Judges: The Case Filing Division in the People's Republic of China*, 17 U.C. DAVIS J. INT'L L. & POL'Y 283, 294 (2011).

³² See FIRST FIVE-YEAR COURT REFORM PROGRAM (1999–2003), *supra* note 28.

³³ For a good analysis of the problems associated with China's early legal system, see generally LUBMAN, *supra* note 3.

³⁴ Hualing & Cullen, *supra* note 25, at 25, 46–47.

³⁵ CHINA CIV. P. LAW OF 1991 art. 13. See also *id.* at 40–41.

By focusing on the parties, dividing judicial functions and responsibilities, and professionalizing the judiciary, these changes were intended to pave the way for greater transparency, as decisions were rendered in open court after exchange of evidence and oral arguments.³⁶ During this period, the SPC even introduced western procedural concepts into civil justice, such as the burden of proof from the Anglo-American tradition and the “principles of oral argument” (*Verhandlungsmaxime*) from the German/Japanese tradition.³⁷ Concepts such as “due process,” class/representative actions, legal vs. objective truth, “equality before the law,” “the rule of law,” and “judicial independence,” made their way into the conversation in the development of the Chinese civil procedure.³⁸ Because of the combined efforts of increased judicial professionalism, procedural reform, and the introduction of adversarial proceedings, the mediation rate declined steadily from the mid-1980s to the mid-2000s.³⁹

But efforts to establish greater legal formality and place burdens of proof on the parties only added greater barriers to justice when they were instituted without adequate legal assistance. The number of Chinese lawyers, then and now, remains small relative to the population, and most Chinese lawyers gravitate towards urban rather than rural areas.⁴⁰ Where previously lawyers had been state cadres employed by the government, the new private lawyers steered towards the more profitable practice of corporate and business law.⁴¹ In some rural areas, lawyers and judges who were legally trained remained rare. The effect was to increase the disparity between rich and poor in terms of access to justice.⁴²

³⁶ See generally ZUIGAO RENMIN FAYUAN [SUPREME PEOPLE’S COURT], SEVERAL RULES ON THE MATTERS CONCERNING REFORM OF CIVIL AND ECONOMIC TRIAL METHODS: JUDICIAL EXPLANATIONS OF RELEVANT REGULATIONS OF CIVIL EVIDENCE LAW (People’s Court Pub. House 2002). Several Provisions of the SPC on the Issues concerning the Civil and Economic Trial Mode Reform were issued in 1998. The Trial Methods Rules were issued on July 6, 1998 and effective on July 11, 2002.

³⁷ *Id.*

³⁸ RENMIN FAYUAN DIERGE WUNIANGAIGE GANGYAO (2004–2008) (人民法院第二个五年改革纲 (2004 – 2008)) [SECOND FIVE-YEAR REFORM PROGRAM FOR THE PEOPLE’S COURTS (2004–2008)], <https://www.cecc.gov/resources/legal-provisions/second-five-year-reform-program-for-the-peoples-courts-2004-2008-cecc#body-chinese>. During this period, the SPC acknowledged the need to look overseas in designing reforms of China’s courts.

³⁹ See Hualing & Cullen, *supra* note 25, at 3.

⁴⁰ See generally Fu Yulin, *Dispute Resolution and China’s Grassroots Legal Services*, in CHINESE JUSTICE, *supra* note 3, at 314.

⁴¹ Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China’s Transition from Socialism*, 113 AM. J. SOC. 352, 365–71 (2007).

⁴² Yulin, *supra* note 40, at 314.

Added to this picture was the increasing number of disputes that naturally occurred with economic development. Faced with increased workload, as well as professional incentives, some Chinese judges retreated behind a veil of legal technicality.⁴³ Cases were dismissed on technicalities, or worse, often not accepted at all.⁴⁴ Rather than face reversals that could result in lower pay and diminished promotion prospects, Chinese judges preferred to have cases go away rather than adjudicate them.⁴⁵ Burdened with the obligation to assess the complaint substantively at an initial stage but relieved of the obligation to investigate, Chinese judges retained great discretion in accepting or not accepting cases, and would deny acceptance of troublesome or politically sensitive cases without offering litigants a chance to argue otherwise.⁴⁶ For accepted cases, judges would also push for a mediated settlement, which would not be appealed by the parties or protested by the procuratorate.

More problematically, courts faced pressure from local government intervention, termed “local protectionism.”⁴⁷ One of the first initiatives Deng Xiaoping undertook to stimulate the Chinese economy was to introduce fiscal decentralization, in which the central government increasingly cut intergovernmental transfers and shed its fiscal responsibilities to lower levels of government.⁴⁸ This has provided local governments with a strong incentive to shield local firms and industries from interregional competition, as well as to protect state-owned enterprises under their administration. Such local businesses are often a local government’s base of political power, and source of fiscal revenue and private wealth. In turn, courts (themselves financed by local governments) were then pressured to exert “local protectionism,” and to rule on behalf of home litigants.⁴⁹

Initially, as the economy grew, the central government in Beijing had high hopes that courts, prompted by disgruntled citizens, could assist in

⁴³ See Sida Liu, *With or Without the Law: The Changing Meaning of Ordinary Legal Work in China, 1979–2003*, in CHINESE JUSTICE, *supra* note 3, at 234.

⁴⁴ See Liu & Liu, *supra* note 31, 284–65, 287–88.

⁴⁵ See Carl Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, in CHINESE JUSTICE, *supra* note 3, at 58.

⁴⁶ Liu & Liu, *supra* note 31, at 320.

⁴⁷ Thus, the First Five-Year Court Reform Plan targeted local protectionism as one danger to “socialist rule of law.” See FIRST FIVE-YEAR COURT REFORM PROGRAM (1999–2003), *supra* note 28.

⁴⁸ Chunli Shen et al., *Fiscal Decentralization in China: History, Impact, Challenges and Next Steps*, 13 ANNALS ECON. & FIN. 1, 10 (2012).

⁴⁹ See *Judicial Independence in the PRC*, CONG.-EXEC. COMM’N ON CHINA, <https://www.cecc.gov/judicial-independence-in-the-prc>.

reining in local governments and growing corruption.⁵⁰ Even as courts, faced with increasingly complex cases and procedures, retreated behind a veil of technocracy, the early 2000s saw more corruption cases involving court personnel. The conviction of Huang Songyu,⁵¹ a former vice president of the Supreme People's Court, and the subsequent investigation of Xi Xiaoming, serve as visible examples of alleged judicial corruption at the highest level.⁵² As Malcolm Feeley stated in his analysis of court reforms, a high expectation for court reform could render any reforms unattainable. This was indeed the case for China. High hopes and aspirations when confronted with actual dissatisfied experiences led Mary Gallagher to term the phenomenon of "uninformed enchantment" and "informed disenchantment" in relation to the Chinese court system.⁵³ Disgruntled and dissatisfied litigants, failing to get satisfaction in the courts, turned to petitioning (xinfang) en masse to Beijing.⁵⁴ More threatening to the central state, some petitioners even resorted to protesting in the streets.⁵⁵

III. A RETURN TO HARMONY

By the mid-2000s, increased citizen discontent with growing inequality due to unchecked economic growth spilled out into social unrest in the streets. Just as economic reforms led to greater disparity within the Chinese population, so also the reality of greater legal formality without greater legal representation led to greater dissatisfaction with Chinese courts. Litigants

⁵⁰ Ren Jianxin (任建新), *Zuigao Renmin Fayuan Gongzuo Baogao 1996 Nian* (最高人民法院工作报告 1996 年) [Supreme People's Court Work Report, 1996] (Mar. 12 1996), http://www.npc.gov.cn/wxzl/gongbao/2000-12/07/content_5003526.htm.

