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Articles

Crossing the River by Feeling the Stones: The Path to Judicial Independence in China

Stephen L. McPherson**

I. Introduction

In the scope of one generation, the People's Republic of China ("PRC") has gone from an economy predominated by central planning to an economy driven by market forces. Investment from abroad and "red capitalists," spurred on by Deng Xiaoping's admonition that "to get rich is glorious,"¹ have adapted and enjoyed the fruit of China's rapidly changing economy. However, China's continuing economic expansion has created a number of new challenges. Foreign investors, red capitalists, and small business entrepreneurs alike will not be so inclined to continue the expansion and develop their enterprises without the assurance that their investments in capital will be preserved. The web of

* See JOSEPH FEWSMITH, *DILEMMAS OF REFORM IN CHINA* 39 (2006).

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1. Omar Swartz, *Critical Thoughts on Law and Reform in Post-Maoist China*, 8 *GONZ J. INT'L L.* 4, 6 (2004-2005) (citing ORVILL SCHELL, *TO GET RICH IS GLORIOUS: CHINA IN THE EIGHTIES* (1984)).

economic expansion will likely never completely penetrate the cell-like localities of rural China unless there is consistency in the rules of business, and how those rules are enforced when parties disagree about their mutual obligations. Without such consistency, capitalists' incentive to invest is limited. More fundamentally, the central government will not maintain its legitimacy unless the people see that it empowers an objective legal authority that reaches and is respected not just in the eastern coastal municipalities but also in the western inland villages.

Aware that the future presents such challenges, the Chinese Communist Party ("CCP") has embraced, in principle, the notion of the rule of law in China.² Jiang Zemin, in a speech before the Fifteenth Party Congress, stated that "rule of law [is] central to economic development, national stability, and Party legitimacy."³ Jiang Zemin further proclaimed that "the [CCP] is fully committed to 'govern the country according to law.'"⁴ The Fifteenth Party Congress even amended the CCP's charter to include governing by law and establishing rule of law among its goals.⁵ Jiang's report to the Sixteenth Party Congress in 2002 stated that "[n]o organization or individual enjoys any privilege above the Constitution and laws."⁶

Despite a ceremonial and even constitutional acceptance of the rule of law in concept, the CCP and its minions persist in tolerating violations of the rule of law. Rights advocates are jailed on manufactured charges.⁷ Lawyers who challenge the government for violation of rights or of the rule of law suffer the consequences of being out of step with the party.⁸ Low-level judges are pressured to make decisions that favor the interest of the party.⁹ Finally, judges who make decisions in disharmony with

2. Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 44 (2001).

3. Randall Peerenboom, *A Government of Laws: Democracy, Rule of Law, and Administrative Law Reform in China* in DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION, 72 (Suisheng Zhao ed., 2006).

4. Orts, *supra* note 2, at 45.

5. Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 261 (2003).

6. *Id.*

7. See Luisetta Mudie, *China Detains Top Guangdong Rights Lawyer*, RADIO FREE ASIA, Sept. 15, 2006, http://www.rfa.org/english/china/china_guofeixiong-20060915.html?searchterm=None (last visited May 13, 2008) (explaining the detention of Guangdong Lawyer and rights advocate Guo Feixiong on suspicion of running an illegal business).

8. See Luisetta Mudie, *Rights Group Slams Legal System as China Jails Blind Activist*, RADIO FREE ASIA, Aug. 31, 2006, http://www.rfa.org/english/china/china_activist-20060831.html?searchterm=None (last visited May 13, 2008) (explaining the jailing of Chen Guangcheng who called authorities to account for official abuses under China's one child policy).

9. See U.N. Comm'n on Human Rights, *Report of the Special Rapporteur on the*

the party find themselves out of favor and risk the loss of their offices.¹⁰

If China's economic expansion is to continue, the rule of law must become more than mere verbiage in a statement of policy, whether that statement is uttered by the president or memorialized in China's constitution. A full acceptance of the rule of law must take place because of its vital importance to the international community, including China's neighbors and trading partners; to international businesses headquartered in China; and most importantly, to the Chinese people who already question the party's receipt of all too much of the reward for China's economic expansion.¹¹

This Article will explore the issue of rule of law reform in China. Specifically, it will examine the issue of judicial independence. While the rule of law on the whole is critical to China's future, the independence of China's judiciary is perhaps the most critical aspect of rule of law reform. Cultural differences and challenges cloud understanding of the meaning of rule of law reform. Part I will establish the necessary definitional framework for the rule of law. Part II will summarily raise some political/cultural considerations for rule of law reform in China and will explore China's distinctive conceptions of the rule of law. Part III describes China's legal system. Part IV will address institutional obstacles to judicial independence in China and some suggested solutions. Part V will address center/periphery obstacles to judicial independence in China. Part VI will engage in a brief case study analysis comparing economic (rural and enterprise) reform with rule of law reform in China.

II. Defining the Rule of Law

While the rule of law in China and elsewhere has received various definitions from various parties, scholars agree upon a number of core components to having a nation that supports the rule of law. The International Bar Association's recent statement on the subject embodies most of these core components:

The Rule of Law is the only system so far devised to provide impartial control of the use of state power. That single sentence is sufficient to explain why the Rule of Law is pre-eminently the best available system for organizing civil society.

Independence of Judges and Lawyers, ¶ 24 U.N. DOC. E/CN.4/2004/60/Add.1 (Mar. 4, 2004) (prepared by Leandro Despouy).

10. See Jim Yardley, *A Judge Tests China's Courts, Making History*, N.Y. TIMES, Nov. 28, 2005, <http://www.nytimes.com/2005/11/28/international/asia/28judge.html?ex=1290834000&en=ace85e8658820210&ei=5088&partner=rssnyt&emc=rss> (last visited May 13, 2008).

11. Peerenboom, *supra* note 3, at 70.

Resolution of IBA Council—September 2005

An independent judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process; are all unacceptable.

