China's Courts: Restricted Reform

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ABSTRACT China's courts have in recent years engaged in significant reforms designed to raise the quality of their work. Yet such top-down reforms have been largely technical and are not designed to alter courts' power. Courts have also encountered new challenges, including rising populist pressures, which may undermine their authority. The most important changes in China's courts have come from the ground up: local courts have engaged in significant innovation, and horizontal interaction among judges is facilitating the development of professional identity. Recent developments have largely avoided two central questions facing China's courts: why have courts been permitted to develop even limited new roles, and what additional roles, if any, may they play within the Chinese political system?

Recent developments in China's courts reflect a paradox largely avoided in literature on the subject. Changes to courts' formal authority have been limited, courts still struggle to address basic impediments to serving as fair adjudicators, and they continue to be subject to Communist Party oversight. They have also confronted new challenges, in particular pressure from media reports and popular protests. At the same time, however, the party-state has permitted, and at times encouraged, both significant bottom-up development of the courts and their expanded use as fora for the airing of rights-based grievances, including administrative litigation, class actions and a small number of discrimination claims filed directly under the Constitution. Some courts have engaged in significant innovation. Judges are better qualified than in the past, and are increasingly looking to other courts and judges, rather than Party superiors, in deciding novel or difficult cases. As a result, courts are increasingly coming into conflict with other state institutions, growing numbers of well-educated judges are developing professional identities, and popular attention to both the problems and the potential roles of the courts appears higher than ever before.

The current and potential future role of China's courts has received wide attention. Discussions in both China and the West, however, have largely avoided two central questions. First, why has the party-state permitted the courts to develop even limited new roles? Secondly, can courts play an effective role in a non-democratic governmental system? This article surveys recent developments in China's courts with a view to beginning to answer these questions. The focus is on civil and administrative litigation, where reforms have been more significant than in the criminal justice system.

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Reformed Courts?

Caseloads

Are Chinese courts playing fundamentally different roles in society from those played in the recent past? There is no clear benchmark for evaluating changes in their position within the party-state. As Donald Clarke has noted, "perhaps Chinese courts are not designed to do, and should not do, the things Western courts do."[1] Courts are one of a number of state bureaucracies with the power to resolve disputes, and lack significant oversight powers over other state actors. Despite these differences, Chinese judges and academic commentators have in recent years looked to Western models of courts and judging in evaluating developments in China's courts.[2]

Reports have noted that Chinese courts are handling more cases than at any time in the past, with some claiming that China is facing a "litigation explosion."[3] The courts reported hearing 8.1 million cases in 2006,[4] more than triple the number heard in 1986. Yet such comparisons overstate the growth of litigation in China: as Table 1 shows, caseloads have grown only modestly, if at all, since 1999. The total number of cases heard in 2006 was only 2 per cent higher than in 2005, and the total number of first instance cases actually decreased by 2 per cent between 1996 and 2006. Similarly, the total number of first instance civil cases decreased in four years between 1999 and 2006; the total number of administrative cases likewise decreased in four of those years.[5] Lower court judges have confirmed in interviews that caseloads have either declined or grown only modestly over the past five years.[6] The modest increases are striking when set against the backdrop of China's rapid economic growth and widespread reports of a surge of civil disturbances in China. Judges attribute the declines to lack of confidence in the courts, in particular to the difficulties

1 Donald Clarke, "Empirical research into the Chinese judicial system," in Erik Jensen and Thomas Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford: Stanford University Press 2003), pp. 164–92.

2 For example, see Liao Weihua, "Fayuan zuzhi fa jiang chutai zhuanjia jianyi jiang renmin fayuan gaiming fayuan" ("Court organization law will come out, experts suggests changing people's courts into courts"), 4 December 2004, Nanfang Chuang, available from http://www.southcn.com/news/china/zgkx/200412040062.htm. Although noting that any reforms must accord with China's "national conditions," the Supreme People's Court (SPC) has acknowledged the need to look overseas in designing court reforms. SPC, "Renmin fayuan dierge wunian gaige gangyao (2004–2008)" ("The second five-year reform plan of the people's courts (2004–2008)"), 26 October 2005, available from http://www.law-lib.com/law/law_view.asp?id=120832.

3 "Beijing susong shuliang baozhashi zengzhang, qunian 76% anjian weineng jiean" ("The number of cases in Beijing increases explosively, the percentage of not closed cases increased by 76% last year"), *Fazhi wanbao* (*Beijing Legal Times*), 27 April 2005, available from http://news.xinhuanet.com/legal/2005-04/27/content_2884636.htm.

4 Xiao Yang, "Zuigao Renmin Fayuan gongzuo baogao (2007)" ("SPC work report (2007)"), 14 March 2007, available from http://www.chinacourt.org/public/detail.php?id=239089.

5 For analysis of the decline in caseloads, see Xin He, "The recent decline in economic caseloads in Chinese courts: exploration of a surprising puzzle," *The China Quarterly*, No. 190 (2007), pp. 352–74.

6 Interviews. Much of the information in this article is based on interviews with more than 200 judges, lawyers and academics. Interviews were conducted in Beijing, Shanghai, Guangdong, Jiangxi, Hubei, Jilin, Sichuan and Shaanxi between 2003 and 2007.

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successful litigants face in enforcing decisions, and to private parties' preference for informal methods of dispute resolution.[7]

Nevertheless, the long-term trend appears to reflect a modest increase in the use of the courts, and that a greater range of cases and cases of greater complexity are being brought. Litigants are also increasingly challenging first instance decisions: appeals have grown at a much faster rate than first instance cases, with appeals nearly doubling between 1995 and 2006. The increase in appeals suggests that litigants may be both more familiar with legal procedures, and perhaps more confident that higher courts will issue decisions that differ from those of lower courts.

The modest growth in litigation in recent years suggests that courts are not necessarily playing a greater role relative to other institutions. As Table 1 and Figure 1 show, the increase in court caseloads coincided with a decline in the total number of disputes resolved through People's Mediation Committees until 2004.[8] Compared to other institutions engaged in dispute resolution, however, the modest rise in the total number of court cases appears less significant. Disputes and complaints of all types have increased in China in recent years, and thus any increase in court caseloads may simply be part of the more general increase in both disputes and grievances. For example, far more grievances are raised through the letters and visits system than through the courts.[9] Commercial arbitration cases, including both domestic and international disputes, increased by more than 20 per cent annually from 2004 to 2006.[10] Labour arbitration cases more than quintupled between 1996 and 2004.[11] The fact that the number of disputes and complaints raised in other institutions has continued to rise suggests that the decrease in the growth of litigation has not resulted from increased clarity of legal norms.

