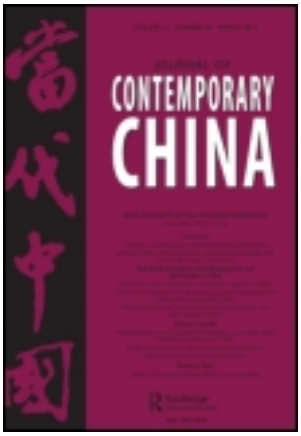

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Recalibrating the Measure of Justice: Beijing's effort to recentralize the judiciary and its mixed results

TITUS C. CHEN*

This article seeks to explain contradictions that have abounded in China's judicial reform, i.e. the juxtaposition of liberal and authoritarian characteristics. Incompatible phenomena came about because the post-1999 judicial reform has failed to rein in local and departmental resistance in key issue areas. China's national principals accepted the judicial system's policy prescription of administering the country by law, with an aim to reclaim central control over local state agents. However, the national leadership's varying political support to different aspects of judicial reform resulted in uneven outcomes and frustrated the goal of judicial centralization. In order to secure the goal, the national leadership has, since 2006, reinstituted more authoritarian policy imperatives into the existing liberal framework of judicial reform. China's post-1999 judicial reform has therefore oscillated between merit-based professionalism and allegiance-oriented demand. Conceptual incompatibility eventually led to behavioral contradictions and delivered mixed signals.

Introduction

This article analyzes the institutional and policy factors that have informed judicial ambivalence in China. Observers of China's judicial politics have noticed that, during the past decade (1999–2009), judicial professionalization has advanced and claimed moderate success, judicial administrative reforms have taken effect, and the notions of rule-based governance and human rights protection have been constitutionalized. At the same time, however, the move toward judicial independence has stagnated, the Chinese Communist Party (CCP) has accentuated its control over the judiciary, and targeted repressions against civil and political rights activists through judicial means have intensified after 2006. These ambivalent phenomena have led China scholars to

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suspect that Beijing has backtracked from the previous endorsement of realizing rule of law.[1]

The article presents a state-centered explanation of the contradictory developments in China's judicial politics. I argue that ambivalence has intensified because Beijing's post-1999 judicial reform failed to withstand local and departmental resistance in key areas, led to highly uneven results, and undercut the objective of judicial centralization. The suboptimal outcomes prompted national leaders to introduce conservative agenda and authoritarian methods into the existing liberal reform framework, hence breeding contradictions and confusion.

The article is composed of three major sections. I first trace the unusual ascendency of the notion of the rule-based governance in the 1990s that preceded and laid the discursive groundwork for the post-1999 judicial reform. The second section surveys the blueprint of judicial reform outlined by the Supreme People's Court (SPC) after 1999. I argue that the national party leadership's rhetorical endorsement of rule *by* law, while intent on reclaiming its effective command over the judiciary (judicial centralization), made possible the post-1999 judicial reform, which featured two categories of reform measures: judicial professionalization and institutional reformulation. The third section of this article analyzes the uneven results of the post-1999 judicial reform.

Discursive foundation of post-1999 judicial reform

The decade of China's judicial reform (1999–2009) was preceded by Beijing's search for solutions to rein in the disturbing tendency of administrative decentralization. Fiscal decentralization and phased deregulation significantly, which enhanced economic incentives and productivity after 1978, gave rise to local protectionism of various types that had progressively eroded the central government's command and control over the macro-economy and social development.[2] Decentralization was visible not only in economic policy-making processes but even more so in legal-judicial apparatuses, which had been known for their inter-departmental inconsistencies and inter-local fragmentation.[3] Decentralization in internal security and the judiciary was further consolidated during the 1980s, as legislative, law enforcement and judicial organs had to contribute to local authorities'

1. Jiang Ping, *Zhongguo de fazhi chuzai yige da daotui de shiqi* [*Rule of Law in China is in a Period of Great Regression*], (2009), available at: http://sunguodong2002.blog.sohu.com/144164134.html (last accessed 30 April 2010).

2. Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), pp. 210–211; Andrew H. Wedeman, *–From Mao to Market: Rent Seeking, Local Protectionism, and Marketization in China* (Cambridge: Cambridge University Press, 2003), ch. 3–5; Bin Liang, *The Changing Chinese Legal System, 1978–Present* (London: Routledge, 2008), p. 70; Melanie Manion, *Corruption by Design* (Cambridge, MA: Harvard University Press, 2004), p. 100; Dali L. Yang, *Remaking the Chinese Leviathan* (Stanford, CA: Stanford University Press, 2004), pp. 26–29, ch. 4.

3. Anthony R. Dicks, 'Compartmentalized law and judicial restraint: an inductive view of some jurisdictional barriers to reform', *China Quarterly*, (March 1995), pp. 83–84, 88–89; Peerenboom, *China's Long March toward Rule of Law*, pp. 141–142, 240, 256–259, 311; Murray Scott Tanner and Eric Green, 'Principals and secret agents: central versus local control over policing and obstacles to "rule of law" in China', *China Quarterly*, (September 2007); Randall Peerenboom, 'Introduction', in Randall Peerenboom, ed., *Judicial Independence in China* (Cambridge: Cambridge University Press, 2010), pp. 20–21; Randall Peerenboom, 'Competing conceptions of rule of law in China', in Randall Peerenboom, ed., *Asian Discourses of Rule of Law* (London: Routledge, 2004), pp. 126–127; Minxin Pei, *China's Trapped Transition* (Cambridge, MA: Harvard University Press, 2006), pp. 71–72; Randall Peerenboom and Weitseng Chen, 'Developing the rule of law', in Bruce Gilley and Larry Diamond, eds, *Political Change in China: Comparisons with Taiwan* (Boulder, CO: Lynne Rienner, 2008), pp. 146–147.

overriding agenda of economic expansion. Economic structural reform not only did little to redress, but actually exacerbated, juridical fragmentation and legal-judicial inconsistencies.[4]

As the central leadership resumed economic development and reform programs at the 14th CCP Congress in October 1992, local and departmental protectionisms soon re-emerged.[5] The central party leadership in the following months lashed out against protectionist practices, reiterated party discipline and legality, and publicly urged territorial and ministerial authorities to uphold central authority and to cultivate an awareness of the whole (*quanju yishi*, 全局意識), i.e. to refrain from parochial and self-aggrandizing acts.[6] Throughout the rest of the 1990s the central government introduced administrative structural reforms that consequentially reconfigured China's central–local relations, and recuperated the national regime's policy-making and policy-coordinating capabilities.[7] Such recentralization effort, which was no less than rebuilding the Chinese party-state, extended also to the judiciary and law enforcement after the mid-1990s.

In Spring 1994 the central government was poised to implement structural reforms in aspects of taxation, finance, banking, and state-owned enterprise management. Furthermore, Premier Li Peng's government work report to the annual NPC session in March 1994 indicated that Beijing was determined to rationalize the government structure, and to transform government functions toward a regulatory state that facilitated and supervised, but decreased its participatory and interventionist roles in, market operations.[8] Given the recurring phenomenon of local and departmental protectionisms that came along with the raging economic overheating in 1992 and 1993, it was expected—and actually transpired—that the high-profile structural reforms would meet with stiff local resistance and generate central–local tensions. The central leadership at the time was seeking alternative policy discourses and instruments that were compatible with the conception of a regulatory state to smooth the reform process. In particular, Beijing was looking beyond disciplinary warnings and ideological appeals. It was against this opportune background that the notion of *legality*—that is, administering the country by law—was brought up by a sector of China's legal-judicial system and won the central leadership's recognition.

4. Peerenboom, *China's Long March toward Rule of Law*, pp. 188, 311, 315, 328; Wedeman, *From Mao to Market*, pp. 204–205; Liang, *The Changing Chinese Legal System*, pp. 70–71.

5. Wedeman, *From Mao to Market*, pp. 215–229.

6. Jiang Zemin, 'Shisijie erzhong quanhui de gongzuo baogao (03/07/1997)' ['Work report to the 2nd Plenum of 14th CCP Central Committee (03/07/1997)'], in *Shisida Yilai Zhongyao Wenjian Xuanbian* [*Selected Important Documents since the 14th CCP Congress*] (Beijing: Renmin Press, 1997), pp. 132, 960–963; Qiao Shi, 'Nuli jianli shehui zhuyi shichang jingji falu tixi (07/02/1993)' ['Striving toward establishing the legal system of socialist market economy (07/02/1993)'], in *Shisida Yilai Zhongyao Wenjian Xuanbian*, pp. 340–341.

