

The Rule of Law in China

Incremental Progress

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The Communist Party of China's commitment to build a "harmonious socialist society" relies in major part on strengthening the rule of law. By 2020, the party aims to further improve the socialist democratic and legal system, the administration of the country according to law, and the guarantee of and respect for the people's rights and interests.

Today, however, China does not much resemble a "rule of law" society. Corruption scandals are common, as are increasingly violent and widespread social unrest over unpaid wages, environmental degradation, and irregular takings of land and housing, and the harsh and arbitrary criminal justice system is still plagued by the use of torture. Outspoken academics, activist lawyers, investigative journalists, and other champions of the disadvantaged and unfortunate are arrested, intimidated, and restrained. Entrepreneurs struggle to build successful businesses only to have them expropriated by local governments in what seems to be a clear violation of the recently added constitutional guarantee to protect private property. For redress of grievances, citizens are likely to bypass the weak, politically submissive judiciary in favor of an archaic, extra-judicial petitioning process.

"Rule of law" connotes a system under which law acts as a curb on state and private power. Rules are set in advance and applied consistently, equally, and transparently by independent courts that serve as a backstop to protect civil, political, and human rights. One of a legal system's essential functions, endorsed in principle by the Chinese leadership, is to provide and enforce rules that facilitate the emergence of private ordering in a market economy. China's leaders also now promote another important function of law, which is to order and regulate the exercise of government power. To achieve both these ends, China is in fact developing a respectable body of administrative law to help restructure the functions and operation of formerly all-powerful government bureaucracies in order to limit their interference with markets and personal activity, while implementing systems to achieve rational regulation and more effective social management. Yet, as with most aspects of China's dynamic modernization

program, the development of law and a modern Chinese legal system is a complex and often unprecedented process. While China's Communist Party and government leaders espouse the principle that establishing the "rule of law" is critical to sustain the country's rapid economic growth and effectively manage its wrenching transition to a market economy and more social pluralism, significant challenges remain. These include China's lack of a traditional foundation for the rule of law, and the Communist Party's affirmative rejection of the kind of liberal democratic political order typically associated with the rule of law.

No one claims that today's China is a "rule of law" country. Nonetheless, most would acknowledge that China has moved a long way from the primarily "rule of man" governance approach of traditional and Maoist China. This essay suggests that China is also moving beyond the instrumental "rule by law" paradigm in which government merely uses law as a tool to control society. Instead, China is slowly establishing elements of a "rule of law" system that increasingly provides mechanisms also to restrain the arbitrary exercise of state and private power and offers the promise, if not the guarantee, that Chinese citizens and other actors can assert their rights and interests in reliance on law.

What Are the Roots of Rule of Law Reform?

Since Deng Xiaoping engineered China's "opening to the West" in 1979, China's legal development, like its economic development, has been extraordinary. The 1982 post-Cultural Revolution Constitution called for upholding the "uniformity and dignity of the socialist legal system," set forth the aspirational principle that no individual or organization (including political parties) is above the Constitution or the law, and spelled out certain fundamental rights and duties of Chinese citizens. The explicit goal of "building a socialist rule of law country" was added to the Constitution in 1999.

In practice, since 1979 the National People's Congress (NPC), China's supreme legislative body, has enacted and revised more than 200 laws that are still in force¹ and are generally consistent with accepted principles of international law. Moreover, China has concluded a large number of international agreements, including 21 international conventions on human rights² and World Trade Organization (WTO) accession agreements, which require changes in China's domestic legal system. China's government bureaucracy, headed by the State Council, has promulgated thousands of implementing rules that regulate many aspects of everyday life.

The growth of a legal culture is increasingly manifest in China's primary law-related bodies and in the general population. The process of legal reform continues slowly to professionalize the central legal institutions—the NPC and its Standing Committee, the State Council, the Supreme People's Court, and the

¹ Information Office of the State Council of the People's Republic of China, "Building of Political Democracy in China," October 2005, Part III: The People's Congress System, <http://www.china.com.cn/english/features/book/145877.htm>.

² *Ibid.*, Part VII: Respecting and Safeguarding Human Rights.

Supreme People's Procuracy—all of which are gradually becoming more transparent and accessible. In the wider society, many Chinese lawyers and legal scholars actively promote legal reform and the protection of basic rights. Even the Chinese media now regularly reports on legal issues and controversial cases. As a result of legal reform, China's institutions and general population increasingly rely on legal procedures to achieve their objectives. Chinese citizens have proved strikingly adept at using the law to assert their rights and interests against the government and others.

However, despite the growth of an increasingly robust legal system and broader legal consciousness in the general population, the Communist Party retains ultimate control, especially over the handling of sensitive political, economic, and social issues. Out of some necessity, the Communist Party has gradually ceded some authority to institutions that grapple on a daily basis with the complex decisions and policies required in a rapidly modernizing society and economy. The market, the government bureaucracies, the courts, and other specialized institutions have been the beneficiaries of this process. Consequently, the Communist Party's partial withdrawal from daily governance over a wide range of issues provides a degree of autonomy for independent actors to develop the "rule of law with Chinese characteristics." But China's progress toward establishing the rule of law under a system dominated by the Communist Party takes us, as in so many other issue areas, into previously uncharted waters.

