A Quiet Revolution: An Overview of China’s Judicial Reform

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I. INTRODUCTION: CHANGING WITH THE TIMES, A NEW MINDSET

China’s accession to the World Trade Organization (WTO) has been hailed as the harbinger of a new age. Contrary to their past reservations based on ideological reasons, policy makers and opinion molders in China now openly embrace the notion that, in order for China to be a respectable member of the international community, it must follow certain universally accepted norms, whether they be the United Nations Human Rights Convention, or rules proscribed by the WTO. Indeed, this recognition has become so much of the national consciousness that a new term has been coined and widely circulated. It is comprised of five Chinese characters: “yu guo ji jie gui,” and literally means “making (the railroad) tracks consistent with the international gauge.”

China’s entry into the WTO has provided a much-needed outside impetus for it to adopt certain universally accepted principles such as transparency and judicial review. But China’s resolve to enter the WTO, even if it meant that fundamental changes are necessary, reflects a much deeper current in thinking. The conversion of Chinese society from a planned economy to a market economy has fundamentally changed the
relationship between the individual and the government, or at least it requires such a change. As Nobel Prize winning economist Milton Friedman recently put it, the key to the success of such a transition is not privatization, as he thought ten years ago, but rule of law.¹

When a government agency issues a directive depriving businesses of their right to free competition, can an individual ask the Court to declare it unlawful on the grounds that it violates the Administrative Procedure Law? When the legislature passes a law depriving an individual citizen of a fundamental right, can that individual ask the Court to strike down the statute on the grounds that it unconstitutional? Such are the fundamental issues facing China in its drive towards a modern economy and towards a modern society based on rule of law. It is in this arena that the judiciary shall play a key role.

Starting in the late 1980s and up until recent years, Chinese legal reform has largely centered on efforts to enact new legislation (including administrative regulations) in various areas of substantive law. Within the judiciary, reform has taken the form of developing a modern adversarial trial system, including the introduction of some elementary rules of evidence. Such reforms were deemed necessary to resolve the civil and commercial disputes arising from China’s transformation from a planned to a market economy.²

An overhaul of China’s trial system alone, however, has not been enough to enable the Chinese courts to fulfill their functions in achieving justice. Indeed, some experts believe that such efforts have failed woefully.³ There is a new awareness among many within the Chinese legal community that all the reform measures will mean nothing without the establishment of judicial independence. In other words, an “institutional reform” is needed to reset the status of the courts and their relationship with other branches of the government.

Now we seem to be witnessing a second phase of China’s legal reform, one that focuses on the need to bring the judiciary to the center


stage as an arbiter between private citizens and the government and a
guardian of the citizens’ rights against government encroachment. As
this new chapter of judicial reform unfolds, many of China’s lower courts
have taken initiative to introduce various innovative measures. But more
important, in this course of experimenting, traditional thinking has been
challenged, ideological taboos have been broken, the relationship between
the individual and the government has been perceived in a new light, and
the roles of the courts are under constant reassessment.

Several interwoven “mega-trends,” which also constitute the most
urgent tasks on the agenda of China’s judicial reform today, have emerged
from the current innovations. Among other things, they are: a recognition
that rule of law is the benchmark of modern civilization; an emphasis on
the vital role to be played by an independent judiciary in achieving rule of
law; an acknowledgement of the relationship between constitutional
protection of individual rights and rule of law; the requirement for judicial
independence by China’s commitment made in joining the WTO; the need
to create a system of binding precedents and case law to achieve greater
consistency among courts in their applications of the law and to reduce
abuse of discretion on the part of judges; and finally, the need for
transparency of the judicial process.

Such themes in China’s current judicial reform may sound quite
familiar to an American lawyer since many of their underlying concepts
originated from the American experience with rule of law, including the
development of an independent judiciary as the ultimate guardian of
citizens’ constitutional rights. Indeed, detailed references to American
law permeate Chinese legal scholars’ discussions and provide inspiration
to Chinese courts for their innovative measures. Such American influence
should not come as a surprise, since numerous Chinese law school
professors have received degrees or training in the United States and
numerous judges, lawyers, and law enforcement officials have visited this
country and received short-term training.

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4 In their tradition of collectivism, the Chinese are not used to the term
“individual.” Somehow the term carries a selfish connotation. While this attitude is
changing, most Chinese still prefer to use the term “citizen” when discussing “individual”
rights.

5 For example, John Marshall Law School has operated a Co-training Master of
Law program in cooperation with the Chinese State Intellectual Property Office (SIPO),
training Chinese judges and government officials on intellectual property law, State
Intellectual Property Office of the People’s Republic of China, International Activities,
http://www.sipo.gov.cn/sipo_English/gftx_e/ndbg_e/2002nb_e/t20030425_13503.htm
(last visited June 1, 2003). Temple University also has a Masters of Law program in
bearing fruit. To borrow a phrase from Michael Rosenfeld, an impressive amount of transplanting has taken place.\footnote{See Michel Rosenfeld, \textit{Constitutional Migration And The Bounds Of Comparative Analysis}, 58 N.Y.U. ANN. SURV. AM. L. 67, 68 (noting that “there has been an impressive amount of migration of constitutional ideas and of transplantation of constitutional norms across national boundaries”).}

This article attempts to interpret this newest chapter of China’s legal reform through the prism of somewhat divergent views of Chinese judges and legal scholars. It is worth noting that most of the legal scholars cited and quoted here are prominent and influential in China’s legal community and can be considered the “vanguards” of China’s legal reform. So far mostly unknown to the West, these developments deserve our attention because they represent a trend that will change China in the decades to come.

Part I of this article offers a general introduction of the changing mindset among the Chinese leadership and the legal community, while Part II discusses China’s endeavors to transform its political system from rule of man to rule of law. Part III examines prospects for China’s constitutional reform and considers the role of the courts in a changing China’s constitutional framework, including their power to interpret the Chinese Constitution, and strike down legislation. Part IV focuses on judicial review of administrative decisions and other government conduct following China’s entry into the WTO. Part V discusses the changing perception within the Chinese legal community of judicial independence as an important guarantee of achieving social justice and as a requirement of the WTO; Part VI observes a recent trend in which the roles and powers

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partnership with Tsinghua University in Beijing, that teaches Chinese judges, government officials, law professors, minority students and private attorneys about American and international law. The two-year program has already graduated sixty-five students, and a current class of forty-four students began study in August 2003. In addition to the Masters of Law Program, Temple created a separate judge-education program in partnership with the Supreme People’s Court of China and the National Judicial College of China. It has also hosted conferences and working groups to collaborate with Chinese law professors and government officials on such subjects as the new draft law on property, a code of judicial ethics, and compliance with the World Trade Organization regulations. The information on Temple’s two programs can be found at Temple University School of Law, \textit{Beijing Masters of Law Program}, \url{http://www2.law.temple.edu/page.asp?page=article&SectionID=beijing&ArticleID=331&PartID=2&server=www2&db=templepub} (last visited June 2, 2003); Temple University Japan, \textit{Temple Law School Dean Receives International Award From the Government of China}, \url{http://www.tuj.ac.jp/newsite/main/news/press/lawschool.html} (last visited June 2, 2003).
of the judiciary have expanded through an emerging case law precedent system; Part VII examines certain efforts taken by the Chinese courts to increase transparency and accountability in the judicial process.

Finally, in Part VIII, the article attempts to explain what has made the profound transformation in legal thinking possible in today’s China, which, after all, did not jump onto the bandwagon of drastic political reform as Russia and Eastern Europe did following the collapse of the Soviet Union. In contrast to Russia’s bold conversion to the market economy, over the last decade China has taken a much more cautious approach toward political reform. So why now? My explanation is that China is a fundamentally different country than it was over a decade ago, especially in terms of the national mindset.

To cover such a broad range of subjects in a single article of this length is no easy task. One may even call it over-ambitious. The breakdown of the subjects is inevitably somewhat arbitrary as many discussions are overlapping and interwoven. Hopefully, it will provide interested readers in the United States with a general, but timely picture of the on-going process of judicial reform in China, which by all measures is a quiet revolution in the making.

II. **RECOGNITION OF RULE OF LAW AS A UNIVERSAL VALUE & BENCHMARK FOR MODERN CIVILIZATION**

Discussions among Chinese legal scholars about the need for rule of law as a major component in China’s modernization drive started in the mid-1990s. The importance of the rule of law, however, has never been as relevant or important as it is today. There are at least two explanations for this. First, the progress of China’s economic reforms has created many complex problems, such as increasing commercial and international disputes and rampant corruption and economic crime, which can only be effectively addressed by a fair and efficient judiciary. Second, the

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7. The topic of respect for human rights, for instance, is closely related to the topic of rule of law and judicial independence is both vital to rule of law and necessary to meet the requirements for judicial review and transparency under the regime of WTO.

8. See Wang Liming, supra note 2 (citing ZHANG WENXIAN, FAXUE JIBEN FANCHOU, [STUDY OF FUNDAMENTAL CONCEPTS IN JURISPRUDENCE] 284 (1993)).

9. “Fairness and Efficiency” have been cited by the current Chief Justice of the Supreme People’s Court in China, the Honorable Xiao Yang, as a major goal for the judiciary in the new century. The term has become a slogan in China, and quoted as an objective by many court officials. *China’s Top Judge Says Court Must Promote*
conversion to a “socialist market economy” has loosened the ideological control that the Chinese Communist Party (CCP) exercises over China’s political reforms, which is the larger context within which China’s judicial reform has progressed.

In 1997, the 15th Congress of the CCP, amended the party’s charter to include “governing the country according to law” and “establishing Socialist rule of law” as major goals for the country by the year of 2010. According to one interpretation, this significant amendment indicates: (1) a recognition of rule of law as a universal measure of civilization, thus eliminating the longtime held prejudice against the Western concept of rule of law; (2) a recognition that rule of law is not yet fully established in China, and (3) a determination to lay a foundation for such rule of law by 2010.

China’s efforts in judicial reform acquired a new momentum and accelerated with the 16th Congress of the CCP in November, 2002. General Secretary Jiang Zemin’s report to the Congress contains several conceptual breakthroughs. First the report emphasizes that the Constitution is the highest law of the land: “No organization or individual enjoys any privilege above the Constitution and laws,” said Jiang. This appears to put the Communist Party itself under the Constitution, at least theoretically. Advocates of reforms have not missed this important point. Professor Mo Jihong, a leading Chinese constitutional law scholar points out that the Constitution is the product of the principle that sovereignty belongs to the people. He wrote:


Mo Jihong, Jianli Xianfa Quanwei, Baozhang Gongmin Quanli [Establishing the Authority of the Constitution to Protect Citizens’ Rights], BEIJING RIBAO [BEIJING DAILY], Dec. 2, 2002, at 14. Professor Mo is a research fellow at the Institute of Legal Studies, Chinese Academy of Social Sciences.
In comparison to laws made by the legislature, the Constitution originates directly from the people. It is a legal weapon for the citizens to protect their lawful rights against the abuse of powers by the government. Without such protection, power will be abused without checks and balances and citizens’ rights will be infringed. . . . Historically, modern constitutions have all aimed at protecting the basic human rights of the citizens. The Constitution in a socialist country should play the same function. Its authority should be utilized in checking and restraining government powers.  

Professor Mo also called for the establishment of a comprehensive legal system centered on the Constitution, aimed at protecting the citizens’ rights in consistency with China’s commitments as a party to the United Nations Human Rights Convention.  

The second breakthrough made at the 16th Party Congress is the emphasis on procedural justice and judicial reform. According to Professor Chen Weidong, director of People’s University, Center of Litigation System and Judicial Reform, President Jiang Zemin’s report to the Party Congress asserted, for the first time in China, that litigation procedures are vital to the safeguarding of the rights of citizens and legal persons under the law. This indicates that the CCP leadership is moving towards a new understanding of the term “justice.” It now understands that justice includes both substantive and procedural justice, that procedural laws play an important role in achieving just outcomes, and that a country with rule of law must first be a country with rule of procedural law. This constitutes a correction of the country’s long over-emphasis on substantive law at the expense of procedural law. It is important to stress, Professor Chen believes, that litigation procedure serves a dual function: it is both an instrument to implement substantive laws, and something of inherent value with an independent function.  

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14 Id.  
15 Id.  
17 Id.
What the Chinese call “procedural justice” is certainly not unfamiliar to American lawyers. It is essentially the same concept as the American Constitution calls “due process of law.” Indeed, as a leading jurist in China puts it, procedure is “the life of law.” This includes the procedure to pass a law or to promulgate a regulation, the procedure to conduct public hearings for public comment, the procedure for court enforcement of laws and regulations, the procedure for the police to obtain a warrant for search and seizure, or a warrant of arrest, etc. While all of these new concepts are still preceded with prefixes such as “socialist” or “Chinese,” these prefixes appears to be just a matter of formality. One should not be deceived. It is the custom of this generation of leaders in China that all radical departures from the past are shrouded in reverence for tradition.

The profoundness of this conceptual revolution can be gleaned from the shift of the focus from “rule by law” to “rule of law,” two terms in Chinese reflecting somewhat different understandings of the goals of China’s legal reform. The first term comprises the Chinese characters “yi fa zhi guo,” which can be literally translated into governing the country according to law or government by law. While this formulation is a departure from the old ideology that the state could act arbitrarily, it carries an inherent ambiguity. Does it mean that the government must rule through laws (such as statutes and regulations) or that the state must act within the limit of laws (especially those laws that are aimed at protecting individual rights) while ruling the country? It is no coincidence that government leaders have a preference for the former construction of the term. To many of China’s leaders, the function of the law is to provide a code of conduct for citizens so that they will have rules to follow and laws to abide. The second term, now most often used by advocates of legal reforms, but becoming increasingly accepted in China, is “fa zhi,” which can be translated into English as rule of law and seems to have been a Chinese translation of that English term. Because it does not contain the noun country as the object of the verb rule, this formulation seems to carry a greater emphasis on the limitations on government power. Or at least it means that the ruler, as well as the ruled, must act within the bounds of laws.