The Rule of Law is the foundation of a civilized society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect.¹²

Other key attributes to the rule of law include the notion that 1) the rules are pre-fixed and preannounced, 2) all are equal before the law and no man is above the law, 3) fixed formal procedures that are characterized by “consistency, predictability, calculability,” 4) protection of capital/property, 5) limits to corruption, 6) a correct level of regulation, 7) transparency and accountability, and 8) proportionality.¹³

III. Political/Cultural Considerations for Rule of Law Reform

Until recently, the Chinese conception of the rule of law could be characterized as “rule by law,” or use of law as an instrument by the government to restrain the citizen, instead of “rule of law,” which restrains not only the citizenry but also the government.¹⁴ Additionally, earlier Chinese conceptions of the rule of law might also be termed rule of man or rule by person.¹⁵ The development of institutions has helped to curb rule of man or rule by person in contemporary China but has not totally eradicated the notion of rule of man or rule by person.

The Chinese conception of the rule of law is further complicated by

12. Francis Neate & Fernando Pombo, Officers of the Int'l B. Ass'n, Open Letter to Attendees at the Int'l B. Ass'n & Am. B. Ass'n Rule of Law Symposium (Sept. 2006).

13. Bo Li, *What is Rule of Law?*, 1 PERSP. No. 5, (Apr. 30, 2000), available at http://www.oycf.org/Perspectives/5_043000/what_is_rule_of_law.htm; see also Steven Leavitt, Address at the Int'l B. Ass'n & Am. B. Ass'n Rule of L. Symposium (Sept. 16, 2006).

14. Orts, *supra* note 2, at 50-54.

15. *Id.* at 50, 52; see also Graig R. Avino, *China's Judiciary: An Instrument of Democratic Change*, 22 PENN ST. INT'L L. R. 369, at 372 (2003) (citing ALBERT HUNG YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (1992)).

two normative schools of thought: Confucianism and Legalism.¹⁶ These two schools of thought are analogous to Western notions of “natural law” and “positive law.”¹⁷ Natural law theory denounces law that undermines morality as non-law.¹⁸ Similarly, Confucianism stresses the importance of having moral men in leadership over coercive legal rules and elevates the importance of moral leaders to live out and apply the law above the importance of enforcing legal rules.¹⁹ A good leader then serves as a substitute for a good system.²⁰ By contrast, Western positivism and Chinese Legalism stress the use of law by a sovereign to shape behavior.²¹

A historical lack of separation between the powers of the judiciary and the power of governmental officials creates a great cultural obstacle to judicial independence.²² Officials placing pressure upon judges and magistrates who resolve disputes is not a recent phenomenon.²³

The historical lack of a legal profession in China created a litigation system that was both slow and expensive.²⁴ Trials were very unpleasant sometimes resulting in torture for parties and/or witnesses.²⁵ Consequently, the history of the litigation system serves as a disincentive for the Chinese people to resort to litigation to solve their disputes.²⁶

Problems with litigation discouraged would-be litigants and encouraged mediation by local village leaders instead.²⁷ Mediations were conducted and resolved with Confucian rules of morality.²⁸ Furthermore, litigation was avoided at all costs because disputes were discouraged under Confucian teaching.²⁹

Group orientation is another Confucian principle that impacts the political culture of China’s legal system and judiciary. However, it need not be applied so as to completely trust the morality of the great leader or the party. Instead of blind trust for the great leader, accountability for corruption and lack of objectivity through an independent judiciary can

16. Orts, *supra* note 2, at 51.

17. *Id.*

18. *Id.*

19. *Id.* at 52.

20. LUCIAN W. PYE, *THE SPIRIT OF CHINESE POLITICS*, 18-19 (1968).

21. Orts, *supra* note 2, at 53-56.

22. Sam Hanson, *The Chinese Century: An American Judge’s Observations of the Chinese Legal System*, 28 WM. MITCHELL L. REV. 248, 250 (2001); *see also* Avino, *supra* note 15, at 373, 378.

23. Avino, *supra* note 15, at 373-74.

24. *Id.* at 373.

25. *Id.* at 374.

26. *Id.*

27. *Id.* at 374.

28. Avino, *supra* note 15, at 374.

29. *Id.* at 373-74.

also serve the interests of group orientation.³⁰ If the Confucian ideal teaches that the public interest is to be supreme, the judiciary must be detached from the party so that China's judges can act independently in the public interest without fear of reprisal by party and without the present level of incentive to engage in corruption.³¹

IV. China's Legal System

China's legal system is heavily influenced by China's cultural and political heritage. Prior to the entry of western influences in the early 20th century, China did not have a legal profession.³² The Imperial examination system served to qualify officials for office.³³ By virtue of office, officials became the arbiters of disputes despite the lack of any special equipping or training for legal or judicial types of functions. Consequently, disputes were resolved in accord with generalized Confucian principles.³⁴

When Western influences manifested themselves and the examination system ceased, a legal system began to develop but ceased during WWII and China's civil war. Then, Mao obtained control, and "law was completely eliminated from China and replaced by a precarious balance between policy considerations and the capricious will of the rulers."³⁵ Mao's "rule of man" replaced and undermined any previous state of legal reform and persisted throughout Mao's leadership.³⁶ In fact, during the Cultural Revolution, Mao abolished laws, closed all remaining law schools, and his "pronouncements were believed to be the only source of law."³⁷ This state of affairs continued through the Cultural Revolution until the rule of law was proposed in the late seventies.³⁸ Therefore, for the first thirty years of the PRC, courts had no impact upon the people's lives.³⁹ Administrative officials resolved conflicts and the courts, when they existed, only had marginal power.⁴⁰

30. Lin, *supra* note 5, at 264-65.

31. *Id.*

32. Weifang He, *China's Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class*, 19 COLUM. J. OF ASIAN L. 138, 139 (2005).

33. *Id.*

34. *Id.* at 139-40.

35. *Id.* at 145.

36. Avino, *supra* note 15, at 376-77.

37. *Id.* at 377 (citing Wang Chenguang, *Introduction: An Emerging Legal System, in* INTRODUCTION TO CHINESE LAW I, 11 (Wang Chenguang et al. eds., 1997)).

38. He, *supra* note 32, at 145.

39. Xin Chunying, *What Kind of Judicial Power Does China Need?*, 1 INT'L J. OF CONST. L. 58, 60 (2003).

40. *Id.*

A. *Newness of Legal Profession*

The dearth of legal professionals in China has had a profound impact upon the development of the nation's legal system. An American judge visiting China reported that in Xi'an province, a fifty-five year old was the senior lawyer.⁴¹ It is likely that individuals even in this relatively young age group—young when compared with the ages of seasoned practitioners in other nations—are a rarity in China because of the nascence of its legal profession. China's legal profession has few traditions to draw upon because of the eradication of the legal systems and profession under Mao.⁴² Most lawyers are relatively young in the profession.⁴³ Consequently, new lawyers cannot and will not have the kind of mentoring and professional development training that is so typical in nation-states with fully developed legal professions.