Is the National People's Congress Helping or Hindering?

Although the NPC is touted as the "highest organ of state power" through which the Chinese people exercise state power, in fact it has long been dismissed as a "rubber stamp" by both Chinese and Western observers. The entire Congress of nearly 3,000 deputies meets only once a year. A Standing Committee of 200 members makes most of the NPC's decisions between annual meetings in close consultation with the Communist Party, which sets the NPC's annual agenda. Nonetheless, recent practices reflect an effort to make the NPC and its provincial, county, and local counterparts more professional, transparent, and responsive to the concerns of the people they purport to represent.

People's Congress (PC) deputy elections, ostensibly democratic but in fact traditionally orchestrated by the Communist Party, are becoming incrementally more competitive.³ Many deputies now reach out to their putative constituents for

³ Taking advantage of little used provisions in the People's Congress (PC) deputies election law, the 2003 district level PC elections witnessed the emergence of, and official media reporting on, many relatively "independent" candidates. See, for example, "Independent Candidate Elected," *China Daily*, December 17, 2003, http://www.chinadaily.com.cn/en/doc/2003-12/17/content_291055.htm; and reference to elections in Shenzhen in "Top Legislators to Mull Election Law Changes," *China Daily*, August 17, 2004, <http://www.china.org.cn/english/2004/Aug/104235.htm>. Modest amendments to the PC election law adopted in 2004 reflected pressure for more competitive PC election processes at the township and country/district level, which have direct

suggestions and feedback. Some deputies, in accordance with their duty to supervise government, actively question government work reports, conduct on-site inspections to assess the implementation of laws, and seek more authority to review government budgets. This supervisory task received further legal support with the NPC Standing Committee's August 2006 adoption of a long-awaited law outlining mechanisms by which standing committees of PCs at all levels can more effectively monitor government activity and the operation of the courts.⁴

The legislative process itself is gradually becoming more participatory and transparent. The NPC and local PCs increasingly consult scholars and interest groups, publish draft legislation over the Internet and through the media to solicit broad input, and hold public hearings on draft legislation felt to be of particular concern to the people, with a trend toward putting virtually all drafts out for widespread public comment. Some 24 local PCs had reportedly held 38 hearings by the end of 2004,⁵ and the NPC held its first public hearing in September 2005 to obtain input on a proposed amendment of the personal income tax law. Chinese citizens can now sign up to observe or "audit" legislative proceedings at all levels.

To improve the legislature's institutional competence, deputies have begun to undergo various training programs and receive information between congressional sessions to enhance their understanding of the complex policy issues facing China. Legal scholars and other experts are being recruited into the ranks of permanent PC committees. Law professors and lawyers associations are increasingly called on to provide advice during the legislative process. PC leaders hope that increased public participation through hearings and written comment on published draft legislation will not only bolster the PCs' credibility and educate the public on their work, but will also produce higher quality and more widely accepted laws that better reflect complex social and economic realities.

elections. These amendments authorized holding primary elections in some cases and additional means of campaigning. See "Decision of the Standing Committee of the National People's Congress Concerning Amendments to the Election Law of the People's Republic of China on the National People's Congress and Local People's Congresses," October 27, 2004, http://www.gov.cn/ziliao/flfg/2005-06/21/content_8297.htm. During the round of township and county/district level PC elections that began in July 2006 and runs through the end of 2007, despite stern instructions for the party to control nominations and campaigning, independent candidates—other than some of the more outspoken and visible activists—are again standing for office and, in some cases, being elected. Candidates are being advised, both officially and by veteran campaigners, not to seek publicity about their campaigns. See, for example, "Elections in China: No Contest," *Economist*, November 9, 2006, [http://www.economist.com/displayStory.cfm?Story_ID=S'%2BX\(%2FRA_*!P!D%0A](http://www.economist.com/displayStory.cfm?Story_ID=S'%2BX(%2FRA_*!P!D%0A); Josephine Ma, "Party Keeps a Firm Grip on Election Experiment," *South China Morning Post*, September 11, 2006.

⁴ "Zhonghua renmin gongheguo geji renmin daibiao dahui changwu weiyuanhui jiandu fa" [Law of the People's Republic of China on Supervision by the People's Congress Standing Committees at All Levels], effective January 1, 2007, http://news.xinhuanet.com/politics/2006-08/27/content_5013597.htm. See "China's Top Legislature Adopts People's Congress Supervision Law," *People's Daily Online*, August 28, 2006, at http://english.people.com.cn/200608/28/eng20060828_297335.html.

⁵ Wu Nanlan, "More Public Hearings Urged," *China.org.cn*, November 1, 2005, http://service.china.org.cn/link/wcm/Show_Text?info_id=147177&p_qry=people's%20and%20congress%20and%20system.