18 Wang Liming, supra note 2.
20 See CHENG LIAOYUAN, JUDADE BIANHUA, CONG FAZHI DAO FAZHI [TREMENDOUS CHANGES: FROM “RULE BY LAW” TO “RULE OF LAW”] (1999).
Soon after the 16th National Party Congress adopted “rule of law” as the primary goal for China’s legal reform, Chinese legal scholars noted the significance of this move. Professor Jiang Ping, one of the most prominent legal scholars in China, cheered it as “a major shift in the country’s strategy for development.”

Another leading scholar believes that the shift of the CCP’s emphasis from “rule by law” to “rule of law” had at least three important implications: (1) it established the principle of supremacy of law; (2) it discarded the erroneous concepts of “rule by the Party” and “The Power of the Party Is Above All;” and (3) in rule of law, the people are the sovereign, and the state and its employees are to be ruled. Since then, the distinction between “rule by law” and “rule of law” has been a hot topic of discussion among legal academics in China.

For example, in a recent article, Professor Wang Liming, Vice-Dean of People’s University Law School and one of China’s leading authorities on civil and commercial law, attempted to distinguish between rule of law and rule by law. According to Professor Wang, whereas rule by law is concerned only with how the government uses laws to impose its rule, rule of law emphasizes that the government must also be bound by law.

Quoting Professor Liang Huixing, a leading Chinese scholar of an older generation, Professor Wang pointed out that the long-held notions that state interests should absolutely prevail over individual interests, that the state can exercise its power without any limitation, and that acts of the state are by definition rational, all derived from the doctrine that public interest is supreme, which was in accord with a centralized planned economy and authoritarianism. In contrast, a democratic body politic and a country with rule of law must fully guarantee the citizens’ rights. Rule of law requires that when an administrative agency imposes a duty

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21 Jiang Ping, Xuanze Yifazhiguo Shi Yi Ge Zhongda De Lishi Tupo [Choosing “Rule of Law” Is a Major Historic Breakthrough], FAZHI RIBAO [LEGAL DAILY], Dec. 11, 1997. Professor Jiang Ping is the Director of the People’s University Center of Civil and Commercial Studies, and China’s leading authority on civil law.


23 Wang Liming, supra note 2.

24 Id.

25 Id. (citing Liang Huixing, Gonggong Liyi Zhishang Shuo Bixu Fangqi [The Doctrine that Public Interest Is Supreme Must be Abandoned], FAZHI RIBAO [LEGAL DAILY], Jan. 31, 1993.).
on the public, it must also protect the legal rights of the citizens. Under this construction, protecting the rights of citizens and legal persons must be the guiding principle for all public power in all activities. 26 “If we do not regard rule of law merely as a means, but as a goal for China’s social development,” wrote Professor Wang in the same article, “then a system of civil and commercial laws that embody modern values of rule of law should play an important role.” 27 Believing that China’s legal system should be centered on civil and commercial laws to promote rule of law, Professor Wang argued that “[a]s civil and commercial laws recognize equality of all and individual freedoms, provide full protection of property and personal rights, require a clear corresponding relationship between rights and duties, and afford transactional certainty [sic] and convenience, they constitute a solid legal foundation for the establishment of a society based on rule of law.” 28

While Professor Wang Liming’s article emphasizes limiting government power as an important component for rule of law, other Chinese jurists have highlighted the close relationship between rule of law and respect for human rights. In an article recently posted on Chinacourt.org, Professor Xu Xianming, President of China University of Political Science and Legal Studies (CUPL), began his discussion on rule of law by asking whether the equation “Human Rights + Rule of Law = Democracy” makes sense. 29 Without answering this question explicitly, Xu reviews China’s history since the Communist takeover in 1949 to illustrate his point:

On the issue of human rights, the three generations of Chinese leadership have taken different positions. To the first generation, “human rights” was a bourgeois concept to be guarded against. It was due to this erroneous thinking that no system was established to safeguard human rights. The second generation of Chinese leadership tried to distinguish “our” human rights from “their” human rights and began to make some efforts to build “our” human

26 Id.
27 Id.
28 Id.
rights. The third generation, which is the current leadership, for the first time has recognized the universal nature of human rights and regarded it as the common heritage of human civilization. It has taken bold steps to engage in exchanges, co-operations, and dialogues with the West. Now promotion of human rights becomes a major thread in the process of building democracy in China. On the issue of rule of law, there are also clear differences between the three generations: the first generation set up a system first but destroyed it later, leaving the legal system in a limbo. The second generation could not get rid of the traces of China’s transition from a political state to a burgher’s [sic] society. \(^{30}\) . . . The legal system set up by it was mostly limited to the areas of political and public laws. The third generation has set out to reconstruct China’s legal system with brand new values. Under them, a new legal framework is being built on the foundation of civil and commercial laws. A market economy is an economy of civil and commercial laws. It reflects the features of a ‘rights-based’ economy. \(^{31}\)

According to Professor Xu, therefore, China’s progress toward democracy and rule of law is “really no more than a history of progress in the protection of human rights.” \(^{32}\) Professor Xu further wrote, “Rule of law, in its ideal form, refers to a balance between public power and citizens’ right under the law. Citizens’ rights are respected, protected, and rescued by the power of the state. Human rights is not only the origin of public power, it is also its limitation and purpose.” \(^{33}\) He concluded his article with the following words: “Democracy without rule of law, or rule of law without human rights, simply does not exist in reality.” \(^{34}\)

Many high-ranking judges in China have also openly embraced the view that rule of law is a foundation for a modern, democratic society. In

\(^{30}\) *Id.* Professor Xu used the term “*shi min shehui,*” which in historical studies usually refers to the rise of the burghers during the European Renaissance.

\(^{31}\) *Id.*

\(^{32}\) *Id.*

\(^{33}\) *Id.*

\(^{34}\) Xu Xianming, *supra* note 29.
a book entitled *Toward a Government by Law*, Judge Jiang Bixin, the Chief Judge of the Chinese Supreme Court, Chamber of Administrative Litigation, wrote:

In any country, if a citizen is harmed by an administrative action but cannot seek judicial relief from a court, then there is no democracy to speak of. The most fundamental premises for a democratic system are: (1) a citizen’s basic rights must be safeguarded by the law and (2) where there is a dispute between a citizen and the government, there must be a due process for the resolution of such disputes through litigation. Without such premises, there will be no foundation for a democratic body politic.

To sum up, a major shift in perspective took place among Chinese jurists in the past decade. Previously law was perceived as an instrument to impose the will of the state on the people, albeit a less arbitrary and more rational instrument compared to the ruthless and capricious rule of man in the past. Now emphasis is on the need to use law to limit the powers of the government so that the rights of individual citizens will be respected. With the acceleration of economic reforms, the dominant trend in Chinese legal thinking has been to recognize that the protection of citizens’ rights is the *raison d’etre* of a constitutional system.

III. CONSTITUTIONALISM AND THE ROLES OF THE JUDICIARY IN CONSTITUTIONAL REFORM

A. The Awakening of Constitutionalism in China

No student of China’s legal reform during the past two decades will fail to notice the trajectory that reforms have taken—from commercial law, to civil law, then through administrative law and criminal law, and eventually culminating in the gradual reform of constitutional law. Constitutional law, being the closest to the distribution of political power, and hence the most sensitive to the Communist leadership, has had to wait until just recently to become the focus of reform. Of course, for quite

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some time Chinese scholars of constitutional law have pointed out that supremacy of the constitution over both the government and Chinese Communist Party is a predicate for rule of law, and without constitutional limitations on government powers, there can only be rule of man, not rule of law. While the taboos against discussion of constitutional reform have gradually disappeared since the late 1980s, only recently have meaningful changes become a realistic prospect.

The new amendment to the Charter of the CCP, adopted at the 16th National Congress held in November 2002, provides that “the Party must act within the bounds of the Constitution and the laws.” This marks the first time that the CCP has officially accepted the notion that the Constitution is the supreme law of the land, and even the Party itself must adhere to its provisions. As the Chief Justice of the Chinese Supreme Court wrote in interpreting the significance of this amendment:

In terms of subjects, the people are the supreme; in terms of power, the sovereign is the supreme; in terms of rules, the Constitution is the supreme. As the Constitution is the expression of the people’s power and the citizens’ rights, its authority is the people’s authority. . . . The essence of rule of law is to control the power of the state and its operations by way of institutionalizing democracy in laws, to safeguard the fundamental rights and freedom of the citizens.

As will be made clear later in this survey, many of the problems facing the Chinese judiciary today cannot be effectively solved unless

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36 See, e.g., ZHU FUHUI, XIANFA YU XIANZHI GAIGE [CONSTITUTION AND CONSTITUTIONAL REFORM] 73 (2000). Zhu Fuhui is an associate professor at Southwestern University of Political Science and Legal Studies. In addition to constitutional-rights-related provisions found in China’s current civil laws, criminal laws, and administrative laws, a few scholars have also noted that a body of civil rights laws is also needed to enforce the constitutional rights of citizens. See, e.g., Cai Dingjian, Ji Huo Xianfa [Invigorating the Constitution], FAZHI RIBAO [LEGAL DAILY], Dec. 10, 2002.


China restructures its constitutional framework. Many prominent Chinese legal scholars have pointed out that meaningful constitutional reform first requires the recognition of individual freedoms, or citizens’ rights, as they are more commonly called in China. Professor Xu Xianming, President of China University of Political Science and Legal Studies (CUPL), and the country’s leading authority on human rights law, called for the amendment of the Chinese Constitution to extend legal protection to ten major human rights, including the right of property, the right of privacy, the right of economic freedom, the right of free movement, the right of equal protection, and the right to a fair trial.\(^{39}\)

Professor Zhu Fuhui, of the Southwestern University of Political Science and Legal Studies, attached even greater importance to human rights in the Chinese constitutional scheme in a book written several years ago. Zhu believes that “an emphasis on human rights will naturally lead to a constitution based on protection of the citizens’ rights” and that “respect for human rights is a universal value reflected in all modern constitutions, framed ‘on the basis of human rights and human nature.’”\(^{40}\) Therefore, Zhu argues, protection of human rights must be the starting point in designing the structure of China’s legal system in a manner that sufficiently limits government powers.

The current recognition of the importance of individuals’ rights and the need to limit the government through the constitution marks a dramatic departure from the Chinese Communist Party orthodox that long belittled the importance of constitutional rights in favor of the totalitarian rule of the Party. It is, no doubt, an important step. How to make the constitution function as a guarantee of the citizens’ rights remains an enormous challenge to reformers in China, because in the past courts have been prohibited from applying and interpreting the constitution in individual cases.

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\(^{39}\) *Shi Xiang Renquan Xu Jiaru Xianfa, Cai Fang Zhongguo Zhengfa Daxue Xiao Zhang Xu Xianmin [Ten Categories of Human Rights Need to Be Added to the Chinese Constitution—An Interview with Xu Xianming, President of China University of Political Science and Legal Studies],* ZHONG XIN SHE [CHINA NEWS AGENCY], Dec. 10, 2002. Other than the rights listed above, the ten categories also include the right of living, the right of environment, the right to development, and the right to know, which are not perceived as human rights in the West.

\(^{40}\) See *ZHU FUHUI, supra* note 36, at 285.

\(^{41}\) *Id.*
B. Whether the Courts Have the Power to Interpret the Chinese Constitution

There is a dynamic, symbiotic relationship between a “living constitution” and an independent and active judiciary. In the United States, the authority of the Constitution has given the judiciary an instrument to impose its powers over other branches of the government and at the same time, the courts’ interpretation has made the Constitution a “supreme law of the land” with teeth, not just on paper. In contrast, the Chinese Constitution has functioned primarily as a “mission statement,” serving as the political platform of the Communist Party. Even though it contains some provisions related to the rights of citizens and the powers of the government, such provisions have no impact in real life because (1) they are mostly an “embodiment or expression of the current policies and thought of the Communist Party, as opposed to a fundamental source of authority,”\footnote{DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 171 (2003).} and (2) they have not been turned into standards of conduct through judicial interpretation and application. Indeed, according to a judicial interpretation issued by the Supreme Court itself, courts do not have the power to apply the Constitution in individual cases.\footnote{Qi Yu Ling An: Xuezhe De Fanying [The Case of Qi Yuling: Reactions from Scholars], FAZHI RIBAO [LEGAL DAILY], Sept. 16, 2001, available at http://www.legaldaily.com.cn/gb/content/2001-09/16/content_24355.htm, [hereinafter Case of Qi Yuling: Reactions from Scholars] (quoting Professor Cai Dingjian of the Legislative Commission, the National People’s Congress). See also Qi Yuling v. Chen Xiaoqi, Case of Infringement of Citizen’s Fundamental Rights of Receiving Education Under the Protection of the Constitution by Means of Infringing Right of Name, 5 Zuigao Renmin Rayuan Gongbao [Gazette of the Supreme People’s Court of the People’s Republic of China] 158 (2001) [hereinafter Qi Yuling Case].}

This phenomenon of storing the Chinese Constitution “in the attic” has attracted mounting criticism in China. As one critic wrote: “The Constitution should not be a collection of moral teachings or generalized political theories and empty narrations. It should have the force of law.”\footnote{ZHU FUHUI, supra note 36 at 156.} In a constitution, he further argued, the best place for political views and the fundamental concepts of the state is the preface. The main body should be used to provide normative rules, the violation of which must result in legal sanctions.\footnote{Id.} Indeed, it has been recognized by many legal \footnote{Id.}
scholars in China that the ineffectiveness of the Chinese Constitution results from the lack of judicial interpretation and application. In an article published in the People’s Court Daily, Qiao Xinsheng, a professor at the Southern Chinese University of Financial, Political, and Legal Studies, made the following comment:

While China’s current constitutional framework does not accommodate the U.S.-style judicial review established by Justice Marshall in the 1803 case of Marbury v. Madison and courts probably do not have the power to strike down legislation as violating the constitution, they should at least have the power to apply the constitution in individual cases to fill in the gaps left by ambiguous and broad legislation. Indeed, much of the legislation in effect now conflicts with the basic principles of the constitution, such as the citizens’ freedom from arrest without court orders and their freedom from forced labor. In enforcing the constitution, courts can better protect such individual rights against government encroachment.