While aggressive lawyering is the norm in some nations, aggressive advocacy in China is deemed impolite.⁴⁴ The Honorable Sam Hanson, an American appellate court judge, shares an anecdote from his visit to China where a young aggressive lawyer defending a criminal case in a rural region was arrested for "illegally obtaining evidence" the first day of trial.⁴⁵ The implication of the story was that he was arrested, at least in part, because of aggressive lawyering and because he had interviewed multiple witnesses.⁴⁶ He was held for five months and his license was revoked.⁴⁷

China's system of legal education has grown a great deal since the beginning of the reform movement in the late seventies. In 1979, China had only two law schools and approximately two to three thousand lawyers.⁴⁸ By 1999, China's legal education system had grown to over two hundred law schools and its legal profession had swelled to over 100,000 lawyers.⁴⁹ Today, China has roughly 120,000 lawyers and three hundred law schools.⁵⁰ For comparison, the United States had a reported

41. Hanson, *supra* note 22, at 249.

42. *Id.* at 251.

43. *Id.*

44. *Id.* at 252.

45. *Id.* at 252.

46. Hanson, *supra* note 22, at 251-52.

47. *Id.*

48. Jamie P. Horsley, *The Rule of Law in China: Incremental Progress*, at 8 (Mar. 2006), available at http://www.chinabalancesheet.org/Documents/Paper_Rule_of_Law.PDF#search='The%20Rule%20of%20Law%20in%20China%3A%20%20Incremental%20Progress%2C%20Jamie%20P.%20Horsley%20March%202006'; Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603, 604 (2003).

49. Gewirtz, *supra* note 48, at 604.

50. Horsley, *supra* note 48, at 8.

191 law schools in 2005-2006.⁵¹

At a population of 1.3 billion, this means that China has one lawyer for every eight thousand people. For comparison, the United States has 1.1 million lawyers for 300 million people or 1 lawyer for every 300 people.⁵²

The newness of China's legal profession carries over into the judiciary. In the past, retired military officers with no particular legal training have typically served as the predominant pool of candidates for low-level judgeships.⁵³ Judges' professional training varies. However, substantial improvements in judicial training have been realized. In 1995, only 6.9% of judges had an undergraduate education.⁵⁴ By 2005, 51.6% of judges had undergraduate degrees.⁵⁵

With the passing of the 1995 Judges Law, judicial professionalism has increased greatly in China.⁵⁶ Judges have uniform qualifications including both education and expertise.⁵⁷ This increase in professionalism has given the judiciary heightened status in the public eye and enhanced the perception of and notion of judicial independence.⁵⁸ However, the Judges Law is not uniformly enforced and the courts still have a long way to go towards true judicial independence.⁵⁹

B. Court System

The Chinese court system is a hierarchical system with four levels.⁶⁰

51. 2005-2006 ABA Legal Educ. Statistics: Enrollment and Degrees Awarded 1963-2005, <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf> (last visited Mar. 5, 2008).

52. Hanson, *supra* note 22, at 248; *see also* ABA Nat'l Lawyer Population by State, http://www.abanet.org/marketresearch/2007_Natl_Lawyer_FINALonepage.pdf (last visited Mar. 5, 2008).

53. *Law in Political Transitions: Lessons from East Asia and the Road Ahead for China, Before the Cong. Executive Comm'n on China* 8 (2005) (written statement of Jerome A. Cohen, Professor of Law, N.Y.U.), available at <http://www.cecc.gov/pages/hearings/072605/Cohen.php> (last visited Mar. 5, 2008) [hereinafter Cohen Statement]; Avino, *supra* note 15, at 381; Hanson, *supra* note 22, at 249.

54. Cohen Statement, *supra* note 53, at 8.

55. *Id.*

56. Judges Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective Jul. 1, 1995) (P.R.C.); Cohen Statement, *supra* note 53; Avino, *supra* note 15, at 385.

57. Avino, *supra* note 15, at 385.

58. *Id.*

59. *Id.*

60. Congressional Executive Commission on China: Chinese Courts and Judicial Reform, <http://www.cecc.gov/pages/virtualAcad/rol/judreform.php?PHPSESSID=d212d2e7922b79edbf635dbba4c6b37f> (last visited Mar. 5, 2008) [hereinafter CEC on Chinese Judiciary].

As of 2006, Approximately 200,000 judges served within the system.⁶¹ The lowest level consisted of the three thousand Basic People's Courts at the county or district level.⁶² The next level up is the Intermediate People's Court.⁶³ 390 Intermediate People's Courts operated over the cities and prefectures.⁶⁴ Thirty-one High People's Courts operated at the provincial levels in the provincial capitals.⁶⁵ The Supreme People's Court, the highest judicial organ, is located in Beijing.⁶⁶

Level	Court	Level	Number
Highest	Supreme People's Court	National	1
	High People's Courts	Provincial	31
Lowest	Intermediate People's Courts	City and Prefecture	390
	Basic People's Courts	Rural/County & City/District	3,000

V. Addressing Institutional Obstacles to Judicial Independence

In the CCP's Fifteenth National Congress Jiang advocated "providing systematic guarantees for the judicial organ to exercise power independently and openly."⁶⁷ Both the party and its leader have embraced the notion of judicial independence. While the term judicial independence is subject to interpretation, China's judiciary should take the party at its word and begin to gradually make decisions in furtherance of that end. Institutional judicial independence and legal profession independence are desperately needed to balance unbridled party power.⁶⁸

A. One Party System

The most significant structural challenge to an independent judiciary in China is the one party system. The CCP controls the National People's Congress ("NPC"). The NPC virtually functions as the single branch of government in China. The NPC through its Standing Committee plays a preeminent role in the appointment of judges.⁶⁹ Through the State Councils, it also supervises the licensing of

61. Horsley, *supra* note 48, at 6.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Horsley, *supra* note 48, at 6.; *see also* XIAN FA art. 127, § 7 (1982) (P.R.C.).