7. Barry Naughton and Dali L. Yang, 'Holding China together: introduction', in Barry Naughton and Dali L. Yang, eds, *Holding China Together: Diversity and National Integration in the Post-Deng Era* (Cambridge: Cambridge University Press, 2004), pp. 8–11. Also, *Journal of Democracy* published two special issues in 2003 and 2009, respectively, that analyzed the endurance and resilience of CCP authoritarianism and its administrative reform. Other representative works that address China's recentralization drive include, *inter alia*: Yang, *Remaking the Chinese Leviathan*; Kjeld Eri Brodsgaard and Zheng Yongnian, eds, *The Chinese Communist Party in Reform* (London: Routledge, 2006); Andre Laliberte and Marc Lanteigne, eds, *The Chinese Party-State in the 21st Century* (London: Routledge, 2008); David Shambaugh, *China's Communist Party* (Washington, DC: Woodrow Wilson Center Press, 2008); and Bill K. P. Chou, *Government and Policy-making Reform in China* (London: Routledge, 2009).

8. Naughton and Yang, 'Holding China together: introduction', pp. 17–18; Dali L. Yang, 'Economic transformation and state rebuilding in China', in Naughton and Yang, eds, *Holding China Together*, pp. 122, 137–142; Yang, *Remaking the Chinese Leviathan*, pp. 16–24, 94.

The communiqué from the 4th Plenum of the 14th CCP Central Committee in September 1994 was focused on strengthening the party's organizational integrity and its ruling capacity. Among other things, the Plenum document urged cadres to be familiar with the knowledge of modern law.[9] Xiao Yang, then Minister of Justice, noticed the wording about studying the law and decided to capitalize on the seemingly insignificant sentence. After the 4th Plenum he proposed that two law seminars be arranged for the central leadership to become familiar with modern legal concepts.[10] Xiao's proposal certainly found favor with Jiang Zemin. Before long the law seminars were held at Zhongnaihai on 9 December 1994 and 20 January 1995, respectively. All the members of the Politburo Standing Committee and the CCP Central Secretariat attended both sessions. Eventually six law seminars were held for CCP Politburo Standing Committee members between December 1994 and December 1997.[11]

Xiao Yang and his reformist associates from the Ministry of Justice (MOJ) carefully screened lecturer candidates in order to impress the central leadership with potential utilities of the law and legal institutions to the structural reform agenda. Each seminar proposed the goal of 'administering the country by law', and attributed administrative fragmentation, official irregularities and local protectionism to: (a) inadequate legislation and legal institutions that sustained the outdated mode of public administration; and (b) ignorant officials who were oblivious to, or intentionally violated, state laws and regulations for parochial interests. Based upon such situation diagnoses, law seminar lecturers recommended the central government to: (a) accelerate, improve, and better coordinate the legislative work by the National People's Congress and individual ministerial organs; and (b) strengthen the consciousness of law and intensify legal training for party cadres and government officials.[12]

The MOJ's effort towards matching the legal discourse of *yifa zhiguo* (依法治国, administrating the country by law, or rule *by* law) with the central leadership's structural reform agenda was well received. Jiang Zemin concluded each law seminar with policy remarks that affirmed the reformist lecturer's situation diagnoses, and admonished party cadres to reflect upon and apply the lecturer's policy prescriptions.[13] Jiang further instructed the regularization of the law seminar at all levels of party organization.[14] Up to this point the central leadership had promoted the conception of the rule-based governance by an approach reminiscent of a political campaign through propaganda apparatuses: law seminars were set up at the provincial level after the General Secretary's verbal endorsement, and reports about the Zhongnanhai law seminars appeared prominently on the front pages of major newspapers. Notwithstanding such a favorable attitude, Jiang's remarks revealed the central party leadership's instrumentalist understanding of the law: legal institutions are devised to

9. 'Zhonggong zhongyang guanyu jiaqiang dang de jianshe jige zhongda wenti de jueding' ['Decision of the CCP Central Committee on several consequential issues regarding strengthening the Party's organization'], in *Shisida Yilai Zhongyao Wenjian Xuanbian*, pp. 971–972.

10. Xiao Yang, 'Yifa zhiguo jiben fanglue de tichu, xingcheng he fazhan' ['The generation, formulation, and development of the idea of administrating the country by law as a fundamental agenda'], *Qiushi* no. 20, (2007), available at: http://www.qstheory.cn/zxdk/2007/200720/200907/t20090707_6783.htm (last accessed 10 May 2010).

11. *Zhonggong Zhongyang Fazhi Jiangzuo Huibian* [*Compiled Documents of CCP Center Law Seminars*] (Beijing: Falu Press, 1998), p. 1.

12. *Ibid*., pp. 54, 80–83, 129–131.

13. *Ibid*., pp. 1–2, 55–60, 105–115.

14. *Ibid*., pp. 56–57.

retain the eroded authority of the central regime over local authorities.[15] Also, the political status of the law remained subsidiary and subservient to that of economic development.[16] In short, Jiang Zemin's promotion of law seminars and the party center's rhetorical endorsement of *yifa zhiguo* were policy-oriented discourses to justify the unfolding governmental reforms and to shore up economic development.[17]

As the structural reform proceeded in earnest in 1995, the central regime met local and departmental resistance. Jiang Zemin sounded out sharp criticisms and warnings at the 5th Plenum of the 14th CCP Central Committee on 28 September. He then took the opportunity of the third law seminar to mobilize the law to the central regime's advantage. Jiang gave a major policy speech after the seminar on 8 February 1996, in which he formally defined the idea of *yifa zhiguo* as a constitutive component of the Deng Xiaoping theory of socialism with Chinese characteristics.[18] An editorial of the *Legal Daily* on the next day indicated that Jiang's speech greatly elevated the political status of *yifa zhiguo,* and made the idea into an important official guidance for the administration of the state and social affairs.[19]

Effects of the formal recognition of *yifa zhiguo* soon appeared in China's legislation and political discourses. A little over a month after Jiang's policy speech at the third seminar, delegates of the 8th NPC voted in March 1996 to write the ideas of *yifa zhiguo* and building up of the country with socialist legal institutions (*jianshe shehui zhuyi fazhi guojia*, 建设社会主义法制国家) into the Ninth Five-Year Plan of Economic and Social Development and the Guideline of Vision 2010.[20] In September 1997, against the larger backdrop of the Asian financial crisis, the Chinese central leadership gave the law and legal institutions more prominence, when Jiang Zemin in his work report to the 15th CCP Congress argued that *yifa zhiguo* is

> the basic strategy employed by the Party in leading the people and running the country. It is also the objective demand of a socialist market economy, an important hallmark of social and cultural progress, and a vital guarantee for the lasting political stability of the country.

Jiang proceeded to point out that pending administrative reforms and socialist modernization efforts required the party to continually perfect socialist legal institutions, to administer the country by law, and to construct a socialist rule-of-law state (社会主义法治国家) as one of the major tasks of party-initiated political reform. He further elaborated on the party center's endorsement for reforms in legislative work, law enforcement and the judiciary.[21]

15. William P. Alford, 'The more law, the more . . . ? Measuring legal reform in the People's Republic of China', in Nicholas C. Hope, Dennis Tao Yang and Mu Yang Li, eds, *How Far Across the River? China Policy Reform at the Millenium* (Stanford, CA: Stanford University Press, 2003), pp. 136–137; Peerenboom, *China's Long March toward Rule of Law*, pp. 300–301.

16. Xiao Yang, *Zhongguo Xingshi Zhengce he Celue Wenti* [*Issues on China's Criminal Justice Policy and Strategy*] (Beijing: Falu Press, 1996), pp. 37–38.

17. *Zhonggong Zhongyang Fazhi Jiangzuo Huibian*, p. 56.

18. Xiao Yang, *Zhongguo Xingshi Zhengce he Celue Wenti*, pp. 40–41.

19. *Zhonggong Zhongyang Fazhi Jiangzuo Huibian*, pp. 106–108.

20. Xiao Yang, 'Yifa zhiguo jiben fanglue de tichu, xingcheng he fazhan'.

21. Jiang Zemin, 'Gaoju Deng Xiaoping lilun weida qizhi, ba jianshe you Zhongguo tese shehui zhuyi shiye quanmian tuixiang ershiyi shiji (09/12/1997)' ['Holding high the great banner of the Deng Xiaoping Theory, carrying forward comprehensively the undertaking of building socialism with Chinese characteristics into the 21st century (09/12/1997)'], in *Shiwuda yilai Zhongyao Wenjian Xuanbian* [*Selected Important Documents since the 15th CCP Congress*] (Beijing: Renmin chubanshe, 2000), pp. 32–33.

