

**PLACING POWER IN THE CAGE OF LAW:
JUDICIAL INDEPENDENCE IN CHINA**
CAITLIN E. SCHULTZ*

I. INTRODUCTION

Over the past fourteen years, the United States Congress has allocated \$320 million to aid programs in China specifically targeting human rights, democracy, rule of law, and related activities.¹ Aid went to projects supporting China's own judicial independence goals, including government transparency, criminal justice reform, and access to legal counsel.² This aid has decreased over time, especially as China has become more capable of financing its own development.³ Critics of U.S. monetary support to China point to marginal results because of "political constraints" and suggest focusing on "changing China's approach to the law rather than expanding existing rule of law programs."⁴

China is making great strides in changing its approach to the law without support from the United States. What China needs more than financial aid or outside incentive to improve its own judicial processes is for the United States to fulfill its statements that its leaders so often speak of: promising to render intangible support, encouragement, and a spirit of cooperation.⁵

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* Capital University Law School, juris doctor candidate 2016. University of Missouri-Kansas City China Summer Law Program at Peking University, student, Summer 2015. Muskingum University, Valedictorian, BA in journalism, 2010. Lanzhou University, Gansu Province, China, visiting student, 2008–09. Thank you to Dr. Thomas McGrath, Associate Professor of History at Muskingum University; to the Sinocism newsletter for delivering timely and interesting China news and commentary; and to Jeffrey Snapp, Professor of Legal Research and Writing at Capital University Law School.

¹ THOMAS LUM, CONG. RES. SERV., RS22663, U.S. ASSISTANCE PROGRAMS IN CHINA 1 (2014), <http://fas.org/sgp/crs/row/RS22663.pdf>.

² *See id.*

³ *See id.* at 2.

⁴ *Id.* at 3.

⁵ *See* Press Release, The White House, Remarks by President Obama and Vice President Xi of the People's Republic of China Before Bilateral Meeting (Feb. 14, 2012), <https://www.whitehouse.gov/the-press-office/2012/02/14/remarks-president-obama-and-vice-president-xi-peoples-republic-china-bil>. On February 14, 2012, President Obama stated,

The United States cannot change China, but *China* can change China.⁶ If the United States focuses its support on encouraging China's judicial reforms, both nations will benefit and come closer to a spirit of cooperation and understanding.

On October 23, 2014, the Central Committee of the People's Republic of China⁷ announced a major plan for legal reform.⁸ This plan is universally translated as "rule of law" reform, but outsiders attack the reform's translated name and substance because of its improbability of achieving the

[It] is absolutely vital that we have a strong relationship with China. And we have continually tried to move forward on the basis of recognizing that a cooperative relationship based on mutual interest and mutual respect is not only in the interests of the United States and China, but is also in the interest of the region and in the interest of the United States—in the interest of the world.

Id.

⁶ See, e.g., Dan Blumenthal, *Is China at Present (or Will China Become) a Responsible Stakeholder in the International Community?*, REFRAMING CHINA POLICY: THE CARNEGIE DEBATES (June 11, 2007), http://carnegieendowment.org/files/Blumenthal_Responsible%20Stakeholder%20Final%20Paper.pdf. "Only China can change China. . . . [W]e cannot convince China to conform to our definition It will have to do so on its own." *Id.*

⁷ The nation is officially called the People's Republic of China (PRC), but this Comment will simply refer to it as "China." The PRC is not to be confused with the Republic of China (ROC), more commonly known as Taiwan, over which the PRC claims sovereignty. The PRC is sometimes referred to as "mainland China," excluding not only Taiwan but also Hong Kong and Macau, two Special Administrative Regions (SARs). Moreover, the PRC came into existence in 1949, and this Comment discusses cultural, linguistic, and historical matters not limited to post-1949. For a discussion of the PRC, the ROC, and SARs, see SUSAN V. LAWRENCE & MICHAEL F. MARTIN, CONG. RES. SERV., R41007, UNDERSTANDING CHINA'S POLITICAL SYSTEM 1, 9 (2013), <https://www.fas.org/sgp/crs/row/R41007.pdf>.

⁸ See *CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward*, CHINA COPYRIGHT & MEDIA BLOG (Oct. 28, 2014), <http://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward> [hereinafter *Decision Translation*].