67. Avino, *supra* note 15, at 389; Xin, *supra* note 39, at 59.

68. Orts, *supra* note 2, at 111.

69. XIAN FA art. 67(12), § 1 (1982) (P.R.C.).

lawyers.⁷⁰

The Chinese state is structured such that the NPC is “the highest organ of state power.”⁷¹ The Standing Committee of the NPC serves as a permanent body representing the NPC.⁷² The Standing Committee’s authority extends well beyond the traditional authority of a legislative body and includes the power of constitutional and statutory interpretation.⁷³ Chapter III, Section 1, Article 67 of the Constitution of the People’s Republic of China vests authority in the Standing Committee of the NPC to “interpret the Constitution and supervise its enforcement” and “to interpret statutes.”⁷⁴

The NPC elects and may recall from office the President of the Supreme People’s Court.⁷⁵ The Standing Committee of the NPC appoints and may recall from office Vice-Presidents and judges of the Supreme People’s Court.⁷⁶ Furthermore, “[t]he Supreme People’s Court is responsible to the [NPC] and its Standing Committee.”⁷⁷ Local courts are likewise responsible to lower level governmental powers.⁷⁸

This vesting of enactment, enforcement and interpretive power within one body creates a major structural challenge to the development of an independent judiciary in China. This problem is further compounded by the fact that the courts’ funding and infrastructure are provided by their local people’s congresses.⁷⁹

B. *Funding and Infrastructure*

China’s constitution on its face states that the courts “exercise judicial power independently,”⁸⁰ however, in reality judges are very

70. Under article sixty-seven, subsection six of the Constitution of the People’s Republic of China, the Standing Committee of the NPC supervises the State Council. XIAN FA art. 67(6), § 1 (1982) (P.R.C.). It also appoints the leadership of the State Councils. XIAN FA art. 62(5), § 1 (1982) (P.R.C.). The judicial administration under the State Council supervises the licensing of lawyers and can issue warnings and other disciplinary measures. Law on Lawyers (promulgated by Standing Comm. Nat’l People’s Cong., May 15, 1996, effective Jan. 1, 1997) chp. II, art. 6, chp. I, art. 4 (P.R.C.).

71. XIAN FA art. 57, § 1 (1982) (P.R.C.).

72. *Id.*

73. XIAN FA art. 67(1), (4), § 1 (1982) (P.R.C.).

74. XIAN FA art. 67(1), § 1 (1982) (P.R.C.); *see also* Law on Legislation art. (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective Jul. 1, 2000) chp. II, § 4 art. 42 (P.R.C.) (“The power to interpret a national law shall vest in the Standing Committee of the National People’s Congress.”).

75. XIAN FA art. 63(4), § 1 (1982) (P.R.C.).

76. *Id.* at art. 67(11), § 1.

77. *Id.* at art. 128, § 7.

78. *Id.*

79. Horsley, *supra* note 48, at 7.

80. XIAN FA art. 126, § 7 (1982) (P.R.C.)

dependent upon officials.⁸¹ The courts are entirely too dependent upon local government officials to achieve true judicial independence. Local officials hold appointment and removal power and the local government provides financing for the local courts.⁸² Basic People's Courts depend upon the local people's congresses and local officials for their salary, budget, personal housing, offices and courthouses.⁸³ Objectivity and independent judgment is difficult to maintain when judges decide cases that impact governmental officials who provide the judges' compensation.⁸⁴

Judges are not highly compensated. Because they receive so little, temptation to accept bribes and engage in corruption is high. In Shanghai, where judges are better compensated and have high social status, the judges are less likely to be corrupt or accept bribes.⁸⁵ Shanghai judges simply have more to lose if they engage in corruption.⁸⁶ Judges in Shanghai earn around \$8,750 (U.S.), 3.5 times the income of judges in other localities.⁸⁷

At times, an administrative official exerts so much power over judges in cases where the official has a personal interest as to cause a merger of the trial and enforcement of judgment processes in a single hearing.⁸⁸ Judges are often given instructions by political leaders on individual cases.⁸⁹ Sometimes the instructions are oral, sometimes they are in writing, or even included in official documents, with a requirement that the judge report back on the results.⁹⁰

The courts' connection to the CCP, not at just the national level, but at the local level as well, presents major institutional obstacles to judicial independence. To accomplish reform, judges and courts on the local level must become separate from local government leaders at the same level.⁹¹ It has been suggested that having courts extend across jurisdictional lines might prevent these close connections and the structural problem associated with funding and supervision by localities.⁹² Furthermore, having appointment and removal power vested

81. Xin, *supra* note 39, at 69-70.

82. *Id.* at 74.

83. Frank K. Upham, *Who Will Find the Defendant If He Stays With His Sheep? Justice in Rural China*, 114 YALE L.J. 1675, 1685 (2005).

84. Horsley, *supra* note 48, at 7.

85. Mei Ying Gechlik, *Judicial Reform: Lessons From Shanghai*, 19 COLUM. J. ASIAN L. 37, 128 (Spring/Fall 2005).

86. *Id.*

87. *Id.*

88. Xin, *supra* note 39, at 74.

89. Xin, *supra* note 39, at 69-70.

90. *Id.*

91. Lin, *supra* note 5, at 296-97.

92. *Id.*

outside of the locality in which judges sit, would relieve the judges from any sense of obligation to the local officials who appoint them.⁹³

C. *Layers of Supervision*

Judges in the PRC function under layers of supervision. They are supervised internally by other judges within the court, by the NPC and its counterparts on the local level (as described above), and by the public.⁹⁴ “[B]asic court judges’ [have] many masters: the parties before [them], other residents, local government agencies, and the judicial hierarchy.”⁹⁵ Some supervision is helpful for accountability; excessive supervision can interfere with neutrality and judicial independence.⁹⁶

1. Internal Supervision

Internal factors and controls upon the independence of judges can compromise their independence as easily as external concerns. Just as higher ranking administrative officials can correct the decisions of lower ranking officials, higher ranking judges on the same level can correct the decisions of other lower ranking judges.⁹⁷ Even in Shanghai, which has one of the best trained and most highly compensated courts, senior judges exert influence over junior judges.⁹⁸ To avoid tampering by higher level judges with greater connection with an individual case, trial judges must have authority to resolve disputes before them with finality.