Under China's unitary legal system, all laws and regulations must conform to the Constitution and national law. Under the WTO, China is further committed to ensuring uniform application of the law, a complicated task in such a large, diverse, and rapidly changing country. In 2004, the NPC Standing Committee (NPCSC) established a special office for reviewing all central and local government regulations, as well as court and procuracy legal interpretations, to standardize lawmaking and law interpretation work throughout the nation.⁶ At the end of 2005, the NPCSC published revised procedures for the public to file petitions challenging the legality of lower-level regulations.⁷ While the review office represents a welcome institutional development, its work unfortunately has been shrouded in secrecy, with no required accountability to the public. In fact, there have been no reports that the NPCSC has ever overturned a law or regulation as unconstitutional or illegal.⁸

Despite continued dominance by the Communist Party of the legislative system, the introduction of more open and participatory legislative processes, stepped up supervision by the PCs of government activity in implementing the laws set by people's congresses, and the trend toward attempting to ensure more uniform application of the law all represent positive developments that may contribute to helping improve and strengthen the legal system over the long term.

How Are Administrative Law Developments Promoting Reform?

Chinese leaders and scholars now view administrative law as an important instrument for transforming traditional governance models and increasing the predictability, openness, and fairness of China's immense regulatory bureaucracy in its dealings with citizens, businesses, and other organizations. China's WTO commitments to market-based regulatory reforms further spurred momentum toward those ends.

The landmark 1989 Administrative Litigation Law (ALL) grants Chinese citizens the unprecedented right to sue the government over "concrete" government actions that violate their rights and interests, although not over "abstract" actions such as decisionmaking. This law, while limited in scope, is a tangible step in implementing the constitutional concept that the Chinese

⁶ Information Office of the State Council of the People's Republic of China, "Building of Political Democracy in China," October 2005, Part III: The People's Congress System.

⁷ "Xingzheng fagui, difangxign fagui, zizhi tiaoli he danxing tiaoli, jingji tequ fagui bei'an shencha gongzuo chengxu" [Working Procedures for the Filing and Review of Administrative Rules, Local Rules, Autonomous Region and Special Purpose Regulations, and Special Economic Zone Rules], revised December 12, 2005, <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=52394>. See "People Given Right to Question Laws' Constitutionality," Xinhua News Agency, December 20, 2005, http://service.china.org.cn/link/wcm/Show_Text?info_id=152559&p_qry=people's%20and%20congress.

⁸ "Groups Petition Government to Review Constitutionality of Internet News Rules," Congressional-Executive Commission on China Virtual Academy, June 30, 2006, <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=54921>.

government is itself constrained by law and accountable to its citizens (at least in certain respects). The 1994 State Compensation Law (SCL) further grants citizens the right to claim monetary compensation when they are injured by unlawful government actions.

Citizens were quick to file lawsuits against the government under these two novel pieces of legislation. However, despite a credible plaintiff success rate of roughly 30 percent under the ALL, the number of administrative lawsuits has leveled off in recent years, although with marginal increases in the past two years and the development of more “mass” or group lawsuits in such areas as environmental pollution, land requisition, migrant laborer wages, and social security payments.⁹ Commentators attribute this leveling off not to a decline in grievances but rather to a combination of lowered expectations and the inability of plaintiffs in more politically sensitive cases, such as those involving alleged corruption, to get the courts even to accept the case filing.¹⁰ Relatively few compensation claims have even been filed under the SCL, with its low levels of mandated compensation.¹¹ Chinese officials and scholars recognize that both laws are inadequate as drafted and implemented. Work is underway to provide more effective remedies against the abuse of state power, but the political obstacles to suing the state, including politically deferential courts, clearly remain.

While the ALL and the SCL attempt to limit state action by providing redress after the fact, the 1996 Administrative Penalties Law (APL) and the 2004 Administrative Licensing Law impose procedural constraints on government action itself. The APL is the first Chinese law to provide regulated persons the right to defend their case and the right to a public hearing in the event the agency plans to impose a penalty such as ordering a production stoppage, revoking a license or imposing a large fine. This law thus introduced the concept of

⁹ While the number of administrative lawsuits dropped after and has fluctuated since topping out at some 98,759 cases in 1999, the Supreme People’s Court reported increases in such filings of 4.7 percent for 2004 and 3.8 percent for 2005, when the total number of such cases recorded in the court’s annual *Work Report* to the NPC totaled 95,707 cases filed in local courts plus another roughly 60 such cases handled by the Supreme People’s Court itself. See Congressional Executive Commission on China, *2005 Annual Report*, under V(b) Legal Restraints on State Power, http://www.cecc.gov/pages/annualRpt/annualRpt05/2005_5b_legal_restraints.php (for background and statistics through 2004); Xiao Yang, *Supreme People’s Court Work Report 2005*, www.court.gov.cn/work/200503180013.htm (with statistics on 2004 cases); and Xiao Yang, *Supreme People’s Court Work Report 2006*, http://news.xinhuanet.com/politics/2006-03/19/content_4318279.htm (with statistics for 2005). In addition, the Chinese press has reported a noticeable increase in the number of administrative lawsuits being filed in local courts, with some provincial and municipal level courts reporting a doubling of such cases in the early months of 2006, while some lower level courts have reported increases of as much as 200 percent. See, for example, “‘Liaowang’ wenzhang: ‘min gao gong’ anjian dafu zengchang de beihou” [Essay in Liaowang Magazine: Background on Large Increase in “the People Suing the Government” Cases], April 22, 2006, http://news.xinhuanet.com/politics/2006-04/22/content_4459792.htm; “Officials Must Respect the Law,” *China Daily*, April 24, 2006.