The debate over the judiciary’s power to interpret and apply the Constitution remained purely academic until August 13, 2002, when the Chinese Supreme Court took what has been hailed in China as the first step of “judicialization (sifahua) of the Constitution.” The story begins in 1990, when Qi Yuling, a 17-year-old girl from Shandong province, passed the entrance exam to a technical college. One of her classmates, however, stole her admission notice when it arrived at the high school that they both attended, and enrolled in the vocational school under Qi’s name. Not only did the “imposter Qi” manage to graduate from the school, but she eventually landed a well-paying job at the Bank of China. During the years that her classmate attended school in her name, the “real Qi,” believing that she failed the entrance examination, suffered periods of unemployment interspersed with low-paying jobs selling food at streetstands. When Qi found out about how the imposter had stolen her future, she sued the imposter, the vocational school, her own high school, and the

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city education commission, a local government agency.

In a “judicial interpretation” issued in response to a question submitted by the High Court of Shandong Province, the Chinese Supreme People’s Court affirmed the girl’s basic right to education under the Chinese Constitution. In so doing, the highest judicial authority has given what the reform-minded legal community in China has long been waiting for: a break with the half-century old tradition that the Constitution can serve only as guidelines for legislation, not to be applied directly in actual disputes, and certainly not to be applied by courts to determine whether an individual has certain rights against the government.

While the court’s actions in the Qi Yuling case are a far cry from judicial review as it is known in the West, this case symbolizes a first step taken by the Chinese judiciary towards asserting itself in China’s new political landscape. Hailed as “China’s Marbury v. Madison” by supporters and “a great usurpation” by its opponents, Qi Yuling’s case precipitated enormous publicity and a great deal of controversy.

The opponents of the Qi Yuling case (or, to be more accurate, those who believe that the significance of the Supreme Court’s interpretation has been blown out of proportion) argue that China has a civil law tradition and the power to interpret the Constitution does not lie with the Court, but rather with the Standing Committee of the National People’s Congress. Opponents further assert that meddling of the judiciary in this area will

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47 Id. Professor Qiao’s article has a detailed account of the story. See also Mao Ming Shangxue Shi Jian Yin Faxian Fa Sifahua Di Yi An [School Enrollment Imposter Incident Triggered the First Case of Judicialization of the Constitution], NANFANG ZHOUMO [SOUTHERN WEEKEND], Aug. 16, 2002 [hereinafter School Enrollment Imposter].

48 See School Enrollment Imposter, supra note 47.

49 The Shandong High Court subsequently ruled in Qi’s favor relying on the Supreme Court’s interpretation. See Li Airong, Xianfa Quanli Zheng Zai Shenggen, Cong Lilun Dao Xianshi [The Constitutional Rights Are Taking Roots, from Theory to Reality], FAZHI RIBAO [LEGAL DAILY], Dec. 9, 2002.


51 Case of Qi Yuling: Reactions from Scholars, supra note 43.
only weaken the Chinese constitutional system.  

But the majority of jurists in China seem to welcome the step taken by the Supreme Court with enthusiasm. Professor Mo Jihong, one of China’s leading authorities on constitutional law, called the step “a historic decision” because it “broke the long-held tradition that barred judicial relief for infringement of citizens’ constitutional rights.” He wrote:

Judging by the world trend, protection of the citizens’ rights through judicial application of the constitution has become a universal practice. It is the application of a constitution that turns it into a living law, instead of a “political platform.” The key issue here is when a violation of the constitution takes place, or when a dispute arises in the application of the constitution, there has to be some effective legal procedure to deal with it. Only courts can apply the Constitution accurately in specific circumstances. Therefore, if the Constitution cannot be used as legal authority in court adjudications, then the judiciary will never be able to review the constitutionality of laws and regulations. The result is a flawed justice.

Professor He Wei Fang of Peking University, looked at the issue from another perspective. He took the view that to apply the law means to interpret the laws and therefore judges, and not the legislature should have the ultimate authority of interpretation: “If the legislature that made the laws also interprets the laws, then there would be no checks and balances between these two kinds of powers.” In fact, Professor He was one of the first Chinese jurists openly supporting the judicialization of the constitution. In a 1999 article, he argued that, based on the experience in


53 Mo Jihong, Xianfa Ying Jinru Sifa Shenpan [The Constitution Should Enter the Realm of Court Adjudication], http://www.legalinfo.gov.cn/gb/special/2002-11/01/content_4188.htm (last visited June 6, 2003). Professor Mo is the Director of the Center of Constitutional Studies, the Institute of Law, Chinese Academy of Social Sciences.

54 Id.

55 Case of Qi Yuling: Reactions from Scholars, supra note 43.
countries where constitutionalism is most developed, the best way to affirm the authority of the Chinese Constitution is to allow citizens to litigate in reliance on it. If a judge finds that a statute or a regulation violates the Constitution, he may declare it void. This can be done either in ordinary courts, or in specially established constitutional courts. Without such a mechanism, wrote Professor He, the Constitution only exists on paper.

As Professor Jiang Ping of People’s University pointed out, while the Qi Yuling case involved only a private citizen’s constitutional right and therefore is not a “true case” of “judicial review,” it opened the door for the Chinese judiciary to play a more active role in reviewing the constitutionality of the “abstract conduct” of the government, such as legislation. Jiang Ping gave the example of a lawsuit initiated by three high school students who, encouraged by the Supreme Court’s interpretation in the Qi case, sued the Chinese Ministry of Education for unreasonable scores given during the college entrance examination. Professor Jiang Ping believed that this case amounts to a “true constitutional litigation,” as it involves the constitutional right of equal protection, not just the right to education.

With the 16th Congress of the CCP placing even greater emphasis on the role of the constitution in promoting rule of law in China, debate on whether the Constitution should be “judicialized” has reached a new level. Indeed, Hu Jintao, the new Party leader, openly expressed his support for “constitutionality review” and for establishing mechanisms to assure respect for constitutional rights.

56 HE WEIFANG, JUTI FAZHI [RULE OF LAW IN SPECIFICS] 42 (2002) (citing He Weifang, Xianfa De Zuijin Xiugai Yu Xianfa Quanwei [The Recent Amendment to the Constitution and Actual Authority of the Constitution], DA HE BAO [Big River Dispatch], Mar. 25, 1999).

57 Id. (quoting Professor Jiang Ping).

58 Id.

C. Whether Courts Have the Power to Interpret and Strike Down Statutes

Closely related to the issue of the courts’ power to interpret the Constitution is the corresponding power to strike down legislation based on such interpretations. Under China’s current constitutional framework, the courts are under the “supervision” of the legislature. What if a statute is ambiguous or inconsistent with legislation? What if each side of a particular dispute relies on different, conflicting interpretations of a statute? And what if a particular law violates a citizen’s rights as provided in the Constitution? Should courts have the power to construe conflicting or ambiguous statutes and strike down such statutes when their enforcement would cause fundamental unfairness or deprive citizens of their fundamental rights under the Constitution? Chinese legal scholars are endeavoring to answer some of these important questions.

According to Chinese tradition, and under the Chinese Law on Legislation, only the legislature has the power to construe and repeal statutes. But since legislators generally have no incentive to interpret the law, citizens are often left with no legal recourse. When citizens that suffer injustice complain to the legislature, or pursuant to the Law on Legislation to the particular government agency in charge of a particular law’s implementation, they will likely meet indifference and delays. In one example, a foreign business in Beijing was put into a rather difficult situation by conflicting regulations issued by two administrative agencies. When the business petitioned the State Council to review the regulations pursuant to the Law on Legislation, they waited for over year without receiving a response. An article on their situation described the inadequacy of the Law on Legislation: “In allowing the citizens to participate law-making, the Law on Legislation is like a window opened too high on the wall. Unfortunately, no one can reach it because there is


62 Id.
no ladder.” The notion that only the legislature can interpret laws has met increasing challenges in China. Professor He Weifang called it a “myth,” noting that “[w]hen courts and judges apply statutes to particular cases, they are also interpreting laws [and] making rules for effective application of the statutes for the future.”

At a Symposium held at the Peking University Center of People’s Congress and Legislature Studies in August, 2001, Professor Ma Huaide, China’s leading authority on administrative law and Dean of China University of Political Science and Legal Studies (CUPL) Law School, and Associate Professor Wang Lei of Peking University Law School pointed out that in many countries conflicting administrative regulations are resolved through litigation. Because the outcome of litigation often depends on how courts interpret a particular statute, they argue, the parties themselves have a strong interest in having the courts review and interpret

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63 Id.

64 He Weifang, Zhongguo Sifa Zhidu De Liang Ge Wenti [Two Problems with the Chinese Judicial System], ZHONGGUO SHEHUI KEXUE [CHINA SOCIAL SCIENCES] Issue 6, (1997). In a highly publicized case, an intermediate court in Gansu Province found a local ordinance conflicting with a national law and voided the challenged administrative conduct based on the ordinance. The provincial legislature immediately lashed out at the court, claiming the decision “seriously encroached upon the legislative power endowed onto the local people’s congress and its standing committee by the Constitution and local government organization law” and demanded the high court of the province to reverse the lower court’s decision and hold its leaders liable for violating the law. Fayuan Qi Ke Feiyi Ren Da Fagui, [A Court Is In No Position to Challenge an Ordinance Passed by a Local People’s Congress], BEIJING QINGNIAN BAO, [BEIJING YOUTH DAILY], Oct. 27, 2000, cited in Jiang Mingan, Sifa Quanwei Li, Fazhi Yecun, [Without Judicial Authority, There Would Be No Rule of Law], FAZHI RIBAO [LEGAL DAILY], Nov. 5, 2000, available at http://www.jc.gov.cn/personal/yssx/fsnx2/fsnx1655.htm (last visited June 6, 2003). In the same article, Professor Jiang Mingan of Peking University Law School supported the court and criticized the provincial legislature’s position and the traditional view that only legislatures could make such findings. He argued that it was not illegal for the court to find the local ordinance inconsistent with national laws, since in a country based on rule of law, the courts should have the ultimate power to dispose all legal disputes and the authority of law must be exercised through courts and judges. On the contrary, what was illegal was the local legislature’s interference with the courts’ business. “If the legislature or any other organ can instruct the courts how to try and dispose a case,” Professor Jiang asked, “and judges must worry how to avoid legal responsibility for their decisions, then where is the guarantee of judicial independence in adjudication? How can the authority of the courts and judges be maintained in the country’s social life? Without judicial independence, without their authority in the country’s social life, can one call this country one with rule of law?” Id.
But under the current constitutional framework, serious obstacles exist for the courts to resolve issues of statutory interpretation. As local courts are under the authority of, and have to report to, the local legislature, they have no power to strike down local ordinances that conflict with higher laws. Local courts must, therefore, send such issues to the legislature for review. Despite the existing structure, many scholars think that the best way to resolve disputes involving statutory interpretation is to give the courts the power to address this problem. Professor Gong Renren of Peking University Law School proposes a gradual approach whereby the courts can take one small measure at a time, winning positive attention from the public and the country’s leadership. Professor Wang Chenguang of Tsinghua University Law School agrees, suggesting that initially the courts can merely refuse to apply a law, rather than invalidating it.

Not everyone believes the courts should be given powers to interpret or construe statutes, though, especially not in the context of measuring them against the Constitution. Professor Chen Duanhong of Peking University Law School, for instance, points to the fact that many reform measures in the past two decades were actually adopted in disregard of the existing constitutional framework and were legitimized only by ex post facto amendments to the Constitution (three times in less than twenty years). He argues that this demonstrates that sometimes violations of the Constitution are necessary for China’s economic reform and development. What China needs today, he argues, is a wise and effective government with powers to implement its economic reforms. While some of the reform measures might infringe on individual rights, they should be upheld so long as their goals are consistent with the underlying values of the Constitution, i.e., development and prosperity.

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65 Invalidate an Unconstitutional Law, supra note 62.
66 Id.
67 Id.
68 Chen Duanhong, Fanrong Shi Zhongguo Xianfa De Jiben Jiazhi [Prosperity Is the Fundamental Value underlying China’s Constitution], FAZHI RIBAO [LEGAL DAILY], Dec. 6, 2002.
69 One example that might illustrate what Professor Chen means is the need for the government in most Chinese cities today to relocate residents from crowded city centers to the outskirts of town for the purpose of creating more profitable central business districts. In America, the government would be required by the Constitution to
To support his view, Professor Chen pointed to what he calls the trend of expansion of the state powers in the West during the 20th Century. Calling this process the “New Constitutionalism,” Chen believes that a strong state is exactly what China needs at this stage of its development. Summarizing China’s experience in the past half century, he writes:

Initially, we had the planned economy in which the government was omnipresent. By the end of the 1970s, the economic reform was started to modernize the country and eliminate poverty. With the progress of the economic reform, government power retreated from certain areas, and the private sector began to grow. The establishment of judicial review of administrative conduct is an indication that individual freedom and rights began to acquire their legitimacy against the government. With China’s entry to the WTO, the economy will become more market-oriented, and the government will lose more monopolies and control over resources. As a result the equation between authority and freedom will tip more toward the latter. But ultimately, the expansion of freedom will depend on how it promotes the goal of national prosperity. Before the economic reform is uncompleted, and when poverty is still a major problem confronting us, the concern for freedom should only be limited to the degrees of judicial review of administrative conduct. There remains a distance to judicialization of the Constitution.  

I quoted Professor Chen at length because his view represents a school of thinking in China, which, though gradually losing ground, still holds tremendous influence among Chinese intellectuals. Three things warrant comment here. First, Professor Chen’s argument that reform measures infringing on individual rights should be upheld so long as their goals are consistent with the underlying values of the Constitution does not provide a justification for denying courts the power to invalidate unconstitutional measures. If a measure is consistent with the underlying

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compensate residents at a level reflecting fair market values of the properties lost by the residents in relocating. In China, however, the government has a free hand to relocate urban residents, providing them whatever compensation the government chooses since there are no constitutional restraints on eminent domain laws.