Notwithstanding his rhetorical support for judicial reform, Jiang's 1997 report still placed the law and legal institutions under the omnipresent agenda of political control and the overarching ambience of economic expansion. Even so, Jiang's endorsement for the discourse of *yifa zhiguo* soon took effect as it facilitated a series of the Chinese government's international legal and constitutional commitments over the next two years. Beijing signed the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in October 1997 and the International Covenant on Civil and Political Rights (ICCPR) in October 1998, which formally committed China to the universal obligations of human rights protection. A constitutional amendment followed in March 1999, adding a new section in Article 5 of the State Constitution that reads, 'The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law'.[22] The amendment constitutionalized the CCP's commitment to the rule-based governance, and laid a constitutional groundwork for judicial reform after 1999.

Post-1999 judicial reform: professionalism and institutional reformulation

Meanwhile, Xiao Yang left the MOJ in 1998 to take up the presidency of the Supreme People's Court. Xiao's personal promotion (from the ministerial to the vice-premier rank) signified the central leadership's affirmation of the quality and agenda of his work at the MOJ. Under Xiao's reform-oriented leadership, and following the impetus of the 1998 governmental reform, the SPC soon took upon itself a pivotal role in converting the central leadership's discursive endorsement of improving the law and legal institutions into a top-down impetus for substantive actions of judicial reform.

In October 1999 the SPC released the famed Document No. 28, titled the Five-Year Guideline for the Reform of People's Courts (hereafter the First Courts Reform Guideline). The Guideline began with a blunt assessment of the state of China's judiciary that conveyed a sense of urgency and desperation: 'the People's Court must reform … the People's Court's adjudicative function has encountered unprecedented complications, and its administrative institutions and adjudicative work mechanisms have come under severe challenges … without reforms the People's Court holds no future'.[23] The Guideline unreservedly pointed out the two most outstanding deficiencies of China's judiciary, i.e. judicial fragmentation and the poor quality of adjudication, and attributed the two problems to the obsolete institutions of judicial administration and the outmoded logistical support.[24] Therefore, the Guideline's overarching agenda was to centralize the judiciary by judicial professionalization and institutional reconfiguration.

The First Courts Reform Guideline highlighted the national unity of legal-judicial institutions as the ultimate goal. Under the banner of impartiality and efficiency, the

22. Zou Keyuan, 'The Party and the law', in Brodsgaard and Yongnian, eds, *The Chinese Communist Party in Reform*, p. 81.

23. Zuigao Renmin Fayuan [Supreme People's Court], 'Renmin fayuan wunian gaige gangyao' ['Five-Year Guideline for the Reform of People's Courts'], in *Zhongguo Falu Nianjian 2000* [*China Law Yearbook 2000*] (Beijing: Zhongguo Falu Nianjian Press, 2000), p. 608.

24. Zhu Mingshan, 'Guanyu renmin fayuan wunian gaige gangyao de shuoming' ['Explanations of the Five-Year Guideline for the Reform of People's Courts'], in *Zhongguo Falu Nianjian 2000* [*China Law Yearbook 2000*] (Beijing: Zhongguo Falu Nianjian Press, 2000), p. 613.

Guideline laid out 50 reform items that may be categorized into two groups of policy prescriptions. The first category involved functional professionalization through standardized practices.[25] The other major group of policy prescriptions pertained to the administrative reform of the courts toward an adjudication-centered institution, including the reform of judicial personnel administration, the improvement of judges' adjudicative authority vis-à-vis that of court bureaucracies, and the improvement of the finance and facilities of the judiciary. In particular, given the fact that the Adjudication Committee (AC, or the *shenpan weiyuanhui*) of each courthouse (composed of leading court bureaucrats and senior judges) had played a crucial role in defending and sustaining the vested interests of local authorities or businesses, the Guideline proposed to curtail the AC's unbridled influence by expanding the adjudicative power of collegial panels and lead judges, codifying the AC's functional jurisdiction, and scaling back excessive case referrals to the AC.[26]

Uneven results and implications of post-1999 judicial reform

Two interrelated categories of policy prescriptions—i.e. the reform for judicial professionalism, and the reconfiguration of judicial institutions—figured prominently in the SPC's First Courts Reform Guideline. Over time, however, the SPC's reform effort has brought forth uneven effects: whereas judicial professionalization has made steady but impressive strides, the proposed institutional reconfiguration of the judiciary has either fallen through or procrastinated.

Progress in judicial professionalization

The national leadership's political support of judicial professionalization was predicated on an assumption: the professionalization effort enabled judicial officials to look beyond their immediate bureaucratic environs when carrying out judicial functions, hence retaining central authority and curbing the centrifugal tendency. The professionalization drive turned out to be a less controversial and more successful reform. In order to standardize the process and criteria of judicial recruitment, the 1995 Judges Law was revised in 2001 which raised the quality threshold of the judgeship by requiring new judges to hold all the following qualifications: a university degree, professional legal knowledge, and prior work experience in law-related realms.[27] Furthermore, the SPC, the MOJ, and the Supreme People's Procuratorate (SPP) decided in January 2002 to combine hitherto separate and regional examinations for new judges, lawyers, and procurators into a unified national bar exam. The first such standardized examination was held in March 2002.[28] The SPC further issued a binding opinion in 2002 that required new judges who passed the national bar exam to undergo intensive, full-time professional training before the formal accreditation of the judgeship. In the same year the SPC stipulated that the sitting judges whose

25. Zuigao Renmin Fayuan, 'Renmin fayuan wunian gaige gangyao', p. 611.
26. *Ibid*., p. 610; Zhu Mingshan, 'Guanyu renmin fayuan wunian gaige gangyao de shuoming', p. 614.
27. Zhu Jingwen, *Zhongguo Falu Fazhan Baogao* [*Report on China's Legal Development*] (Beijing: Zhongguo Renmin Daxue Press, 2007), p. 197.
28. Liang, *The Changing Chinese Legal System*, pp. 65–66.

educational and professional qualifications did not measure up to the new standards were required to make up for the discrepancy through in-career training courses and/or continuing education programs within five years.[29]

Besides standardizing the recruitment and evaluation criteria, the SPC also standardized the criteria of judicial ethics to rein in judicial corruption and irregularities. In November 2000 the SPC issued a binding circular that prohibited immediate family members of high-ranking justice officials from engaging in for-profit legal services and law-related businesses. In March 2001 the SPC released the detailed regulations on the avoidance of conflict of interest in the adjudicative work.[30] In October 2001, the SPC issued the Basic Code of Conduct for Judges, a comprehensive set of prescriptive and prohibitory injunctions that sketched the proper judicial behavior in professional functions and private aspects.[31] It bears noticing that the reformist wording of the Basic Code remarkably incorporated international norms of judicial ethics, and raised awareness to both substantive and procedural dimensions of justice. Furthermore, the Basic Code gave scant attention to the party's role in the conduct of judicial work. In fact, the leadership of the party was not mentioned at all in the document, indicating the effect of de-politicization that came along with the professionalization drive. The SPC further issued two binding regulations on judicial integrity and disciplinary rules, respectively in 2003 and 2004.[32]

In addition to the professionalization effort, the SPC concurrently explored innovative concepts and practices to enhance the judiciary's professional capacity and social responsiveness. The introduction of legal aid was a case representative of judicial innovation after the late 1990s. Such state-led efforts of judicial professionalization and judicial innovation were carried out with international aid, as the central party leadership and national judicial bureaucrats were receptive to international best practices that were conducive to the central authority.[33] Xiao Yang was personally involved in the establishment and operationalization of the US–China Rule of Law Initiative in 1997.[34] The First Courts Reform Guideline of 1999, which was impossible without the Ford Foundation's research grants, reaffirmed the necessity of selectively transplanting legislations from industrially advanced states and learning from international best practices.[35]

29. Zhu, *Zhongguo Falu Fazhan Baogao*, p. 198; Benjamin L. Liebman, 'China's courts: restricted reform', *China Quarterly*, (September 2007), p. 625.

30. Liang, *The Changing Chinese Legal System*, pp. 65–67.

31. Zhu, *Zhongguo Falu Fazhan Baogao*, p. 199.

32. *Ibid*., p. 199.