¹⁰ Joseph Kahn, “When the Chinese Sue the State, Cases Are Often Smothered,” *New York Times*, December 28, 2005.

¹¹ The Supreme People’s Court reports only 2,991 state compensation lawsuits in 2005 and 3,134 such cases in 2004. See *Supreme People’s Court Work Reports* cited above in note 9.

procedural due process, requiring official action to meet minimum standards of fairness, including the right to adequate notice and a meaningful opportunity to be heard before a decision is made. Virtually all government agencies including the Ministry of Public Security, China's police agency, and local governments have adopted regulations implementing the APL and its hearing requirement.

The Administrative Licensing Law represents another important advance. This law, with no counterpart anywhere in the world, establishes the foundational principle that government should intervene only where individual initiative, private associations, or the market cannot adequately address a situation. It seeks to restrain government interference with market activity by restricting the number of government agencies that have authority to issue approvals in the form of licensing and by limiting the types of activity that can be so regulated. The number of matters requiring licensing approvals at all levels has been nearly halved since the law's adoption. Transparency requirements mandate public hearings in certain situations and require disclosure of licensing information.

Although many officials balk at relinquishing traditional approval powers, the Licensing Law is having an impact. A private Chinese company sued the powerful Ministry of Information Industry (MII), which regulates the communications sector, over its refusal to grant the company a license to manufacture and sell wireless handsets under its own brand. The company based its lawsuit on the equal treatment and nondiscrimination principle of the Licensing Law.¹² Beijing taxi drivers banded together to sue the municipal government over its refusal to grant them individual licenses and to hold hearings on the issue, citing the Licensing Law's endorsement of regulation through market competition.¹³ Nearly 300 Zhejiang farmers took a provincial development and reform commission to court for approving a polluting power plant project without any public hearing as required under the Licensing Law.¹⁴ One Chinese official has credited the Licensing Law with helping to transform the attitude that law serves merely as a tool to control the people. Instead, law is increasingly seen as a mechanism that can also restrain government behavior.

Reinforcing these positive legislative trends, the State Council has launched a concrete 10-year program to promote "administration in accordance with the law."¹⁵ The program sets forth objectives and tasks for establishing a "law-based" or "rule of law" government, to regulate the exercise of government power and introduce enhanced enforcement mechanisms. One of the hallmarks of this program is "scientific and democratic decisionmaking." Government leaders have

¹² Although the court in which the lawsuit was filed apparently never accepted the case, the company, Aux, was ultimately issued a manufacturing license in March 2005 under liberalized MII regulations on the issuance of handset manufacturing licenses.

¹³ Although this case was reportedly accepted and heard by a district court in Beijing, it is not known what the decision was. However, the Beijing government announced it was reviewing the licensing regulations.

¹⁴ "East China Farmers Say Power Plant Will Pollute Villages," *China Daily*, June 14, 2005.

¹⁵ "Quanmian tuijin yifa xingzheng shishi gangyao" [Outline for Promoting the Comprehensive Implementation of Administration in Accordance with the Law], adopted and effective March 22, 2004, http://news.xinhuanet.com/zhengfu/2004-04/21/content_1431232.htm.

realized that achieving rational regulation requires administrative agencies to open up their regulatory processes to broader public involvement and scrutiny. Greater participation by individuals, businesses, and social organizations through holding public hearings, soliciting expert and interest group views, and publishing draft rules and policies for widespread comment from the general public is now increasingly recognized as important for gathering the information and expertise on which rational regulation is based.¹⁶

By the end of 2005, provincial-level governments and central ministries had held 74 rulemaking hearings and released roughly 500 draft rules for public comment.¹⁷ Anecdotal evidence suggests that the experimental public participation process is having some influence on government decisionmaking. For example, the Beijing government withdrew a proposed regulation on contractors from outside the city after public comments criticized the proposal as unnecessary and discriminatory. In another case, after two rounds of public comment on draft General Standards of Physical Examination for Recruitment of Civil Servants, during which AIDS activists provided detailed input, the Ministries of Personnel and Public Health issued a final version in January 2005 stipulating that AIDS remains a disqualifying condition but implying that HIV-positive people who do not have full-blown AIDS are fit for governmental jobs. Although the Legislation Law encourages (without directly requiring) the release of draft legislation for public input for selected legislation deemed to be closely related to the “vital interests” of the people, many local governments and PCs have announced they will start to release virtually all draft rules and regulations for public input, except where drafts of proposed legislation involve state secrets, commercial secrets, or individual privacy. In June 2006, Guangzhou Municipality went a step further and adopted China’s first rules mandating transparent public participation in all government rulemakings and in each phase of the rule formulation process.¹⁸

Drafting officials are beginning to realize that providing feedback to the public on the handling of submitted comments is also critical for gaining public acceptance of and voluntary compliance with regulatory decisions, as well as for encouraging continued public participation. The NPC, for example, issued a detailed summary of the main categories of the 11,500 comments that it received during a public comment period on the draft Property Law conducted during July and August 2005, explaining why suggestions were accepted or rejected and how they were dealt with in the subsequent redraft. Local governments have adopted

¹⁶ See Jamie P. Horsley, “Public Participation and the Democratization of Chinese Governance,” in *Political Civilization and Modernization in China: The Political Context of China’s Transformation*, ed. Yang Zhong and Shiping Hua (Hackensack, N.J.: World Scientific Publishing, 2006).