Top-down reform

The modest growth in caseloads does appear to reflect a conscious decision by party-state leaders to strengthen the courts' ability to resolve an increasing number and range of disputes.[12] But the party-state has also emphasized

7 Interviews.

8 The number of disputes resolved through People's Mediation Committees grew in 2005, the first increase in more than a decade. The increase probably reflects renewed state emphasis on mediation as part of efforts to construct a "harmonious society."

9 Although the total number of complaints raised is not made public, the system handles an enormous volume of grievances each year. Carl F. Minzner, "Xinfang: an alternative to the formal Chinese legal system," *Stanford Journal of International Law*, Vol. 42, No. 1 (2006), pp. 103–79.

10 Wen Jie, "2006 Niandu quanguo zhongcai anjian shouli shuju jianxi" ("Brief analysis of arbitration cases decided nationally in 2006"), China-arbitration.com, 15 March 2007, available from http://www.china-arbitration.com/readArticle.do?id=ff80818111440b34011153d7086a0046.

11 Ministry of Labour and Social Security, "Zhongguo laodong tongji nianjian (2005)" ("Yearbook of China labour statistics (2005)"), pp. 523–24, available from http://www.molss.gov.cn/images/2006-11/16/27110316153762520791.pdf.

12 For example, see Jiang Zemin, Report to the 15th National Congress of the Communist Party of China, 12 September 1997 (discussing judicial reform), available from http://dcdj.ccp.org.cn/old/ReadNews.asp?NewsID=3395.

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Table 1: **Number of Cases (First Instance and Appeals) Closed Nationwide, 1994–2006**

Year	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
1st criminal	480,914	496,082	616,676	440,577	480,374	539,335	560,111	623,792	628,549	634,953	644,248	683,997	701,379
1st civil[a]	3,427,614	3,986,099	4,588,958	4,720,341	4,816,275	5,060,611	4,733,886	4,616,472	4,393,306	4,416,168	4,303,744	4,360,184	4,382,407
1st admin.	34,567	51,370	79,537	88,542	98,390	98,759	86,614	95,984	84,943	88,050	92,192	95,707	95,052
All 1st inst.	3,943,095	4,533,551	5,285,171	5,249,460	5,395,039	5,698,705	5,380,611	5,336,248	5,106,798	5,139,171	5,040,184	5,139,888	5,178,838
2nd criminal	52,579	53,942	67,087	64,548	70,767	78,803	86,619	98,157	89,440	96,797	96,204	96,776	94,092
2nd civil	179,687	208,263	243,510	263,664	294,219	339,929	363,522	377,672	357,821	370,770	377,052	392,191	406,381
2nd admin	7,672	9,536	11,365	12,684	14,220	18,072	19,404	22,149	27,649	25,045	27,273	29,176	29,054
All 2nd	239,938	271,741	321,962	340,896	379,206	436,804	469,545	497,978	474,910	492,612	500,529	518,143	529,527
Letters and visits to courts[b]	5,847,948	6,361,495	6,960,162	7,131,469	9,351,928	10,691,048	9,394,358	9,148,816	3,656,102	3,973,357	4,220,222	3,995,244	Not yet available
Mediation by people's mediation committees	6,123,729	6,028,481	5,802,230	5,543,166	5,267,194	5,188,646	5,030,619	4,860,695	4,636,139	4,492,157	4,414,233	4,486,825	Not yet available

Notes:

[a]Prior to 2002 Chinese courts had separate divisions for handling civil and economic cases; they were merged in 2002. The figures for 1994 to 2001 thus include both civil and economic cases.

[b]"Letters and visits" refers to complaints about cases received in writing or in person by courts; for a discussion of the letters and visits system, see below. Complaints about the courts to letters and visits offices at other Party or state institutions are not included in this figure.

Sources:

1994–2005: *Zhongguo falü nianjian* (*China Law Yearbook*) 1995–2006. 2006: 2007 SPC Work Report (for first instance data); Supreme People's Court, *2006 nian quanguo fayuan shenli zhixing anjian qingkuang* (*Details of Cases Tried and Enforced Nationwide in 2006*), available at http://www.dffy.com/sifashijian/ziliao/200703/20070314163527.htm (for data on second instance cases).

Figure 1: **First Instance Cases, Mediation by People's Mediation Committees, and Court Letters and Visits, 1994–2006**

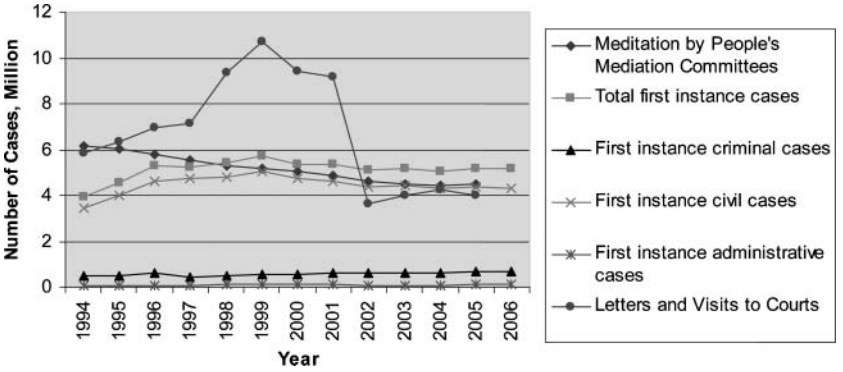
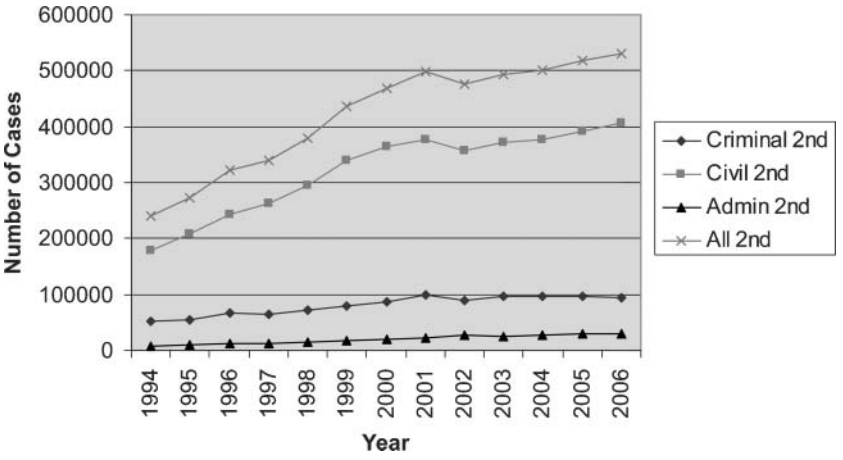