70 Id.
values of the Constitution, then there is no reason for a court to declare it unconstitutional. Second, Professor Chen’s argument is somewhat weakened by his failure to recognize that the dilemma between development and individual freedom is not unique in today’s China. By referring to “the trend for expansion of state powers in the West during the 20th century,” he appears to mean the rise of the “welfare state” in the West. This immediately calls to mind the conflict between a reform-minded president (FDR) and a conservative Supreme Court in America during the New Deal Era. But this rationale for less judicial restraint merely provokes the question: In balancing the encroachment on individual rights against the “public good,” who should have the authority to determine what is “good” for the long term interests of the society? Should the government have the ultimate say on this issue? These are not abstract questions. In the construction of the Three Gorges Dam Project, for instance, millions of local residents were relocated and concerns for environmental impacts were expressed both inside and outside China. Should the government have the ultimate say about whether economic development should be accomplished at the expense of both the local residents and the environment? Should the government have untrammeled power to do whatever it pleases, so long as it believes doing so is consistent with the country’s long-term interest in “development and prosperity?”

Professor Chen’s views reflect a fundamental paradox facing constitutional reformers in China: the Constitution itself reflects conflicting goals. On one hand, it recognizes certain individual rights, which leaves some room for rights advocates to seek support from the Constitution. On the other hand, it reflects the Marxist and traditional Chinese philosophy that the collective good should stand above individual interests. How to resolve such contradictions shall remain a monumental

71 Id.
73 Martin Fackler, Dam Leaves Some Residents High, Dry; China: Compensation falls short for those Displaced by Three Gorges Project, L.A. TIMES, Feb 17, 2002; see also Sam Howe Verhovek, Reservoir of Pride and Dread: Emotions run high as China's Three Gorges Dam Project Reaches a Milestone, L.A. TIMES, June 2, 2003.
74 This concept is explicitly incorporated into the P.R.C. Constitution in Article 51: “Citizens of the People's Republic of China, in exercising their freedoms and rights,
task facing the Chinese judiciary in the years to come.

IV. JUDICIAL REVIEW OF ADMINISTRATIVE ACTS UNDER THE WTO

The discussion in the preceding section touched on the issue of whether courts should have the power to review and strike down statutes based on their interpretations of the Constitution. This form of judicial review has been highly controversial, partly due to the lingering distrust of “judicial law-making” deeply rooted in China’s continental legal tradition. But when it comes to judicial review of administrative acts, it is a completely different story. The concept of judicial review of administrative acts has been accepted since the late 1980s. This acceptance has led to a trend that gained new momentum with China’s entrance into the WTO.

A. Judicial Review of Administrative Decisions

Since the passage of China’s Administrative Litigation Law (ALL) in 1989, many Chinese citizens and entities have utilized the law to challenge administrative decisions. The 1991 Opinions on Several Issues concerning the Implementation of the People’s Republic of China Administrative Litigation Law (the 1991 Opinions) and the 2000 Interpretations on Several Issues concerning the Implementation of the People’s Republic of China Administrative Litigation Law (the 2000 Interpretations) issued by the Chinese Supreme Court have provided more detailed guidelines regarding the procedures for judicial review of
administrative decisions. In the first ten years after promulgation of the ALL, according to Vice-Chief Justice Li Guoguang of the Supreme People’s Court, courts in China heard 580,600 administrative litigation cases and disposed 573,000 of them, in 40% of which, the plaintiff prevailed. According to Yuan Shuhong, Director of Research, National College of Public Administration, the number of administrative litigation cases has increased at an annual rate of more than 10% and in the year 2001 alone, there were 1,000 such cases, in 40% of which the plaintiffs prevailed. According to another source, in the year ending March, 2002, for the first time the total number of administrative litigation cases per year exceeded 100,000. The range of cases has also expanded from those involving law enforcement, land management, and forestry agencies to administrative acts of nearly all government agencies.

One recently reported case, Diantou Longsheng Rock Materials Quarry v. City of Fuding, illustrates the increasingly important role...
played by the judiciary in China’s transformation from a planned economy to a market economy based on rule of law. In the city of Fuding, Fujian Province, there are over 920 rock processors, all of which must rely on a single source for the supply of whinstone materials (basalt rock): the Fujian Whinstone Supply, Company, Ltd. Each year only 90,000 square meters of whinstone is mined. Thus, demand far exceeds supply. For the purported purpose of assisting stronger businesses, the city government of Fuding issued two directives (or administrative decisions) setting aside 8,000 square feet of whinstone materials for twenty-two “strong enterprises needing assistance.” On March 3, 2001, the City of Fuding issued Directive 14, which provided for weighted increase of whinstone materials to thirty-one local enterprises. The result was that each year 11,300 square feet of materials would be set aside for this purpose and each business would be deprived of an average 12.28 square feet of whinstone.

The Plaintiff was one of the enterprises affected adversely by Directive 14. It took the city government to court, alleging that, of the thirty-one so-called “strong enterprises needing assistance,” twenty-six had annual outputs of less than 500,000 yuan, the level that, according to the standards set by the government itself, qualified an enterprise for the assistance. A strong enterprise, argued the plaintiff, must prove itself in free competition. Favoring it by administrative means would only create inequality, disturb the social and economic order founded on free competition, and foster nepotism, favoritism, and corruption. The plaintiff asked the court to void the city of Fuding’s Directive 14, on the grounds that it constituted an unlawful administrative act.

The defendant, City of Fuding (City), argued that Directive 14 was a non-mandatory administrative directive with no legal consequence and served merely as a guideline to the supplier Fujian Whinstone Supply Co.,


Id.

As a legacy from her planned economy of the past, government agencies in China are still used to regulate by issuing directives, even though the total number of directives have declined as governments have lost many of their powers as administrators of enterprises, and become more regulation-oriented.

Diantou Longsheng Rock v. Fuding.

Id.
As to the plaintiff’s claim, the City argued this directive provided neither rights nor duties and had no direct relationship with the plaintiff’s interests. The City further argued that as such, the government’s conduct in issuing Directive 14 did not fall into the category of specific administrative conduct under Article 2 of the People’s Republic of China Administrative Litigation Law, and therefore was not a subject matter for administrative litigation. The court rejected the City’s argument, holding that although the directive did not specify any rights or duties for the plaintiff, by interfering with the sales of Fujian Whinstone Supply, Co., Ltd, it directly affected the plaintiff’s right to operate its business. Therefore with respect to the plaintiff, the directive constituted a “specific administrative conduct” within the meaning of Article 2 of the ALL, and “an act of administrative agency that abridges the lawful right to conduct one’s business” under Article 11 (1)(c) of the ALL. Therefore, the court held that the dispute was within its subject matter jurisdiction over administrative litigation and the plaintiff had the right to bring suit. To support its position, the court cited Article 1, Section 1 of the 2000 Interpretations, issued by the Chinese Supreme Court, which provides that all citizens, legal persons, or other entities, may commence litigation in the people’s courts pursuant to the laws, if they are not satisfied with the administrative conduct of entities or organizations that have government administrative functions or their employees.

Having assumed jurisdiction over the dispute, the court declared Directive 14 unlawful. But rather than ruling on the merits, it ruled against the defendant on procedural grounds, finding that the government had failed to submit evidence and legal authority within the time as required by Articles 32 and 26 of the ALL. The court, however, did not have the

86 Id.
87 Id. Article 2 of the ALL provides that “if a citizen, a legal person or any organization consider his or its lawful rights and interests have been infringed upon by a specific administrative act of an administrative agency or its staff, he or it shall have the right to bring a lawsuit before a people’s court in accordance with this law.” ALL, supra note 75, art. 2.
88 Diantou Longsheng Rock v. Fuding. See also ALL, supra note 75, art. 11 (1)(c).
89 Id. See also 2001 Interpretations, supra note 76, art. 1 §1.
90 Id. “Defendants (government) have the burden of proof with respect to the specific administrative conducts engaged. They should submit the evidence and laws and regulations relied upon while engaging such administrative conducts.” ALL, supra note 75, art. 32; ALL art. 26(2) further requires government defendants to submit such
opportunity to revoke the directive. As it turned out, the City of Fuding had already repealed Directive 14 by the time the case came before the court. Relying on another article of the Administrative Litigation Law, the court declared the repealed directive unlawful all the same.

In another well-publicized case, two law school professors, who are also practicing attorneys, filed a lawsuit against the Municipal Planning Board of Nanjing to revoke a permit issued by the Board for the construction of a scenery observation tower on the summit of Zi Jin Mountain, a major scenic site outside Nanjing. The plaintiffs claimed that the construction of this multi-storied structure of steel and concrete there would totally ruin the scenery formed by the wooded green environment. They based their claim on the allegation that the Board’s issuance of the permit violated Article 7 of Nanjing City Regulations on Zhong Shan Ling (Sun Yat-sen Tomb) Park, which covered the proposed construction site. Pursuant to Article 7, for the purpose of preserving information within ten days after they receive a copy of the complaint, together with the answer to the complaint. Failing to do so within the time provided would result in an inference that no evidence or legal authority exists for such administrative conduct.

91 Id. More recently, the Chinese Supreme Court issued its second Judicial Interpretation on Several Issues concerning Evidence in Administrative Litigation, Zuigao Renmin Fayuan Guanyu Xingzheng Susong Zheng Ju Ruogan Wenti De Guiding, available at http://www.court.gov.cn/lawdata/explain/executivecation/200303200028.htm; see also XINHUA NEWS AGENCY, Daily News Dispatch, Administrative Agencies Will Lose Suits If They Fail to Produce Evidence, July 26, 2002. The Second Interpretation contains eighty articles, covering the distribution of burden of proof, and deadlines for submitting evidence, discovery and preservation of evidence, cross-examination and verification regarding evidence, the examination and admission of evidence, etc. The most important part is the provision that in the event that the plaintiffs and third parties are unable to gather certain evidence, the courts shall do so at the request of the plaintiffs so long as the latter provides “accurate clues” to such evidence. Such evidence includes materials and records kept and maintained by government agencies that involve state secrets, trade secrets, individual privacy, and other evidence that the plaintiffs are unable to collect.


93 Two Teachers Sued, supra note 92.

94 Id.
natural and man-made scenery within the district and maintaining its ecological balance, all construction must be in harmony with the natural environment. To refute the Board’s argument that they lacked standing to sue, the plaintiffs cited Article 2 of China’s Administrative Litigation Law which provides that “all citizens, legal persons, or other entities who believe that specific administrative conduct of administrative agencies or their employees has injured their lawful rights and interests may commence litigation in a people’s court.” They also relied on Article 6 of the People’s Republic of China Environmental Protection Law, which provides that “all entities and individuals have a duty to protect the environment and the right to report or charge entities and individuals that have polluted or damaged the environment.” The Plaintiffs claimed that they obtained standing to sue by purchasing and using preferred annual pass to the scenery district.

While it is uncertain whether the term “charge” in Article 6 of the Environmental Protection Law gave the plaintiffs the right to bring a civil lawsuit against the Board, a government agency, their creativity signals a new milestone in the increasing awareness among the Chinese citizenry that litigation may be the best means to assert and protect their rights against government agencies. Shortly after the plaintiffs filed suit, the director of Zhong Shan Ling Park indicated that construction had been suspended. The case was extensively covered by the Chinese press, and more than three thousand Nanjing residents participated in the debate.

95 Id.
96 All the courts in China are called “People’s Courts,” including the Supreme Court. For a brief introduction of the structure of China’s court system, see CHOW, supra note 42 at 199-202.
98 Id.
99 Id.
through various media. Four months later, the uncompleted project was demolished through explosions. 100 Despite the progress represented in these cases, there remain some major problems when it comes to judicial review of administrative law decisions in China.

1. There is no code of conduct for administrative agencies

Although China adopted its Administrative Litigation Law in 1989, there has yet to be an administrative procedure law setting forth the standards to determine when administrative conduct is “unlawful” and therefore justifies nullification by the courts. Such a law is needed to answer questions such as: Does the government have the power to order farmers to grow certain crops? Should the government compensate a citizen after it breaches a contract? Should there be a time limit for government agencies to take action upon applications and petitions? Should there be rules for government agencies to follow in cases of eminent domain? 101 A code of conduct for administrative agencies is also needed to ensure compliance with the GATT/WTO transparency principles in rulemaking and in the uniform, impartial, and reasonable administration of laws and regulations of foreign trade. 102

A well-reported case highlights the severity of the problem. A plain-clothed policeman demanded to be allowed entry into a private home, claiming to be on duty. The owner refused to let him in without seeing any identification. The owner was subsequently detained for fifteen days on charges of obstruction of justice. When he sued the police for violation of due process, the court dismissed the criminal case against the owner of the house on the grounds that the police were required under Chinese law to present identification while discharging official duties. 103 Similar incidents frequently take place and citizens lawful rights and interest are injured because, without an administrative procedure law to provide procedures to restrain the administrative conduct of government

101 Bill Introduced, CHINA YOUTH DAILY, supra note 79.
102 Pitman B. Potter, The Legal Implications of China’s Accession to the WTO, 163 THE CHINA QUARTERLY 592, 604-05.
103 Bill Introduced, CHINA YOUTH DAILY, supra note 79.
employees, such employees tend to act arbitrarily and capriciously.\footnote{Id. According to Professor Yang Haikun, Dean of Suchow University Law School, the notorious “virgin prostitution case” of 2001 provided a typical example of how government agencies encroach on citizens’ personal freedoms because there is not sufficient procedural regulation of, and restraint on, their administrative conduct. The “virgin prostitution case” referred to an incident in Shaanxi Province in which the police detained a young woman and a group of “male customers” on prostitution-related charges, but eventually it was exposed that the accused had all been framed by the police. A similar incident took place recently in Hebei Province. See Shaanxi Ma Dan Dan Wei Faxian Zhi Zi You Huo Pei 74.66 Wan Yuan Jingshen Sunhai Peichang [Shaanxi: Ma Dandan Awarded 746,600 Yuan Emotional Disturbance Damages for Being Illegally Detained], FAZHI RIBAO [LEGAL DAILY], Dec. 13, 2001, available at http://www.people.com.cn/GB/shehui/212/5369/.\}

In September, 2002, a team of thirteen legal experts was called together by Peking University Center of Public Law Studies to draft a bill for China’s first administrative procedure law. Subsequently reviewed by over forty administrative law scholars coming from all over the nation, the draft contains 106 sections divided into parts on the general principles, the scope of administrative conduct, normal administrative procedures, special administrative procedures, administrative remedies and administrative liabilities. There is also a chapter devoted to the public hearing system. This draft also covers “internal acts” of administrative agencies, such as directives, orders and disciplinary decisions, subjects so far considered outside the scope of legal regulation.\footnote{Chen Jieren, Xingzheng Chengxu Fa Hu Zhi Yu Chu: Quan Guo Ren Da Cheng Li Qi Cao Yanjiu Xiao Zu, [Administrative Procedure Law Is In the Making: The National People’s Congress Formed Team to Draft and Study Document], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Sept. 19, 2002.} According to Professor Ying Songnian, a leading administrative law scholar and member of the Judicial Committee of the National People’s Congress (NPC, China’s Parliament), a separate team of experts has been appointed by the NPC to tackle the task of drafting the administrative procedure law.\footnote{Id. It is interesting to note that earlier, Professor Ying, a member of the NPC, had already introduced a bill to enact an Administrative Procedure Law, but the bill apparently was not sent to the floor for a vote. See Bill Introduced, CHINA YOUTH DAILY, supra note 79. There seem to be different opinions on whether a law creating a comprehensive code of administrative procedure should be adopted or whether the same objective may be accomplished in several statutes. Professor Zhang Zhaowen of Zhejiang University Law School, for instance, believes that it would be better first to enact several statutes and later adopt the code when more conducive conditions are present. See Zhang Zhaowen, Xingzheng Chengxu Fa Dian Hua Bixu Renzhen Dui Dai, [Codification of the Administrative Procedure Law Is a Serious Business], FAZHI RIBAO [LEGAL DAILY], June 20, 2002. Professor Jiang Mingan of Peking University Law}
2. The scope of review is too narrow

Under the current framework of China’s Administrative Litigation Law, “abstract” administrative conduct, or administrative acts of rule-making, are not subject to judicial review. Therefore, the Administration Litigation Law may need to be amended to comply with the transparency and rule of law principles of GATT/WTO.