⁵¹ *China Jails Former Top Judge for Corruption*, THE GUARDIAN, Jan. 19, 2010, <https://www.theguardian.com/world/2010/jan/19/china-supreme-court-judge-jailed> (Corruption cases can sometimes be a reflection of the tug between judicial independence and Party loyalty. Notably, Huang was famous for issuing the first court decision based on China's constitution—a ruling overturned soon after Huang was dismissed from his post).

⁵² Lauren Hilgers, *A Chinese Supreme Court Justice Falls From Grace*, FOREIGN POL'Y (July 28, 2015), <http://foreignpolicy.com/2015/07/28/china-supreme-court-corruption-crackdown/>.

⁵³ See Mary E. Gallagher, *Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness*, 40 L. & SOC'Y REV. 783 (2006).

⁵⁴ Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103, 103–05 (2006).

⁵⁵ Spasms of public anger against perceived injustices or government corruption occur periodically in China, but the protest against the cover-up of a teenage girl's rape and murder, in the seat of Weng'an County in Guizhou Province, resulted in thousands of protestors, and fire being set in a government complex and police cruisers. In other words, this protest was larger and more destructive than usual. Jill Drew, *Anger over Rape-Murder Case Sparks Riot in China*, WASH. POST, June 30, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/29/AR2008062900805.html>.

flocked to file letters and petitions of appeal to governmental agencies, as well as flocked to the streets.⁵⁶ The Chinese state responded with a combined strategy of harmony and populism.

Concerned with threats of social instability, the Chinese government launched its next set of policy reforms. This time, the emphasis was on preserving social harmony.⁵⁷ Then-President Hu Jintao announced the national goal of preserving a “harmonious society” (和谐社会).⁵⁸ In his government work report delivered at the opening meeting of the Third Session of the Tenth National People’s Congress (“NPC”), Premier Wen Jiabao in 2005 promised that the government would “strive to solve outstanding problems vital to the immediate interests of the people, safeguard social stability and build a harmonious socialist society.”⁵⁹

In response, the Chinese legal system resurrected its historical preference for mediation over adjudication and its trial reforms blended both an effort to ensure “stability at all costs,”⁶⁰ as well as pragmatic solutions to increase efficiency and accountability. Reminiscent of traditional Confucian philosophy, the emphasis was on stability and tranquility, resolving rather than adjudicating disputes. Courts, rather than adjudicate right from wrong, were increasingly asked to act as the safety valve for a widening range of popular complaints.⁶¹ While court access was theoretically addressed by lower court fees,⁶² and the substitution of a registration system for a filing

⁵⁶ See Minzner, *supra* note 54, at 103–05.

⁵⁷ See *China Publishes ‘Harmonious Society’ Resolution*, CHINA.ORG.CN (Oct. 19, 2006), <http://www.china.org.cn/english/2006/Oct/184810.htm>.

⁵⁸ Maureen Fan, *China’s Party Leadership Declares New Priority: ‘Harmonious Society,’* WASH. POST, Oct. 12, 2006, <http://www.washingtonpost.com/wpdyn/content/article/2006/10/11/AR2006101101610.html>.

⁵⁹ Letian Pan, *Premier Wen Stresses Building of “Harmonious Society,”* XINHUA, Mar. 5, 2005, http://www.gov.cn/english/2005-03/05/content_30052.htm.

⁶⁰ Social stability at all costs also permeates China’s criminal justice system. See Joseph Kahn, *Deep Flaws and Little Justice, in China’s Court System*, N.Y. TIMES, Sept. 21, 2005, <http://www.nytimes.com/2005/09/21/world/asia/deep-flaws-and-little-justice-in-chinas-court-system.html>.

⁶¹ Benjamin Liebman, *Chinese Courts: Restricted Reforms*, 21 COL. J. ASIAN L. 1, 23–25 (2007).

⁶² The Litigation Cost Payment Act (诉讼费用交纳办法), effective April 1, 2007, lowered court fees from 4% to .5% to 2.5% of the monetary compensation for cases at the low but raised the rates for upper tier cases with disputed property valued at one million yuan. For property valued at less than 10,000 yuan, a flat fee of 50 yuan applies. While this enables ordinary citizens to bring litigation, it further divided the courts in terms of resources since court fees still constitute a percentage of a court’s finances.

system for complaints was proposed,⁶³ Chinese judges were urged to end disputes rather than adjudicate them in an effort preserve harmony.⁶⁴

Chinese courts responded. Even as prior reforms to professionalize the judiciary and to streamline litigation continued, the SPC couched its reforms this time in a language consistent with the goal of a “harmonious society.”⁶⁵ In 2007, the SPC issued an opinion that instructed the Chinese judiciary to “mediate if possible” and to “resolv[e] cases and solv[e] problems to promote social harmony.”⁶⁶ In its Third Five Year Court Reform Plan (2009–2013), the SPC noted that “increasing social harmony” was one of its primary tasks, and strengthening power restraints and supervision were its focus.⁶⁷ Promoting social harmony for the courts in this instance meant more mediated outcomes rather than adjudicating rights in a particular dispute.

During these years, the Chinese government promoted an official national “grand mediation” (*da tiaojie*) campaign, in part to relieve pressure on courts and to respond to what was perceived as a litigation explosion.⁶⁸ In 2009, Sichuan Province boasted that its mediators (*renmin tiaojie yuan*) and mediation organizations (*renmin tiaojie zuzhi*) had resolved 527,000 disputes, which the government claimed contributed to a 23.5% drop in “mass

⁶³ A case registration system was established this year by the Supreme People’s Court. *See* Guanyu Renmin Fayuan Tuixing Lian Dengji Zhi Gaige de Yijian (关于人民法院推行立案登记制改革的意见) [Opinion on the Implementation of the People’s Courts Reform of the Case-filing Registration System] (promulgated by Sup. People’s Ct., Apr. 1, 2015, effective May 1, 2015), http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=246925.

⁶⁴ *See* Zuigao Renmin Fayuan Guanyu Jinyibu Jiaqiang Sifa Jianyi Gongzuo Wei Goujian Shehui Zhuyi Hexie Shehui Tigong Sifa Fuwu de Tongzhi (最高人民法院关于进一步加强司法建议工作为构建社会主义和谐社会提供司法服务的通知) [Opinion of the Supreme People’s Court, Regarding the Next Step Towards Litigation Development According to Socialist Principals and Harmonious Society], para. 2 (Sup. People’s Ct. 2007), http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=91949.

⁶⁵ *See generally* THE POLITICS OF LAW AND STABILITY IN CHINA (Sue Trevaskes et al. eds., 2014).

⁶⁶ Guanyu Jin Yi Bu Fahui Susong Tiaojie Zai Goujian Shehui Zhuyi Hexie Shehui Zhong Jiji Zuoyong de Ruogan Yijian (关于进一步发挥诉讼调解在构建社会主义和谐社会中积极作用的若干意见) [Several Opinions on Further enhancing the Positive Effect of Court-Directed Mediation in the Construction of a Harmonious Socialist Society], SUP. PEOPLE’S CT. GAZ., at 25 (Sup. People’s Ct. 2007).

⁶⁷ Notice, Supreme People’s Court, Zuigao Renmin Fayuan Guanyu Infa 《Renmin Fayuan Desangge Wunian Gaige Mouyi (2009-2013)》 de Tongzhi [Qianxing Youxiao] (最高人民法院关于印发《人民法院第三个五年改革纲要 (2009–2013)》的通知 [现行有效]) [Notice of the Supreme People’s Court on Issuing the Third Five-Year Reform Outline for the People’s Courts (2009–2013)], <http://en.pkulaw.cn/display.aspx?cgid=114912&lib=law>; *see also* RENMIN FAYUAN DI SAN GE WU NIAN GAIGE GANYAO (2009–2013) (人民法院第三个五年改革纲要) [THIRD FIVE-YEAR REFORM PLAN FOR THE PEOPLE’S COURTS (2009–2013)] (promulgated by the Sup. People’s Ct., Mar. 17, 2009, effective March 17, 2009), http://www.chinacourt.org/flwk/show/php?file_id=134421.