Figure 2: **Second Instance Cases (Appeals), 1994–2006**



reforming other dispute resolution institutions – including the letters and visits system, mediation, arbitration and administrative review. These moves suggest that the party-state is focused on the need to resolve disputes and grievances, and thus preserve social stability. But they do not necessarily reflect an increased role for the courts in comparison with other institutions.

Court reform has, however, received enormous attention over the past decade. China commenced its project of court reform when it began reconstruction of its legal system in 1978. The role of the courts received increased attention in the late 1990s, as China's leadership renewed efforts to strengthen the legal system. Following the embrace of "rule of law" by the 15th Congress of the Chinese Communist Party in 1997, the Supreme People's Court (SPC) in 1999 issued its first five-year plan for reforming China's courts. This brought increased

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attention to the need to strengthen the courts. The plan set out 50 goals.[13] In late 2005 the SPC issued a second five-year plan, covering the period from 2004 to 2008, again listing 50 goals.[14]

Both plans address problems in the courts, ranging from judicial training to regularity in court procedures. Such reforms are largely either general and overly abstract, or primarily technical changes designed to address competence and fairness. The goals of the 2005 plan, although similar in number, also appear modest when compared to the 1999 one.[15] The earlier plan embraced some quite significant reforms, including the creation of rules of evidence and the separation within courts of the acceptance of cases from adjudication, and adjudication of cases from enforcement. With one exception – the reform of procedures for capital cases – the 2005 reforms include no major breakthroughs. The 2005 plan does mention the need to address centralizing court appointments, a step towards breaking the link between local authorities, which generally control court appointments, and judges. But it proposes doing so only within "given areas," not nationally. And it raises the topic of centralized financing of courts, but proposes no specific steps towards this goal.

Despite the limited goals of the official plans, courts have undertaken significant reforms designed to strengthen the competence of judges and the professionalism of the court system. Most significantly, the education levels of judges have improved dramatically. Media reports in mid-2005 stated that, for the first time, more than 50 per cent of Chinese judges had university degrees.[16] This marks a sharp increase from 6.9 per cent in 1995. Since 2002, all new judges in China have been required to possess bachelor's degrees. Likewise, in 2002 the Supreme People's Court stated that sitting judges who were below the age of 40 would be required to obtain a degree within five years or lose their jobs. Older judges who lacked a university education would be permitted to stay only if they completed a training course.[17] Many new judges, in particular at higher-level courts in major cities, now possess graduate degrees in law. New judges in China are also now required to pass the national bar exam, which had a pass rate of just 14 per cent in 2005. Those who became judges before 2002, however, are not required to pass the exam. Court presidents – who generally are the most

13 SPC, "Renmin fayuan wunian gaige gangyao" ("The five-year programme for reform of the people's courts"), 20 October 1999, available from http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=chl&gid=23701.

14 "The second five-year reform plan of the people's courts (2004–2008)."

15 Although the plan covers the period 2004–2009, it was not made public until 2005. The delay may reflect internal division regarding its contents.

16 "Woguo faguan he jianchaguan zhengti suzhi tigao benke bili guoban" ("The overall quality of our nation's judges and procurators is raised, more than half are university graduates"), *Renmin ribao* (*People's Daily*), 17 July 2005, available from http://news.xinhuanet.com/legal/2005-07/17/content_3228617.htm. The 50% number probably includes not only graduates of four-year universities, but also those from evening classes, junior colleges, or *da zhuan*, as well as correspondence courses. These degrees are not necessarily in law.

17 "Wenping shangqu budengyu shuiping tigao, faguan peixun buneng zhi benzhe wenping qu" ("An advanced degree does not equal enhanced ability, judge training should not solely aim at degrees"), *Xinhua wang* (*Xinhua Net*), 11 March 2004, available from http://news3.xinhuanet.com/newscenter/2004-03/11/content_1360136.htm. Obtaining such training, however, appears relatively easy.

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powerful figures within courts and who take part in deciding major or sensitive cases – likewise are not required to be judges or to pass the bar exam.[18] The SPC has also taken steps to improve the quality of court decisions. In 2005 it issued a notice stating that opinions should include both accurate descriptions of the facts and evidence, and logical arguments and legal reasoning.[19]

Attention to training judges and to well-reasoned opinions appears to be yielding results. Judges comment that greater competence in the judiciary increases the ability of courts to resist external pressure by relying on legal arguments.[20] In addition, judges say that whereas in the past such intervention might have come either formally, in the form of written instructions, or informally through telephone calls, courts increasingly are swayed only by written instructions. Many such instructions tell courts to "emphasize" a case, or handle a particular case "according to law," rather than dictating outcomes, although even instructions in such form may make clear the desired outcome. It is difficult to assess whether interference in China's courts is increasing or decreasing. Some in China argue that external interference is actually growing, reflecting both falling confidence in the courts and the rise of the importance of popular opinion and social protest as means of influence. But it does appear that courts confronted by such pressures are increasingly likely to try to use legal arguments to resist.

Intervention continues, however, and continues to be a legitimate action by Party officials. Greater political sophistication in the courts may also make direct intervention by officials outside them less necessary, because courts are well aware of the cases most likely to be of concern to Party leaders. Improvements have been greater in routine cases than in politically sensitive ones. But the scope of sensitive cases remains wide and includes not only major criminal or political cases, but also those involving the financial interests of the party-state, powerful individuals or high profile companies, as well as cases involving a large number of plaintiffs and those receiving media coverage.

Other reforms have been less successful. Lack of enforcement of court decisions continues to be a major problem. Difficulties enforcing decisions reflect problems that courts cannot address on their own: local protectionism, continued intervention in cases by party-state officials and administrative departments, an undeveloped credit system, and weak punishment for non-compliance with court orders. In an acknowledgement of the continuing difficulties in enforcement, the Party's Central Political-Legal Committee issued a notice in December 2005 calling for the co-operation of the police and the

18 The failure to reform the appointment system for court presidents continues to serve as a major impediment to strengthening the courts.