33. Jacques Delisle, '*Lex Americana*? United States legal assistance, American legal models, and legal change in the post-communist world and beyond', *William University of Pennsylvania Journal of International Economic Law* 20(2), (Summer 1999), pp. 180–308; Alford, 'The more law, the more … ?', pp. 123, 137–138, 141; Nicole Schulte-Kulkmann and Sebastian Heilmann, *US–China Legal Cooperation—Part II: An Overview of American Governmental Legal Cooperation Initiatives*, Occasional Paper (Department of Political Science, Trier University, Trier, Germany, 2005); Helene Piquet, 'Chinese labor law in retrospect: efficiency and flexibility legitimized', in Andre Laliberte and Marc Lanteigne, eds, *The Chinese Party-State in the 21st Century: Adaptation and the Reinvention of Legitimacy* (London: Routledge, 2008), p. 42.

34. William P. Alford, 'Exporting the "pursuit of happiness"', in C. Stephen Hsu, ed., *Understanding China's Legal System* (New York: New York University Press, 2003), pp. 46–92; Paul Gewirtz, 'The US–China Rule of Law initiative', *William & Mary Bill of Rights Journal*, (September 2003), p. 612.

35. Nicole Schulte-Kulkmann and Sebastian Heilmann, *US–China Legal Cooperation—Part III: An Overview of Private American–Chinese Legal Cooperation Programs*, Occasional Paper (Department of Political Science, Trier University, Trier, Germany, 2005), p. 65.

Through procedural and behavioral standardization, practical innovation, and international cooperation, the professionalization effort has constructed a better-educated and aspiring judgeship. Within ten years the number of Chinese judges holding a college degree grew more than tenfold (from 10,000 in 1995 to 115,000 in 2005), and the percentage of college degree holders increased more than seven times, from 1995's 6.9% to 2005's 51.6%.[36] In addition to formal education and in-career training, Western governments and law schools have furnished various exchange programs for Chinese judges and lawyers to receive intensive professional training either in China or abroad.[37] Given the central party leadership's acquiescence and the national judicial leadership's encouragement, courts of various levels conducted a number of experimental projects that explored the applicability of foreign judicial practices (such as the adversarial mode of criminal justice proceedings that is practiced in the common law system), not infrequently in partnership with international organizations that provided financial aid, professional training and practical know-how. Meanwhile, the pro-reform atmosphere emboldened liberal-minded law scholars and lawyers to propose institutional solutions (usually in cooperation with international aid) that would further strengthen judicial professionalism, better integrate international legal norms into the domestic legal framework, or enhance judicial independence.[38] Activism of outspoken liberal law scholars even led to the unexpected abolishment of the urban repatriation system in 2003.[39]

Better-trained judges became attentive to procedural justice, and spent more time in case deliberation and verdict writing.[40] They were eager to gain more autonomy from instructions and interventions from other branches of government and the party. Such improvement raised social expectation of a competent, impartial, and responsive judiciary. Civil society groups and individual citizens were able, and even encouraged by state media, to mobilize the law and the courts system to redress disputes and

36. Liebman, 'China's courts', p. 626; Zhu, *Zhongguo Falu Fazhan Baogao*, pp. 197–198.

37. United States General Accounting Office, *Foreign Assistance: US Funding for Democracy-Related Programs (China)* (Washington, DC: United States General Accounting Office, 2004); Nicole Schulte-Kulkmann and Sebastian Heilmann, *US–China Legal Cooperation—Part I: The Role of Actors and Actors' Interests*, Occasional Paper (Department of Political Science, Trier University, Trier, Germany, 2005); Nicole Schulte-Kulkmann, *The German–Chinese "Rule of Law Dialogue": Substantial Interaction or Political Delusion?*, Occasional Paper (Department of Political Science, Trier, Germany, Trier University, 2005); Matthew C. Stephenson, 'A Trojan horse in China?', in Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006), pp. 199–212; Schulte-Kulkmann and Heilmann, *US–China Legal Cooperation—Part III*, pp. 6–11; Thomas Lum, *CRS Report for Congress: US-Funded Assistance Programs in China* (RS22663) (Washington, DC: Congressional Research Service, 2007); Thomas Lum, *CRS Report to Congress: US Foreign Aid to East and South Asia: Selected Recipients* (RL31362) (Washington, DC: Congressional Research Service, 2007); Titus C. Chen, *Capped Socialization: How Have International Norms Changed China, 1860–2007*, doctoral dissertation, Department of Political Science, University of California-Irvine, Irvine, CA, 2008, ch. 4.

38. Tan Shigui, *Zhonguo Sifa Gaige Yanjiu* [*Studies on China's Judicial Reform*] (Beijing: Falu Press, 2000), pp. 81–92, 393–405; Chen Guangzhong, *Gongmin Quanli yu Zhengzhi Quanli Guoji Gongyue yu Woguo Xingshi Susong* [*International Covenant on Civil and Political Rights and Our Country's Criminal Litigation Institutions*] (Beijing: Commercial Press, 2005); Zhang Mingjie, *Gaige Sifa: Zhongguo Sifa Gaige de Huigu yu Qianzhan* [*Reforming the Judiciary: Retrospect and Prospect of China's Judicial Reform*] (Beijing: Shehui Kexue Wenxian Press, 2005).

39. Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (Oxford: Oxford University Press, 2007), pp. 208–209.

40. Liebman, 'China's courts', pp. 631–638; Peerenboom and Chen, 'Developing the rule of law', p. 146.

grievances, hence exercising their law-granted civil rights. It is not a total coincidence that the post-1999 judicial reform unfolded almost in tandem with the popularization of rights activism and public interest lawyering.[41] In summary, the top-down effort of judicial professionalization, to a moderate extent, has generated positive effects to civil rights protection and has improved China's international image.[42]

Procrastination in institutional reconfiguration

Despite moderate accomplishment of professionalization, extra-judicial considerations have conditioned and slowed down the proposed institutional reforms. Given the judiciary's subordinate status vis-à-vis other governmental bodies and the party, its institutional reform agenda would almost be certain to meet with other bureaucracies' suspicion and reluctance.

The First Courts Reform Guideline advocated for an adjudication-centered courts system, and proposed a corresponding agenda of institutional reform of the judiciary in three major inter-locking aspects: personnel administration, courts bureaucracy, and finance. Yet the progress made during the following decade has been remarkably uneven: reform has been relatively effective in the fiscal-issue area, less so in the bureaucratic-organizational sphere, and least pronounced in the personnel policy.

(a) Improving the finance and facilities of the judiciary. One root cause of the judiciary's dependence on the mercy of parallel party leadership and government, hence perpetuating local protectionism, is the parallel government's comprehensive control over a court's finance. Because of the courts' inferior position and low priority in government work, judges and judicial bureaucrats have complained about the short funding of the courts, especially at the basic level and in underdeveloped regions, which provided meager remuneration and fostered rent-seeking.[43] However, the First Courts Reform Guideline only briefly and vaguely proposed experimental measures that would improve the government's financial commitment for courts operation and adjudicative work. The brevity and ambiguity of the SPC's reform proposal on judicial finance suggested the level of difficulty and the degree of complexity of the financial issue, which foreclosed any progress in the following five years (2000–2005).

While the SPC's financial reform effort stagnated, law scholars and reform-minded judicial bureaucrats began to gather momentum for the idea of centralizing budgetary powers over the courts, advocating that the readjustment would ease the judiciary's financial austerity and relieve judges of local patronage.[44] Finally, in October 2006 the CCP Central Committee released a binding Decision on Further Strengthening the Work of People's Courts and People's Procuratorates (hereafter the *2006 Decision*). According to Xiao Yang, it was the first internal

41. Hualing Fu and Richard Cullen, '*Weiquan* (rights protection) lawyering in an authoritarian state: building a culture of public-interest lawyering', *The China Journal* 59, (January 2008), pp. 113–122.

42. Schulte-Kulkmann and Heilmann, *US–China Legal Cooperation—Part II*, p. 20.

43. Ching Kwan Lee, Against the Law: Labor Protests in China's Rustbelt and Sunbelt (Berkeley, CA: University of California Press, 2007), pp. 186–188.