⁶⁸ PETER C.H. CHAN, MEDIATION IN CONTEMPORARY CHINESE CIVIL JUSTICE: A PROCEDURALIST DIACHRONIC PERSPECTIVE 113 (Leiden et al. eds., 2017).

incidents” and a 47.3% decline in grievances filed through the petition (*xinfang*) system.⁶⁹ That same year, the Chinese government moved to stream-line mediation procedures and, on August 28, 2010, the National People’s Congress Standing Committee passed the first People’s Mediation Law (“PML”), effective on January 1, 2011.⁷⁰ In presenting the draft law for approval in June, Minister of Justice Wu Aiyong told the Standing Committee that “[m]ediation should be the first line of defense to maintain social stability and promote harmony.”⁷¹

For disputes that did turn into litigation, Chinese judges resumed their active role in case management, particularly for collective action cases that had the potential to turn into disorder. Group litigation was discouraged and, if filed, was disaggregated into individual lawsuits. The idea was to keep a close eye on potential sources of local unrest by monitoring these lawsuits and preventing them from developing into full-blown social conflicts. Accordingly, civil procedure rules were also amended in 2012 to reflect this strategy of diverting civil cases through a system of multi-tracking, mediation, and disaggregation.

By the time of its Fourth Judicial Reform Plan (2014–2019), the Supreme People’s Court identified the completion of “Diversified Dispute Resolution” as one of the major aims of the reform.⁷² Under diversified dispute resolution, courts are expected to segregate different tracks for different kinds of cases with a renewed emphasis on mediation.⁷³ Judges

⁶⁹ Pei Zhiyong, *He wei gui diao wei xian sichuan quanmian goujian “da tiaojie” gongzuo tixi* [Harmony Valued, Mediation First—Sichuan Completes Building of “Great Mediation” Work System], PEOPLE’S DAILY, Mar. 23, 2010.

⁷⁰ PEOPLE’S MEDIATION LAW OF THE PEOPLE’S REPUBLIC OF CHINA (promulgated by Standing Committee of the National People’s Congress, Aug. 28, 2010, effective Jan. 01, 2011), [http://www.cspil.org/Uploadfiles/attachment/Laws%20and%20Regulations/\[en\]guojifalvwenjian/PeoplesMediationLawofthePeoplesRepublicofChina.pdf](http://www.cspil.org/Uploadfiles/attachment/Laws%20and%20Regulations/[en]guojifalvwenjian/PeoplesMediationLawofthePeoplesRepublicofChina.pdf).

⁷¹ Zhu Zhe & Lan Tian, *Mediation Draft Law Could Ease Tension*, CHINA DAILY, June 23, 2010, http://www.chinadaily.com.cn/china/2010-06/23/content_10005555.htm.

⁷² Memorandum, Supreme People’s Court, Guan Yu Ren Min Fa Yuan Jin Yi Bus Hen Hua Duo Yuan Hua Jiu Fen Jie Jue Ji Zhi Gai Ge Di Yi Jian (关于人民法院进一步深化多元化纠纷解决机制改革的意见) [Concerning the People’s Courts More Deeply Reforming the Diversified Dispute Resolution Mechanism] (June 29, 2016), <http://www.court.gov.cn/fabu-xiangqing-22742.html>.

⁷³ *Id.* (The SPC stated that it will “[c]ontinue to promote mediation, arbitration, administrative rulings, administrative reconsideration or other dispute settlement mechanisms with an organic link to litigation, mutually coordinate and guide parties to choose an appropriate dispute resolution. Promote the establishment of dispute mechanisms that are industry-specific and specialized in the areas of land requisition and property condemnation, environmental protection, labor protection, health care, traffic accidents, property management, insurance and other areas of dispute, dispute resolution professional organizations, promote the improvement of the arbitration systems and administrative ruling systems.”).

must, in the early stages of litigation, assess and track the case in one of the following four ways—if the case has little or no factual disputes (such as in debt collection), an expedited procedure (*du cu cheng xu*, 督促程序, translated loosely as “supervising procedure”) is to be used; mediation is to be used if the litigants’ dispute is more substantial, but believed to be capable of settlement; otherwise, courts are expected to use simplified procedure (*jian yi cheng xu*, 简易程序) or ordinary procedure (*pu tong cheng xu*, 普通程序), according to the needs of the case; and trial procedure (*kai ting sheng li*, 开庭审理) should be used for a case that requires litigants to exchange evidence to clarify the points of dispute.⁷⁴

Undeniably, these numerous court reforms were motivated by a desire to efficiently handle the workload faced by any overburdened court system. According to the Supreme People’s Court, the number of court cases rose by at least 25% between 2005 and 2009, but the total number of judges (190,000) remained almost the same.⁷⁵ By 2009, civil cases made up 86% of the total cases handled by the courts, compared to 12% for criminal cases.⁷⁶ According to at least one observer, recent reforms are a reflection of an “institutional pragmatism” on the part of Chinese courts to protect their own institutional power by enhancing efficiency.⁷⁷ Many of the court reform proposals can be said to meet any judicial system’s goals of uniformity and efficiency. Yet, the reform methods chosen by SPC were heavily flavored by the national policy as identified by the Party at the time. Although, as Malcolm Feeley suggests, incremental changes by the courts themselves must be encouraged, one additional factor that has to be taken into consideration is the role of courts and civil justice in nation and state building. Particularly for top-down regimes such as China, any reform must be consistent with the national goals defined by the CCP, and in this instance, that goal was creating a harmonious society.

IV. THE CHINESE DREAM

⁷⁴ CHINA CIV. P. LAW OF 1991 art. 133.

⁷⁵ Huazhong Wang & Jingqiong Wang, *Courts Hit by Rising Number of Lawsuits*, CHINA DAILY, July 14, 2010, http://www.chinadaily.com.cn/china/2010-07/14/content_10102630.htm.

⁷⁶ KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION MAKING IN CHINA* 176 (Cambridge Uni. Press 2017).

⁷⁷ See generally Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People’s Court of China*, 25 COLUM. J. ASIAN L. 1 (2012).

Most recently, China has advanced yet another national goal: the “Chinese Dream.” Just after becoming the General Secretary of the Communist Party of China in late 2012, Xi Jinping announced what would become the hallmark of his administration—that is, the pursuit of “the Chinese Dream.”⁷⁸ The Chinese Dream, according to Xi, is “the great rejuvenation of the Chinese nation.” Chinese citizens, President Xi urged, should “dare to dream, work assiduously to fulfill the dreams and contribute to the revitalization of the nation.”⁷⁹ The goal is less about individual fulfillment or convergence towards a universal community, and more about Chinese prosperity, national glory, and the collective effort towards that goal. This inward turn has led to greater “internal repression, external truculence, and a seeming indifference to the partnership part of the United States-China relationship.”⁸⁰ It is an inward turn towards nationalism, an appeal to patriotism, and efforts to re-centralize.

Indeed, the “Chinese Dream” means pulling together as a nation, but it is also an inward turn for reformers and citizens. Party leaders have cautioned against borrowing institutions wholesale from abroad, focusing instead on centralizing and securing China’s increasingly fragmented interests.⁸¹ On October 23, 2014, the 4th Plenum of the 18th Central Committee of the Chinese Communist Party issued its decision concerning “Comprehensively Promoting Governing the Country According to Law.”⁸² While this is not the first time the CCP inserted law in its programmatic proposals,⁸³ this is the first

⁷⁸ Rogier Creemers, *The Chinese Dream Infuses Socialism with Chinese Characteristics with New Energy*, CHINA COPYRIGHT & MEDIA, May 6, 2013, <https://chinacopyrightandmedia.wordpress.com/2013/05/06/the-chinese-dream-infuses-socialism-with-chinese-characteristics-with-new-energy/>.