Western⁹ standard of rule of law.¹⁰ At the conclusion of the planning meeting, the committee publicly released the *Chinese Communist Party Central Committee Decision (Decision)*,¹¹ which explains the judicial reforms and describes them from a uniquely Chinese perspective on law and governance.¹² Modern Chinese politics is rooted in China's historical legal tradition,¹³ and understanding this background is essential to improving U.S. foreign policy toward China.

Xi Jinping¹⁴ repeatedly emphasizes the nation he leads will not transition to a Western democracy.¹⁵ China's leaders clearly express that sentiment, and the Communist Party of China is "still the most important political and developmental force for contemporary China."¹⁶ Although China could potentially achieve the Western standard of rule of law, the standard is inapplicable to China's current system of governance.¹⁷ China is capable of moving toward a strong and independent judiciary that places

⁹ "Western" refers not to a geographic area of the world, but rather to the modern political distinction of nations that exhibit liberal democracy. This use is an oversimplification, but the label highlights the black-and-white approach toward China's very gray politics and government.

¹⁰ See, e.g., Paul Gewirtz, Opinion, *What China Means by 'Rule of Law'*, N.Y. TIMES (Oct. 19, 2014), <http://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html>.

¹¹ *Decision Translation*, *supra* note 8.

¹² See *infra* Part IV (describing "Socialist rule of law with Chinese characteristics"); *Decision Translation*, *supra* note 8, at art. I.

¹³ See *infra* Part II.A.

¹⁴ Xi Jinping is the President of the People's Republic of China and the General Secretary of the Communist Party of China. See LAWRENCE & MARTIN, *supra* note 7, at 2. His dual role as leader of the state and leader of the Party gives him great power over China. *Id.*

¹⁵ Angela Meng, *Xi Jinping Rules Out Western-Style Political Reform for China*, S. CHINA MORNING POST (Sept. 6, 2014), <http://www.scmp.com/news/china/article/1586307/xi-jinping-rules-out-western-style-political-reform-china>. According to political and legal expert Jacques DeLisle, Xi Jinping believes unifying the leadership will develop the nation, and one "long-standing Chinese leadership critique of Western-style democracy is that it is prone to paralysis and gridlock and ultimately governmental weakness." *Id.*

¹⁶ Zhu Suli, *The Party and the Courts*, in JUDICIAL INDEPENDENCE IN CHINA 52, 52–53 (Randall Peerenboom ed., 2010).

¹⁷ See *infra* Part II.A.

constraints on the leaders of its state who lead via the Party¹⁸—placing power in the “cage” of law.¹⁹

By continuously referring to “rule of law,” the United States compromises its foreign policy platform of cooperation and—even worse—risks failure in future dealings with China.²⁰ U.S. foreign policy toward China consistently centers on a false expectation that China’s economic development will naturally lead it to democracy.²¹ The United States should not expect that outcome.²² The “liberal myth” that the United States’ engagement with China will bring about a democratic society is based on a false view of international relations.²³ In reevaluating its policy toward China, the United States should consider China’s trajectory as a modern and capable world power without a democratic form of government.²⁴ To begin, the United States should abandon its use of the phrase “rule of law”

¹⁸ See *infra* Part IV.

¹⁹ Cheng Li, *Rule of Law: Fourth Plenum Has Opened Up Discourse on Constitutionalism, Governance*, BLOOMBERG BRIEF: CHINA’S TRANSITION, Oct. 2014, at 8, <http://www.bloombergbriefs.com/content/uploads/sites/2/2014/10/China-Plenum-opt.pdf> (quoting Xi as saying he will place “power in the cage of law”); *The Rise of Xi Jinping: Xi Who Must Be Obeyed*, ECONOMIST (Sept. 20, 2014), <http://www.economist.com/news/leaders/21618780-most-powerful-and-popular-leader-china-has-had-decades-must-use-these-assets-wisely-xi> (quoting Xi as saying he will “lock power in a cage”).

²⁰ See generally JAMES MANN, *THE CHINA FANTASY* (2007) (arguing the leaders of the United States, for several decades, have been perpetuating illusions about China for economic gain).

[W]e should not assume China is headed for democracy or far-reaching political liberalization. China will probably, instead, retain a repressive one-party political system for a long time. American or European business and government leaders who deal regularly with China . . . foster an elaborate set of illusions about China, centered on the belief that commerce will lead inevitably to political change and democracy.