This problem is illustrated in a case cited in an article written by two senior staff members of the Standing Committee of the People’s Congress of Guangdong Province. The traffic police agency of a city in Guangdong province was sued for detaining a bicycle taxi operator for seven days in violation of China’s Administrative Penalties Law, which provides that all administrative penalties limiting a person’s bodily freedom must be set by law. The police argued that they had acted according to the city’s municipal police regulations. While the court ruled against the police for violating the Administrative Penalties Law (even though they were acting in accord with municipal regulations), the court found that under the current legal framework it did not have the power to strike down the municipal regulation itself because the court had no power to review an “abstract” act of the government.

As a senior Chinese judge pointed out, leaving the “abstract acts” of administrative agencies out of the scope of judicial review has
significantly limited the effectiveness of administrative litigation. It also indicates that the law has failed to respond to social needs. Unfortunately, the outdated concepts of judicial review lingering in many people’s minds still stand as a major obstacle to a breakthrough in this aspect.  

3. The process of administrative litigation is unjustly long and slow

While administrative litigation cases constitute only about 3% of total cases handled by Chinese courts, backlogs and delays are common due to interventions from local governments. In one example, the municipal government of Shenyang was sued for demolishing a shopping mall and evicting the tenants in breach of its previous ground lease. After the complaint was filed with the Intermediate Court of Shenyang City, the case was transferred back and forth between it and a lower court several times on various conflicting procedural grounds. When the Intermediate Court finally decided to hear the case after more than two years’ delay, the plaintiffs’ representative was detained by the court security for arriving ten minutes too early. As no one appeared for the plaintiff when the case was called, the court intended to dismiss the case and enter a default judgment against the plaintiff. After negative media coverage, however, the court finally apologized to the plaintiffs. Yet there is no word when the court would hear the case.

B. Judicial Review in The Framework of WTO

In joining the WTO, China has committed itself to the principles of

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112 Li Zhonghe, Xingzheng Susong Ren Zhong Dao Yuan, [A Long Way to Go for Administrative Litigation], FAZHI RIBAO [LEGAL DAILY], Oct. 10, 2002, available at http://www.legaldaily.com.cn/gb/content/2000-10/10/content_6453.htm. The author, Li Zhonghe, was a Vice Chief Judge of the Henan Province High Court.

113 Yuan Shuhong, supra note 78.

transparency and judicial review, both concepts inconsistent with the current Chinese system where rules and regulations of general applications are not subject to judicial review. Are the courts above the government? This is the fundamental question the Chinese have struggled with ever since the idea of judicial review first entered the public arena in the mid-1980s. The Chinese government’s decision to join the WTO has answered this question once and for all. While this policy shift stems from China’s desire to benefit from foreign trade, to some extent it also reflects a broad consensus among the Chinese (granted, there has been opposition) that in order to become an influential member of the international community, China must follow certain international norms, including the principles of transparency and judicial review. These norms may have originated in the West, but as they reflect the universal trend of today’s world, China should embrace them rather than reject them as incompatible with China’s unique circumstances.

There is no question, however, that joining the WTO left China with no choice but to strengthen the courts’ power to deal with local protectionism. As things now stand, local governments, especially those at the provincial level, often use their administrative powers to raise barriers to goods coming from other places: Province A’s cigarettes cannot be sold in Province B, while Province B’s alcohol cannot be sold in Province A. Such abuse of administrative powers will prevent the formation of a unified national market and, if unchecked, will jeopardize China’s fulfillment of its commitments under the WTO. The Chinese judiciary has not missed the significance of WTO’s requirement for transparency and judicial review. Shortly after China entered the WTO, Tian Fengqi, Chief Judge of the Liaoning Provincial High Court, characterized the demand on the Chinese courts as both a challenge and an opportunity. China’s accession to the WTO, wrote Judge Tian, will lead to further opening of the domestic market, and as a

\[\text{\textsuperscript{115}}\text{Potter, supra note 102 at 602.}\]

\[\text{\textsuperscript{116}}\text{Bill introduced, CHINA YOUTH DAILY, supra note 79.}\]


consequence more contacts and conflicts with other member countries in all areas, many of which involve laws and the judiciary. 118 Therefore, on the shoulders of the courts rest the dual tasks of enforcing, on one hand, China’s commitments to foreign parties in accordance with the rules of the WTO, and protecting, on the other hand, China’s economic security and national interest within the limit of such rules. 119

To meet the fundamental requirement for transparency under the WTO, Judge Tian points out, Chinese courts and judges must consciously adopt the modern spirit of rule of law, embodied by public and fair trials, and consistency. This means making trial procedures known to the public and declaring judgments in open court as much as possible. Judge Tian also advocates adopting such innovations as in-court cross-examination, in-court determination of evidence, entering orders and judgments in public, and promoting fairness and efficiency through public access. Moreover, Judge Tian called for effectively implementing the judge recusal system to avoid unilateral contact between parties and the judge, and also prohibiting inappropriate social functions that affect the image of judges or prevent them from conducting fair trials. 121 Finally, Judge Tian also urged that judges in China waste no time in learning the rules of the WTO and international law, because “how our courts adapt to the rules of the WTO determines, to some extent, whether such rules can survive in our country, and how we borrow and apply the laws of other member countries determines, to some extent, the international credibility of our country.” 122

On August 30, 2002, the Supreme People’s Court issued the Rules Concerning Adjudication of International Trade-Related Cases, to become effective on October 1, 2002. 123 It is the first time an important judicial interpretation has been issued concerning adjudication of administrative

\[118\] Id.
\[119\] Id.
\[120\] Id.
\[121\] Id.
\[122\] Id.
cases under WTO related rules. Some Chinese legal scholars have hailed these rules as China’s first step toward real judicial review. According to Deputy Chief Justice Li Guoguang of the Supreme Court, this set of rules was issued to address the most urgent issues arising from adjudication of international trade-related administrative cases. With China’s accession to the WTO and the resulting increase in foreign trade, the number of new types of administrative, civil, and commercial cases will increase dramatically. Therefore, Justice Li notes, nearly all areas of administrative decision-making, such as trademark, patent, anti-dumping, customs tariff, and other international trade-related administrative cases, would soon become subject to judicial review. Once it has accumulated more knowledge and experience, the Supreme Court will issue further judicial interpretations concerning judicial review of such cases. With China adopting more international norms following its accession to the WTO, court cases applying WTO-related rules are already on the rise. Indeed, consistency with the WTO requirement for judicial review has become an important starting point for the Supreme Court in issuing its judicial interpretations, as Justice Li Guoguang explained to the public through an internet chat room that in the future his court will follow three criteria in issuing its judicial interpretations: (1) they shall be consistent with the Chinese Constitution, (2) they shall be consistent with the WTO rules, and (3) they shall be consistent with the international treaties entered into by China.

There is no doubt that China’s accession to the WTO has not only exposed certain fundamental challenges to the Chinese judiciary, but it has also afforded abundant opportunities for structural reform. It is equally clear that reform-minded jurists are determined that such opportunities will not pass them by.

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125 Id.
126 Id.
127 Caifang Zuigao Renmin Fayuan Fuyuan Zhang Li Guo Guang [Interview with Li Guoguang, Vice-Chief Justice of the People’s Supreme Court], RENMIN FAYUAN BAO [PEOPLE’S COURT DAILY], Sept. 5, 2002.
IV. THE CHANGING PERCEPTION OF JUDICIAL INDEPENDENCE AND ITS PROSPECT IN CHINA POST WTO ENTRY

While China’s entry into the WTO provided a significant movement towards judicial independence, WTO accession is certainly not the only driving force. In recent years, advocates for judicial independence have become increasingly vocal. To understand the significance of this recent development, some historical perspective will be helpful.

A. From Rejection to Acceptance: A Radical Departure from the Past

Barely a decade ago an authoritative book published in China on the Chinese judicial system, entitled _Judicial System in China_, declared, “the nature of judicial system is to prosecute, on behalf of the state, activities that are against the ruling order and to implement the will of the state with coercive force.” With undertones of the Marxist “class struggle” the author continued:

Separation of powers” as conceived by Montesquieu can never become a reality. No matter how “separated,” the purpose of the bourgeois state is to suppress the rebellions of the working class and maintain the bourgeois state. The concept of “judicial independence,” derived from the concept of separation of powers, has been used to portray the courts as an institution above the classes and administering justice. But this is just to pacify the working class to prevent their rebellions. Although the constitution and laws provide for “judicial independence” as a principle, in reality the courts are both “independent” and “non-independent” at the same time, and their function is to disguise the reactionary nature of the bourgeois judiciary.

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128 ZHONGGUO SIFA ZHIDU [JUDICIAL SYSTEM IN CHINA] 43 (Wu Lei ed., 1991). In the same book the author also wrote that the socialist judicial system in China is the most revolutionary and most advanced judicial system in history. _Id._ at 55.

129 _Id._ at 91-92. The one example cited by the author for “independence” is the court’s power to try the president. The examples for “non-independence” are Congress’s power to impeach the president and the roles played by administrative judges. _Id._ at 55.
How much has changed in the short decade since Professor Wu made his negative comment on the theory of Western style separation of powers and judicial independence. A book published in 2000, also entitled *Judicial System in China* and edited by the Chief Judge of the High Court of Tianjin, recognizes that judicial reform is a universal and irreversible trend: “While the legal systems in the world are divided into two, i.e. the socialist system and the capitalist system, which overlapped with the traditional division between the common law system and the continental system, a commonality between all of them is they all have been undergoing constant reforms.”  

While the book mentions the socialist nature of the Chinese legal system in passing, as most official writings in China still do, it is devoid of the ideological rhetoric of its predecessor and focuses primarily on the roles of the judiciary in an increasingly complex market economy. But even such a view appears outdated since both judicial reform and the modernization drive have accelerated rapidly in the two years between 2000 and 2002. Today, both separation of powers and checks and balances have both been accepted in China as valuable political theories, if not wholly adaptable within the current legal system. Moreover, the Communist leadership has openly embraced judicial independence, as a principle, despite the fact that there are still different interpretations as to what “judicial independence” actually means.

**B. Rampant Judicial Corruption: An Internal Impetus for Reform**

Judicial corruption is another important impetus for adopting reform measures to increase judicial independence. Perhaps there is no better example to illustrate this point than the legal community’s reactions to *Cangnan County v. Long Gang Rubber Molding, Inc.* In this much-publicized case, a court at the county level totally disregarded both the facts and law in entering judgment in favor of the county department of...
treasury and a perpetrator of fraud who controlled the agency, for the sole reason that the court’s funding came from that department.

Outraged by the result in _Cangnan County v. Long Gang Rubber Molding, Inc._, two prominent legal scholars, Professor Su Huiyu, Vice President of China Society of Criminal Law Studies, and Professor Zheng Wei of Eastern China University of Legal and Political Studies, lamented in 1999 that such phenomena are the inevitable result of the absurd situation in China where “those who manage the money bags manage those who manage the law,” and called for immediate restructuring of the Chinese judiciary. As they pointed out, the Chinese court system suffers from the following problems: (1) abuse of discretion by the judges, which makes the outcome of litigation unpredictable; (2) local protectionism, (3) corruption among judicial officials, and (4) lack of authority and efficiency of the judiciary. Unless this system is reformed, they warned, the people will completely lose their confidence in the government, jeopardizing the survival of the Communist regime.

The root of “judicial corruption” in China, as Professor He Weifang of Peking University Law School puts it, lies in an “institutional flaw” of the Chinese judiciary: Dependence on local governments for funding and control by the same departments in staffing. Under the current Constitution and the existing governmental framework, the standing committee of the local People’s Congress appoints the chief

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132 See Su Huiyu & Zheng Wei, _Sifa Tizhi Fei Gai Bu Ke [Judicial Independence Is Absolutely Necessary],_ FAZHI RIBAO [LEGAL DAILY], May, 1999 (citing _Yi Zhihuangzi De Shenjiu De Jiekuan An [A Loan Dispute Case That Needs Probing],_ DEMOCRACY & LAW [MINZHU YU FAZHI], May 21, 1999, at 8. In a more recent and far more serious incident,

Judge Tian Fengqi was removed from his position as the Chief Judge of Liaoning Provincial High Court, a position equivalent to that of the chief justice of any state supreme court in the United States, for receiving several million yuan of bribes and promoting the business interests of his son through his position. See _Chief Judge of Liaoning Provincial High Court Removed from His Positions in the Government and Parties,_ supra note 117.