¹⁷ *Guowuyuan 2005 fazhi gongzuo zongshu: jiaakuai jianshe fazhi zhengfu* [Summary of Legal Work of the State Council in 2005: Accelerating the Establishment of Law-based Government], December 29, 2005, http://www.gov.cn/zfjs/2005-12/29/content_141063.htm.

¹⁸ “*Guangzhouoshi guizhang zhiding gongzhong canyu banfa*” [Guangzhou Municipal Measures on Public Participation in Rulemaking], adopted June 27, 2006, effective January 1, 2007, http://www.gzlo.gov.cn/LawNew/LawNew_Read.asp?id=253.

semi-annual press conferences on rulemaking activity or other devices to similarly provide a regulatory response to public participation. The pioneering Guangzhou public participation provisions require the drafting agency to issue a public explanation for each rule adopted. Such response or feedback mechanisms could potentially help create a sense of partnership between government and the public and, if institutionalized and made legally enforceable, foster a mutual expectation of greater government accountability.

Recognizing that citizens need information in order to participate constructively in government decisionmaking, and as an anticorruption measure, the State Council's program also calls for greater information disclosure. Most governments above the county level now regularly post a great deal of information on their more than 10,000 Web sites and hold periodic press conferences to report and respond to questions on their activities.

In a move intended to break with the centuries-long tradition of government secrecy, the State Council on January 11, 2007, approved China's first national "freedom of information" ordinance,¹⁹ as a prelude to adoption by the NPC of an information access law. Chinese leaders and policy documents now regularly refer to the people's "right to know," but this "right" had yet to be incorporated into national Chinese law. The State Council Open Government Information Regulations (the "OGI Regulations"), an administrative measure lacking the full weight of a law passed by the NPC, should nonetheless help standardize and "legalize" throughout the nation the open government information experiment already undertaken pursuant to local or departmental rules by over 30 Chinese provinces and large municipalities, as well as by many central and local government agencies.²⁰

Adoption of the OGI Regulations follows the party's endorsement, through a March 2005 "Opinion" issued jointly with the State Council, of the presumption that all information should be made public unless exempted from disclosure as a commercial secret, individual privacy, or state secret. These exemptions, of course, provide potentially substantial loopholes, but the change in emphasis from a presumption that ratified secrecy to one that requires disclosure in the ordinary course is nonetheless significant. Moreover, the new OGI regime gives citizens an unprecedented *right* to request information from the government and imposes on government the *obligation* to furnish nonexempt information, both on its own initiative and in response to individual requests. Regardless of formidable challenges to implementing the new disclosure mandate nationwide, the OGI

¹⁹ "Wen Jiabao zhuchi changwuhui, shen yi tongguo zhengfu xinxi gongkai tiaoli" [Wen Jiabao Presides over Standing Committee Meeting that Deliberates and Adopts Open Government Information Regulations], January 17, 2007, http://www.gov.cn/ldhd/2007-01/17/content_499420.htm.

²⁰ See, for example, Jamie P. Horsley, "Guangzhou's Pioneering Foray into Open Government," *China Business Review* (July-August 2003); Jamie P. Horsley, "Shanghai Advances the Cause of Open Information," *Freedominfo.org*, April 20, 2004, <http://www.freedominfo.org/news/shanghai/index.htm>; and Jamie P. Horsley, "Access to Government Information in the People's Republic of China," in *The Bowker Annual Library and Book Trade Almanac 2006*, 51st edition, ed. Dave Bogart (Medford, N.J.: Information Today, 2006).

Regulations should help incrementally to enhance government transparency and promote more accountable government.

Can China's Courts Deliver Justice?

The combination of weak institutional infrastructure and continuing political interference by the Communist Party means China's massive judicial system of over 3,000 basic courts and nearly 200,000 judges cannot yet guarantee the independent and consistent protection of citizens' rights and interests or enforce government and private compliance with the law. Although the current president of the Supreme People's Court, Xiao Yang, has led an effort to improve the quality of judges and reform the judiciary, Communist Party interference, poorly trained and compensated judges (especially outside the major cities), and corruption are among the many problems beleaguering the court system.

While the courts heard roughly 8 million cases in 2005, Chinese government agencies, including the courts themselves, were flooded with nearly twice as many citizen petitions for administrative assistance through the "letters and visits" or *xinfang* system.²¹ Thirty percent of these petitions recently have involved complaints about the legal system itself and the handling of specific cases,²² while others involve allegations of government malfeasance.