Id. at xiii.

²¹ See *id.* at xii–xiii.

²² *Id.*

²³ See Christopher Ford, *Remarks at Hudson Institute on the Death of the “Liberal Myth” in U.S. China Policy*, NEW PARADIGMS F. (Dec. 3, 2014), <http://www.newparadigmsforum.com/NPFtestsite/?p=1896>. Christopher Ford is the Republican Chief Counsel to the U.S. Senate Committee on Appropriations. *Id.*

²⁴ See *id.*

concerning China's judicial reforms and instead support and encourage China's goal of judicial independence regardless of its label.

Several reasons support this view. First, simply because China will not transition to a democracy with separation of powers and checks and balances does not mean the judicial reforms cannot achieve judicial independence, which is a major component of the rule of law.²⁵ Second, a stronger judicial system in China will lead to predictability within the Chinese legal system and benefit foreign cases brought before China's courts.²⁶ Third, diplomacy between the nations will benefit from the United States offering support and encouragement toward legal reform in China.²⁷

Xi Jinping states that his goal for the nation's judicial reform is to place Party power in the "cage" of law.²⁸ This reform is indeed plausible by virtue of China's recent legal reforms, including those announced as part of China's Fourth Five-Year Plan²⁹ and the more recent and groundbreaking Fourth Plenum on the rule of law in October 2014.³⁰ Judicial independence is central to the reforms and is the key that locks power in the cage of law.³¹

II. CHINA'S LEGAL HISTORY AND MODERN GOVERNANCE

China has a rich tradition of governance, which developed apart from Western legal traditions and Western democracy.³² Yet, the United States continues to dismiss China's decision to reject democracy and refuses to accept China's lack of Western rule of law characteristics.³³ Instead of viewing the problems in China's judicial system as they are, the United States blames China's form of governance. This straw man argument both hinders the United States' diplomatic relationship with China and precludes its attempts to cooperate with the nation.

²⁵ See, e.g., Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT. L. 1, 6 (2003), <http://chinesejil.oxfordjournals.org/content/2/1/1.full.pdf>.

²⁶ See, e.g., Shimon Shetreet, *The Normative Cycle of Shaping Judicial Independence in Domestic and International Law*, 10 CHI. J. INT'L L. 275, 278 (2009).

²⁷ See *supra* note 5 and accompanying text.

²⁸ See *supra* note 19 and accompanying text.

²⁹ See *Fourth 5-Year Court Reform Plan Roadmap and Timeline*, CHINA L. TRANSLATE (July 11, 2014), <http://chinalawtranslate.com/fourth-judicial-5-year-plan-roadmap/?lang=en>.

³⁰ See *infra* Part IV; *Decision Translation*, *supra* note 8.

³¹ See *infra* Part III.D.

³² See *infra* Part II.A.

³³ See *infra* Part III.

China's judicial problems stem not solely from the nation's one-party state but rather from three separate concerns. First, China's legal and judicial systems were recently built from the ground up following the Cultural Revolution of the 1960s.³⁴ The recent creation and implementation of China's laws and regulations³⁵ produces uncertainty, unpredictability, and a weak statutory structure. A second concern separate from China's system of governance is its inquisitorial, rather than adversarial, judicial system.³⁶ A perceived lack of "due process" (a U.S. Constitutional term inapplicable to China)³⁷ and other problems are criticisms of the inquisitorial system and should not be blamed on China's one-party system. A third concern is China's civil law, rather than common law, system.³⁸ Civil law judicial systems can result in a lack of predictability of outcomes and inconsistent statutory interpretation.³⁹ Although the civil law system is the source of much frustration with China's judicial system, it should be criticized separately from China's form of governance.

China's system looks nothing like the Western model.⁴⁰ These differences, however, do not mean China cannot strengthen its court system and attain judicial independence. In fact, China is "on the road" toward this goal,⁴¹ and the United States should support China's recent reforms despite disagreeing with the system's form.

A. Historical Governance Concepts Exhibited Today

Rule of law concepts are not consistent with traditional Chinese culture,⁴² which even today stresses power structures over individual rights.⁴³ The basic concepts of Chinese governance are rooted in a powerful and moral leader who works "to educate, persuade, and perhaps even change

³⁴ See *infra* Part II.B; JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 575, 699 (2d ed. 1999).

³⁵ See SPENCE, *supra* note 34, at 669–76.