19 "Zuigao Renmin Fayuan guanyu zai quanguo fayuan minshi he xingzheng shenpan bumen kaizhan 'Guifan sifa xingwei, cujin sifa gongzheng' zhuanxiang zhenggai huodong de tongzhi" ("Notice of the SPC regarding implementing the 'Standardizing judicial acts, enhancing judicial justice' special alteration and correction movement in the civil and administrative divisions of courts nationwide"), 15 July 2005, available from http://www.findlaw.cn/findlaw/lawdetail.asp?id=94852.

20 Interviews.

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procuracy in the enforcement of court judgements and for the establishment of a comprehensive enforcement information system that involves government departments overseeing banks, real estate, vehicles and other sectors.[21] Similarly, repeated official statements regarding the importance of combating corruption in the judiciary suggest that corruption continues to be a major problem, one that reflects the difficulty of strengthening the authority of courts so long as they remain subject to extensive external influence.

Depoliticization?

Courts continue to be subject to Party leadership. Nevertheless, scholars in China have argued that the courts have gradually shifted from primarily serving as political tools in criminal campaigns in the early 1980s to focusing on providing justice in individual cases today.[22] Court rhetoric has changed over the past decade, reflecting a modest attempt by the courts to shift from being a tool for enforcing Party policy to being a neutral forum for dispute resolution. Many judges have replaced their military-style uniforms with robes – a change viewed as a step forward by some commentators who see it as a signal that judges and courts are not simply another branch of the party-state.[23] Likewise, the new education requirements for judges represent a shift away from primary reliance on political backgrounds in selecting members of the judiciary.

Depoliticization – to the degree it has occurred – may be possible precisely because the courts are not a challenge to Party authority. Local Party organizations continue to oversee court appointments, court presidents are often primarily chosen for political reasons, and the overwhelming majority of judges continue to be Party members. Within the Party hierarchy, the President of the Supreme People's Court continues to rank well below the Minister of Public Security, a pattern generally replicated at local level.

Courts' loyalty to the Party was re-emphasized in 2006 with the launching of a new campaign on "socialist rule of law theory" in the courts, procuratorates, justice bureaus and public security bureaus. The campaign began with a speech

21 "Zhongyang Zhengfawei: Dongyuan shehui liliang, qieshi jiejue zhixing nan" ("Central Political-Legal Committee: mobilize the resources of society, conscientiously solve the problem of enforcing judgements"), *Xinhua wang*, 23 January 2006, available from http://news.xinhuanet.com/legal/2006-01/23/content_4090238.htm. One response of courts to problems in enforcement has been renewed stress on mediation to reduce contradictions and conflict in society. The most recent SPC work report stated that 30% of all civil cases were resolved through mediation in 2006, and that 55% of first-instance civil cases were mediated or withdrawn prior to judgement (SPC Work Report 2007). Judges cite two primary reasons for this trend: mediated decisions are more likely to be enforced than adjudicated cases, and they are less likely to result in protests and complaints.

22 Yu Zhong, "Lun Zuigao Renmin Fayuan shiji chengdan de zhengzhi gongneng: yi Zuigao Renmin Fayuan linian 'gongzuo baogao' wei yiju" ("On the actual political function of the SPC: using the annual 'work report' of the SPC as a base"), *Qinghua faxue* (*Tsinghua Legal Studies*), Vol. 7, available from http://law-thinker.com/show.asp?id=2829.

23 "Ganshou sifa zunyan: chuan fapao qiao fachui xingshi beihou de yiyi hezai" ("Feeling the honour of the judiciary: what's the meaning behind the actions of wearing robes and hitting gavels"), *Xinhua wang*, 5 June 2002, available from http://news3.xinhuanet.com/newscenter/2002-06/05/content_425067.htm.

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by Luo Gan (罗干), head of the Party's Central Political-Legal Committee, in which he stated that the goals were to guarantee the legal and political system's "political colour" and loyalty to the Party, the nation, the people and the law. The five elements of the campaign were "ruling the country by law," "implementing law for the people," "maintaining fairness and justice," "serving the overall situation" and "following the leadership of the Party."[24] In the speech Luo appeared to be drawing a distinction between "rule of law" and "socialist rule of law," with the latter emphasizing the legal system's obligation to follow Party leadership, and in particular Hu Jintao's theory of a "harmonious society." The SPC instructed all courts nationwide to educate judges in these principles. In a follow-up speech, Cao Jianming (曹建明), vice-president of the Supreme People's Court, linked the campaign to the need to avoid the "negative influence of Western rule of law theory"[25] – an apparent reference to those within and outside China advocating Western-style judicial independence for China.

New Pressures

The recent focus on reinforcing political orthodoxy in the courts reflects the modest reach of top-down court reform. The evolution of Chinese society and governance has also resulted in new challenges for the courts. This section discusses pressures on them that threaten to undermine their already fragile authority.

Media pressure

Over the past decade China's courts have confronted increasingly aggressive and influential media. The media have long been far more powerful actors in the

24 "Luo Gan zai shehui zhuyi fazhi linian yantaoban shang qiangdiao: shenru kanzhan shehui zhuyi fazhi linian jiaoyu, qieshi jiaqiang zhengfa duiwu sixiang zhengzhi jianshe" ("Luo Gan emphasizes in a symposium on socialist rule of law theory: deepen education on socialist rule of law theory, enhance the ideological and political construction among workers in the political-legal system"), *Zhongguo fayuan wang* (*China Court Web*), 14 April 2006, available from http://www.chinacourt.org/public/detail.php?id=201753. In a speech in November 2006, Luo again called for strengthening Party oversight of legal institutions. He also added a more direct critique of those advocating judicial independence and Western-style legal reforms. Luo warned against underestimating the influence of such arguments, in particular arguments that deny the Party's leadership of legal and political institutions, on those working in the political-legal system. He also stated that "hostile forces" were trying to use legal institutions as an entry-point for Westernizing and splitting China. Luo Gan, "Zhengfa jiguan zai goujian hexie shehui zhong danfu zhongda lishi shiming he zhengzhi zeren" ("Political and legal institutions shoulder an important historical mission and political responsibility in the construction of a harmonious society"), *Qiushi* (*Seeking Truth*), No. 3 (2007), available at http://www.qsjournal.com.cn/qs/20070201/GB/qs%5E448%5E0%5E1.htm.