44. Cheng Zhuru, *Sifa Gaige yu Zhengzhi Fazhan* [*Judicial Reform and Political Development*] (Beijing: Zhongguo Shehui Kexueyuan Press, 2001), pp. 279–301.

document issued by the CCP central leadership that directly bore upon the judicial work.[45] The *2006 Decision* constituted a major development toward a financially sound judiciary, because the document unequivocally threw political endorsement behind the proposal of strengthening the government's financial, infrastructural, and welfare commitments to the courts and judges. Nevertheless, the *2006 Decision* stopped short of endorsing the centralization of budgetary powers over the courts.

The SPC and the Ministry of Finance soon acted on the *2006 Decision* by issuing a joint announcement in July 2007 that increased the amount of professional stipends for judges.[46] In addition, the SPC claimed that it had, since 2006, secured an additional 70,000 judicial posts; a SPC spokesman pointed out that 80% of the newly acquired positions were used to staff the shorthanded basic-level courts.[47] Meanwhile, since April 2007, the SPC and the Ministry of Finance had begun joint investigations that surveyed the fiscal state of courts of different regions and at different levels, with a view to constructing a feasible action plan for centralizing the courts' budget.[48]

On 28 November 2008, the CCP Central Political and Legal Affairs Commission (CCPCPLAC), after meticulous, multi-year negotiations with at least 17 state ministries and party organs, released a consequential Opinion on the Questions of Deepening the Reform of Judicial Institution and Judicial Work Mechanism (hereafter the *2008 Opinion*), in which fiscal reform featured prominently.[49] Against the background of a loose national monetary policy to offset the brunt of the global financial crisis, the *2008 Opinion* proposed a complicated, multi-layered reform scheme that partially centralized the finance of the judiciary.[50] If enforced, the state and provincial support was expected to shoulder 50–90% of operational and administrative costs, and up to 90% of fixed-asset investment, of courts in underdeveloped and unstable regions, hence effectively alleviating basic-level courts from perennial dependence on local fiscal provision.[51] It was estimated that the central government would therefore bear an additional RMB40 billion for judicial costs.[52] In addition, the *2008 Opinion* proposed a legislation that would institute regular annual growth of

45. 'Shenru xuexi guanche zhongyang "jue ding"jinyibu jiaqiang renmin fayuan gongzuo tuijin renmin fayuan shiye quanmian fazhan' ['Studying thoroughly and implementing faithfully the Party center's "Decision", further strengthening the work of people's courts, and carrying forward the undertakings of people's courts toward comprehensive development'], *Renmin Fayuanbao* [*People's Courts Daily*], (12 October 2006), available from the CNKI website (last accessed 30 April 2010).

46. 'Sifa gaige jiang zai qidong jiceng fayuan jingfei huo jiang naru zhongyang yusuan' ['Judicial reform to be restarted; finance of basic-level courts might be incorporated into the budget of the central government'], *Fenghuang Net*, (5 December 2008), available at: http://news.ifeng.com/mainland/200812/1205_17_908489.shtml (last accessed 10 May 2010).

47. 'Zuigao renmin fayuan huiying wangmin shida wenti' ['Supreme People's Court answered ten questions by netizens'], *Renmin Fayuanbao* [*People's Courts Daily*], (3 June 2009), available from the CNKI website (last accessed 30 April 2010).

48. 'Sifa gaige jiang zai qidong jiceng fayuan jingfei huo jiang naru zhongyang yusuan'.

49. Qin Xudong, 'Xin yilun sifa gaige qimu' ['A new round of judicial reform was embarked'], *Caijing*, (18 December 2008), available at: http:www.caijing.com.cn/2008-12-18/110040452.html (last accessed 10 May 2010).

50. Luo Jieqi, 'Zhengfa jingfei gaige qidong caizheng fenji fenlei quane fudan' ['Reform over the finance of political–legal sectors began; courts finance to be shared according to budgetary categories and by administrative levels'], *Caijing*, (4 Junuary 2009), available at: http://www.caijing.com.cn/2009-01-04/110044744.html (last accessed 10 May 2010).

51. *Ibid*.

52. 'Sifa gaige jiang zai qidong jiceng fayuan jingfei huo jiang naru zhongyang yusuan'.

the courts' operational costs that pegs the growth of the annual government budget.[53] All these major proposals were formally incorporated into the Third Five-Year People's Courts Reform Guideline (hereafter the Third Courts Reform Guideline), released by the SPC in March 2009.[54]

According to Xu Xi and Lu Rongrong, the *2008 Opinion* has brought forth actual effects: central and provincial governments' expenses on court operations has significantly increased in 2009.[55] Notwithstanding the moderate success in improving the courts' fiscal condition, Chinese law scholars and journalists pointed out that ten years of judicial reform had not addressed one of the key problems, i.e. the institutionalized and retrenched local control over the courts' finances.[56] Central financial assistance assuaged but did not deal with this root cause of local protectionism and judicial rent-seeking.[57]

(b) Strengthening judges' adjudicative authority vis-à-vis that of court bureaucracies. The SPC's accomplishment in augmenting judges' adjudicative authority vis-à-vis that of court bureaucracy was less forthcoming or impressive than its moderate success in fiscal realms. As non-judicial considerations have loomed large, the SPC leadership was forced to redefine the objective and approach of its organizational reform.

The SPC's organizational reform agenda was focused on the Adjudication Committee (AC), a quasi-judicial body constitutive of each Chinese courthouse.[58] Various Chinese laws grant the Adjudication Committee advisory, supervisory, deliberative and judicial powers over major or complicated cases. Over the years the Adjudication Committee had exercised a supreme judicial power within each courthouse. Nevertheless, liberal law scholars and lawyers had, since the 1990s, faulted the Adjudication Committee for contradicting the international norm of a fair and competent trial, and perpetuating judicial fragmentation.[59] Judges, however, did not necessarily agree with the above prescription, although they shared most

53. Luo Jieqi, 'Zhengfa jingfei gaige qidong caizheng fenji fenlei quane fudan'.

54. 'Zuigao renmin fayuan guanyu yinfa "Renmin fayuan di sange wunian gaige gangyao (2009–2013)" de tongzhi' ['Announcement of Supreme People's Court regarding the distribution of "the Third Five-Year Guideline for the Reform of People's Courts (2009–2013)"'], *Xinhua*, (17 March 2009), available at: http://news.xinhuanet.com/legal/2009-03/26/content_11074127.htm (last accessed 10 May 2010).

55. Xu Xin and Lu Rongrong, *Zhongguo Sifa Gaige Niandu Baogao (2009)* [*Annual Report on Judicial Reform in China (2009)*], unpublished manuscript, (2010), p. 3.

56. Cai Dingjian, 'Zhongguo de sifa gaige yu xianzheng zhidu' ['Judicial reform and constitutional institutions in China'], Paper presented at *Legal Reform in China: Problems and Prospects*, 18 April (Washington, DC: Carnegie Endowment for International Peace, 2005).

57. Xu Xin and Lu Rongrong, *Zhongguo Sifa Gaige Niandu Baogao (2009)*, p. 3.

58. Xiao Jianguo and Xiao Jianguang, 'Shenpan weiyuanhui zhidukao—jianlun quxiao shenpan weiyuanhui zhidu de xianshi jichu' ['A study of the history of the Adjudication Committee—and examining the contemporary justifications of abolishing the institution of the Adjudication Committee'], *Beijing Keji Daxue Xuebao* [*Journal of Beijing University of Technology*] 18(3), (November 2002), pp. 61–62.

59. Sun Yong and Wu Yulin, 'Shenweihui zhidu yu gongkai shenpan zhidu yuanze de chongtu' ['The conflict between the institution of the Adjudication Committee and the principle of open trial'], *Jiangsu Jingjibao* [*Jiangsu Economy Daily*], (6 July 2001), available from the CNKI website (last accessed 30 April 2010); Jiang Xiaoyang, 'Huan shenweihui benlai mianmu' ['Examining the original functions of the Adjudication Committee'], *Zhongguo Funu Bao* [*Chinese Women Daily*], (20 April 2002), available from the CNKI website (last accessed 30 April 2010); Quan Xinghe, 'Wanshan xianxing shenpan weiyuanhui zhidu de goxiang' ['Proposals on improving the existing institution of the Adjudication Committee'], *Zhongguo Gaigebao* [*China Reform Daily*], (9 November 2005), available from the CNKI website (last accessed 30 April 2010).

of law scholars' diagnoses about the Adjudication Committee. The Adjudication Committee, judges contended, demanded serious reform but should not be dismantled altogether, because the Committee had developed unanticipated functions that were not explicitly prescribed by law but were crucial for a limited degree of judicial autonomy from external interferences under the existing asymmetric power relations between the judiciary and other governmental bodies.[60] The protracted debate over the Adjudication Committee manifested the abiding clout of local authorities over same-level courts.