⁷⁹ Xi urges youths to contribute to “Chinese Dream,” CHINA DAILY, May 4, 2013, http://europe.chinadaily.com.cn/china/2013-05/04/content_16476315.htm.

⁸⁰ James Fallows, *China’s Great Leap Backward*, ATLANTIC, Dec. 2016, <https://www.theatlantic.com/magazine/archive/2016/12/chinas-great-leap-backward/505817/>. In that same article, Asia Society’s Orville Schell stated, “In my lifetime I did not imagine I would see the day when China regressed back closer to its Maoist roots. I am fearing that now.”

⁸¹ See Chris Buckley, *Xi Jinping Assuming New Status as China’s “Core” Leader*, N.Y. TIMES, Feb. 4, 2016, <https://www.nytimes.com/2016/02/05/world/asia/china-president-xi-jinping-core.html?mcubz=0> (according to Xinhua, the state run news agency, a meeting of the Politburo, a council of the Party’s twenty-five most senior cadres reached the conclusion that the key to strengthening party leadership is maintaining the centralized and unified leadership of the party center,” and urged officials to support a “staunch leadership core.”).

⁸² An English translation of the Fourth Plenum Decision is available at <http://chinacopyrightandmedia.wordpress.com/2014/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/> [hereinafter Plenum Decision].

⁸³ Since the 11th Party Congress, China has recognized the need for law in a market economy and in 1999, China acknowledged incorporated the words “rule the country according to law, establish a socialist rule of law state” into its constitution.

time a CCP central committee devoted an entire plenary session decision solely to the topic of law. More importantly, the Plenum Decision unequivocally reaffirmed the centralizing primacy of the Party and the national government as the initiator of law.⁸⁴

Containing both symbolic messages and concrete proposals, the Plenum Decision unapologetically outlined the dominance of China as a developmental state and the role of the Chinese Communist Party within it.⁸⁵ Having studied foreign models in other countries for the last thirty years, a more powerful and assertive China is now emphasizing that it will follow its own development path to legal reforms and “will not indiscriminately copy foreign rule of law concepts and models.” China, under the leadership of the CCP, will be the one to define what is meant by “socialist rule of law with Chinese characteristics.”

Chief Justice Zhou, the head of the Supreme People’s Court in Beijing, in a recent statement to legal officials, declared, “[w]e should resolutely resist erroneous influence from the West: ‘constitutional democracy,’ ‘separation of powers’ and ‘independence of the judiciary.’” Chief Justice Zhou, a moderate reformer who has strived to professionalize the Chinese judiciary in recent years, has bowed to the strict political climate that Xi Jinping has established in China in response to rising domestic instability.⁸⁶

The “Chinese Dream” has resulted in greater constraints on civil society, such as stamping out support for an independent press, sharply limiting speech on the internet, and urging the reduction of “foreign” influences on “socialist law with Chinese characteristics.”⁸⁷

How much of this inward turn filters down to the individual judge level is certainly subject to speculation, as some judges may still continue to interact with foreign courts and reference (although never cite to) foreign court decisions.⁸⁸ But the admonition is a reminder that “socialist law with

⁸⁴ See Plenum Decision, *supra* note 82.

⁸⁵ See *id.*

⁸⁶ Michael Forsythe, *China’s Chief Judge Rejects Judicial Independence and Legal Reformers Wince*, N.Y. Times, Jan. 18, 2017, <https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html>.

⁸⁷ *Id.*

⁸⁸ Memorandum, Supreme People’s Court, *Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zhizuo Falu Wenshu Ruhe Yinyong Falu Guifanxing Wenjian de Pifu* (最高人民法院关于人民法院制作法律文

Chinese characteristics”⁸⁹ encompasses the leadership of the Chinese Communist Party and, specifically, the Central Committee of the CCP. Operationally, the Plenum Decision openly acknowledges, “in all cases where legislation involves adjustment to major structures or major policies, it must be reported to the Party Central Committee for discussion and decision.”⁹⁰ While it is common knowledge that most legislation must be approved by the Party leadership, this is the first time that the Party openly acknowledged and affirmed concretely its role in China’s governance and the making of laws. Further, the Plenum Decision explicitly emphasizes the dual structure of the Party-state constitutional order. China will govern according to law (依法治国), but the Party will be governed according to its own internal regulations (依规治党).⁹¹ According to the Plenum Decision, Party discipline can be more stringent than law.⁹²

Several major reforms reflect this most recent focus in developing a Chinese version of rule of law that would be consistent with today’s “Chinese Dream” ideal and its language of nationalism. While some of these reform efforts have roots from before the “Chinese Dream,” they have more recently moved front and center, to not only improve uniformity and access in the civil justice system, but to attempt to re-centralize control. Indeed, consistent with today’s tone, these measures all seek to recentralize the court system and redirect authority back to the central state. These include efforts to centralize

书如何引用法律规范性文件的批复) [The SPC Reply on How People’s Courts Should Cite Regulatory Legal Documents in Making Court Documents] (Oct. 28, 1986), http://www.law-lib.com/Law/law_view.asp?id=3936. Officially, neither case law nor foreign law is allowed to be cited in Chinese domestic judgments. *See also* Fa Shi [2009] No. 14 (July 13, 2009), http://www.court.gov.cn/qwfb/sfjs/201002/t20100210_1065.htm. The SPC also formally enacted The Provisions on Citation to Regulatory Legal Documents Including Laws and Regulations in Court Decisions (effective November 4, 2009), which specified the sources of law that are allowed to be cited in court decisions as: laws and legal interpretations, administrative regulations, local regulations, autonomous regulations, separate regulations, and judicial interpretation. *See also* Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT’L L.J. 33, 104 (2006) (In practice, when encountering new or difficult legal questions, lower court judges often consult with higher courts for instruction. In the early 2000s, scholars noted some borrowing of legal concepts as in the defamation area).

⁸⁹ *See* Plenum Decision, *supra* note 82.

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² However, to ensure that leaders in all sectors take law seriously, the Plenum Decision anticipates that law indicators be written into annual cadre performance evaluations. The Plenum Decision also promises a more rule-based order for the Party—party rules will be strengthened and while party institutions, such as political legal committees and party cells in the courts, will continue, their roles, authority, and duties will be clarified. Interestingly, Party internal rules are highly formal and structured, and some even contain aspects of due process protection (“shuang gui” hearing). Xinhua reported on a two-year old campaign within the Party system (中央 公厅法规局) to clean up (qingli), or old/conflicting Party rules and regulations.

funding of the courts,⁹³ develop a uniform case guidance system, and create inter-regional courts that hear inter-provincial disputes. Again, while each of these reforms can be said to be necessary for any legal system to ensure uniformity and consistency, the features, constraints, and timing of each measure are unique to China and dominated by the goals of centralization and nationalization.

First, as noted earlier, China's major developmental strides since the late 1970s have been the result of a strategy of decentralization of finances.⁹⁴ Under the policy of "eating in different kitchens," local governments have been required to cover their own costs with their own revenues.⁹⁵ Because court funding is derived mainly from the budget of the government at the same administrative hierarchal level,⁹⁶ court budgets have varied greatly, leaving courts in less developed regions with budgets that fail to meet minimal normal operational expenses.⁹⁷ Where funding has been scarce, many courts have resorted to extra-budgetary funding collected from litigation fees and judicial fines imposed on litigants. Since local courts are financially beholden to local governments, local party bosses have also controlled judicial appointments, judicial salaries, and promotions, and as a result they have often influenced the work of the courts.⁹⁸

Insufficient court funding has induced judges to engage in "profit making" activities, such as collecting arbitrary litigation fees and selecting high fee cases; but more concerning to the central government, local funding has made courts more susceptible to pressure from local government than to central government commands. Thus, in 2017, in the latest White Paper on Judicial Reform of Chinese Courts, the central government identified "promoting centralized management of personnel, financial and material resources of local courts below provincial level" as one of the major reforms needed.⁹⁹ The White Paper proposes that management of local courts below the provincial level be taken away from commission departments at the

⁹³ Xin He, *Court Finance and Court Responses to Judicial Reforms: A Tale of Two Chinese Courts*, 31 L. & POL'Y 463 (2009).