³⁶ John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 *TEX. INT'L L.J.* 455, 473 (2012).

³⁷ See U.S. CONST. art. XIV, § 1.

³⁸ See Capowski, *supra* note 36, at 455.

³⁹ *Id.*

⁴⁰ See *infra* Part II.B.

⁴¹ See *infra* Part IV.

⁴² See Haiting Zhang, *Traditional Culture v. Westernization: On the Road Toward the Rule of Law in China*, 25 *TEMP. INT'L & COMP. L.J.* 355, 367–68 (2011).

⁴³ See *id.* at 372.

popular inclinations.”⁴⁴ Xi Jinping exhibits these qualities; central themes of his rule are his campaign against corruption⁴⁵ and use of the law to assist the Party in effectively ruling the nation.⁴⁶

Moreover, in contrast to Western democratic systems designed with the goal of “constraining leaders”⁴⁷ through separation of powers, checks and balances, and a slow process for implementing and changing laws, China seeks to streamline its leaders’ exercise of power.⁴⁸ A powerful leader prevents the nation from falling into chaos, which has long been the central goal of Chinese political culture.⁴⁹ The Fourth Plenum *Decision*’s first principle is “[p]ersisting in the leadership of the Chinese Communist Party,” which emphasizes that “[t]he leadership of the Party is the most essential trait of Socialism with Chinese characteristics,” and it relies on China’s “basic experience” as its foundation.⁵⁰

China’s governance has consistently focused on achieving economic growth and maintaining social order to avoid much-feared chaos.⁵¹ Today’s leaders have looked to legal reform as a means to quell social unrest over land grabs, pollution, and corruption.⁵² For example, almost two-thirds of incidents of unrest in rural China involve local officials illegally seizing land.⁵³ In 2013, unrest concerning pollution surpassed unrest related to land

⁴⁴ DAVID M. LAMPTON, FOLLOWING THE LEADER: RULING CHINA, FROM DENG XIAOPING TO XI JINPING 49–50 (2014).

⁴⁵ See Maximilian Walsh, Opinion, *Xi Jinping’s Anti-Corruption Campaign in Working in China*, FIN. REV. (June 17, 2015), <http://www.afr.com/opinion/columnists/xi-jinpings-anticorruption-campaign-in-working-in-china-20150617-ghpxgx>. In 2014, sixty-eight of the nation’s leaders and over 70,000 low-level officials were investigated, and the campaign continues in 2015. *Id.*

⁴⁶ See G.E., *Xi Makes the Rules*, ECONOMIST: BLOG (Oct. 24, 2014), <http://www.economist.com/blogs/analects/2014/10/chinese-politics>.

⁴⁷ LAMPTON, *supra* note 44, at 58.

⁴⁸ See *id.* at 58–59.

⁴⁹ See *id.* at 59.

⁵⁰ *Decision Translation*, *supra* note 8, at art. I.

⁵¹ LAMPTON, *supra* note 44, at 48.

⁵² See Sui-Lee Wee, *China Vows Better Rule of Law, but No Word of Disgraced Security Chief*, REUTERS (Oct. 23, 2014), <http://www.reuters.com/article/2014/10/23/us-china-politics-law-idUSKCN0IC1D220141023> (stating that China’s legal reforms were implemented in part as a response to public opinion that the judicial branch’s solutions to national problems have been unsatisfactory).

⁵³ See *Rule of Law in China: China with Legal Characteristics*, ECONOMIST (Nov. 1, 2014), <http://www.economist.com/news/leaders/21629383-xi-jinping-invoking-rule-law-thats-risky-him-and-good-china-china-legal>.

disputes,⁵⁴ and environmental regulations to control pollution were enacted in early 2014⁵⁵ as a direct response.⁵⁶ In addition, Xi Jinping's recent anti-corruption campaign is a direct effort to build Party legitimacy and maintain public confidence in China's leaders.⁵⁷

This modern focus on moral leadership is rooted in Chinese legal tradition.⁵⁸ Historically, legal discourse in China revolved around the philosophical argument between Confucians and Legalists.⁵⁹ Confucians believed moral education could create an internal force to control rulers' enforcement of law, whereas Legalists believed human nature could not be changed by moral education.⁶⁰ Despite the differences between these philosophies, neither could "dispute the idea that good men can bring about good government."⁶¹ Moreover, the debate between these two ideologies resulted in their blending; although Confucianism ultimately prevailed, subsequent leaders understood that elements of Legalism are necessary for good governance.⁶²

China's process of selecting leaders has historically reflected the concept that moral leaders are good rulers.⁶³ For example, the traditional

⁵⁴ *Chinese Anger Over Pollution Becomes Main Cause of Social Unrest*, BLOOMBERG BUS. (Mar. 6, 2013), <http://www.bloomberg.com/news/2013-03-06/pollution-passes-land-grievances-as-main-spark-of-china-protests.html>.