133 Su Huiyu & Zheng Wei, _supra_ note 132.

judge and other judges within their particular regional jurisdiction. This breeds local protectionism and often turns the courts into instruments of local authorities, resulting in varying regional interpretations of a single law. To remedy this flaw Professor He Weifang of Peking University Law School proposed the following measures to restructure the Chinese judiciary:

1. A unified court system so that local courts will be shielded from local protectionism; Professor He favors “de-localization” of the courts and uniform funding of the courts through the central government;

2. A supreme court that has the power of denying certiorari and hears only the most important cases for the purpose of unifying case law and providing guidance to the lower courts;

3. A supreme court that has more authority but fewer judges; Professor He proposes cutting the number down to fifteen.

Professor Wang Liming of the People’s University, proposed the following structural reforms to remedy the lack of judicial independence in China:

First, restructuring the current court system by separating the courts from the hierarchy of provincial and local governments. Right now the courts are affiliated to governments at the same level, and depend on the latter for

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135 The legislatures in China are called the People’s Congress, which form a hierarchy which runs from local Congresses up to the National People’s Congress, which serves as China’s parliament. Chow, supra note 42, at 153-56.
136 He Weifang, Rule of Law and Rule by Lawyers, supra note 134, at 66.
137 Id. Professor Zhu Fuhui also shares this view. See Zhu Fuhui, supra note 36, at 285.
138 Id.
their budgets, and for appointment and transfer of judges and other court personnel. While such structural changes must proceed cautiously and gradually, a practical first step is to establish regional courts with geographical jurisdictions not identical with, but overlapping those of local governments.  

Second, all trials, with few exceptions, should be held in public and full public access to courtrooms must be guaranteed. Also, courts should be required to render their decisions on the basis of legal reasoning which must be set forth in explicit language in the decisions and made available to the public to facilitate scrutiny by public opinion. The court should be impartial and its role limited to adjudicating the disputes, not gathering evidence. The current practice of judges having unilateral contact with the parties, or even being taken to the restaurants at the invitation of parties, or making trips to gather evidence together with parties, should all be legally prohibited.  

Third, a code of ethics and disciplinary rules should be established for judicial conduct. Although this issue is addressed in the current Judges Law, the rules are too simple and general, providing no guidelines in many areas. There is no rule, for instance, regarding the punishment once such rules are violated. The current system for evaluating judges is also very weak and operates only as a formality. Therefore, within the court system an institution should be established, such as Judges Qualifications Review Boards, which would be responsible for screening unqualified candidates lacking legal experience.  

Professor Wang’s views are shared by Professor Xu Xianmin of China University of Political Science and Legal Studies, who believes that, in addition to establishing a regional court system overlapping with the current division of jurisdictions, the following reforms would assure

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140 Wang Liming, supra note 2.
141 Id.
142 Id.
greater judicial independence in China: centralizing the authority to assign judges in the Supreme Court, vesting the power to appoint and remove judges of courts at an upper level of the People’s Congress (the legislature), investing the power to appoint and remove judges of the regional courts in the National People’s Congress (the Parliament), and making the national government the source of funding for the judiciary. As the above examples and discussions illustrate, the rampant corruption in the Chinese judiciary results from its lack of independence. Not separated from the more active executive and legislative branches, the judiciary is heavily influenced by local party and government officials who often abuse their power by interfering with the courts’ business. The only solution lies in the adoption of the separation of powers principle and gradually increasing judicial independence through the various measures proposed by the Chinese jurists.

C. China’s Accession to the WTO: An Impetus from the Outside

Increasing judicial independence is not only necessary to check the judicial corruption rampant in China, it is also a reform necessitated by China’s Accession to the WTO. As Professor Mi Jian, Deputy Chief Justice of the Qinghai Provincial High Court, pointed out, judicial independence is an essential prerequisite for all WTO members, as it is a foundation for all the rules and mechanisms under WTO. Without judicial independence, China will not be able to meet WTO’s requirements for uniform enforcement of law, impartial judicial review, including annual review of trade policies, transparency of the adjudication process, etc. As a consequence of such failure, warned Professor Mi, China will lose its credibility with other members of the WTO and eventually be precluded


from the international mechanisms of settling trade disputes.145

Of course, the impact of China’s accession to the WTO on its judicial reform is not limited to the areas of foreign trade and investment—the areas to which requirements of the WTO are directly applicable. The Chinese government is now also under pressure to raise the standards of transparency and uniform application of law in non-foreign-trade-related areas to avoid accusations of applying double standards—one for foreigners and one for the Chinese citizens. Already the suggestion that China’s commitments under the International Human Rights Conventions apply only to foreigner-related cases has sparked an uproar among legal scholars. Similar complaints have been made by Chinese businesses about economic policies. It is ironic that while foreign businesses perceive China’s accession to the WTO as a means to afford them “national treatment,” the Chinese themselves welcome the opportunity to be treated equally as foreigners.146

V. THE FUNCTION OF CASE-LAW PRECEDENTS WITHIN THE CODE-LAW FRAMEWORK

In recent years, there have been vigorous discussions in China among jurists and judges about whether the Chinese court system should adopt the practice of following case law precedents. While such debates are not new among Chinese legal scholars,148 recently the focal point has

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145 Id.
146 Li Kai, Zhongguo Ying Queli Chenmo Quan [China Should Establish the Right to Remain Silent], in 6 CHENGXU FA YANJIU [PROCEDURAL LAW REVIEW] 247, 254 (Chen Guangzhong & Jiang Wei eds., 2001).
148 Wang Jiancheng, Weihe Bu Neng Shixing Panlifa [Why Stare Decisis Cannot Be Adopted], YANTAI DAXUE XUE BAO [YANTAI UNIVERSITY JOURNAL], Jan. 5, 2001, Issue 13, available at http://www.rmfyb.com (The historical conditions for the growth of Anglo-American doctrine of stare decisis do not exist in contemporary China; Nor does China have the respect for judges found in the common-law tradition but instead has for the past century followed the civil law tradition from Germany and France, which has accomplished rule of law without stare decisis; the doctrine of stare decisis needs a whole system to support its operation in real life, such as judges well-trained in law and legal ethics, a system that gives judges sufficient discretion, an advanced, scientific,
shifted. Whereas in the past the issue was whether the doctrine of *stare decisis* should even be considered in China’s judicial reform, now the differences between the participants in the debate mostly center on how much of that doctrine should be adopted. The latest round of debate within the Chinese legal community indicates that there is now a general consensus that at least some court decisions should be treated as binding precedents for lower courts. Notably, the latest round of debate was triggered by a measure taken by a district court—the bottom rung in the hierarchy of the Chinese court system.

A. “Stare Decisis” with Chinese Characteristics

In July 2002, the District Court of Zhongyuan, in the City of Zhengzhou, introduced an innovative system that allowed judges to follow as precedent prior decisions rendered by other judges of the same court in other cases. In an article describing the innovation, Presiding Judge Li Guanghu of the Zhongyuan District Court defines the system as “a process whereby a holding shall be recognized as a ‘precedent’ with a certain degree of binding effect in the adjudication of similar cases in the future, which other panels and individual judges should refer to in handling similar cases.” Judge Li then asserts the relevance and compatibility of his innovation with the existing Chinese legal system: “Such a practice will resolve the current flaws of the code-law system to the maximum degree, but at the same time discard those parts in the case law system that conflict with our current laws.”

In his explanation of his court’s procedure, Judge Li introduces the specific steps and components of the precedent system adopted by his court:

1. The trial committee (within the court) selects as candidates a variety of typical cases. These cases must...
have the following qualities: 1) they must be of first
impression or novel in kind; 2) they can be used as
guidelines for conducting trials, handling evidence,
applying laws, etc.; 3) they must involve a difficult job in
interpreting statutes, etc.

(2) Then the trial committee shall decide which cases shall
be treated as precedents. Once selected, such precedents
shall be distributed among the judges of the court.

(3) The precedent must contain factual analysis and legal
reasoning. It must also be followed by comments so that its
underlying rationale can serve as guidance for future cases.

(4) Replacing old precedents with new precedents. The
need for doing so may arise when new laws are passed, or
existing laws amended. All the precedents applying new
laws, regulations, and judicial interpretations shall serve
as new precedents, replacing the old precedents.

(5) When a decision that has served as a precedent is
reversed or remanded by an appeals court, it must be
abolished or amended as precedent by the trial committee.

(6) The decisions serving as precedents shall first be
published within the court, and subsequently made
available to the public. When precedents reach a certain
quantity and volume, they shall be compiled and published
periodically.

In criminal cases, wrote Judge Li, precedents have served effectively as a
sentencing guideline and as definitive interpretations of various legal

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152 Under the current Chinese constitutional framework, the Supreme Court has limited authority to issue “judicial interpretations” for the purposes of providing uniform guidelines to lower courts in applying various statutory laws. Chow, supra note 42, at 208.

153 Li Guanghu, supra note 150. Judge Li speaks of making the precedents available to the “parties,” but by this he seems to mean the public since he refers to the ability of the parties to predict how their cases would fare in the same court.

154 Id.
While Judge Li’s Zhongyuan District Court was the first Chinese court to adopt the precedent system, Tianjin City, the third largest city in China, was the first to implement such a system at the provincial level. Called the “Precedent Guideline System,” the experiment was on the drawing board as early as August, 2002, shortly after the Zhongyuan District Court adopted the measure, and it went into effect on October 15, 2002.

Under the Tianjin system, precedents are selected and adopted by the trial committee of the Tianjin City High Court, and followed as guidelines by all the courts in Tianjin, which include the high court itself, two intermediate courts, and a number of city courts. The purposes for adopting this practice, according to the Chief Judge of the Tianjin High Court, include treating similar cases similarly, transparency of the adjudication process, encouraging judges to be more cautious in exercising discretion, increasing efficiency in trials and preventing miscarriage of justice, and, finally, filling the gaps where there is no statutory provision on a certain subject.

It is difficult to predict whether this trend will expand to jurisdictions across China. The current constitutional framework places the judiciary under the control of the legislature and vests the power to interpret laws, especially the Constitution, solely in the legislature. At the same time, creating binding precedents is considered law-making under the Continental tradition, of which China is at least a half-hearted...

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155 Id.
156 Tianjin Shixing Minshangshi Panli Zhidao [Tianjin Starts Pilot Project on Civil/Commercial Precedents], RENMIN FAYUAN BAO [PEOPLE’S COURT DAILY], Oct. 17, 2002, available at http://www.chinacourt.org/public/detail.php?id=14160 (last visited June 6, 2003). Like three other cities, i.e. Beijing, Shanghai, Chongqing, Tianjin is a zhi xia city, which means administratively it is directly under the central government in China, more or less like Washington, D.C. and Mexico City, and enjoys all the powers normally reserved for provincial governments.
157 Id.
158 Id.
159 Id.
160 Id.
161 CHOW, supra note 42, at 166. “A major distinction between China and many western legal systems in the area of legislative interpretation relates to the role of courts. . . In China, courts do not play such a central role in the interpretation of laws and, with the notable exception of the Supreme People’s Court, have only a limited role in the interpretation of laws.” Id.
follower. Thus, unless the Constitution is amended and the governmental framework restructured, there is very little room for Chinese courts to openly adopt a precedent system. On the other hand, the courts themselves have increasingly published their opinions and make them increasingly similar to the “findings of fact and conclusions of law” published by federal district courts in the United States.\textsuperscript{162} In China, such published cases are officially characterized as “references and guidelines” for lower courts, but the latter cannot cite them as binding legal authority. Innovations such as Judge Li’s and the Tianjin High Court’s suggest China is taking the first steps towards implementation of a precedent system, but there is still a long way to go.\textsuperscript{163}

B. \textit{The Rationale Behind Zhong Yuan District Court’s Decision to Adopt Its Precedent System}

Apparently not wanting to give people the impression that the precedent system is a wholesale transplant of the Anglo-American doctrine of \textit{stare decisis}, Judge Li of the Zhongyuan District Court took pains to distinguish the two. While the doctrine of \textit{stare decisis} has been viewed in China as contradictory to the civil law principle that laws can only be made by the legislature, Judge Li points out, “the precedent system by itself does not create new laws, but instead regulates how judges apply laws and “provides a yardstick to measure whether a particular exercise of discretion is regular or not. It merely puts a limit on the ‘degrees’ of discretion of the judges.”\textsuperscript{164} “In the precedent system [as instituted by the Zhongyuan District Court],” argued Judge Li, “the precedent itself is created pursuant to statutory laws. Other panels and individual judges will seek reference from such precedent while handling similar cases, not citing them [sic], but they will have to adjudicate pursuant to statutory provisions. Therefore such precedents are not judge-made laws, and certainly not legal authorities.”\textsuperscript{165}

As if to preempt criticism that his court is following the common law doctrine of \textit{stare decisis}, Judge Li clarifies that “our precedent system is different from the practice of \textit{stare decisis} in a very important way: a

\begin{footnotes}
\item[162] See infra Part V.
\item[163] Interview with Judge Yongjian Zhang of the Chinese Supreme People’s Court, Second Civil Division, in his office in Beijing, China. (Nov. 28, 2002).
\item[164] Li Guang Hu, \textit{supra} note 150.
\item[165] \textit{Id.}
\end{footnotes}
holding by a particular court has binding effect only on itself but not on other courts at the same level, and certainly [precedents of lower courts] are not binding on courts above it."  

Li continues with his disclaimer: “Also, to say the precedents should have ‘some binding effect’ means that they will definitely not have as ‘strong’ a binding effect as laws. The precedent only functions as a guideline to the same court in judging similar cases in the future.”

In an interview with Twenty-First Century Economic Tribune, one of the most liberal newspapers in China, however, Li openly admitted that his precedent system “borrowed the reasonable parts of the Anglo-American doctrine of stare decisis.”