25 "Cao Jiaming zai shehui zhuyi fazhi linian yantaoban shang qiangdiao: renmin fayuan yao laogu shuli shehui zhuyi fazhi linian" ("Cao Jianming emphasizes in the symposium on socialist rule of law theory: the people's courts must steadily establish socialist rule of law theory"), *Zhongguo fayuan wang*, 14 April 2006, available from http://www.chinacourt.org/public/detail.php?id=201755. Cao also spoke of the need to avoid "extreme 'left' thoughts" and the "remnants of feudalism." His speech appeared primarily aimed at placing the courts in line with current Party ideology, and thus perhaps designed to insulate them from criticism for excessive reliance on Western models. But such comments also reflect the SPC's move away from aggressively promoting court reform.

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Chinese political system than the courts, serving as both the mouthpiece and the "eyes and ears" of the Party. The growth of commercial media in the 1990s allowed the media to combine their traditional official role with marketized mass appeal. This encompassed expanded coverage of the legal system, including a significant volume of critical reporting on the courts. The internet has facilitated such coverage, with news on major cases spreading rapidly online and courts finding it more difficult to block critical reporting.[26]

The media are playing an important role in exposing injustice and in pressuring courts to behave fairly. At the same time, media coverage reinforces Party oversight of the courts. Media efforts to stir up and claim to represent popular opinion can lead officials to intervene in cases. Judges complain that there is little they can do to resist media pressure, even when media views are inconsistent with substantive or procedural law.

When media and court views diverge, party-state leaders appear to continue to trust the media more than they do the courts. In a system in which intervention in individual cases by Party officials remains legitimate, even the threat of intervention can be sufficient to affect cases. Deference to media views is accentuated by concern for social stability: the fact that a case is attracting significant media and popular attention is often sufficient reason to justify intervention, regardless of the underlying dispute. The media's ability to influence the courts, and to do so by stirring up popular sentiment online, reflects the degree to which assuaging popular demands for justice remains more important than deciding cases according to legal and procedural norms.

Petitions and protests

Courts have also increasingly come under pressure from petitioners and protestors. As Table 1 shows, courts reported handling just under four million letters and visits in 2005. The figure includes only letters and visits to the courts – and thus excludes complaints about the courts raised with other party-state actors or institutions.

Judges say that pressure from letters and visits has increased in recent years and that courts are often under pressure from court and Party superiors to resolve petitioners' grievances. This is the case even when, according to judges, such complaints lack legal merit. In some local courts the annual evaluation of judges' performance and bonuses are based in part on the volume of letters and visits resulting from their cases.[27] Court officials and academics have noted that

26 For analysis of court-media relations, see Benjamin L. Liebman, "Watchdog or demagogue? The media in the Chinese legal system," *Columbia Law Review*, Vol. 105, No. 1 (2005) pp. 1–157.

27 For example, see "Beijing fayuan dui zhongda shesu xinfang an jiang shixing lingdao baoan zhidu" ("Beijing courts will implement a system making court leaders responsible for the resolution of major litigation-related letters and visits"), *Zhongguo xinwen wang* (*China News Net*), 28 July 2005, available from http://news.qq.com/a/20050728/000926.htm.

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dealing with petitions and visits is distracting judges from their work handling cases and that courts handle nearly as many petitions as they do cases.[28]

Much press coverage of the issue highlights how letters and visits have led courts to alter incorrect decisions or have assisted in compelling parties to implement court judgements.[29] Judges confirm that some petitions and protests do result in courts re-examining and correcting erroneous cases.[30] Other accounts, however, note that courts have paid petitioners themselves when court decisions fail to provide sufficient funds to petitioners.[31] Commentators have argued that courts are being forced to change decisions to protect social stability and that the letters and visits system is weakening judicial authority.[32] Judges comment that they sometimes alter decisions, pay parties from court funds or pressure losing parties to pay more money than ordered by the court in order to assuage protestors.[33]

Judges know that the more they respond to protests, the more they will encourage similar actions by others. As with media influence, courts' inability to resist popular pressure reflects concern with social stability by party-state officials. Fear that popular discontent may result in unrest encourages officials to respond to such complaints. Given such concerns, persuading protestors to terminate their protests becomes more important than following legal and procedural standards.

Other problems are also undermining efforts to strengthen the judiciary. Courts continue to lack transparency, with decisions generally not publicly available.[34] They have also imposed new restrictions on the media's ability to

28 2004 SPC Work Report; Zuo Weimin and He Yongjun, "Zhengfa chuantong yu sifa lixing: yi Zuigao Fayuan xinfang zhidu wei zhongxin de yanjiu" ("Politics and law, tradition and judicial rationality: research centred on the SPC's letters and visits system"), *Sichuan Daxue xuebao: zheshe ban* (*Journal of Sichuan University: Philosophy and Social Science Edition*), No. 1 (2005), available from http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4523. The SPC's 2007 Work Report did not include figures on the total number of letters and visits raised with the courts, but did note that letters and visits to local courts decreased by 11% in 2006 and that those to the SPC decreased by nearly 5%. The continued declines probably reflect the SPC's instruction that courts at all levels should work to reduce litigation-related letters and visits (SPC Work Report 2007).

29 For example, see "Jiangsu Hebei deng sheng bufen qunzhong yueji xinfang shijian diaocha" ("An investigation of skipping-level letters and visits by masses from Jiangsu, Hebei and other provinces"), *Liaowang xinwen zhoukan* (*Outlook Weekly*), 30 October 2004, available from http://news.xinhuanet.com/newscenter/2004-10/30/content_2156474.htm.

30 Interviews.

31 "Jinhua Zhongyuan zhashi zuohao shesu xinfang gongzuo" ("Jinhua Intermediate Court works hard on litigation-related letters and visits"), 27 December 2005, available from http://www.jhcourt.cn/news/news_detail.asp?id=626 (link no longer valid; copy on file with author). Courts have also created "judicial relief" funds to assist poor litigants who are unable to enforce judgements in their favour. "Zuigao fayuan tan tuidong quanguo fanwei nei jianli zhixing jiuzhu jijin" ("SPC discusses promoting the establishment of an enforcement relief fund nationwide"), Sina.com, 21 January 2007, available at http://news.sina.com.cn/c/2007-01-26/114912148273.shtml.