⁵⁵ See Benjamin van Rooij & Alex Wang, Opinion, *China's Pollution Challenge*, N.Y. TIMES (May 19, 2014), <http://www.nytimes.com/2014/05/20/opinion/chinas-pollution-challenge.html>. "The nation's leaders nevertheless remain fearful of citizen unrest breaking out over pollution violations, and preventing social unrest remains the top priority." *Id.*

⁵⁶ See *id.*

⁵⁷ See Dingding Chen, *4 Misconceptions About China's Anti-Corruption Campaign*, DIPLOMAT (Aug. 6, 2014), <http://thediplomat.com/2014/08/4-misconceptions-about-chinas-anti-corruption-campaign/?utm>.

⁵⁸ See Wejen Chang, *Foreword* to *THE TURN OF THE RULE OF LAW IN CHINA* vii, vii (Karen G. Turner et al. eds., 2000).

⁵⁹ See *id.* at x; M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUD. L. REV. 43, 64 (2005).

⁶⁰ See Chang, *supra* note 58, at xxi.

⁶¹ *Id.*

⁶² See JOHN W. HEAD & XING LIJUAN, *LEGAL TRANSPARENCY IN DYNASTIC CHINA* 55 (2013).

⁶³ See Jialue "Charles" Li, *China, A Sui Generis Case for the Western Rule-of-Law Model*, 41 GEO. J. INT'L L. 711, 741 (2010). During the Han Dynasty, the leadership "recruitment system [was] based upon objective standards of merit such as education, administrative experience, recommendation, and examination." *Id.* (citation omitted).

civil service examination system tested men on knowledge of classical literature, including Confucius's works on morality.⁶⁴ Although family wealth was necessary to allow a student years of study instead of aiding the family in its farming or business, the civil service selection process did not discriminate based on social status but rather focused on merit.⁶⁵ Today, the Chinese system of selecting leaders is largely meritocratic⁶⁶ and is derived from Confucian thought.⁶⁷ Although corruption and other systemic problems substantially hinder the Chinese political system,⁶⁸ China believes it is governed best by those who exhibit strong leadership skills and who are virtuous and moral.⁶⁹

Xi Jinping's view of his own power affirms the West's misunderstanding about China's present political direction.⁷⁰ Xi often quotes both Legalist thinkers and Confucius when describing national policy and his leadership style.⁷¹ Most noteworthy, Xi has quoted revered Warring States Legalist Han Fei: "When those who uphold the law are strong, the state is strong," and Confucius: "He who rules by virtue is like the North Star. It maintains its place, and the multitude of stars pay homage."⁷² Through these words, Xi signals his authority and legitimacy while

Additionally, in the Tang Dynasty, "the examination began to include the test on the knowledge of codes, judgment, and legal theories." *Id.* (citation omitted).

⁶⁴ See SPENCE, *supra* note 34, at 46.

⁶⁵ See Li, *supra* note 63, at 742.

⁶⁶ See Eric X. Li, *The Life of the Party*, FOREIGN AFF. (Jan./Feb. 2013), <http://www.foreignaffairs.com/articles/138476/eric-x-li/the-life-of-the-party>.

⁶⁷ See Zhang Weiwei, Opinion, *Meritocracy Versus Democracy*, N.Y. TIMES (Nov. 9, 2012), <http://www.nytimes.com/2012/11/10/opinion/meritocracy-versus-democracy.html>.

⁶⁸ See Daniel A. Bell, *Chinese Democracy Isn't Inevitable*, ATLANTIC (May 29, 2015), <http://www.theatlantic.com/international/archive/2015/05/chinese-democracy-isnt-inevitable/394325>. "In practice, however, 'princelings' often dominate: several of China's leaders, including the president, are the descendants of prominent and influential Communist officials." *Id.*

⁶⁹ See Daniel Bell & Eric Li, Opinion, *In Defence of How China Picks its Leaders*, FIN. TIMES (Nov. 11, 2012), <http://www.ft.com/cms/s/0/903d37ac-2a63-11e2-a137-00144feabdc0.html#axzz3PsW8NsBE>.