⁹⁴ Shen et al., *supra* note 48, at 1–5.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ He, *supra* note 93.

⁹⁸ See *Judicial Independence in the PRC*, *supra* note 49.

⁹⁹ *China Issues White Paper on Judicial Reform of Chinese Courts*, CHINA DAILY, Feb. 27, 2017, http://www.chinadaily.com.cn/china/2017-02/27/content_28361584.htm [hereinafter *China Issues White Paper*].

municipal or county level and placed with the provincial commission department with the assistance of the higher people's court in that region.¹⁰⁰

Towards this goal, a centralized funding management system has also been explored in which funding for local courts in some provinces, autonomous regions, and municipalities directly under the central government is allocated in the central government budget and managed by provincial level financial departments.¹⁰¹ These proposed measures would centralize funding,¹⁰² which in theory would reduce local courts' financial dependence on local government. Interestingly, while this might free local courts from local government influence, it might also increase the power of the SPC and provincial high courts who are poised to play a much bigger role in budget preparation.

Second, there is now an immediate task to unify and set uniform legal outcomes through a case guidance system, established centrally by the SPC. As noted earlier, the Chinese legal system is at its base a blend of Maoist-socialist legal thought overlaid on top of a civil law system. As in other civil law systems, Chinese legislation remains supreme, and unlike the common law system, judges are said to apply, not make, the law. Yet absent a precedent system, this has meant that lower courts may have greater leeway in interpreting legislation and adjudicating cases. While individual judges are circumscribed by a "collegiate panel" of judges and often supervised internally by the adjudication committee, each court may nevertheless rule in ways inconsistent with other lower courts and inconsistent with the intent of the central government.¹⁰³ A case guidance system, much like the precedent system within common law systems, would allow the Supreme People's Court to unify and "rein in" lower provincial courts, not only through the time-consuming process of individual appeals, but also through more systematic

¹⁰⁰ *See id.*

¹⁰¹ *See id.* See also *Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform Regulates "Unify the Management of Personnel and Budgets of Courts and Procuratorates Below the Provincial Level,"* XINHUA, http://news.xinhuanet.com/politics/2013-11/15/c_118164235.htm.

¹⁰² *See China Issues White Paper, supra* note 99.

¹⁰³ Another experiment in combating inconsistent judgments and local protectionism is the introduction of cameras in the Chinese courtroom. See Jerome Cohen & David Wertime, *A Crack of Daylight Enters Chinese Court Proceedings*, FOREIGN POL'Y (Oct. 12, 2016), <http://foreignpolicy.com/2016/10/12/a-crack-of-daylight-enters-chinese-court-proceedings-live-streaming-transparency-reform-doubts/>.

methods such as interpretations and circulars, with publications of important cases.¹⁰⁴

The idea of “case law,” while not binding, has long existed within the Chinese legal tradition, from the dynastic period to the Republican period (1912–1949). Legal cases were compiled to aid imperial magistrates in their adjudication of cases.¹⁰⁵ With the reestablishment of the legal system in post-Mao China, in 1985, the Supreme People’s Court began its now-established practice of publishing “typical cases” (*dianxin anli*) in its official publication, the Gazette of the Supreme People’s Court. This work continued in 1999 when the SPC called for “diligence” in pursuing a system of case guidance.¹⁰⁶ In 2004, the SPC added a new section to publish cases in the Gazette that contained legal rules abstracted from each case.¹⁰⁷ But it was not until 2005 that the Second Five Year Reform Plan listed constructing a guiding cases system as a policy objective for the Court.¹⁰⁸

Chinese legal scholars have debated the merits of adopting a precedent system like the Anglo-American system.¹⁰⁹ Chinese judges are said to apply law, but not to make it as judges do under the common law precedent system. The role of the Supreme People’s Court, meanwhile, is to supervise and guide the lower courts, not to make new law.¹¹⁰ Thus, the call is for the creation of “guiding,” not binding, cases.¹¹¹ It is significant that it was not until 2010 that the present framework of the “case guidance system” gathered momentum and took shape. During that year, the SPC’s Adjudication Committee issued the Provisions of the Supreme People’s Court Concerning Work on Case Guidance (“Provisions”),¹¹² and later in 2015, clarifying regulations

¹⁰⁴ Susan Finder, *China’s Evolving Case Law System in Practice*, 9 TSINGHUA CHINA L. REV. 245 (2017).

¹⁰⁵ See generally DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (1967); Brian E. McKnight, *From Statute to Precedent: An Introduction to Sung Law and Its Transformation*, in *LAW AND THE STATE IN TRADITIONAL EAST ASIA* 111 (Brian E. McKnight ed., 1987).

¹⁰⁶ See Zhang, *supra* note 77, at 43–47.

¹⁰⁷ For an excellent historical discussion of the development of the case precedent system, see Note, *Chinese Common Law? Guiding Cases and Judicial Reform*, 120 HARV. L. REV. 2213 (2016).

¹⁰⁸ See SECOND FIVE-YEAR COURT REFORM PLAN OF THE PEOPLE’S COURT (2004–2008), *supra* note 38.

¹⁰⁹ See Zhang, *supra* note 77, at 44.

¹¹⁰ FAYUAN ZUZHI FA (法院组织法) [ORGANIC LAW OF THE PEOPLE’S COURTS] art. 16 (as amended by the Standing Comm. Nat’l People’s Cong., Oct. 31, 2006).

¹¹¹ See Zhang, *supra* note 77, at 45–46.

¹¹² ZUIGAO RENMIN FAYUAN GUANYU ANLI ZHIDAO GONGZUO DE GUIDING (最高人民法院关于案例指导工作的规定) [PROVISIONS OF THE SUPREME PEOPLE’S COURT CONCERNING WORK ON CASE GUIDANCE] (promulgated by the Adjudication Comm. of the Sup. People’s Ct., Nov. 15, 2010, issued Nov. 26, 2010), translated in STANFORD LAW SCH. CHINA GUIDING CASES PROJECT, English Guiding Case Rules

(“Rules”).¹¹³ From 2011, when the SPC first published guiding cases, until 2017, the SPC has issued close to eighty-seven decisions¹¹⁴ that courts “at all levels should refer to . . . when adjudicating similar cases.”¹¹⁵ These cases serve to fill in holes in legislation and prior judicial interpretations. Yet, under the Chinese case guidance system, the Supreme People’s Court issues cases as guidance which are *de facto*, if not *de jure*, binding on lower courts.¹¹⁶

Guiding cases are uploaded to a centralized website run by the Supreme People’s Court and are meant to educate and guide lower courts on how to handle particular points of law. Along with model cases issued by the SPC, lower courts also began posting selected represented cases online.¹¹⁷ In 2009, under the leadership of Wang Shengjun, president of the SPC, the SPC itself made a big push to increase judicial transparency in its Third Five Year Court Reform Plan by placing a large number of court decisions online.¹¹⁸ As of June 2017, close to 29 million lower court cases have been posted.¹¹⁹ While the primary motive for putting lower court cases online appears to be a desire to curb wrongdoings in the lower courts through greater transparency, the establishment of a SPC case guidance system, by contrast, can centralize and

(2015), available at <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/08/guiding-cases-rules-20101126-english.pdf>; Beida Falü Xinxī Wang (北大法律信息网) [CHINA LAW INFO], http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=143870.