Although Li has been careful to distinguish his system from the common law tradition, he and his court do believe that precedents should have “certain” binding effect for the following reasons: First, although the “trial committee” within each individual court was set up as the highest organ supervising trials pursuant to the People’s Courts Organization Act, they have not provided any meaningful guidelines to individual panels or individual judges since they can only issue general regulations. Second, currently precedents from a higher-level court are already somewhat binding on lower courts. Therefore, it is not unconstitutional for a precedent recognized by the trial committee to have some binding

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166 Id.
167 Id.
168 Borrowing the Doctrine of Stare Decisis, supra note 149.
169 Li Guang Hu, supra note 147.
170 Id. For a description of the roles and powers of the trial committees within the Chinese court system, see Chow, supra note 42, at 210. The official version of the English translation of the Chinese characters “shen pan wei yuan hui” is “adjudication committee,” which is also used by Professor Chow. But this author believes that “trial committee” is a better translation. A court adjudicates a case, sometimes through a trial, sometimes without a trial. Since “shen ban” means trial in Chinese, and what the “shen ban wei yuan hui” does is preside over trials, “trial committee” more accurately reflects the meaning of the original Chinese term. See infra Part VII for a discussion of the current reform measures taken by Chinese courts to supplement or replace the trial committee system with a system of trial by individual judges (fa guan du ren zhi).
171 Li Guang Hu, supra note 147. Judge Li did not elaborate on this point and cited no facts to support this view. An outside observer cannot help asking: If the precedents of higher courts are already binding on lower courts, then what is the fuss about the measure taken by the Zhong Yuan District Court? I guess what Judge Li meant was that, by custom, if not by rule, some of the courts in China have been following precedents from higher courts.
effect on the panels and individual judges within the same court. Third, “laws should be inheritable, stable, consistent, and coherent. For this reason precedents should be binding on cases coming after them.”

C. The Chinese Precedent System: The Scholars’ Views

Despite Judge Li’s caution, criticism of his innovation came fast. On August 30, 2002, the People’s Court Daily published an article examining Judge Li’s court by Professor Zhang Zhiming, a leading constitutional scholar at the Institute of Legal Studies, the Chinese Academy of Social Sciences (CASS). Professor Zhang’s article took a critical view of the innovation made by the Zhongyuan District Court. Zhang asserted that while such efforts should be praised as innovative, Judge Li has unintentionally usurped the “law-making” power, something vested solely in the legislature under the current Chinese constitutional system. “Even the Supreme Court itself should be cautious in taking such usurping measures, let alone a local court,” wrote Professor Zhang.

Professor Zhang raised three reasons why lower courts should refrain from initiating drastic measures of judicial reform. First, the judicial system is one of the most fundamental government systems. It affects the health of the country’s economy and people’s livelihood as well as political stability. Thus, it should not be changed without caution. Second, as China already has a basic legal framework in place, drastic changes should be avoided. Widespread reforms would only lead to the weakening of rule of law. Third, Chinese society has already set up various new and reasonable systems and concepts. It needs some time to stabilize the situation, and let the new measures take root and become established. Clearly, what Professor Zhang opposes most vigorously is not the adoption of the precedent system, but doing it too soon.

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172 Id.
174 Id.
175 Id.
176 Id.
177 Id.
Judge Chen Guimin of the Second Intermediate Court of Beijing also believed that it was too early to adopt a precedent system. He argued:

[I]t is inappropriate to emphasize the judges’ roles in “making laws” at this stage of the development of rule of law in China. This is also determined by our civil law tradition and the need to strengthen judicial authority. In comparison with the Western countries in which rule of law is highly developed, China is still in the initial stage of building rule of law. What is needed now is the absolute authority and strict enforcement of laws (even if sometimes the laws are not comprehensive enough), not premature measures. . . . By tradition China belongs to the civil law system and we do not have the experience and sophisticated techniques in applying precedents. While this should not become an excuse for not using precedents as guidance, such use must be made in a steady and organized manner. Otherwise we would destroy the uniformity of laws and affect negatively the building of rule of law.

Most prominent legal scholars, however, seem to have taken the opposite view—loudly cheering the Zhongyuan District Court’s innovation. Professor He Weifang, a constitutional law professor at Peking University Law School and a vocal proponent of judicial reform, expressed his reservations about Professor Zhang’s criticisms. Two weeks after Zhang’s article first appeared, Professor He authored an article, also published on the website of the People’s Court Daily, arguing that the age of reform in China is far from being near its end. Instead, he pointed out, many basic reforms have yet to be accomplished. For example, there is still no real judicial independence. In a more fundamental sense, China’s constitutional framework needs an overhaul. The specific mechanisms for separation of powers are not in place yet and the relationship between different branches of government must be ascertained. Given the reality of China’s current circumstances, reforms cannot always be accomplished by decisions adopted at the upper levels of government. Therefore, local courts should be encouraged to take the initiative, and their innovations

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may serve as a model for nationwide adoption of new measures.

Professor He has long been critical of knee-jerk opponents to reform. In fact, as early as 1999, Professor He asked: “Why is it that the conventional wisdom that ‘China cannot adopt the precedent system’ cannot be doubted? . . . No one has given any persuasive rationale for it, just as no one can explain why China cannot abolish capital punishment. There has been no empirical research to support these positions, only feelings.” He further pointed out that while on the surface the precedent system might give judges more discretion, in reality it is a system that restrains judges in a most detailed way. At the same time, it teaches students of the law how various laws have been applied to concrete facts.

Even before the Zhongyuan District Court adopted its precedent system, Professor Wang Limin, vice-dean of People’s University Law School and one of the leading civil law authorities in China, gave his explicit support for the adoption of some sort of precedent system. In the preface to his monumental book Research on Ambiguous Difficult Civil Cases, Professor Wang gave several reasons why it is important for China to adopt a case law precedent system. First, precedents assist judges in applying abstract and generalized statutes to specific factual circumstances. Second, the precedent system helps prevent judges from abusing their discretion in judging cases. Third, good precedents will set examples for inexperienced judges in writing well-reasoned decisions with clear findings of fact and persuasive legal reasoning. Fourth, it guarantees consistency between courts and promotes certainty and

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181 Id.


183 Id.

184 Id.
predictability of outcome.\textsuperscript{185}

Professor Wang Liming has also recommended a “partial adoption” of the case law precedent system. Under Wang’s proposal, only the cases of the Supreme Court have binding effect on all courts in the nation, while decisions of all other courts would have binding effect only on courts immediately below them.\textsuperscript{186} To sum up, most of the prominent Chinese legal scholars seems to take the view that, in the framework of China’s current constitutional framework, adoption of a limited precedent system will serve as an effective check on favoritism and abuse of power by judges. Besides, the expectation for “same facts, same result,” will help bring greater certainty to social and economic relationships, a fundamental goal for any justice system.

Another staunch and early supporter of Zhongyuan District Court’s experiment is Professor Zhang Weiping of Tsinghua University Law School, who, after an on-site investigation, made the following finding about Zhongyuan District Court’s precedent system: It differs from the doctrine of \textit{stare decisis} in significant ways; it cannot contradict the laws and regulations, nor create substantive or procedural rights not provided by laws; its purpose is to assure uniform application of laws in cases with similar facts within the court itself; it is based on the recognition of the differences among judges of this court in professional qualities and the precedents are based on reviews and study of the cases by the trial committee, with participation of local scholars. Because these precedents are the distillation of collective wisdom, Professor Zhang Weiping argues, following them would raise the bar in judicial application of laws.

All the controversies notwithstanding, some kind of precedent system will eventually take root in China because it serves the important function of promoting uniformity of litigation outcome—a critical to China’s judicial reform. As Judge Li himself puts it eloquently in his article, the precedent system “enhances rules of adjudication, when laws lack clear, detailed and operational rules or when provisions are vague, and the judges’ initiative is needed.”\textsuperscript{188}

\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{188} Li Guang Hu, supra note 150.
VI. INNOVATIVE MEASURES TAKEN TO INCREASE TRANSPARENCY AND ACCOUNTABILITY OF THE JUDICIARY

Adoption of a precedent system is only one of the innovations in China’s process of judicial reform that will have a tremendous impact in shaping the Chinese judiciary in the years to come. There are other developments, each of which is a “first” in China’s history. Most of these measures aim at making the judiciary more accountable and the judicial process more transparent.

A. Publication of Court Opinions, Including the Dissent

One of these measures is for the courts to include dissenting opinions in their decisions. The pioneers in this area are the Guangzhou Maritime Court and the Second Intermediary Court of Shanghai. In the case of Henan Securities, Inc. v. Shanghai KeJiao Real Estate Development and Management Company, Ltd., the Shanghai court took the unprecedented step of publishing the opinions of the one dissenting judge along with the majority opinion.

To understand the significance of this development, one must bear in mind that the China has followed a continental legal system model in which court decisions did not have binding precedential value. “In many cases, a court will decide a case by issuing an order that is no more than one or two sentences in length with no legal reasoning or analysis.” Therefore, for the court to issue opinions with detailed reasoning is already a departure from the Chinese judiciary’s past practice.

There are two stated rationales behind the Shanghai court’s decision to start including dissenting opinions in its decisions. First, allowing the public to see how a court reaches its decision ultimately results in greater fairness of the judicial process and increases the public’s trust in the system. Indeed, as one commentator said, “sunlight is the best

189 Shanghai Er Zhong Yuan Chuang Hu Shang Shouli Heyiting Bu Tong Yijian Xie Jin Panjueshu [Second Intermediary Court of Shanghai Pioneered the Inclusion of Dissenting Opinions in Decisions], FAZHI RIBAO [LEGAL DAILY], Sept. 12, 2002.
190 Id.
191 CHOW, supra note 42, at 211-12.
disinfectant.” Second, making judges document their opinions in a distinctive manner also helps raise the professional and ethical standards of judges because they will be more careful in their reasoning if their decisions are subject to public scrutiny.

To appreciate the importance of this development, American readers should be reminded of an important difference between the Chinese and American legal systems. With few exceptions, trials in the United States are presided over by a single judge, and “panels” exist only at the appellate level. In contrast, trials in China are mostly presided over by a “trial panel.” The Organic Law of the People’s Courts (OLPC) provides that only simple civil cases, non-serious criminal cases and those specifically allowed by law may be heard by individual judges; for all other cases, trials and appeals must be heard by panels of judges and “people’s jurors.” “Decisions of greater importance” have to be made by “trial committees,” which consist of the chief judge (president), the deputy chief judge, and senior judges. This means that difficult or controversial cases heard by a collegiate panel in a certain court will be reviewed and decided by its trial committee; a judge from the panel will normally make a short report to the trial committee to brief it on the facts and issues. After reviewing the report, the committee will normally

\[\text{Id.}\]

\[\text{Id.}\] The Guangzhou Maritime Court has also adopted this practice. This court sets forth different opinions of the individual judges in the reasoning of its decisions, and uses the term “en banc” on decisions only when the judges’ opinions are unanimous.” See You Zhenyu, Cong Panjue Zaiming Butong Yijian Kan Sifa Xianzhuang [The Inclusion of Dissenting Opinions in Court Decisions, a Current Development of the Justice System], FAZHI RIBAO [LEGAL DAILY], Oct. 10, 2002, available at http://www.legaldaily.com.cn/gb/content/2002-10/10/content_44396.htm (last visited June 6, 2003).


\[\text{Organic Law of the People’s Courts art. 11. The official version of the English translation of the Chinese characters shen pan wei yuan hui is “adjudication committee.” But this author believes that “trial committee” is a better translation. A court adjudicates a case, sometimes through a trial, sometimes without a trial. Since shen ban means trial in Chinese, and what the shen ban wei yuan hui does is presiding over trials, “trial committee” more accurately reflects the meaning of the original Chinese term.}\]
instruct the panel on how to decide the case. 196

This “panel” system has played a positive role in preventing abuse of judicial discretion and miscarriage of justice. Too often, local governments and party officials pressure judges to make decisions that will advance their particular interests. Typically, a government official approaches the chief judge, who in turn exerts pressure on the judges working under his supervision. Indeed, the chief judge in China is not just a presiding judge as in the United States—he also serves as the “president” of the court. He even has the power to discharge judges working in his court. 197 Under such a structure, the collective decision-making process of the trial-panel-trial committee system may serve as a check, albeit a very weak one, against abuses of power by individual judges, including the chief judges.

This two-level structure, however, also comes with reduced accountability, because the judges that determine cases are not those before whom the parties submit their testimonies and evidence. 199 The same problem exists in the Chinese practice that upper courts may “guide” lower courts to help them “solve” difficult cases. A former vice chief judge (vice-president) of the Chinese Supreme Court explained that this practice arose from the need to avoid erroneous decisions. 201 Given that what constitutes “difficult” can be purely subjective, this practice has undermined the notion of due process throughout the entire Chinese justice system.

Since “panels” exist at both the trial and appellate level, publishing all dissenting opinions is more difficult and costly in China. However, the

196 CHOW, supra note 42, at 210-11.
197 Professor He Weifang calls this the “bureaucratization of the court system.” He Weifang, Two Problems with the Chinese Judicial System, supra note 64.
199 He Weifang, Two Problems with the Chinese Judicial System, supra note 64.
200 The Chinese character used is zhi dao, which could be translated into English as direct, instruct, or guide. I think “guide” is probably more fitting for the context. See id.
201 Id.
202 Id.
current statutory framework does provide a certain degree of accommodation for registering the minority voice. While the Criminal Procedure Law of 1979 provides that trial panels shall adopt the majority opinions in reaching their decisions, a 1996 amendment provides that minority opinions should be kept in the record. Should the Chinese judiciary continue its strict adherence to the Continental tradition of not publishing dissenting opinions or should it adopt the Anglo-American practice of doing so? While my survey has not discovered any published articles opposing adoption of the Anglo-American practice, it has uncovered several supporting it. In one of them, the author argued that it promotes judicial transparency and democratic principles. However, the author also recommends limiting publication to appellate opinions and, as a first step, publishing such opinions in civil cases only.

B. Adopting the Single Judge Trial System

In view of China’s limited judicial resources, its practice of requiring most trials to be conducted by a panel of judges rather than individual judges may strike an outside observer as contrary to common sense. But one must realize that, historically, the courts played a very limited function in the Chinese society, especially in non-criminal matters. Only recently have laws become a significant part of the daily life in China. But now the explosion of cases has made the old panel system too expensive to maintain. In 1999, the Intermediate Court of Qingdao in Shandong Province initiated a new system in which all trials except the most important ones are conducted by a single judge.