Noticing the difficulty of getting rid of the Adjudication Committee under the existing political system, drafters of the First Courts Reform Guideline adopted an eclectic approach: weakening and eventually demobilizing the Committee's *deliberative* and *judicial* powers, while re-emphasizing its *advisory* and *supervisory* functions. The short-term policy goal was an effective reduction of case referrals to the Adjudication Committee. With that goal in mind, the SPC began to push for the policy of nominating and appointing judges of high caliber to be presiding judges in collegial panels, who would bear major adjudicative responsibility during trial proceedings and in return would receive additional stipends in recognition of their professionalism and responsibilities.[61] Specifically, the SPC urged the president, vice presidents, section chiefs and deputy section chiefs of a courthouse to sit on collegial panels as presiding judges to ensure the quality and authoritativeness of a trial, hence reducing case referrals.[62] The main assumption that informed such a proposal was that a professionally competent judge would impartially and appropriately apply centrally-sanctioned laws and regulations, hence aligning local conditions with central imperatives and reducing judicial support for local protectionism. Furthermore, the First Courts Reform Guideline mandated the SPC to draw up binding instructions that specified qualifications of membership, and the scope of jurisdiction, of the Adjudication Committee.

The reform momentum soon triggered local experiments on the composition and work style of the Adjudication Committee.[63] Over time, however, local initiatives seemed to deviate from the policy goal of the First Courts Reform Guideline, i.e. to demobilize the AC's deliberative and judicial powers. Rather, several local and intermediate courts delegated *more* judicial and quasi-judicial powers into the

60. Su Li, 'Jiceng fayuan shenpan weiyuanhui zhidu de kaocha ji sikao' ['Examining and reflecting on the institution of the Adjudication Committees at the basic level'], *Beida Faxue Pinglun* [*Peking University Law Review*] 1(2), (1998), pp. 328–350; Dan Po, 'Renmin fayuan quanmian gaige de zhicheng dian' ['The hinge of the comprehensive reform of people's courts'], *Renmin Fayuan Bao* [*People's Courts Daily*], (3 September 2000), available from the CNKI website (last accessed 30 April 2010); author's interview with a senior judge in Guangzhou, February 2010.

61. Dan Po, 'Renmin fayuan quanmian gaige de zhichengdian'.

62. *Ibid*.; Peerenboom, *China Modernizes*, p. 213.

63. Huang Xianan and Liu Lan, 'Shenweihui zenmo simian mei pian? Guanyu Taizhou shi Luqiao qu fayuan shenweihui gongzuo de diaocha shouji' ['Why has the Adjudication Committee not decided on any cases for four year? Investigating the work of the Adjudication Committee of the Luqiao district court at Taizhou city'], *Renmin Fayuan Bao* [*People's Courts Daily*], (12 September 2002), available from the CNKI website (last accessed 30 April 2010); Dai Juan and Zhao Xingwu, 'Xuanren shenweihui weiyuan guifan shenweihui gongzuo: qinhuai gaige shenweihui shixian gongzheng gaoxiao' ['Electing members of the Adjudication Committee and regulating the work of the Adjudication Committee: reforming the Adjudication Committee of the Qinhuai district court realized impartiality and efficiency'], *Renmin Fayuan Bao* [*People's Courts Daily*], (6 May 2001), available from the CNKI website (last accessed 30 April 2010).

functional jurisdiction of their Adjudication Committees, empowered their ACs to micromanage major cases more actively than before, and converted the Committee's *ad hoc* setting into a permanent judicial organization with standing offices, specialized sub-divisions and full-time staff.[64] These local initiatives practically transfigured the Adjudication Committee into a mixed entity that served multiple, cross-cutting purposes: an authoritative tribunal for sensitive cases, a quality-control mechanism for case supervision, a privy council within the judiciary for advisory functions, and a coordination office to deal and bargain with other governmental agencies for enforcement-related issues in post-trial stages.

Noticing the local attitude to the Adjudication Committee, the SPC eventually backed down from its previous proposal, and confirmed *retroactively* the appropriateness of local reform initiatives in the existing political system. Drafters of the Second Courts Reform Guideline opted to accommodate local reform measures, by recommending the creation of professional sub-divisions within the Adjudication Committee and the establishment of permanent AC offices and staff in each courthouse. The withdrawal of the SPC signified the inability and unwillingness of local courts to comply with the central government's idealistic reform measure. Meanwhile, the Second Courts Reform Guideline urged the judiciary to select qualified senior judges to sit in the Adjudication Committee so as to shore up the body's legal competence, a policy recommendation that once again came from results of local experiments and deviated from the original reform design. The policy line of concretizing and strengthening (instead of demobilizing) the Adjudication Committee was affirmed, and was reaffirmed by the CCP Central Committee's *2006 Decision*.

The Adjudication Committee hence survived, and its judicial powers stayed. Its institutional resilience, as my previous analysis indicates, once more testifies to the enduring power of local influence and the limited reach of central imperatives. While the reform on the Adjudication Committee successfully codified and better regulated its functions, hence containing the Committee's arbitrariness, the reform failed to deliver the ultimate policy goal, i.e. augmenting judges' adjudicative authority vis-à-vis that of court bureaucracy. This development suggested that, absent of a substantial rearrangement of the asymmetric power relations between the judiciary and other governmental bodies, judges and judicial bureaucrats were reluctant to surrender the collective judicial power of the Adjudication Committee, the only institutionalized mechanism to check the impact of local interferences.

(c) Reforming personnel administration to adjust the asymmetric power relations. The SPC was not unaware of the asymmetric power relations between the judiciary and the executive branch. The First Courts Reform Guideline attempted to address the structural deficiency by promoting the idea of a vertical, single-track personnel administration of lower courts by higher counterparts. The SPC's proposal of vertical administration, if implemented, would have placed the courts under the

64. Mi Jian, 'Shenweihui gaige buyi zixing qishi' ['It is inappropriate to reform Adjudication Committees without central coordination'], *Renmin Fayuan Bao* [*People's Courts Daily*], (29 June 2005), available from the CNKI website (last accessed 30 April 2010); Zheng Chunyin, 'Shenweihui dangting tingsong cheng zhidu' ['Institutionalizing the Adjudication Committee's hearing of litigations in trial proceedings'], *Fazhi Ribao* [*Legal Daily*], (27 May 2005), available from the CNKI website (last accessed 30 April 2010).

single and direct supervision of the judicial leadership one level higher. The proposal of recentralization, which was recommended overwhelmingly by law scholars and journalists of almost all stripes, was meant to check one of the root causes of local protectionism and external interferences in adjudicative work. By severing the local court administrative ties with the same-level government, the proposal would have improved the judiciary's inferior status to the parallel police bureaus and procuratorates.[65]

However, the proposal has fallen through. Instituting a vertical, single-track administration of judicial personnel would unavoidably weaken local government's political leadership over parallel courts, and elevate political stature and policy influence of the judicial system. Reforming judicial personnel administration hence directly bears upon the highly sensitive issue of rearranging the existing political structure. Central party organs and state ministries have never given a public endorsement to the proposal, and national judicial bureaucrats have barely advocated for it. Departmental and local resistance to the proposal ran high, as it was conceivable that the proposal of vertical personnel administration, if realized, would have stripped a significant administrative instrument of social-political control from the local government, and it was hardly surprising that local party leadership was reluctant to give away the prime authority of nominating and evaluating the personnel of parallel courts through the nomenclatural system.[66] Resistance continued unabated, to the extent that the idea of vertical administration was entirely removed from the Second Courts Reform Guideline. Since 2005 the SPC has not acted on this particular policy recommendation: no follow-up regulations were released, and no local experiments were reported. The stagnation suggested that the SPC was still unable to amass critical political support to rein in local and departmental control over judicial personnel, even though academia, social elites and the general public have consistently called for such a policy initiative.[67]

The proposal's failed launch has held back progress made in the effort towards judicial professionalization, and has effectively dashed the recentralization goal. After ten years of judicial reform, the asymmetric power relations between the judiciary and the executive branch have remained. The CCPCPLAC continues to hold sway over the courts, especially on major, politically sensitive, or collective-action litigations that might implicate social stability.[68] The traditional CCP practice of '*tiaokuai jiehe, yi kuai weizhu*'—combining the horizontal administration with the vertical supervision,

65. Cheng Zhuru, *Sifa Gaige yu Zhengzhi Fazhan*, pp. 303–306; Yang Hongtai, 'Zhuangui shiqi de fanfubai lifa sikao' ['Proposals of anti-corruption legislations during the transitional period'], Paper presented at *International Conference on Crime, Law, and Justice in Chinese Societies: Global Challenges & Local Responses*, 16–18 March, Hong Kong, (2007), pp. 152–153.