Institutionally, the courts are part of the government structure answerable to the NPC. They are not an independent branch of government. The NPCSC, not the Supreme People's Court (SPC), has the authority to interpret national law; judges are merely supposed to apply it. In cases in which the law is vague or politically sensitive issues are involved, government officials and the party may intervene through court-based adjudication committees that supervise the work of the judges and through other means. Perhaps as a result, the courts frequently decline to accept jurisdiction over such sensitive cases. Judges are appointed, with guidance from the party apparatus, and remunerated by the people's congress at the corresponding governmental level, which exacerbates the problem of local protectionism and undue political influence. Judicial independence is more a slogan than a reality in today's China.

Chinese courts also face challenges of competence and professionalism. Until recently, judges were typically drawn from the ranks of the retired military. Appointments were based more on political correctness than on relevant experience or legal knowledge. All new judges are now required to hold university degrees (although not necessarily in law) and pass a national unified bar exam, as well as participate in ongoing legal education programs. Nevertheless, the SPC

²¹ Congressional-Executive Commission on China, *2006 Annual Report*, Part VII, "Development of Rule of Law and the Institutions of Democratic Governance, VII(c) Access to Justice."

²² He Dawei et al., "30 Percent of Petitions Stem from Loss of Popular Faith in Legal Justice," *China Comment*, news.xinhuanet.com, November 29, 2005, quoted in *China Law Digest*, <http://www.chinalawdigest.com/article.php?aid=527>. At the national level, the Office of Letters and Visits under the State Council, whose function is replicated throughout the state bureaucracy at each level of government and in individual government agencies, reports that surveys indicate only two out of every thousand cases were resolved.

reports that only 40 percent of current judges hold a university degree,²³ and the quality of judicial personnel outside major cities like Beijing and Shanghai is very uneven. Low salaries contribute to widespread judicial corruption.

Another problem is that Chinese courts lack the tradition of issuing public and reasoned opinions that do not merely summarize the facts of the case and proclaim the final decision. Requiring judges to clearly and publicly describe the logical steps connecting the applicable legal provisions to the facts of a case acts as a curb on corruption and incompetence. Although trials are increasingly open to the public and the media, and selected opinions are published for reference by other courts and lawyers, judicial transparency is neither well established nor comprehensive.

China's leaders accept in principle the need for a professional and independent judiciary to foster a fair and efficient judicial system. The NPC has scheduled a major revision of the Organic Law on the People's Courts and proposed structural and other reforms to increase judicial independence from local governments. Court adjudication committees are also being widely discussed. How far the Communist Party is willing to go in promoting judicial independence, and the extent to which such independence would challenge its authority, remains to be seen.

Do the Chinese Care about Due Process?

Procedural fairness in pursuit of just and acceptable outcomes is beginning to be reflected in a wide variety of contexts in China. Revised State Council regulations on land requisition attempt to buttress procedural safeguards. These include strengthened requirements for advance notice and public hearings *before* a land requisition is approved and greater transparency in the entire process, including mandatory disclosure of the amount and allocation of the compensation for state-expropriated land. Similarly, revised regulations on the handling of petitions to government agencies oblige government offices to respond to petitioners—and require, for the first time in Chinese history, that public hearings be held on “major, complex, or difficult” problems petitioners raise.²⁴ While the number of protests over land takings, and the large number of petitions, indicate that these procedural safeguards have not yet taken hold, a trend toward requiring greater procedural fairness, which may help gradually to alleviate some of the widespread social dissatisfaction, does seem to be emerging.

Even within the notorious Chinese criminal system, due process is gaining attention. Criminal justice is where the conflict between society's desire to curb crime and corruption on the one hand, and to protect individual rights on the other, is most dramatically played out against a backdrop of Communist Party control. China executes more people every year than the rest of the world

²³ Congressional-Executive Commission on China Virtual Academy, “Chinese Courts and Judicial Reform,” <http://www.cecc.gov/pages/virtualAcad/rol/judreform.php> (page last modified June 3, 2004).

²⁴ “Amendments to Improve Petitioner System,” *China Daily*, February 24, 2005.

combined, for crimes ranging from murder to such nonviolent economic offenses as tax evasion. Given the widespread desire for “social stability,” there appears to be little popular support for abolishing the death penalty entirely. Nonetheless, recent Chinese media reporting on a series of wrongful convictions that led—in at least one widely publicized case—to the execution of an innocent man, helped pressure the courts to introduce more procedural safeguards in criminal cases. Some local courts have prohibited the entry into evidence of confessions elicited through torture, and several criminal justice agencies jointly adopted provisions to improve access to lawyers for more categories of criminal suspects and defendants and at an earlier stage of the criminal process to enable a more vigorous defense.

In late 2005, the SPC also ruled that high courts must hear death penalty appeals in open court with defense lawyers present. In what state media hailed as “the most important reform in capital punishment in China in over 20 years,”²⁵ the National People’s Congress in October 2006 amended the law on courts to require the SPC to approve all death sentences. “This,” explained SPC president Xiao Yang, “is an important procedural step to prevent wrongful convictions.” Broader criminal law and procedure revision is on the NPC legislative agenda, and the sensitive issues involved are being debated vigorously in academic, legal, and official circles, as well as in the media.