¹¹³ ZUIGAO RENMIN FAYUAN GUANYU ANLI ZHIDAO GONGZUO DE GUIDING SHISHI XIZE (最高人民法院关于案例指导工作的规定实施细则) [DETAILED RULES FOR THE IMPLEMENTATION OF THE PROVISIONS OF THE SUPREME PEOPLE’S COURT CONCERNING WORK ON CASE GUIDANCE] (promulgated by the Adjudication Comm. of the Sup. People’s Ct., Apr. 27, 2015, issued May 13, 2015), translated in STANFORD LAW SCH. CHINA GUIDING CASES PROJECT, English Guiding Case Rules (2015), available at <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/10/guiding-cases-rules-20150513-english.pdf>, <http://perma.cc/5CQ2-955H> [hereinafter RULES]; Beida Falü Xinxī Wang (北大法律信息网) [CHINA LAW INFO], <http://en.pkulaw.cn/display.aspx?cgid=249447&lib=law>, <http://perma.cc/235V-CYJ9>.

¹¹⁴ Laney Zhang, *China: Supreme Court Issues Ten More Guiding Cases*, GLOBAL LEGAL MONITOR (Apr. 5, 2017), <http://www.loc.gov/law/foreign-news/article/china-supreme-peoples-court-issues-ten-more-guiding-cases/>.

¹¹⁵ See RULES, *supra* note 113, art. 7.

¹¹⁶ Zhang Jing, *Five-Year Review of China’s Case Guidance System*, ZCHINR (2016), <http://www.zchinr.de/index.php/zchinr/article/viewFile/1712/1736>; see also Note, *supra* note 107.

¹¹⁷ For a good analysis of this mass digitization of Chinese court decisions, see Benjamin L. Liebman et al., *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 21st Century China Center Research Paper No. 2017-01, U.C. SAN DIEGO SCH. OF GLOBAL POL’Y & STRATEGY, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985861##.

¹¹⁸ SUPREME PEOPLE’S COURT, RENMIN FAYUAN DISANGE WUNIAN GAIGE GANGYAO (2009–2013) [THIRD FIVE-YEAR REFORM OUTLINE FOR THE PEOPLE’S COURTS (2009–2013)], <https://perma.cc/MBX4-V2XX>.

¹¹⁹ The SPC website provides a real-time calculation of the total number of documents. See <http://wenshu.court.gov.cn/>. For a good analysis of this mass digitization of Chinese court decisions, see Liebman, *supra* note 117.

funnel authority back to the central SPC, even as it improves uniformity and potentially the quality of court decisions across China.¹²⁰

Finally, along with the centralizing function of the SPC's guiding cases, the SPC also recently inserted its own physical presence in the provinces in the form of circuit courts. In 2014, the Central Committee Fourth Plenum decision announced the establishment of circuit courts as branches of the Supreme People's Court to hear inter-regional cases.¹²¹ In its Fourth Plenum Decision, the CCP Central Committee mandated that "the Supreme People's Court shall set up circuit courts to handle important and complicated administrative, civil and commercial cases of diversity jurisdiction."¹²² These circuit courts are said to have been launched on a trial basis, but interestingly, the creation of these courts was accomplished by Xi Jinping and the Central Committee, rather than through amendments of the Constitution or changes to the Organic Law of People's Court.¹²³ This is a bold move since the establishment of these new inter-regional courts could serve to federalize provincial courts without making legislative changes.

Two reasons were given for the establishment of the circuit courts: to bring the SPC closer to the lower level areas and to make it easier for litigants to bring uniformity to the legal system.¹²⁴ The Fourth Plenum Decision states, "[b]y moving down the office of the Supreme People's Court and solving disputes at locality, it may provide convenience to the parties in lawsuits, and may also allow the Supreme People's Court to focus on the formulation of judicial policies and judicial interpretations, as well as on the trying of cases which are of significant guidance for the unification of laws."¹²⁵

Certainly, the creation of the circuit courts was in response to increased social instability and public dissatisfaction with the legal system, as well as concerns about the large number of angry petitioners coming to the SPC's Beijing office. But more significantly, the creation of the circuit courts took

¹²⁰ For an analysis of how a court's appeal process and, in turn, the resulting decisions, centralizes authority, see MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 39 (1986).

¹²¹ See Plenum Decision, *supra* note 82.

¹²² PEOPLE'S DAILY, http://paper.people.com.cn/rmrb/html/2014-10/29/nw.D110000renmrb_20141029_2-01.htm (last visited Feb. 22, 2016).

¹²³ Cao Yin, *Four Circuit Courts Will Be Added*, CHINA DAILY, Nov. 12, 2016, http://www.chinadaily.com.cn/china/////////2016-11/02/content_27246026.htm.

¹²⁴ Plenum Decision, *supra* note 82.

¹²⁵ *Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform* (CHINA.ORG.CN), Jan. 16, 2014, http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm.

fruition at a time when the Central Committee wanted to reassert central control and curb local interference by bringing the center closer to the localities. According to the Party's own documents, the Third Session of the Eighteenth CCPCC was focused on professionalizing the judiciary, managing courts and prosecutors unified by province level, and separating judicial jurisdiction from administrative jurisdiction.¹²⁶ The Fourth Plenum, however, focused on lowering the center of gravity of judicial work, to have more disputes resolved locally and conveniently, and letting the SPC headquarters in Beijing concentrate on unification of the application of law.¹²⁷ These circuit courts, as an arm of the Supreme People's Court, do just that—bring central authority down to resolve disputes locally and funnel information back to Beijing.

Indeed, one of the stated goals for these circuit courts is to reduce interference from local governments. As a cross-provincial court, the circuit court removes inter-jurisdictional cases from local courts which might be subject to pressures of “local protectionism.”¹²⁸ As divisions of the Supreme People's Court, meanwhile, decisions from these newly created circuit courts have the authority of the Supreme People's Court. As a part of the Supreme People's Court, these circuit courts are powerful enough that provincial governments cannot intervene in their verdicts. Moreover, by having these courts hear cases involving national interests, Beijing can be more assured that the results will be consistent with what it dictates. The central control gained by these circuit courts will both eliminate local bias and ensure greater consistency. Establishing such courts then helps to reduce power at the local level and consolidates it in the hands of central authorities—an effort which is also crucial for seeing through the implementation of economic restructuring.

At the same time, these circuit courts can also divert some of the unrest back to the provinces by funneling disputes, lawsuits, and petitions to the provinces, while all the while collecting information on particular issues for consideration at SPC headquarters in Beijing. They will also serve as a platform for judicial reform measures on a trial basis before launching those measures throughout the entire court system. It is the hope of the Beijing government that these circuit courts reassert central control, provide uniformity, and tangibly represent national authority in the localities.

¹²⁶ See *China Issues White Paper*, *supra* note 99.

¹²⁷ *Id.*

¹²⁸ *Id.*

Accordingly, creation of the circuit courts was carried out with lightning speed.