66. He Weifang, 'Zhongguo fayuan zuzhi fa de xiugai yu sifa duli' ['Amendment of the Organic Law of the People's Courts and judicial independence'], Paper presented at *Legal Reform in China: Problems and Prospects*, 18 April (Washington, DC: Carnegie Endowment for International Peace, 2005), pp. 2–3; author's interview with a senior judge in Guangzhou, February 2010; author's phone interview with a Beijing-based law professor, February 2010.

67. Zhang Qianfan, 'Sifa zhiyehua shi zhongwang suogui' ['Judicial professionalization is a general consensus'], *Nanfang Dushibao* [*Southern Municipal Daily*], (24 March 2010), available at: http://www.infzm.com/content/42962 (last accessed 10 May 2010).

68. Peerenboom, *China's Long March toward Rule of Law*, pp. 302–309; Peerenboom, *China Modernizes*, pp. 212–213; Liebman, 'China's courts', pp. 626–627.

with the horizontal administration as the main force (条块结合, 以块为主)—carries the day, and the structural component of local protectionism stays on.[69]

New elements and contradictory developments after 2005

In retrospect, Beijing's post-1999 judicial reform was inadequate in standing up to local and departmental resistance in financial, personnel, and organizational realms. Absent of the central regime's political will for a resolute implementation, the half-hearted reform tilted toward political reality, and led to highly uneven results not only between the two major categories of judicial reform, but even more so within the category of institutional reformulation. The uneven results failed the reform goal of judicial recentralization: the ill-adapted judicial institutions have not addressed the asymmetric power relationship between the judiciary and other governmental bodies, hence perpetuating local protectionism and continuing to breed judicial corruption of various sorts. The SPC has found it difficult for local judges to properly apply state laws and central directives on official malfeasance cases; in 2009 local courts delivered lenient judgments to 95.6% of criminal cases involving official irregularities.[70] Furthermore, the judiciary has fallen prey to the enticement of corruption: the annual statistics of judicial officials being prosecuted for charges of violating state laws and party disciplines has steadily risen since 2003 (see Figure 1), and 41% of indicted judicial officials were of or above the rank of a deputy section chief.[71]

On the other hand, without a corresponding progress in institutional reform, an increasingly professionalized judgeship was ill-suited to deliver justice professionally to sensitive cases, hence failing to mend the public trust in the judiciary and the party regime as a whole. As a result, judges (those at basic-level courts in particular) during trial proceedings have had to take press reports and public opinion into consideration, which further constrict judicial discretion.[72]

After ten years of judicial reform, local protectionism remains the prevailing issue that weighs down judicial professionalism, judicial rent-seeking rages on, and law scholars and journalists still complain about the localization of court interests that have obstructed the national unity of adjudicative work and law enforcement.[73]

69. Alford, 'The more law, the more …?', pp. 134–135.

70. Huang Xiuli, 'Dusi wei tanguan kaituo de mendao—zuigaofa, zuigaojian guifan guanyuan qingpan de muhou gushi' ['Blocking the access of absolving corrupt officials of their charges—the story about the Supreme People's Court and the Supreme People's Procuratorate's regulations on delivering lenient judgments to government officials'], *Nanfang Zhoumobao* [*Southern Weekly*], (1 April 2009), available at: http://www.infzm.com/content/26419 (last accessed 10 May 2010).

71. 'Sifa fubai dao buneng renshou de dibu Huang Songyou an shi sifajie chiru' ['Judicial corruption is unbearable, and the Huang Songyou case is a shame to the judicial community'], *Nanfang Dushibao* [*Southern Municipal Daily*], (13 March 2009), available at: http://nf.nfdaily.cn/nanfangdaily/nfjx/200903080014.asp (last accessed 10 May 2010).

72. Eva Pils, 'The emergence of unpopular criminal justice in China', Paper presented at *International Conference on Crime, Law, and Justice in Chinese Societies: Global Challenges & Local Responses*, 16–18 March, Hong Kong, (2007), pp. 174–185; Pierre Landry, 'The institutional diffusion of courts in China: evidence from survey data', in Tom Ginsburg and Tamir Moustafa, eds, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008), pp. 233–234.

73. Minxin Pei, *China's Trapped Transition*, pp. 69–72; Xu Xi and Lu Rongrong, *Zhongguo Sifa Gaige Niandu Baogao (2009)*, p. 3; author's interviews with a law professor in Beijing (November 2007), a law professor in Hong Kong (November 2007), and a law professor in Wuhan (November 2007 and February 2010).

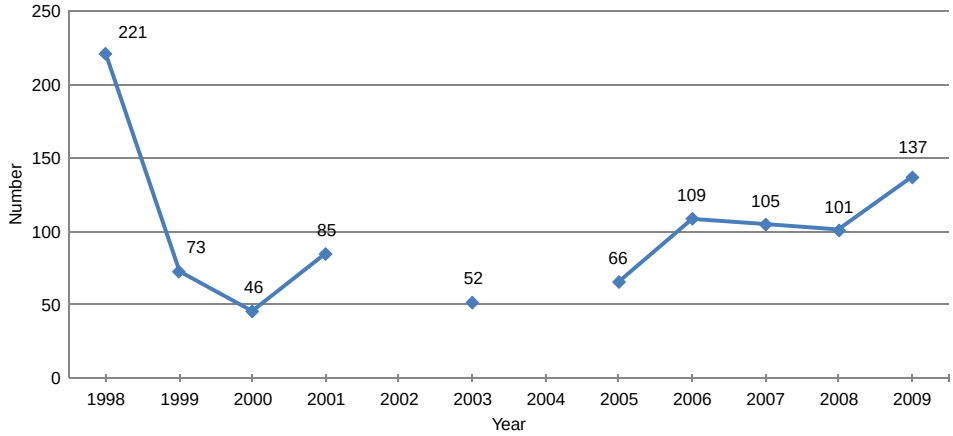

Figure 1. Court officials being prosecuted for violating state laws and party discipline (1998–2009). *Sources*: Work reports from the Supreme People's Court to the Annual Plenum of the National People's Congress, 1999–2010; 'Sifa fubai dao buneng renshou de dibu Huang Songyou an shi sifajie chiru' ['Judicial corruption is unbearable, and the Huang Songyou case is a shame to the judicial community'], *Nanfang Dushibao* [*Southern Municipal Daily*], (13 March 2009), available at: http://nf.nfdaily.cn/nanfangdaily/nfjx/200903080014.asp (last accessed 10 May 2010).

The growing disparity between judicial capacity and judicial institutions has inevitably complicated the prospects and contours of judicial reform, because the suboptimal outcomes led national leaders to rethink the best composition of ways to control the governmental structure and, in return, retain the party's popular legitimacy to rule. In the meantime, the central leadership grew wary of political allegiance of professional judicial officials, and became increasingly suspicious of political agendas and implications of rights-defending activism. In short, the central principals were vigilant that the progress of judicial reform might not only fail to shore up the central authority over local state agents, but even flare up challenges to the existing authoritarian structure.

Signs of a partial yet significant change in the mode and approaches of judicial reform emerged in late 2005, immediately following the Color Revolutions in Eurasia that shocked authoritarian incumbents in China.[74] Luo Gan, the CCPCPLAC Secretary, in April 2006 proposed a socialist rule of law theory that was distinct from the Western notion of rule of law. Luo Gan further urged cadres of law enforcement and judicial systems to be watchful for their 'political colors'. Following Luo Gan's speech, Xiao Yang and Cao Jianmin (then SPC Executive Vice President) soon publicly re-emphasized the imperative of the party's political leadership over the judiciary, and reiterated that China would never transplant Western political institutions blindly.[75] The development suggested that, for the new central party leadership, professionalization and incremental institutional reformulation *alone* were not enough to meet the goal of judicial recentralization. Instead, ideological correctness and political sensitivity carried

74. Titus C. Chen, 'China's reaction to Color Revolution: adaptive authoritarianism in full swing', *Asian Perspective* 34(2), (Summer 2010), pp. 5–51.
75. Liebman, 'China's courts', pp. 627–628.