32 "Woguo xinfang zhidu xianru sichong kunjing mianlin fazhi tiaozhan" ("Our nation's letters and visits system encounters four difficulties, faces challenges from rule of law"), *Xinhua wang*, 30 June 2004, available from http://news.sina.com.cn/c/2004-06-30/12143565398.shtml.

33 Interviews.

34 He Weifang, "Panjueshu shangwang nan zai hechu" ("What's the difficulty in putting court decisions online"), *Fazhi ribao* (*Legal Daily*), 15 December 2005, available from http://law-thinker.com/show.asp?id=3025.

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cover court proceedings, in an apparent effort to ensure positive coverage of the courts.[35] Courts are increasingly dealing with difficult or sensitive cases by inaction – refusing to accept cases or leaving them unresolved.[36] In addition, there is growing inequality within the courts, with those in less developed areas struggling to find sufficient qualified personnel as existing judges leave to pursue higher paying jobs as lawyers.

Horizontal Development and Innovation

Despite these problems, significant change is occurring in China's courts. The most important recent developments are coming from lower courts. Three trends are particularly notable.

First, lower courts are increasingly looking to other courts for guidance when they encounter new or difficult legal questions.[37] In the past, courts generally had little option but to consult higher courts. In recent years, however, judges have increasingly looked horizontally, to courts of equal rank outside their jurisdictions, for guidance. They routinely consult the internet to assist them when they encounter new questions, to learn how courts elsewhere have handled similar issues. In particular, judges in less developed areas note that they frequently look to online media reports, case summaries and in some cases decisions posted to court websites to learn how other courts have handled cases.

Such judicial networking, and the development of informal patterns of precedent, may lead to more consistent application of the law. The growth of the internet may also be facilitating the development of professional identity among judges, who increasingly interact online and who appear ever more aware of the challenges similarly situated judges face elsewhere in China.[38] Greater professional identity among judges is unlikely to alter how they decide sensitive cases, but it may assist them as they seek to combat interference from both within and outside the courts. The growth of horizontal relationships suggests that courts may be able to expand their own autonomy by looking to other courts for guidance rather than to party-state officials or court superiors.

Secondly, judicial networks may foster legal innovation. A small number of local courts have engaged in significant legal innovation. Courts in China have long engaged in experimentation, but in recent years some have issued decisions

35 Vivian Wu, "Press quiet on changes to reporting court cases," *South China Morning Post*, 14 September 2006.

36 For one example, see "Guangxi bu shouli 13 lei ruoshi qunti an, sheng gaoyuan cheng you guoqing jueding" ("Guangxi refuses to accept 13 categories of cases relating to disadvantaged people, high court asserts it is decided by the situation of the country"), *Zhongguo qingnian bao* (*China Youth Daily*), 24 August 2004, available from http://news.qq.com/a/20040824/000070.htm. Doing so is understandable: many such cases in practice involve complex or sensitive issues potentially touching on social unrest, and are disputes that courts could not resolve on their own.

37 Benjamin L. Liebman and Timothy Wu, "Chinese network justice," *Chicago Journal of International Law*, Vol. 8, No. 1 (2007).

38 Similar observations have been made regarding the growth of trans-national judicial networks. Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), pp. 65–103.

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that appear directly to challenge existing legal norms or consciously to break new legal ground. Thus, for example, a court in Henan ruled, in what became known as the *Seed Case*, that a provincial pricing regulation was "spontaneously invalid" because it conflicted with the national Seed Law. The court thus challenged norms that dictate that courts lack the power to invalidate laws or regulations. The case generated a backlash from the provincial people's congress, which ordered the judges responsible to be removed from office. The judges regained their positions after the national media reported on the case.[39]

Likewise, courts in Shanghai, Beijing and Guangzhou have innovated by finding for the media in defamation cases brought by famous persons. The courts have directly or indirectly suggested that famous persons should withstand a higher degree of scrutiny than ordinary persons – despite the absence of any distinction between ordinary and "public persons" in Chinese defamation law.[40] And in a series of cases brought by university students, courts have held that universities may be sued under China's Administrative Litigation Law – despite the widespread presumption that the law did not apply to universities.[41] The cases have been interpreted as efforts by Chinese courts to expand their jurisdiction in administrative litigation, a notable trend given that commentators have argued that courts have been reluctant to undertake administrative cases given the often influential positions of defendants in such cases.[42]

Some judicial innovation is a consequence of the wide discretion Chinese judges have in resolving cases. Unclear legal standards mean that courts must frequently fill gaps. Nevertheless, in some recent cases they have gone further, directly challenging norms, as in the *Seed Case*, or creating legal standards that lack statutory support.

Court experimentation and innovation occurs in politically safe cases, and outcomes are usually consistent with the interests of important party-state actors. Indeed, it may be that innovation is only possible in cases in which outcomes are consistent with powerful interests or there are no strong adverse interests. Thus, for example, the first case to find a public person standard resulted in a judgement in favour of a newspaper that was a subsidiary of the official mouthpiece newspaper of the Shanghai Municipal Communist Party Committee.

39 For a discussion of the case, see Zhao Lei, "Li Huijuan: tiaozhan difang lifa" ("Li Huijuan: challenging local legislation."), 25 July 2004, available at http://www.dffy.com/fayanguancha/fangyuan/200407/20040725162155.htm.

40 Benjamin L. Liebman, "Innovation through intimidation: an empirical account of defamation litigation in China," *Harvard International Law Journal*, Vol. 47, No. 1 (2006), pp. 33–177.

41 For analysis of the cases, see Tom Kellogg, "Campus and the courts: education litigation and judicial protection of rights in China," *Harvard Human Rights Law Journal* (forthcoming 2007).

42 For an example of such arguments, see Li Fujin, "Xingzheng shenpan de kunjing yu chulu" ("The difficulties in and remedies for administrative adjudication"), 19 September 2003, available at http://www.dffy.com/faxuejieti/xz/200311/20031119203349.htm.

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The modest reach of judicial innovation in China highlights a key element of court reform. The SPC does from time to time issue judicial interpretations that go beyond the text of laws the National People's Congress has passed, but such interpretations rarely directly challenge the authority of other institutions. When courts do appear to be seeking to expand their authority, including in defamation litigation, the *Seed Case* and some aspects of administrative litigation, such steps have come from lower courts.[43] Significant institutional change is not the direct result of top-down reform.