What Roles Do China’s Lawyers Play?

In 1979, China had fewer than 2,000 lawyers and just two functioning law schools.²⁶ China now claims roughly 120,000 certified lawyers²⁷ and over 500 law schools.²⁸ While the number of lawyers still amounts to slightly less than one lawyer per 1,000 people, and despite sobering structural and policy impediments to the development in China of a truly independent legal profession, many lawyers and legal scholars are becoming more active in pushing forward the establishment of rule of law.

Legal education has developed rapidly. Law school curricula and teaching methods are becoming more diverse, including the introduction in 2000 of clinical legal education that combines teaching with hands-on practical experience

²⁵ “China Changes Law to Limit Death Sentence,” *China Daily*, October 31, 2006.

²⁶ Tim Johnson, “Lawsuits Sprout in China as Interest in Legal Affairs Blooms,” Knight Ridder, November 12, 2003.

²⁷ Information Office of the State Council of the People’s Republic of China, “Building of Political Democracy in China,” October 2005, reports there were 118,000 certified lawyers at the end of 2004 and 11,691 law firms. A mid-2005 Ministry of Justice study (the “MOJ Study”) reports that the total includes full-time lawyers (103,389), part-time lawyers (6,841), specialized “*gongzhi*” lawyers working in government departments (1,817), in-house counsel (733), military lawyers (1,750), and lawyers providing legal aid services (4,768). “*Woguo zhiye lvshi da 11.8 wan ren*” [Our Country’s Full-time Lawyers Reach 118,000], *Legal Daily*, June 14, 2005, http://www.legaldaily.com.cn/bm/2005-06/14/content_154485.htm.

²⁸ Fu Hualing, “When Lawyers Are Prosecuted: The Struggle of a Profession in Transition,” Social Science Research Network Working Paper Series (May 2006), <http://ssrn.com/abstract=956500>.

representing real clients, and the establishment of law school–based centers that combine research with public interest litigation in such areas as labor, consumer, civil, criminal, and women’s rights, and provide both legal scholars and their students with practical appreciation of the legal problems facing modern Chinese society.

Chinese legal scholars, many of whom study abroad, are a major source of new ideas about the role of law and legal reform in China. They and the Chinese lawyers they train are increasingly involved in policymaking. Local people’s congresses and government legal affairs offices frequently commission scholars’ drafts and seek input from private law firms and lawyers associations. Law professors serve as consultants to governments, and lawyers are going to work directly for government agencies, under an experiment started in 2002 that produced 1,800 first-ever government lawyers by June 2005. As China moves toward a system of more limited government power, in which all actions and decisions must be based on law, the role of legal professionals in advising government should be heightened.

Chinese lawyers are also beginning to engage more directly in politics. Over 400 lawyers serve as local people’s congress deputies at all levels, and more than 1,200—close to 2 percent of the total number of registered Chinese lawyers—serve on people’s political consultative congresses.²⁹ Hopefully, these lawyer-politicians will help further professionalize the legislative work of the PCs.

While many law graduates seek lucrative jobs at China’s 12,000-plus law firms, many are also choosing to represent the less fortunate segments of society. Criminal defendants must now have access to legal assistance even if they cannot afford it, and the Ministry of Justice (MOJ), which regulates the legal profession, requires all lawyers to handle a certain number of legal aid cases each year. The Chinese government, law schools, and nongovernmental organizations sponsor legal aid clinics that assist low income citizens with cases involving employment discrimination, family disputes, urban relocations, rural land takings, and the like. More than 3,000 government-sponsored legal aid clinics claim to have aided some 1.6 million clients. In 2005, the MOJ allocated for the first time roughly \$6.2 million for legal aid in impoverished areas, while local governments earmarked another \$32 million.³⁰ Legal aid is becoming firmly rooted in China’s changing legal culture and helping to raise rights consciousness among sectors of society that have not had much access to the formal legal system in the past.

A growing number of Chinese lawyers have begun to file so-called “public interest” cases that highlight specific social problems. Though the lawyers frequently lose such cases, the public attention thereby drawn to the issues through the media and other avenues often leads to beneficial changes in law or policy.³¹ Some lawyers take on politically sensitive cases involving criminal

²⁹ See MOJ Study, cited above in note 27.

³⁰ “Legal Aid Helped 430,000 Chinese in 2005,” Xinhua News Agency, January 11, 2006, <http://www.china.org.c/english/2006/Jan/154778.htm>.

³¹ One example is lawyer Qiao Zhanxiang, who sued the Ministry of Railways in 2001 for raising tickets prices during Spring Festival without a public hearing. Although he lost his case against the ministry, it did result in a public hearing in 2002 on ticket price reforms, as required by the Price

defendants, peasant activists, religious worshippers, and others that frequently place them in direct conflict with the local governments on which they depend for licenses. In March 2006, after a number of politically sensitive cases spawned discussion of an emerging “rights protection movement” in China, the government-controlled All-China Federation of Lawyers issued a “Guiding Opinion” that imposes substantial new reporting and approval requirements on lawyers seeking to represent “mass cases” involving 10 or more plaintiffs.³² The new requirements seem likely to have a chilling effect on independent representation in all types of politically sensitive cases, although mass lawsuits continue to be brought.