The assignment of cases to a judge to whom an interested party has connections can also serve as an institutional barrier to judicial independence. In Qingdao City, Shandong Province, the court system has begun randomly assigning cases to avoid lack of independence in adjudication and judge shopping.⁹⁹

2. Party Supervision

While the supervision of China’s judiciary need not be removed completely from the party, party officials certainly should not supervise judges based upon individual cases.¹⁰⁰ Instead party or government officials should supervise the court system by reviewing reports and other statistical documents. They should then work through the power to

93. *Id.* at 297-98.

94. Xin, *supra* note 39, at 69.

95. Upham, *supra* note 83, at 1687.

96. Xin, *supra* note 39, at 69.

97. *Id.* at 67.

98. Gechlik, *supra* note 85, at 128.

99. Xin, *supra* note 39, at 68.

100. *Id.* at 70.

appoint and remove judicial officials to regulate the system and not individual cases within the system.¹⁰¹

As noted above, the 1995 Judges Law has initiated great progress towards a more professional, a more regularized, and thereby a stronger and more independent judiciary.¹⁰² While some regulation of the courts is appropriate, excessive regulation would undermine judicial independence.¹⁰³ For example, to achieve true judicial independence, the process of evaluating judges for loyalty to the party should cease.¹⁰⁴ In addition, the notion that judges can not make decisions that could undermine state interests or damage the state is problematic.¹⁰⁵ The courts cannot hold the state, as a party to a dispute, accountable to the rule of law if the courts are required to never undermine state interests.

3. Public Supervision

Like the rest of China's government, the courts are under constant scrutiny by the public. To establish their authority and legitimacy, the courts must be perceived as the final decision maker for disputes.¹⁰⁶ When party or government officials interfere with or undermine judicial decision making, judges are viewed as powerless.¹⁰⁷ They lose the respect of the people. Strengthening the courts so that government or party officials do not have power to tamper with the judges' decision making process will establish judicial authority.¹⁰⁸

In the past, the courts have also made decisions in dereliction to the law so as to insure that the public sees those decisions as just and equitable. Dean Zhu Suli of Beijing University Law School provides an illustrative example: A policeman legally shot a motorcycle driver.¹⁰⁹ The motorcycle crashed killing one of the passengers.¹¹⁰ The young man who died was the second son of the family to die in one year.¹¹¹ The mother and the local people wanted the policeman held accountable.¹¹² When the local prosecutor and the courts did not hold the officer accountable, the dead man's mother committed suicide.¹¹³ In response,

101. *Id.*

102. *Id.*

103. *Id.* at 69.

104. Avino, *supra* note 15, at 387.

105. *Id.* at 387-88.

106. Xin, *supra* note 39, at 78.

107. *Id.*

108. *Id.*

109. Upham *supra* note 83, at 1683.

110. *Id.*

111. *Id.* at 1684.

112. *Id.*

113. *Id.*

the matter was revisited, the policeman was indicted, and the court convicted him but suspended his sentence even though he had committed no crime.¹¹⁴

While this sort of practice will develop court legitimacy in the near term, it will do little to establish the consistent rule of law in the long term. If the courts intend to truly elevate the rule of law, they must establish independence not only from the party state, but from the people and popular opinion as well.

D. Incentives for an Independent Judiciary Under a One-Party System

Some have argued that an independent judiciary and an independent legal profession will threaten party supremacy such that the party will never tolerate it. To the contrary, incremental steps towards independence for the judiciary and the legal profession are essential to the preservation of CCP legitimacy and to China's economic development.

1. Party Legitimacy

Judicial independence is an essential ingredient to the preservation and legitimacy of the CCP.¹¹⁵ Instead of permitting corruption between judges, local officials, and others with connections, an independent judiciary will reduce the possibility of future corruption. Instead of permitting those with appropriate party connections to violate the law with impunity, an independent judiciary will strengthen the ability of law enforcement to fight crime.¹¹⁶ Finally, many of the party members themselves are not so old as to have forgotten the tragedy of the Cultural Revolution.¹¹⁷ An independent judiciary will prevent the kinds of arbitrariness and abuses that characterized the Cultural Revolution and the "whatever Mao says," rule of man approach to law.¹¹⁸

As China's people have grown more sophisticated and gained a greater exposure to information via the internet and other forms of media, they have become increasingly aware of individual rights.¹¹⁹ This growing "rights-consciousness in Chinese society" has not replaced Confucian group orientation and reverence for morality of leadership.¹²⁰ However, it has definitely created an increasing need for objective civil

114. Upham, *supra* note 83, at 1684.

115. Gewirtz, *supra* note 48, at 604-05.

116. *Id.*

117. *Id.*

118. Peerenboom, *supra* note 3, at 59.

119. Gewirtz, *supra* note 48, at 605.

120. *Id.*

means to resolve disputes.¹²¹ An independent judicial system where judges are free of obligations to party officials in resolving disputes will provide such means. Creating a fair and equitable system for dispute resolution will enhance party legitimacy while only modestly compromising party supremacy.¹²²

Corruption, increases in unemployment in the cities, and the phasing out of state-owned enterprises, coupled with the inability for pensioners to obtain benefits, have all created discontentment among the Chinese working class.¹²³ Additionally, working class people are well aware of the vast profits and disproportionate concentration of wealth in the hands of government officials and those with connections to government officials.¹²⁴ In the face of a potentially unstable banking system, and remaining state-owned enterprises that are overleveraged, the people need to have the assurance that at least some of their institutions are moving towards security and stability.¹²⁵ The CCP can accomplish this by moving towards an independent judiciary.

2. Economic Development

Continued economic development is also critically important to sustaining the one-party system. China's developing economy and market system present problems that can only be resolved through an independent legal system.¹²⁶ Along with economic development, China has experienced a concomitant increase in business crime and corruption.¹²⁷ An independent judiciary is an essential ingredient to China's continued prosperity and development, and to the infusion of foreign capital.¹²⁸

China's progressive transition to a market-based economy "has fostered clientelism and corporatism."¹²⁹ Companies often establish relationships with governmental officials to gain a competitive advantage for resources controlled by those officials and for favor when needed.¹³⁰ When disputes arise, a very weak judiciary often does not hold the blameworthy parties accountable, sometimes because of bias or

121. *Id.*

122. *Id.*

123. Larry Diamond, *The Rule of Law as Transition to Democracy in China*, in *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* 79, 80 (Suisheng Zhao, ed., 2006).