The third trend is that, although China's courts are not fora for adjudicating public rights, they have become the place for airing a range of grievances.[44] Over the past decade, litigants have brought a widening array of what might be thought of as public grievances into the courts – including class actions, public interest lawsuits on such issues as women's and environmental rights, and constitutional claims.[45] Many such cases are being brought with the assistance of lawyers who are explicitly seeking to use litigation to bring social change; the fact that China now has more than 150,000 lawyers[46] is resulting in greater incentives for them to bring novel cases. Courts have not always been receptive to such claims. The party-state appears increasingly wary of these efforts, and has imposed new restrictions on lawyers and on public interest litigation.[47] But the fact that these claims have been permitted and at times even encouraged is particularly notable given China's political system: the combination of class actions, contingency fees, administrative litigation, constitutional litigation, and cause lawyering is not common in authoritarian systems (or in many systems of any type outside the United States).

Such claims also highlight a characteristic of public litigation and cause lawyering in China: when they succeed it is rarely because of court decisions. The primary goal of many of these lawsuits is to generate public, and in particular media, attention sufficient to compel official action. When change does result, it is more often from the intervention of party-state officials than from a court opinion. Litigants may hope for a binding court decision, but using the courts as a forum for generating public pressure is often equally, if not more, important in cases in which claims succeed. The use of litigation to create public pressure and to compel extra-judicial action is not unique to China, but China may be distinct

43 One exception to this pattern was the Qi Yuling case, in which the SPC in 2001 seemed to suggest that a case could be brought directly under the PRC Constitution. The decision was both opaque and controversial, and no subsequent cases have endorsed or acknowledged the principle.

44 Liebman, "Innovation through intimidation."

45 For example, see Benjamin L. Liebman, "Note, class action litigation in China," *Harvard Law Review*, Vol. 111 (1998), p. 1523.

46 China Law Yearbook 2006, p. 1001.

47 In March 2006 the All-China Lawyers Association issued a notice requiring lawyers handling collective (defined as involving ten or more people) or sensitive disputes to report such representation to, and accept "guidance from," the local lawyers' association and justice bureau, "Zhonghua quanguo lüshi xiehui guanyu lüshi banli quntixing anjian zhidao yijian" ("Guidance notice of the All-China Lawyers Association regarding lawyers' handling of group cases"), 20 March 2006, http://www.dffy.com/faguixiazai/ssf/200606/20060620110110.htm.

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in its extreme reliance on extra-judicial responses to major public disputes in the courts.

Restricted Reform?

Recent developments do not suggest fundamental changes in courts' power relative to other state actors. This is not surprising: increasing power is not something courts can do on their own, and central Party leaders have not emphasized strengthening the courts' formal power. Nevertheless, despite the formal limitations on court authority, their future role may be significantly influenced by how they define their own roles and by how litigants use them.

Bottom-up developments may also be resulting in courts that are increasingly in conflict with other party-state and official institutions. This is particularly apparent in court interactions with the media, where courts have responded to media oversight by imposing limits on reporting and filing defamation lawsuits. But courts also appear to be increasingly in conflict with people's congresses and procuratorates, both of which have attempted to strengthen their supervision of the courts, and also with administrative departments.

Explaining new roles

Recognizing the limitations of court reform in China is not meant to trivialize the changes thus far. Indeed, asking why China's courts are not more independent or more powerful may be less important than understanding why they have been permitted to develop as they have. Why have courts been permitted to hear a wider range of grievances and to take even modest steps in the direction of increased authority and autonomy?

Western writings on the roles of courts have largely focused on the question of why a democratic regime would create independent courts.[48] Theories include the desire to make political bargains credible, the usefulness of courts to politicians who wish to shift blame for unpopular policies, courts' roles in keeping administrative bureaucracies in line with government policy, and courts' attraction to political parties that may one day find themselves out of power. Such theories have limited applicability in China, where a non-democratic regime has encouraged development of the courts, and where courts have limited powers over other administrative actors.

Another common explanation for the creation of a functional legal system is that such institutions are necessary for economic development. An interest in economic development has certainly played a role in China's legal reforms. But this explanation appears unsatisfactory, because economic development has progressed despite the absence of a legal system that provides effective

48 The list provided here is not exhaustive. For more detailed analysis, see Matthew C. Stephenson, "'When the devil turns…': the political foundations of independent judicial review," *The Journal of Legal Studies*, Vol. 32 (2003), pp. 61–64.

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guarantees of property rights. A desire to conform to international norms may play some role – but also seems a weak explanation for China's recent experiences, in particular the encouragement of class actions and cause lawyering. Three alternative theories are more plausible.

First, courts are one of a number of party-state institutions serving as a safety valve for a widening range of popular complaints. Permitting grievances to be raised through class actions, administrative litigation or even (in a small number of cases) constitutional litigation may be preferable to such complaints not being heard at all – or being raised on the streets. The safety valve function of courts also explains why they may accept but then not decide some difficult cases: the hope may be that once cases are filed, grievances will dissipate over time. The courts are not unique, or even particularly prominent, in this role. The letters and visits system plays a broader, and arguably more significant, function as a safety valve. Courts are thus one of a number of fora for raising grievances, and courts that permit such grievances to be raised act in the interests of social stability.

Concern with social stability also helps explain inconsistent trends in court reform. The party-state has emphasized the role of the courts and has given tremendous attention to courts and law in the media. At the same time, party-state leaders continue to tolerate, and even encourage, a range of official and quasi-official actors to intervene in court decision-making. Concerns with social stability force party-state officials to strive to be even more responsive to public views regarding the courts than might be the case in a democratic system, where the political process provides a mechanism for public grievances to be aired and resolved. The legitimacy of China's leadership depends on its ability both to channel and to contain populism; concerns that popular expressions of outrage may spin out of control encourage rapid intervention in the legal system. The counter-majoritarian function of courts thus may be harder to accept in a non-democratic society, where courts lack authority and public confidence, than in a democracy. This is particularly the case in China, where the rise of social unrest makes officials particularly sensitive to public opinion and where the courts lack a history of being viewed as either authoritative or neutral.