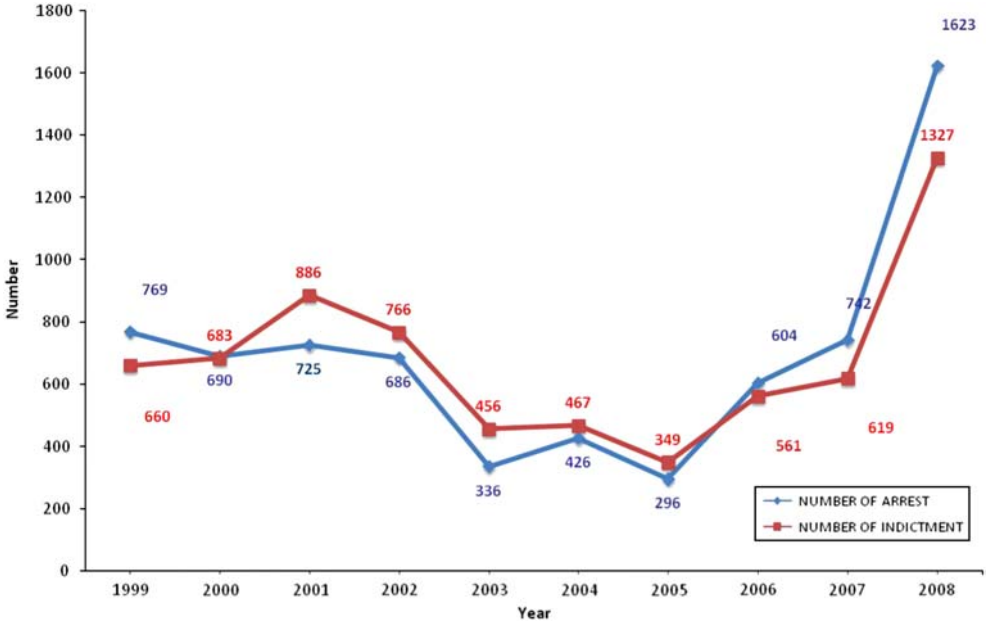

Figure 2. ESS arrests and indictments (1999–2007). *Sources*: National Bureau of Statistics of China, *China Statistical Yearbook* (Beijing: National Bureau of Statistics of China, 1994–2008), available at: http://www.stats.gov.cn/english/statisticaldata/yearlyda.

the sheer weight. From this line of situation diagnosis came Beijing's prioritization of the judiciary's political function of retaining internal security.

Interestingly, Beijing did not abandon the post-1999 framework of judicial reform; in fact, the efforts of professionalization and institutional reformulation carried on steadily (or even accelerated in specific realms) after 2006. Rather, the new emphases on ideological correctness and authoritarian *status quo* were added into the existing reform framework, resulting in the paradoxical juxtaposition of ongoing reform and selective repression in the landscape of China's judicial politics.

As a result, the statistics of arrests and indictments over the crimes of endangering state security (e.g. the ESS crimes as stipulated in Chapter I of the PRC Criminal Law), which reached an all-time low in 2005, soared afterwards (see Figure 2).[76] In particular, lawyers who were involved in rights-defending campaigns and civil society activists who investigated and sought to expose government malfeasances came under increasing political pressure and mounting security risks. The central government either acquiesced to local authorities' selective repression against civil rights advocates and public interest lawyers, or took the lead in arresting political dissidents or rights activists of international prominence on ESS charges. At the same time, international exchange, communication and training programs for judicial reform were halted, downsized, or scrutinized by state security apparatuses.[77]

76. The crimes of endangering state security (ESS crimes) are defined in Articles 102–113 of China's Criminal Law.

77. Chen, 'China's reaction to Color Revolution', pp. 45–47.

When Xiao Yang retired, Wang Shengjun, the CCPCPLAC secretary-general with a background in public security, took up the SPC presidency in March 2008. Wang's appointment consolidated a conservative turn of the national judicial leadership that emphasized inter-agency coordination rather than a unilateral, idealistic reform effort by the judicial system. Under his leadership, the SPC soon highlighted a slogan of the 'Three Supremes' that Hu Jintao had advocated in late 2007. The banner prioritized the party's permanent rule and substantive justice over procedural justice.[78] Meanwhile, the SPC formalized and upgraded the criminal policy of 'conjoining leniency with severity' (*kuan yan xiang ji*), which required judges to give harsher or close-to-maximal punishment to criminal suspects on ESS charges.[79] These authoritarian decisions and acts unfolded side by side with concurrent developments of professionalization and institutional reformulation, hence driving home a contradictory phenomenon of judicial politics in China.

Conclusion: is Beijing moving backward from judicial reform?

This article explains the mixed results of China's judicial reform during the past decade by arguing that previous institutional arrangements and initial policy decisions significantly account for the dynamics and the eventual outlook of the recentralization drive in the judiciary. I present a story of organizational reorientation of the courts in China that was pre-conditioned by asymmetric power relations and was dictated by the CCP's autocratic political agenda.[80] The reformist national judicial leadership, in partnership with liberal-leaning law scholars, introduced the idea of the rule-based governance, and to a lesser extent the Western notion of rule of law, to national leaders, with a view to persuade them that the idea and its realization may be conducive to the central regime's policy agenda of recentralization. The political endorsement and formal codification of the idea paved the way for the post-1999 judicial reform, a top-down pragmatic effort that was focused on improving the courts' dispute resolution functions in order for the central government to reclaim effective control over local authorities. The reform agenda highlighted professional qualifications of judgeship and advocated for a corresponding set of institutional reformulations.

Without attempting to redraft the basic organizing principles of the Chinese governance, the post-1999 judicial reform was from the outset a partial reform that was carried out piecemeal and followed a tortuous course of development. The reform's uneven results suggested its inability to accomplish the professed goal of judicial recentralization, and its unanticipated effects began to worry a threat-stricken central leadership in 2005. As a result, new elements of déjà vu were inserted into the

78. Wang Shengjun, 'Laolao bawo "sange zhishang" kaichuang fayuan gongzuo xin jumian' ['Holding firmly the "Three Supremes" to perfect court work'], *Renmin Fayuanbao* [*People's Courts Daily*], (23 June 2008), available from the CNKI website (last accessed 30 April 2010).

79. Zuigao Renmin Fayuan [Supreme People's Court], 'Zuigao renmin fayuan guanyu guanche kuanyan xiangji xingshi zhengce de ruogan yijian' ['Opinions of the Supreme People's Court on implementing the criminal policy of conjoining severity with leniency'], *Renminwang*, (10 Feburary 2010), available at: http://fanfu.people.com.cn/GB/10964258.html (last accessed 10 May 2010).

80. Donald C. Clarke, 'Puzzling observations in Chinese law: when is a riddle just a mistake?', in Hsu, ed., *Understanding China's Legal System*, pp. 111–112.

existing reform framework, leading to the re-emergence of ideological correctness and political sensitivity in judicial work. The conservative turn was then reflected in rising ESS charges, scrutiny of international cooperation for judicial reform, and increasing mobilization of the courts and law enforcement apparatuses for selective repression against rights activism and cause lawyering.

China's judicial reform is at crossroads. The actual reform process suggests that a rule of law regime without a corresponding political reform, as advocated by Pan Wei, was hardly tenable.[81] However, it remains premature to declare the reform's total failure, because a certain degree of procedural justice and considerate treatment could be found even in high-profile cases that eventually imprisoned political dissidents or rights-defending activists. Even criminal defense lawyers and hard-pressed dissidents admitted the progress.[82] A more sensible conclusion then may be, given the current entangling of the two distinctive, conceptually-incongruent policy lines in the judicial centralization effort, that it is more likely than not that the Chinese judiciary will continue to deliver mixed messages well into the 18th CCP Congress in 2012.

81. Pan Wei, 'Towards a consultative rule of law regime in China', in Zhao Suisheng, ed., *Debating Political Reform in China* (Armonk, NY: M.E. Sharpe, 2006), pp. 3–40.

82. Read, for example, Liu Xiaobo, 'Wo meiyou diren—wode zuihou chenshu' ['I have no enemies—my final statement'], (23 December 2009), available at: http://www.bullogger.com/blogs/stainlessrat/archives/351520.aspx (last accessed 10 May 2010).