Chinese lawyers who undertake criminal defense or politically sensitive cases also face the prospect of being convicted on such grounds as falsifying evidence or revealing state secrets and may lose their jobs and their licenses to practice law. As observed by a prominent lawyer who was suspended from law practice after he took on a number of controversial cases including representation of members of the outlawed Falun Gong spiritual sect, and who was convicted in December 2006 of subversion,³³ “People across this country are awakening to their rights and seizing on the promise of the law... But you cannot be a rights lawyer in this country without becoming a rights case yourself.”³⁴

What Are the Prospects for the Future?

China’s evolving administrative laws and new regulatory practices represent substantial change in traditional and Maoist Chinese political culture. Although enormously difficult to implement, they introduce an unprecedented framework for limiting and guiding the exercise of government power and holding government officials accountable for their actions. This new framework attempts to create more regularized channels for citizens legitimately to supervise government behavior, such as requesting government records, making their voices heard through public participation mechanisms and obtaining redress in court

Law. “More Citizens Winning Cases against the Government,” *China Daily*, December 16, 2003, <http://www.lawinfochina.com/dispecontent.asp?ID=4311&DB=3>. See, also, “Voices against Discrimination: Chinese Citizens Challenge Discriminatory Laws and Practices,” *China Law and Governance Review*, no. 3 (December 2006), <http://www.chinareview.info/pages/main1.htm>, recounting early lawsuits against forms of employment discrimination that, although the legal claims were rejected, resulted in improved policies.

³² See, for example, Human Rights Watch, “A Great Danger for Lawyers”: *New Regulatory Curbs on Lawyers Representing Protesters* (New York: Human Rights Watch, December 2006), <http://hrw.org/reports/2006/china1206>.

³³ Joseph Kahn, “China Arrests Human Rights Lawyer Who Criticized State,” *New York Times*, October 15, 2006; *ibid.*, “Chinese Lawyer’s Sentence Is Light,” *New York Times*, December 22, 2006.

³⁴ Perhaps in part because of widespread and sympathetic international media coverage of his case, he received what was viewed as a relatively light sentence—three years commuted to a five-year reprieve that permits him to stay out of prison so long as he does not commit another crime. Joseph Kahn, “Lawyer Takes on China’s ‘Unwinnable’ Cases,” *New York Times*, December 12, 2005.

against governmental abuse of power. Bureaucratic culture is slow to change in China as elsewhere, but the Chinese leadership appears motivated to foster a new culture of government transparency, restraint, and accountability, expressed through and buttressed by law.

Government transparency is fundamental to establishing the rule of law. To promote accountability, predictability, and competence and to help curb corruption, China should be encouraged to continue introducing transparency into the work of the people's congress system, the NPC's new regulation review office, the government bureaucracy, the courts, and the procuracy. Giving ordinary Chinese citizens not only the legal right to access information but also effective means to enforce that right through the courts would be a significant advance.

Judicial reform is also essential to China's rule of law endeavor. The courts are the ultimate backstop to limit arbitrary, abusive state and private behavior. China's judiciary needs to be strengthened through structural changes in the court system that promote judicial independence from government and party interference and through professional training to help judges fulfill their restraining role. A more credible and transparent Chinese judiciary would also help increase the legitimacy and effectiveness of the Chinese legal system and help channel grievances off the streets.

While sound laws and independent institutions to interpret and enforce them are critical to developing rule of law, so is nurturing a society that is guided by legal rules and that appreciates its rights and responsibilities. Law subjects are now included in the curricula and personnel examinations of government and Communist Party officials, and the Chinese government promotes periodic legal education campaigns among the public, utilizing the media and social organizations. Law-related curricula is being introduced into primary and secondary schools to help children internalize from a young age the importance of law in ordering an increasingly complicated and rapidly changing society.

Continued development of legal aid programs by government and nongovernmental organizations is another significant step in the direction of enhancing legal consciousness, as well providing increased access to the legal system. Encouraging a free press and professional journalists trained in law who provide informed reports on legal issues and cutting-edge cases is another critical strategy to promote a culture of law and restrained and clean government. Such legal education, legal aid, and media training programs should all be continued and supported. So should initiatives designed to support the emergence of a more independent and professional legal profession that can help advance progress toward achieving the rule of law.

Building the rule of law in authoritarian China presents yet another paradox, like the creation of a "socialist market economy" or "socialist democracy." Despite the Communist Party's refusal to relinquish ultimate power over the legal system, it does seem to recognize the benefits of moving toward greater rule of law for its own legitimacy and "governing capacity," for China's economic development, and for the establishment of a "harmonious society." Although China has a long way to go before it can claim to be a rule of law country, the important institutional

and legal developments described in this paper, however incremental, may have far-reaching and possibly unanticipated ramifications for Chinese politics and society.