124. *Id.* at 79.

125. NICHOLAS LARDY, *CHINA'S UNFINISHED ECONOMIC REVOLUTION* 80 (1998).

126. Peerenboom, *supra* note 3, at 68.

127. Lin, *supra* note 5, at 260.

128. Peerenboom, *supra* note 3, at 68.

129. *Id.*

130. *Id.*

corruption. Consequently, would-be investors are deterred from investing capital.¹³¹

To support continued growth, a developing market economy must have rules to govern it, and a neutral and objective arbiter of disputes when those rules are violated.¹³² Otherwise, growth will plateau and the developing economy will not have the systemic support it needs to flourish.¹³³

Market interests require a legal system where contract rights, security interests, and ownership rights can be protected and preserved.¹³⁴ International investors and domestic enterprises alike expect to have their interests protected.¹³⁵ International investors are especially concerned about compliance with international legal norms.¹³⁶ While some level of administrative regulation is certainly appropriate, investors will be deterred from continuing the rapid pace of investment in China unless they know that administrative and local government officials can be held in check by independent judges.¹³⁷

Furthermore, to fulfill the terms of accession to the World Trade Organization (“WTO”), China must demonstrate that its courts are characterized by judicial independence.¹³⁸ If China cannot demonstrate judicial independence, China will not satisfy the WTO’s exacting requirements.¹³⁹

China’s economic progress has already altered the state-society balance of power, reallocating power possessed by the state to an economically developing society, and reducing the CCP’s domination of political ideology.¹⁴⁰ This shifting of power will act as a catalyst for not only continued economic reform, but for judicial independence as well.

E. A Plausibility Probe for Judicial Independence Under a One-Party System

Some scholars have questioned whether judicial independence is even possible under a one-party system. China’s judiciary is often viewed as “simply a government department under the executive.”¹⁴¹ China’s constitution seems to support this notion in some ways and to

131. *Id.* at 73.

132. Horsley, *supra* note 48, at 10.

133. *Id.* at 1, 10.

134. Peerenboom, *supra* note 3, at 59.

135. *Id.* at 73.

136. Gewirtz, *supra* note 48, at 604-05.

137. *Id.*

138. Lin, *supra* note 5, at 298.

139. *Id.*

140. Peerenboom, *supra* note 3, at 73; *see also* Lin, *supra* note 5, at 261.

141. Orts, *supra* note 2, at 75.

undermine it in others.

The United States and Japan are both democracies. The judges in both nations have strong party allegiances at the time of appointment to the bench. In the United States, appointed judges are likely affiliated with and loyal to either the Democrat or Republican Party at the time of their appointments. In Japan, judges have most likely been drawn from Japan's dominant Liberal Democratic Party.¹⁴² However, in both courts, judges issue rulings against the dominant or appointing party.¹⁴³ In the United States Supreme Court, it is not unusual for a justice to develop a judicial philosophy at odds with preferences of his or her appointing party.

Despite the fact that China could not be described as a democracy, the United States and Japan both provide fine examples of how judges function with some objectivity in a political environment. Political factors still play a role in Japan but not nearly the role these factors play in China.¹⁴⁴ Once appointed, it would seem that China's judges should reduce or cut ties to the party in the interests of objective, independent judgment.

F. *Judicial Review*

Because of the Chinese constitution, China's judiciary is still a part of a system supervised by the party, which has the power to interpret laws.¹⁴⁵ The Legal Work Committee of the Standing Committee of the NPC has created a special office for claims of constitutional violations by government actions or regulation. But, in this office, party officials are acting as reviewers of claims against party officials.¹⁴⁶

Consequently, at present, China's constitution is merely a statement of CCP policies interpreted by CCP member government officials. To give China's constitution force and life similar to the constitutions of other nation-states, China's courts must be empowered to hold the government accountable for violation of the rights conferred in the constitution and must have the structural and legal independence to do so without reprisal.¹⁴⁷

In the 1803 landmark case, *Marbury v. Madison*, the United States

142. Upham, *supra* note 83, at 1716-17.

143. In Japan, while "observers of the Japanese judiciary agree that judges feel constrained to decide cases within the range of what is politically acceptable to the Secretariat of the Liberal Democratic Party . . . courts have in several instances ruled against the LDP in politically charged cases." *Id.* at 1717.

144. *Id.*

145. Avino, *supra* note 15, at 384.

146. Cohen Statement, *supra* note 53, at 7.

147. Lin, *supra* note 5, at 270.

Supreme Court observed that “[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”¹⁴⁸ Judicial review furnishes the remedy the Court references. While full-fledged judicial review akin to the United States Supreme Court’s definition of judicial review in *Marbury v. Madison* is not likely in China, some form of judicial review to enforce the constitution and to interpret statutes must be implemented. Otherwise, China’s constitution will remain meaningless.¹⁴⁹

To some extent China has already taken steps towards a system of judicial review. It has implemented judicial review in the administrative law context with the Administrative Litigation Law (“ALL”).¹⁵⁰ This law gives people and enterprises a right to sue for violation of their rights by administrative agencies.¹⁵¹ In the ten years since its enactment, China’s courts have decided over one half million cases and disposed of 40% of them in favor of the plaintiff.¹⁵² For example, since the enactment of the ALL, plaintiffs have successfully brought claims against state-owned enterprises for showing favoritism in the allocation of scarce resources, and against a city planning board to prevent the construction of an observation tower because of aesthetic reasons.¹⁵³

While far from a complete system of judicial review, the ALL marks a first step towards making government accountable to citizens under rule of law.¹⁵⁴ The subjection of administrative agencies to judicial scrutiny may also be a first step towards other kinds of judicial scrutiny.¹⁵⁵ The Supreme People’s Court has already engaged in such judicial scrutiny in a 2001 decision in which it held that a student had a right to an education under the Chinese constitution.¹⁵⁶ Conservatives have labeled the decision “judicial activism.”¹⁵⁷ However, this decision and the ALL are significant steps towards judicial independence down the road.

148. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

149. Lin, *supra* note 5, at 271.

150. *Id.* at 280.