On December 2, 2014, the Central Leading Group for Comprehensively Deepening Reforms deliberated and passed the Pilot Plan for the Supreme People's Court to set up circuit courts. On December 28, 2014, the People's Congress appointed the first president and vice president of the First Circuit and the Second Circuit.¹²⁹ In January 2015, the Adjudication Committee of the Supreme People's Court quickly issued Regulations of the Supreme People's Court on Several Issues Concerning the Case Trial of Circuit Courts, which stipulate, "the circuit courts are the permanent judiciary organs dispatched by the Supreme People's Court. The verdicts, rulings and decisions made by the circuit courts are verdicts, rulings and decisions of the Supreme People's Court."¹³⁰ Each of these courts is empowered to hear major administrative cases, and civil and commercial cross-jurisdictional cases, as well as petitions within their circuit areas.¹³¹

By the end of January 2015, two such courts were already in operation: the No. 1 Circuit Court in Shenzhen, Guangdong Province, with Guangdong Province, Guangxi Autonomous Region, Hainan Province, and Henan (added in 2016) in its circuit area, and the No. 2 Circuit Court in Shenyang, Liaoning Province, with Liaoning Province, Jilin Province, and Heilongjiang Province in its circuit area.¹³² Four additional courts were added by the end of 2016: the No. 3 Circuit Court in Nanjing whose circuit covers Jiangsu, Shanghai, Zhejiang, Fujian, and Jiangxi; the No. 4 Circuit Court in Zhenzhou whose circuit covers Henan, Shanxi, Anhui, and Hubei;¹³³ the No. 5 Circuit Court in Chongqing whose circuit covers Chongqing, Sichuan, Guizhou, Yunan, and Tibet; and the No. 6 Circuit Court in Xi'an, whose circuit covers Shaanxi, Gansu, Qinghai, Ningxi, and Xinjiang.¹³⁴

¹²⁹ *China's First Circuit Court Established in Shenzhen*, CHINA DAILY, Jan. 28, 2015, https://www.chinadaily.com.cn/china/2015-01/28/content_19432673.htm.

¹³⁰ *SPC Provisions on Circuit Court Divisions*, CHINA LAW TRANSLATE (Jan. 29, 2015), <http://chinalawtranslate.com/spccircuitcourts/?lang=en>.

¹³¹ *Id.*

¹³² *China's First Circuit Court Established in Shenzhen*, *supra* note 129.

¹³³ *Zuigao Fa Disan Disi Xunhui Fating Jiepai, Kaishi Zhengshi Bangong* (最高法院第三第四巡回法庭揭牌 开始正式办公) [*SPC 3rd and 4th Circuit Courts Launched, Started Formal Operations*], XINHUA, Dec. 29, 2016, http://news.xinhuanet.com/legal/2016-12/29/c_1120215004.htm.

¹³⁴ *Zuigao Renmin Fayuan Diwu Diliu Xunhui Fating Jiepai Bangong* (最高人民法院第五第六巡回法庭揭牌办公) [*SPC 5th and 6th Circuit Courts Launched and Started Operations*], XINHUA, http://news.xinhuanet.com/legal/2016-12/30/c_1120219231.htm.

These circuit courts are responsible for adjudicating major administrative cases and trans-regional civil and commercial cases. As the standing local judicial organs dispatched by the Supreme People's Court, the judgments, rulings, and decisions made by these circuit courts have the same effect as those made by the Supreme People's Court.¹³⁵ As of December 31, 2016, the No. 1 and No. 2 Circuit Courts had accepted 4622 cases, concluded 4534 cases, and received 73,000 visitors in total.¹³⁶ Additionally, these two courts have become the “experimental units” and “pacesetters” of some of the judicial reforms conducted by the Supreme People's Court.¹³⁷ Finally, these circuit courts have held meetings with local courts and serve to “guide” judicial work apart from hearing the cases themselves.¹³⁸

China has created more experimental courts, including courts specifically directed to administrate cases against local governments. For example, two trans-district courts were created as part of a pilot program to resolve administrative cases across city districts. In December 2014, the Beijing No. 4 Intermediate People's Court and Shanghai No. 3 Intermediate People's Court were given the responsibility of adjudicating major civil, commercial, administrative, environmental and resource protection, food and drug safety, and certain criminal cases that cross the cities' different districts. The Beijing No. 4 Intermediate Court reported that it accepted 2,893 administrative disputes in 2016, twice the amount it accepted in 2015—an increase attributable to the Court's strict adherence to accepting appeals immediately after registration rather than first subjecting them to an initial court review.¹³⁹

This experiment was extended to the provincial level in June 2015, when the SPC promulgated opinions on trans-regional centralized jurisdiction over administrative cases. These opinions instructed certain higher people's courts to, according to respective local conditions, designate some courts to exercise jurisdiction over trans-regional administrative cases, to integrate resources of administrative adjudication, and to improve the judicial environment for administrative adjudication.¹⁴⁰ Higher people's courts such as in Fujian, Shandong, Henan, and Guangdong, have assigned jurisdiction

¹³⁵ *SPC Provisions on Circuit Court Division*, *supra* note 130.

¹³⁶ *See China Issues White Paper*, *supra* note 99.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Cao Yin, *Beijing Court Claims Problems with Administrative Disputes Solved*, CHINA DAILY, Apr. 27, 2017, http://www.chinadaily.com.cn/china/2017-04/27/content_29110989.htm.

¹⁴⁰ *See China Issues White Paper*, *supra* note 99.

over certain administrative cases of first instance to certain designated intermediate people's courts that differ from the courts that typically have jurisdiction over such cases (usually the administrative organ where the defendant is located).¹⁴¹

As the timetable above demonstrates, with a top-down system like China's, implementation of proposed reforms takes place very quickly. It only took three months to set up the proposed circuit courts, complete with the appointment of judges, law clerks, selection of the court sites, and coordination with both central and provincial governments. Planning for these courts was likely to have been undertaken long before their pronouncements, but the actual implementation did take place with astonishing speed. Yet, while the physical establishment of these courts is complete, the more difficult questions regarding their incarnation are the ones that Malcolm Feeley asks. Namely, how are such reforms to be received and will routinization take place?

Two obstacles facing circuit courts have already been identified: physical hardships and an overwhelming caseload. In their first year, the first two circuit courts accepted a combined 1774 cases, which amounts to 70 cases per judge.¹⁴² But both circuit courts also received more than 43,000 visitors, and the No. 1 Circuit Court received 2196 letters.¹⁴³ The combination of the added complexity of cross-province cases and the sheer number of petitioners has meant that many judges work overtime and on weekends. Additionally, while today's transportation options render traveling less physically strenuous and the Internet and cell phones have made communication more accessible, many circuit court judges resent having to be away from their homes and families in Beijing for two years. Finally, the rotation system means that these circuit courts will always be manned by a group of judges who, while experienced, are nevertheless new to the locality.¹⁴⁴

¹⁴¹ *Id.*

¹⁴² See ZUIGAO RENMIN FAYUAN DI YI XUNHUI FATING JING XUAN ANLI CAIPAN SILU JIEXI (Yi) (最高人民法院第一巡回法庭精选案例裁判思路解析(一)) [AN ANALYSIS OF SELECTED CASES OF NO. 1 CIRCUIT COURT (1)] (2016).

¹⁴³ See sources cited *supra* note 3.

¹⁴⁴ Zhang Jie, *Zui Gao Ren Min Fa Yuan Xun Hui Fa Ting Di She Zhi Li Nian Yun Xing Xiao Guo Ji Wen Ti Tan* (最高人民法院巡回法庭的设置理念、运行效果及问题探析) [An Analysis of the Circuit Courts of the Supreme People's Court: Foundational Principles and Results], SUZHOU DAXUE XUEBAO ZHE XUE SHE HUI KE XUE BAN (苏州大学学报哲学社会科学版) [SUZHOU UNIV. J. PHIL. & SOC. SCI. EDITION] (2016).