This is not just a matter of efficiency. When cases are tried by trial committees, the relationship between junior judges and senior judges, just as between lower courts and higher courts, is one of administrative supervision and obedience. Judges have no sense of independence and are

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203 Li Qi, Pan Jue Yi Yi Yan Jiu [On Dissenting Opinions], in 3 SUSONG FAXUE YANJIU [PROCEDURAL JURISPRUDENCE] 61 (Fan Chongyi ed., 2002). See also, CRIMINAL PROCEDURAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA art. 148 (Jan. 1, 1997), http://en.chinacourt.org/public/detail.php?id=2693 (last visited June 18, 2003). "If opinions differ when a collegial panel conducts its deliberations, a decision shall be made in accordance with the opinions of the majority, but the opinions of the minority shall be entered in the records. The records of the deliberations shall be signed by the members of the collegial panel." Id.

204 He Weifang, Rule of Law and Rule by Lawyers, supra note 134, at 103.

205 Id.
often influenced by their superiors in reaching decisions. Some people argue that given the low quality of Chinese judges, trial committees are a necessity—individual judges simply do not have the capability to decide cases. But according to Professor He Weifang, the mechanism of trial committees is not the solution, but the very cause of the problem. As a whole, Chinese judges are poorly educated even though the Judges Law of 1995 provides they must have a college education. Therefore, there is nothing to guarantee that judges in the trial committees are sufficiently equipped to make well-reasoned decisions. On the contrary, the current system increases the possibility that judicial decisions are the result of interventions from superiors, including local governments.

To understand this better, one must realize that in China’s legal culture, a judge means something entirely different from what that term brings to mind in America. In China, courts operate more like a bureaucracy where cases are heard by panels and determined by committees, and the presiding judge (the president) typically has the strongest voice. Lower judges rarely have the power to make independent decisions determining the outcome of cases. In fact, many lower judges do not adjudicate at all. Some even function as administrative staff. Others play a role similar to judicial clerks in the United States, researching cases and drafting memoranda. The Chinese Supreme Court, for instance, has one president (chief justice), eight vice presidents (vice-chief justices), eighty judges, and 120 assistant judges.

While the trial committee system is not likely to disappear given the low quality of junior judges in China, it is highly possible that its influence will gradually diminish while individual judges are given more power to decide cases independently. Already, there seems to be a trend among courts to delegate to individual judges the power and responsibility to decide certain categories of cases.

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206 Id.
207 Id.
208 Id.
209 Id.
210 Id.
211 CHOW, supra note 42, at 204-05.
212 The same trend led to the abolishment of the Chief Judge Review System in Taiwan in 1990. See XU DINGZONG, BEIDA ZOU XIANG FAZHI DE DAOLU LUNTAN
VII. CONCLUSION

As any discerning reader may notice, this article is mostly about what the Chinese legal community thinks about how the Chinese judiciary should be reformed, not what has actually happened. Indeed, in my opinion this is the most important message we should get from the phenomenal progress in China’s judicial reform: The progress to date reflects a profound change in thinking among policy makers and “opinion molders” in China. When China began its reforms under Deng Xiaoping a quarter of century ago, the Chinese government recognized few universal values and excused China’s general non-conformity with an emphasis on China’s “special circumstances.” The general perception among government officials and intellectuals was that, since China was a “socialist” country with a non-Western cultural tradition, Western concepts in legal and political thinking should be viewed with reservation and adopted with even greater caution. Now the Chinese regard many, if not most, of these rules as international norms, and are willing to accept them as such. It appears that more and more judges, legal scholars, other academics, and government officials have openly embraced the underlying


213 In Chinese, “te shu qing kuang.”

214 In a speech made in 1986, Deng Xiaoping told the Chinese leaders:

In developing our democracy, we cannot simply copy bourgeois democracy, or introduce the system of separation of powers. I have often criticized people in power in the United States, saying that actually they have three governments. Of course, the American bourgeoisie uses this system in dealing with other countries, but when it comes to internal affairs, the three branches often pull in different directions, and that makes trouble. We cannot adopt such a system. . . . We cannot do without dictatorship. We must not only reaffirm the need for it but exercise it when necessary. . . . The struggle against bourgeois liberalization is indispensable. We should not be afraid that people abroad will say we are damaging our reputation. We must take our own road and build a socialism adapted to conditions in China—that is the only way China can have a future.

values of many Western-originated practices as universally applicable. This change in thinking is certainly more profound than the structural reforms introduced thus far and will determine the direction, as well as the extent, of future reforms.

What has caused such profound shift in China’s legal thinking? I believe there are at least three possible explanations. First, since the market economy has taken root in China, the relationship between individual citizens and the government has undergone tremendous change. The government’s role in society has steadily eroded and China is evolving into a much more rights-oriented society than it was ten or twenty years ago. As one scholar points out, currently the market economy in China has entered a stage of development in which further progress requires a new type of government with the following features: its functions must be limited; its conduct must be in compliance with the laws; its powers must be fragmented, based on self-rule; its operation must be institutionalized and open to the public; and its legitimacy must be based on popular elections or laws. Most important, with ongoing economic reform comes the recognition of private property and the need to protect it. This makes limitation of government power necessary, since unless the power structure of the state is also changed, holding

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215 As two American authors of book on China’s economic reform point out, “[d]espite adamantly maintaining the name of socialism, the CCP effectively blurred the distinctions between socialism and capitalism and has adopted economic development of China as its highest policy priority. In this sense, the Chinese Communist Party is nothing other than the ‘Chinese Economic Development Party.’” SUSUMU YABUKI & STEPHEN M. HARNER, CHINA’S NEW POLITICAL ECONOMY 32 (1999).

216 See Xu Xianming, supra note 29. (“A market economy is an economy of civil and commercial laws. It reflects the features of a ‘rights-based’ economy.”).


218 In March, 2003, the All-China Industrial and Commercial Alliance, the officially recognized national chamber of commerce, for the third time proposed to amend the Constitution to include a provision on the protection of private property (It has also done so in 1998 and 2002). San Ti Xiu Xian Baohu Siren Caichan, [The Third Proposal to Amend the Constitution to Include Provision on Protection of Private Property], RENMIN RIBAO [PEOPLE’S DAILY], March 3, 2003, available at http://www.law.com.cn/pg/newsShow.php?Id=8961 (last visited June 6, 2003).
power would mean holding property. Therefore, if the sanctity of private property is to be protected by the Constitution, then the role of the government has to be redefined and its power has to be limited. Professor Ji Weidong calls this an opportunity for a “historical compromise.”

The second possible explanation, which is closely related to the first, is that as the Chinese economic system has become more like the dominant Western model, and as China has gradually accumulated greater economic power, Western legal and political ideas have become less menacing and more appealing to the Chinese. The Communist movement started in China at a time when the country, like many other third world countries, suffered immense military defeats, diplomatic humiliations, and economic exploitations at the hands of Western powers and Japan. To the Chinese, the so-called international norms reflected mostly the values of the predatory imperialist West (including Japan) and served mostly its interests. China could not adopt the rules of the game because it was not China’s game. The increasingly important role China plays in the international community and the success of its economic reforms has radically changed the Chinese perception of the world. Not only do

\[219\] *Road Toward Constitutionalism*, supra note 217 (citing Professor Ji Weidong).

\[220\] *Id.* A recent survey conducted by the Chinese Academy of Sciences (CAS) and Tsinghua University’s Studies of National Affairs Center, entitled The Features and Transformation of Senior Officials Corruption in China, studied prosecuted cases of corruption during the years of China’s economic reform between 1978 and 2002. It found that since 1992, corruption of senior government officials began to take the form of joining hands with local businesses and abusing their powers to profit the latter. Zhongguo Gaoguan Fubai Chengxian Shi Da Qushi [The Ten Megatrends in the Corruption of Senior Chinese Officials], ZHONGGUO JINGJI SHI BAO [CHINA ECONOMIC TIMES], June 2, 2003, http://www.southcn.com/news/china/zgkx/200306020265.htm (last visited June 6, 2003).

\[221\] *Id.*, (quoting Professor Ji, Weidong). It is my understanding that, by “historical compromise,” Professor Ji meant a compromise of the Communist ideology and acceptance of what the Communists have regarded as a fundamental “bourgeois,” or Western, concept.

\[222\] *CHOW*, supra note 42, at 3-4 (“The contrast between China’s status in the world today and its position 100 years ago at the beginning of the twentieth could scarcely be more stark. . . . For those who encounter China today, it is important to realize that the results of these foreign incursions into China that seem so distant are still felt today.”)

\[223\] See Deng Xiaoping, supra note 214.
international norms developed in the West now benefit China much as they benefit Western countries, but China now has a voice in making such rules. As Mr. Long Yongtu, chief negotiator from the Chinese Ministry of Foreign Trade and Economic Cooperation in China’s WTO negotiation, points out, integrating into the world order now dominated by the West has yielded a “win-win” result. This is possible largely because there is no longer a concern of loss of sovereignty or foreign interference of domestic affairs.

The third possible explanation, which is also closely related to the first two, is the rejuvenation of the Chinese leadership. Contrary to 1980s when the Chinese government was dominated by people in their 60s or 70s, today, except for the uppermost echelon of leaders, most important posts in China are held by people in their forties, fifties or even younger. This is true regardless of whether one looks at the Communist Party leadership, government agencies, the courts, the media, business

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The reason why China and the United States could reach a bilateral agreement is, to a great extent, due to the fact that leaders of the two countries, from a strategic perspective, treated and handled some crucial difficult problems, thus bringing the negotiation to a “win-win” result. . . . Long Yongtu: I think under the situation of globalization, China's merging into the mainstream of the world economy is the general trend. China is a large developing country, we consider matters on the basis of this national condition. If China wants to develop from a large economic country to an economic power, it must become part of the mainstream of the world economy, otherwise, it will be put into the other register and will face the danger of "marginalization." Entry into the WTO is a rare opportunity, we should firmly seize it. . . . All in all, what we comply with is globalization and not integration, over the past two decades and more since it was opened to the outside world, China has not lost an iota of sovereignty, we still keep in our own hands the main economic means, our fundamental interests will not be harmed. This is true of WTO entry, on the whole, advantages outdo disadvantages.

Id.

225 In his new book, China’s Leaders: The New Generation, Professor Cheng Li of Hamilton College argues that the fourth generation of Chinese leaders, who just took over the Chinese Communist Party and the government in the first several months of 2003, is probably the least dogmatic, most capable, most diverse, and most cautious about coalition-building among all the elite generations in the history of the Chinese Communist Party. See generally CHENG LI, CHINA’S LEADERS: THE NEW GENERATION (2001).
organizations, or universities and research institutions. When it comes to legal reform, the new generation of Chinese leaders is much less constrained by traditional Communist ideology.

"Yi Guo Ji Jie Gui," "making (the railroad) tracks consistent with the international gauge," therefore, has become an increasingly dominant outlook and desire of the Chinese people. Of course, ultimately the success of China’s judicial reform will depend on whether the younger generations can overcome the Communist ideological trappings they have inherited. In its endeavors to create a modern judiciary that is fair and efficient and functions as a guardian of the citizens’ fundamental rights against government encroachment, the Chinese legal community must resolve the inherent conflict between judicial independence and the “Party’s leadership” in the judiciary. Such a monumental task cannot be accomplished overnight and reform should proceed cautiously and gradually. The Chinese themselves are not unaware of the risks associated with hasty and radical change.

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226 According to Professor Cheng Li, the 16th Party Congress marked a shift of power to a younger generation of Chinese leaders, the so-called "fourth generation," whose members were born between 1941 and 1956 and had their formative years during the Cultural Revolution. Now between 47 and 62 years old, these leaders not only hold almost all top ministerial and provincial leadership posts, but also have occupied about 80 percent of the seats on the 16th Central Committee of the Chinese Communist Party (CCP). But more worth watching are leaders of the Fifth generation, nicknamed the Reform Era Generation by Professor Li, who were born after 1957. While they constitute only 4.5% of the 16th Central Committee, they have a much broader representation at the provincial level. Of the 36 prominent leaders of the Fifth Generation researched by Professor Li, 22 are provincial leaders and 81.8% have post-graduate education, most in humanities and social sciences, and a few in law, in sharp contrast to the Fourth Generation who mostly received their education in sciences and engineering. Professor Li believes that, with more exposures to and better understanding of the West, the Fifth Generation is more likely to be outward-looking. See Cheng Li, The Emergence of the Fifth Generation in the Provincial Leadership, 6 CHINA LEADERSHIP MONITOR (Spring 2003), http://www.chinaleadershipmonitor.org/20032/lec.pdf.

227 In a highly publicized first Politburo "collective study session" last December 26, Hu Jintao focused on the rule of law (fa zhi) and the role of the constitution. Although Jiang Zemin has not yet completely faded away, the emphasis on the rule of law and collective leadership indicates an unambiguous sign by the younger generation of leaders of their willingness to depart from the rule of man (ren zhi). See Li Bin, China’s Quiet Revolution, ASIA WEEK, Mar. 11, 2003, available at http://www.atimes.com/atimes/China/EC11Ad02.html (last visited June 6, 2003).

228 See, CHOW, supra note 42, at 219-20.

229 As evidenced by the opinions of the scholars cited in this article who oppose hasty reforms and advocate gradualism.
however, can dispute the impressive strides and progress made thus far.

China’s judicial reform is interesting to American lawyers not only because its champions have drawn many references from the Anglo-American common law tradition and the unique Constitutional framework developed in the United States in the past two centuries. The efforts toward rule of law in the most populous country in the world also promote global progress for rule of law and help assure peace and prosperity in the 21st Century. Furthermore, comparative analysis is capable of yielding insights into the American legal system. The Chinese experiment with elements adopted from the American system can help us understand better the inherent relationship between such elements, and how and why the U.S. system works. Last but not least, certain innovations made by the Chinese may prove to be inspirational in our own efforts to achieve greater justice. After all, in this rapidly changing world, it is not only the Chinese who must learn to change with the times.

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230 Sandra Day O’Connor, On Rule of Law, (unpublished pamphlet written on the eve of her visit to the People’s Republic of China at the invitation of the Chinese People’s Supreme Court, on file with author).

231 Rosenfeld, supra note 4.