151. Congressional Executive Commission on China, CECC 2003 Annual Report: Legal Restraints on Government Power, <http://www.cecc.gov/pages/virtualAcad/rol/legalrestraints.php> (last visited Mar. 5, 2008) [hereinafter Legal Restraints on Government Power].

152. Lin, *supra* note 5, at 28.

153. *Id.* at 284-85.

154. Legal Restraints on Government Power, *supra* note 151.

155. Cohen Statement, *supra* note 53, at 7.

156. Lin, *supra* note 5, at 271-72.

157. *Id.*; see also Xin, *supra* note 39, at 77.

V. Addressing Center/Periphery Obstacles to Judicial Independence

Although economic reform has done much to close the gap between urban and rural society in China, there remains a great disparity between the two.¹⁵⁸ If the rule of law is to fully take form in China, the reach of an independent judiciary must not halt in the cities.¹⁵⁹ It must penetrate into rural village life as well.¹⁶⁰ Otherwise, the value and utility of an independent judiciary will not be fully realized.

One scholar describes an anecdote about a local Basic People's Court judge traveling to a village within his jurisdiction to collect a debt from a rural farmer.¹⁶¹ The judge first finds the village cadre and local law enforcement officials.¹⁶² The group then travels to the farmer's field, pulls him aside from his labors to discuss the matter and then proceeds to the porch of the defendant farmer's home to resolve the matter.¹⁶³ The dispute was successfully resolved and the farmer paid a fair portion of what he owed.¹⁶⁴

At the time of the scholar's anecdote, government policy required a courtroom, professional dress, and all of the pomp and prestige of a respected judicial branch.¹⁶⁵ However, the village in the anecdote, and others like it, were too distant from the state center, and too diffuse in their customs and practices to respect the court as an institution unless the judge brought the law to the village.¹⁶⁶ By going to the village, the judge weakened the institutional strength and authority of the court; however, he or she gained the confidence of the people by reaching them in conjunction with the authority of the local cadre.¹⁶⁷ The approach provided a pragmatic, temporal solution to the problems of the village, but arguably weakened and undermined the power and uniformity of the judiciary.

The institutional reality is that the trial judge works for the government and is ultimately responsible to the government. However, the judge's power is limited and must be utilized in a village setting where national norms may not be received.¹⁶⁸ Local Basic People's Court judges often become a part of the local administrative government resolving disputes and defusing conflict by vindicating local expectations

158. Upham, *supra* note 83, at 1678-81.

159. *Id.*

160. *Id.*

161. *Id.* at 1679.

162. *Id.*

163. Upham, *supra* note 83, at 1679.

164. *Id.*

165. *Id.* at 1680.

166. *Id.*

167. *Id.*

168. Upham, *supra* note 83, at 1692.

instead of strictly upholding state norms.¹⁶⁹

Two examples are instructive. First, two parties had a dispute over a field ox.¹⁷⁰ Instead of strictly applying the law, the local court system ultimately made a common sense evaluation of the parties' dispute and made an award that was not strictly in accord with the law but provided some compensation to the aggrieved party.¹⁷¹ Second, a husband threatened a man in his village after discovering that his wife had had an affair with the man.¹⁷² The village committee attempted to resolve the dispute and the man even offered the husband money to settle the matter.¹⁷³ The husband refused and persisted in his threat.¹⁷⁴ The man filed suit seeking to enjoin the husband.¹⁷⁵ The husband retaliated by filing a claim against the man for money damages.¹⁷⁶ The court unlawfully jailed the man, putting him into "protective custody," threatened both parties, and resolved the situation with a payment from the man to the husband.¹⁷⁷ Again, no legal rules had been violated by the man who committed adultery,¹⁷⁸ yet, the court resolved the matter so that both parties would receive some satisfaction.¹⁷⁹

Judges in each of these cases ignored the law to provide some satisfaction to the parties and to leave the village with the clear impression that justice had been accomplished.¹⁸⁰ This makes the rural judge much more like the justice of the peace in the early American legal system or an imperial magistrate in the historical Chinese legal system than a judge.¹⁸¹

Before recent developments toward judicial professionalism, such as the enactment of the 1995 Judges Law and the commencement of an examination process, rural Chinese judges were usually military officers.¹⁸² They were viewed as coming "from the people" and not outside elites.¹⁸³ In selecting local judges, rural localities were also often

169. *Id.* at 1711.

170. *Id.* at 1689-90.

171. *Id.* at 1690.

172. *Id.*

173. Upham, *supra* note 83, at 1690.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Upham, *supra* note 83, at 1690-91, at 1690-91.

179. *Id.*

180. *Id.* at 1692.

181. *Id.* at 1687.

182. Cohen Statement, *supra* note 53, at 8; Avino, *supra* note 15, at 381; Hanson, *supra* note 22, at 249; Upham, *supra* note 83, at 1681. *See also supra* Part III.A (discussing rural Chinese judges).

183. Swartz, *supra* note 1, at 5.

pragmatically concerned with “how much [money] a judge can generate for the court.”¹⁸⁴

As the criteria for appointment of judges change, it may create more independence and consistency, but might also weaken cooperation of local officials and create greater suspicion and distrust by local populations.¹⁸⁵ As new judicial professionals take on roles within rural communities, they will face a danger that the people will not perceive judges to be part of their community.¹⁸⁶ Furthermore, an outsider will not have the necessary familiarity with local custom to resolve disputes in a manner the local population will understand or fully appreciate.¹⁸⁷

While China does need a more modernized and independent court system, rural China, which comprises a majority of the population, acts under a system where dispute resolution works differently than in urban China.¹⁸⁸ The rural system differs from the system in urban China because of a large disparity in legal sophistication and culture from eastern cities to western rural villages.¹⁸⁹ In urban commercial life, rights are documented, clearer, and quantifiable, and the parties are usually aware of those rights.¹⁹⁰ However, in rural village life, neighbors and relatives are part of a network that makes relationships, even business relationships, decidedly less clear.¹⁹¹ The people are concerned not so much with profit as with the necessities of life and livelihood. Furthermore, they seldom document their transactions in writing.¹⁹² Consequently, rural China’s judges have historically focused upon rightness of results instead of regularization of procedure.¹⁹³

This rural/urban distinction creates great challenges for the development of a consistent, independent, and objective judiciary. Three incremental processes will serve to overcome these challenges. First, as in urban China, the development of market economies in rural China will serve to regularize commercial relationships and help to close the disparity between community mores and national statutes.¹⁹⁴ Second, the judiciary will serve as a key component to bring statutory law to rural China. Rural judges must have sufficient institutional authority to stand

184. Xin, *supra* note 39, at 72.

185. Upham, *supra* note 83, at 1688.

186. Swartz, *supra* note 1, at 5-6.

187. Upham, *supra* note 83, at 1688.

188. Xin, *supra* note 39, at 74-75.

189. Upham, *supra* note 83, at 1687.

190. *Id.* at 1692-93.