While it is too early to determine whether routinization will take place, these circuit courts have already established their priorities. One of the first guidances issued by the No. 2 Circuit Court regarded setting standards in tough administrative litigation cases involving local governments. On August 4, 2017, the No. 2 Circuit Court issued a set of thirty case summaries on administrative cases selected from the many administrative cases heard in the first year and half of operation.¹⁴⁵ These cases primarily dealt with challenges to local government's demolition and land taking.¹⁴⁶ Although this document does not have any formal status, it was approved at a conference of administrative judges in Liaoning, Heilongjiang, and Jilin, and the rules it sets out are now considered highly persuasive to courts in those three provinces. The No. 1 Circuit Court, meanwhile, also recently published an explanation of twelve selected case decisions.¹⁴⁷

Circuit courts serve an important function. In addition to centralization, these courts are able to collect information at the ground level, ensure uniformity, and curb local influences. They do so both by actually adjudicating cases and issuing guidance drawn from the cases adjudicated. Additionally, these courts are important because they provide a platform on which the Supreme People's Court can try judicial reforms in an environment directly under its control. Chinese reforms are often carried out first experimentally on a smaller scale before moving to a national scale. Circuit courts and the pilot inter-district courts already serve this function. Judges staffing these courts are highly experienced, and they can issue decisions without the prior approval of court presidents. Circuit court judges are said to carry out judicial experiments that include seeking to separate the judiciary's adjudicatory functions from its administrative functions, prioritizing the role of court hearings, and applying the "case handling responsibility system," in which a single judge, rather than a collegiate panel, takes responsibility for deciding cases.¹⁴⁸

V. CONCLUSION

¹⁴⁵ Susan Finder, *#2 Circuit Court's Case Guidance on Administrative Cases*, SUPREME PEOPLE'S COURT MONITOR (Apr. 1, 2017), <https://supremepeoplescourtmonitor.com/2017/04/01/2-circuit-courts-case-guidance-on-administrative-cases/>.

¹⁴⁶ *Id.*

¹⁴⁷ See ZUIGAO RENMIN FAYUAN DI YI XUNHUI FATING JING XUAN ANLI CAIPAN SILU JIEXI (YI) (最高人民法院第一巡回法庭精选案例裁判思路解析(一)) [AN ANALYSIS OF THE THINKING IN SELECTED DECISIONS OF SPC NO. 1 CIRCUIT COURT (1)] (2016).

¹⁴⁸ This is a part of the "case handling responsibility system" reform put in place to increase responsibility of individual judges rather than reliance on a "collegiate panel," or approval by court presidents.

In 1983, Malcolm Feeley identified a number of obstacles that stand in the way of United States court reform, and his conclusions are still relevant today. The obstacles Feeley identified include the presence of diverse constituencies with different and often conflicting expectations of the system, unattainable objectives, and the reality that courts lack a central authority or unified value system. In the context of China, the first two of these obstacles have been clearly present, but China represented the flip side of United States judicial reform problems in two other respects. Rather than lacking in central authority or a unified value system, China's judicial reforms have faced the same problem as all centralized regimes: the problem of governing responsively despite changing political winds.

Indeed, as in the United States, expectations for Chinese courts are diverse and at times conflicting. For example, while Chinese courts themselves may be more concerned with efficiency and workload, the Chinese central government may be more concerned with promoting social stability. Chinese reformers also face unrealistic expectations for Chinese courts. Chinese courts are expected to simultaneously promote economic development, rein in local officials and provide equal individualized justice, while at the same time promoting social stability, securing centralization, and easing pressures on Beijing. Such high expectations have led to a period of "informed disenchantment" with the Chinese courts.

Unlike the United States, however, China is a planned, top-down polity with a national identity, and Chinese courts are expected to promote national goals. Within a top-down regime, planned change, once mandated, can occur. In China, judicial reform plans originate under the Central Committee Leading Group on Judicial Reform. Once accepted by the Politburo of the CPC, these preliminary opinions serve as a foundation for multi-year plans prepared by the various leading groups on judicial reforms established with the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice.¹⁴⁹ Accordingly, the problem facing China is less that of a diffuse polity, but rather one that is highly centralized, with each legal institution undertaking institutional reforms under the guidance and coordination of the Central Committee Leading Group on Judicial Reforms.¹⁵⁰

¹⁴⁹ *Zhong Yang Si Fa Ti Zhi Gai Ge Ling Dao Xiao Zu Jie Xi* (中央司法体制改革领导小组解析) [An Analysis of the Central Committee Leading Group on Judicial Reform], CAIXIN (Jan. 16, 2014), <http://china.caixin.com/2014-01-16/100629902.html>.

¹⁵⁰ JIANFU CHEN, *CHINESE LAW: CONTEXT AND TRANSFORMATION* 1008 (3rd ed. 2014).

As a result, Chinese reforms can both take too long and occur too quickly. If not accepted by the Politburo of the CPC, needed change may happen very slowly or not at all. If change does take place, it will always be subject to a regime change, political whim, and the next set of national goals. Feeley's proposed solution for United States court reform was to adopt a problem-oriented "rights strategy": letting the courts themselves solve specific problems placed before them through litigation because courts are well-placed to identify specific problems and devise pragmatic solutions. But litigation-based strategies have limited effect in China. Chinese reforms have curbed impact-type litigation by disaggregating cases and promoting mediation. And although the SPC can issue judicial interpretations said to fill legislative gaps, Chinese court judges do not make law through case decisions. In China, many of the problems facing the judiciary are deeply rooted in the political-economic system and may not be easily changed by the judiciary itself.

Yet Feeley's litigation- and court-centered proposal does make sense for China in a different way, which may be why the circuit courts were created. Chinese judicial reforms have faced the main problem of any centralized regime: that of responsive governance. Here, the center in Beijing may be too far removed to correctly diagnose judicial deficiencies. In addition to centralization, the presence of these "branches" of the Supreme People's Court may provide an information funnel for the court to have direct access to local legal issues and to interact with local legal communities. It does, in a sense, let the judiciary take information from litigation, even if the litigation itself does not create the change. This was demonstrated by the recent promulgation of guidance documents and publication of sample cases by the No. 1 and 2 Circuit Courts.

Specifically, Article 8 of the SPC Provisions on Circuit Court Divisions empowers the circuit courts to report and transfer back to Beijing any cases that have major guidance value. Article 9 also requires circuit court divisions to ride circuit within their region to try cases and receive petitioners. Getting information back to the center is important for a country as vast as China that lacks democratic structures of accountability and information funneling.

These circuit courts may then serve both to bring the center to the localities and, in turn, relay information from the localities back to Beijing.¹⁵¹

In reducing the caseload from the headquarters of the Supreme People's Court in Beijing, these circuit courts free the Supreme People's Court, allowing it to optimize its role and function, and better guide the lower courts. According to the Supreme People's Court annual report, almost every year the caseload is more than 10,000.¹⁵² Cases heard in 2015 at the Supreme Court were up 42.6% compared with 2014, with most cases still heard at headquarters in Beijing, rather than in the two circuit courts existing at the time.¹⁵³ However, with the addition of four more circuit courts, the caseload of the Supreme People's Court will definitely be reduced. This may lead to the Supreme People's Court spending more time on important cases and providing better guidance the lower courts, as the United States Supreme Court does.

The latest set of Chinese judicial reforms is an effort to unify the application of laws in a highly concentrated central government, which faces a country with huge local differences and diversity of local interests, cultures, and norms. These changes reflect efforts to centralize and be more responsive. The central government needs to have an early handle on cases with national import. But if Malcolm Feeley is correct, the higher the volume of cases and the greater the emphasis on efficiency, the likelier it is that these new courts will simply process cases to meet stated goals rather than promote real change.

¹⁵¹ *Zui Gao Ren Ming Di Yi Xun Hui Fa Yuan Dao Hai Nan Shan Cun Xun Hui Kai Ting* (最高法院第一巡回法庭到海南山村巡回开庭) [*The First Circuit Court of the Supreme People's Court Tour Village in Hainan Province*], XINHUA, Sept. 02, 2015, http://news.xinhuanet.com/legal/201509/02/c_128190308.htm.

¹⁵² *Id.*

¹⁵³ See Susan Finder, *Big Data from the Supreme People's Court*, SUPREME PEOPLE'S COURT MONITOR (Mar. 20, 2016), <https://supremepoplescourtmonitor.com/tag/china-court-statistics-2015>.