Secondly, the evolving roles of courts, including increasing conflicts with other party-state institutions, reflect the development of institutional competition in the Chinese political system. The central party-state has encouraged a range of official actors – including courts, the media, letters and visits bureaus, the procuratorates, Party discipline authorities, and people's congresses – to play oversight roles, often over each other. Attempts by the courts to expand their autonomy and authority are consistent with similar steps being taken by other actors. This reflects an emerging characteristic of institutional relationships in China, one that appears to be a crucial part of the institutionalization of the party-state that has helped to explain its resilience.[49] The aim appears to be to

49 Andrew J. Nathan, "Authoritarian resilience," *Journal of Democracy*, Vol. 14, No. 1 (2003), pp. 6–17.

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encourage a range of official actors to expand their roles in resolving grievances and fighting abuses, and to serve as checks on each other. Some greater transparency is encouraged, but within the limits of Party oversight and primarily by party-state actors. Wrongdoing is addressed, and party-state legitimacy is maintained, without fostering the development of non-state checks on official action. Thus any expansion in court roles or authority may reflect the increased attention to resolving grievances and expanding oversight in the Chinese system in general, not greater authority of the courts. China's leadership is sensitive to the possibility that allowing more prominent roles to non-state actors may undermine central authority. In the legal system, however, allowing a widening range of grievances to be brought by individuals and organizations may also be an effective tool for asserting state control.

Thirdly, bottom-up development of the courts may be a source of judicial power. The ability of judges to network horizontally may lead to greater authority and autonomy of the courts. The trajectory of court development may not be entirely determined by top-down edicts or constitutional structure. Chinese judges themselves are increasingly looking to the roles judges play in other countries as they seek to define their own positions. Likewise, litigants' aspirations for the legal system appear to derive from both rising attention to the role of law and courts and from international norms.

Fairness without independence?

Understanding why the Chinese party-state has permitted even the level of court reform experienced thus far yields insight into a central question facing China's courts: what are the possible limits of court development in a non-democratic society? Many in the West and in China have looked to China's courts in the hope that they may play a transformative role in the Chinese political system. But the more pertinent question may be what role courts can play within the current system. Can they serve as fair adjudicators of private disputes, and as checks on some forms of official action, without political change? And, if they do, will they legitimize Party rule, or will the development of a more professionalized judiciary inevitably lead to courts that challenge Party authority? Recent developments and debates in China have largely avoided this question.[50]

China's effort to create courts that act fairly without challenging single-party rule is not unprecedented. Other single-party states – including Spain under Franco and modern Singapore – have had courts that commentators have viewed as largely fair and independent in their handling of non-sensitive or non-political cases.[51] Parallels may also be drawn with Japanese courts, which

50 One exception is the work of "new-left" scholars such as Pan Wei, who have argued that China can and should establish rule of law without democracy. See, for example, Pan Wei, "Fazhi yu weilai de zhongguo zhengti" ("Rule of law and China's future political system") *Zhanlüe yu guanli* (*Strategy and Management*), No. 5 (1999), at pp 30–36.

51 José J. Toharia, "Judicial independence in an authoritarian regime: the case of contemporary Spain," *Law and Society Review*, Vol. 9, No. 3 (1975), pp. 475–96.

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were largely independent both in the late imperial period and also, after democratization, during the long period of Liberal Democratic Party rule.[52] Similarly, research on Egypt has explored why that authoritarian regime has created an independent constitutional court.[53]

Recent Chinese experience does not fit squarely into any of these models. In contrast to Singapore and Japan, for example, the range of cases deemed to be sensitive in China is extraordinarily wide – and includes not only direct challenges to Party authority or major criminal cases but also a wide range of cases attracting public attention, as well as those involving litigants with ties to party-state officials. In contrast to Franco's Spain, where a degree of independence was possible because courts' powers were extremely limited and courts played little role in creating legal values, China's courts have become significant fora for the airing of rights-based grievances. And in contrast to Egypt, where the constitutional court was established and developed to a great extent because of its role in furthering economic development, courts in China have developed into significant fora for the airing of rights-based claims even without serving as effective guarantors of property rights.[54] Moreover, the most significant changes in Chinese courts' roles appear to be coming from lower courts.

Developing the capacity of China's courts to handle routine cases fairly would be a significant accomplishment. Doing so would also be consistent with two of the three explanations offered above for the development of the courts to date: serving as a safety valve for discontent and grievances, and institutionalizing the operation of the party state. But the third explanation, that horizontal and bottom-up development may lead to greater court autonomy, suggests that further development of the courts may also give rise to increased tensions with other party-state actors. As courts continue to develop horizontally, and as judges develop professional identities, it may become increasingly difficult to constrain court development. By encouraging the development of more professional judges, the party-state may also be fostering greater challenges.

Recent developments suggest that courts' ability to serve broader aims may depend on their developing greater authority, either on their own or at the behest of the party-state. Their ability to do so will be shaped by party-state

52 John O. Haley, "The Japanese judiciary: maintaining integrity, autonomy and the public trust," Washington University in St Louis School of Law, Faculty Working Papers Series, Paper No. 05-10-01 (forthcoming in Daniel J. Foote (ed.), *Law in Japan: A Turning Point* (Seattle: University of Washington Press, 2007)). Haley notes a long tradition of judicial independence in Japan stretching back to the 19th century. In contrast, Mark Ramseyer and Eric Rasmusen argue that courts in democratic Japan, although generally independent, have yielded to LDP interests in certain sensitive cases. J. Mark Ramseyer and Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago: University of Chicago Press 2003), pp. 122–23. Haley finds no evidence of such political influence on modern Japanese courts.

53 Tamir Moustafa, "Law versus the state: the judicialization of politics in Egypt," *Law and Social Inquiry*, Vol. 28 (2003), pp. 883–930.

54 In Egypt, as Moustafa describes, the Constitutional Court has developed into a forum for challenging the regime. In China, in contrast, courts have neither challenged single-party rule nor served as fora for those seeking to do so.

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policy, but will also reflect their continued bottom-up development. The roles of courts and judges are no longer solely defined by top-down pronouncements. Judges appear to be looking to the roles judges play in other countries as they seek to define their own positions; litigants' aspirations likewise appear to derive both from rising attention to the role of judges and from international norms. Recent attempts to steer judges away from "Western rule of law theories" are a tacit acknowledgment of such trends. Continued bottom-up development may be crucial to courts' serving the Party's interests – but may also promote new challenges. The most significant development regarding China's courts is that their role in Chinese society is increasingly contested.

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