191. *Id.* at 1693.

192. *Id.*

193. Xin, *supra* note 39, at 75.

194. Upham, *supra* note 83, at 1699-1700.

up against interference from government officials.¹⁹⁵ To gain such institutional authority over time and to garner trust and legitimacy, rural judges and courts must satisfactorily and fairly resolve village disputes. Developing this level of legitimacy and trust will take time. Eventually, residents will come to the realization that the local court can effectively resolve disputes and that relationships and personal connections will no longer serve as a substitute for clearly defined legal relationships. Third, an independent judiciary with authority to hold the state in check will receive legitimacy among rural localities. Village citizens will see that judicial power can be used not just to resolve internal village disputes but also to hold unbridled power of the state and the party in check.¹⁹⁶

If it is concluded that existing judicial institutions cannot sufficiently mimic the role that judges have played in rural China in the past, and at the same time develop the characteristics of consistency and independence, it may be advantageous to modify existing judicial institutions and develop a new one. The new institution could be composed of officials who would fulfill the combined roles of a chancellor in equity in a common law system, a mediator in the modern legal setting, and an imperial magistrate in the historical Chinese system. These new magistrates would serve to balance the equities of the parties and mediate their disputes. Just as a chancellor in equity under a common law legal tradition, the new magisterial official would administer justice “according to fairness as contrasted with strictly formulated rules of common law.”¹⁹⁷ The equity system ameliorated the harshness of common law rules in favor of fairness.¹⁹⁸ The existing court system could also be modified so that Basic People’s Court judges would no longer be directly responsible to local level party officials, and no longer closely tied to individual villages.¹⁹⁹ Any parties aggrieved by the decision of the local magistrate could have their dispute tried before the Basic People’s Court.

VI. Economic Reform: A Case Study for Progress Toward Judicial Independence

While reform towards an independent judiciary presents ideological and implementation challenges, many of those challenges have already been met in the context of economic reform. One can likely predict the future path of judicial reform by reviewing the PRC’s path to economic

195. *Id.* at 1680-82, 1701.

196. *Id.* at 1705.

197. BLACK’S LAW DICTIONARY 540 (6th ed. 1990).

198. *Id.*

199. Diamond, *supra* note 123, at 83-84.

reform within the rural and enterprise settings.

Rural reform in China commenced not at the center of the party state, but rather within the villages of rural China.²⁰⁰ Reform began as a series of experiments with the household responsibility system after the failure of the Dazhai production system.²⁰¹ The Dazhai production system made higher level commune production brigades the basic unit of account for production instead of lower-level teams.²⁰² The household responsibility system left production decisions to the family and not to production brigades, stressed autonomy of the production team, encouraged sideline production, and restored the notion of private plots.²⁰³ The success of the responsibility system coupled with the lobbying efforts of the Chinese Rural Development Group resulted in eventual adoption of the household responsibility system in official party documents.²⁰⁴

By contrast, enterprise reform commenced at the center of the party state in top-down fashion.²⁰⁵ Enterprise reform posed a greater ideological challenge to official communist party ideology.²⁰⁶ Because of the great ideological challenge, reformers were much more careful in their approach to reform and in the language chosen to present reform to party officials.²⁰⁷ Enterprise reform also posed a real threat to party power and to the tax dollars that the party depended upon from state-owned enterprises.²⁰⁸ Any mishap could have resulted in disaster to the party.²⁰⁹ After much study and debate, the party eventually acknowledged the power of the market and gave state-owned enterprises more authority to respond to market forces. Over time, incrementally, the center embraced the notion of enterprise reform in favor of a market approach instead of a planned approach.²¹⁰

Reform towards an independent judiciary shares similarities with both rural reform and enterprise reform. Just as the rural villages began to experiment with the household responsibility system, the Supreme People's Court has, on one occasion, engaged in the process of constitutional review. Other courts have begun the process of creating a precedent system to insure consistency of decisions on interpretation of

200. FEWSMITH, *supra* note *, at 19.

201. *Id.* at 20.

202. *Id.* at 19-20.

203. *Id.* at 20-21.

204. *Id.* at 34-41.

205. FEWSMITH, *supra* note *, at 56.

206. *Id.* at 64-65, 80.

207. *Id.* at 80.

208. *Id.* at 56-57.

209. *Id.* at 57.

210. FEWSMITH, *supra* note *, at 63, 75-79.

the law and on sentencing for criminals.²¹¹ Just as the Chinese Rural Development Group carefully studied and advocated for rural reform, scholars in China and elsewhere abroad are lobbying for the independence of China's court system in their scholarship. China's association with the WTO and the necessity for an independent judicial system to support its economic growth make it extremely likely that the current trend towards a more independent judiciary will continue.

As with enterprise reform, judicial independence poses great ideological and practical challenges to party control. However, just as the party embraced market ideology and compromised its presuppositions about a planned economy, the party has already embraced the notion of an independent judiciary in concept. The party has already taken the first step towards accepting independent judicial review by enacting the ALL. While independent courts could well compromise party control, just as enterprise reform could have undermined the party's power and its tax coffers, the party can only conclude that such a risk is essential. Otherwise, the engine of economic development and international investment fueling it in China could stall, and the party's legitimacy before its increasingly rights-conscious people could plummet.

VII. Conclusion

The Chinese Rural Development Group advocated practical incrementalism and chose "crossing the river by feeling the stones" as its mantra.²¹² While it is unlikely that complete judicial independence will emerge immediately, the CCP will likely make its way incrementally towards an independent judiciary. The party simply has too much to lose by not moving towards judicial independence and too little to gain by preserving the status quo.

211. Lin, *supra* note 5, at 300-02.

212. FEWSMITH, *supra* note *, at 39.