⁷⁰ See Michael Pillsbury, Opinion, *Misunderstanding China*, WALL ST. J. (Sept. 17, 2014), <http://online.wsj.com/articles/misunderstanding-china-1410972607?utm>.

⁷¹ See Chris Buckley, *Leader Taps Into Chinese Classics in Seeking to Cement Power*, N.Y. TIMES (Oct. 11, 2014), <http://www.nytimes.com/2014/10/12/world/leader-taps-into-chinese-classics-in-seeking-to-cement-power.html>.

⁷² *Id.*

encouraging Chinese citizens to abide by Chinese values and tradition attributable to Confucian and Legalist thought.⁷³

This holds true beyond the national level.⁷⁴ China's local systems also illustrate the same incompatibility with common Western rule of law concepts.⁷⁵ Much of China is rural and disconnected from national norms.⁷⁶ Local judges often administer justice by conforming to local expectations rather than strictly upholding national legal norms.⁷⁷ This focus on case outcomes evidences China's reliance on substantive justice in its inquisitorial system.⁷⁸ Accordingly, some Chinese legal scholars believe that procedural justice, a major component of Western rule of law, "is incompatible with Chinese legal culture."⁷⁹ That is, procedural justice focuses on fair *processes*, which is especially prominent in adversarial justice systems but not in systems focused on fair *outcomes*.⁸⁰

This comparison of modern political leaders to Confucian and Legalist tradition notably skips over the destruction of traditional Chinese society between the birth of the People's Republic of China in 1949⁸¹ and Deng Xiaoping's rise to power in 1978.⁸² In the 1950s, the Party created and reorganized existing schools into politics and law institutes.⁸³ But this effort to train legal minds collapsed shortly after its establishment and did not rise again for over twenty years.⁸⁴ When the dust settled in 1978, the nation began rebuilding its judicial system⁸⁵ and in the 1990s implemented

⁷³ See *id.*

⁷⁴ See Stephen L. McPherson, *Crossing the River by Feeling the Stones: The Path to Judicial Independence in China*, 26 PENN ST. INT'L L. REV. 787, 805 (2008).

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See Capowski, *supra* note 36, at 473.

⁷⁹ Yuanyuan Shen, *Conceptions and Receptions of Legality*, in THE LIMITS OF THE RULE OF LAW IN CHINA 20, 32–33 (Karen G. Turner et al. eds., 2000).

⁸⁰ See Capowski, *supra* note 36, at 462.

⁸¹ See SPENCE, *supra* note 34, at 489–90.

⁸² See *id.* at 618.

⁸³ See Carl Minzner, *The Rise and Fall of Chinese Legal Education*, 36 FORDHAM INT'L L.J. 334, 340–41 (2013).

⁸⁴ See *id.* at 341.

⁸⁵ See Mireille Delmas-Marty, *Instituting the Rule of Law in China in the Context of Globalization*, in CHINA, DEMOCRACY, AND LAW: A HISTORICAL AND CONTEMPORARY APPROACH 571, 571 (Mireille Delmas-Marty & Pierre-Étienne Will eds., Naomi Norberg trans., 2012) (describing the "legal revival" that began with Deng Xiaoping's use of "socialist

hundreds of fundamental laws.⁸⁶ Today, China's leaders are modernizing the legal system while calling upon thousands of years of legal tradition, which developed on a different track from the Western rule of law model.⁸⁷

B. China's Current Political Climate

The Chinese Communist Party is separate from the state.⁸⁸ The Party and the modern Chinese state of the People's Republic of China have been in power since 1949.⁸⁹ The Party has a "strict organizational structure" that often mirrors the state structure, and the Party's political influence over the state is significant.⁹⁰ State leaders in China often simultaneously hold positions of power in the Party, and this "cross-fertilization" and "intermingling" extends to aspects of Chinese society beyond government, such as business and education.⁹¹ Party membership, however, lends few clues as to an individual's specific political ideology, and factions exist within the Party.⁹² Dissent is common among members of the National People's Congress—China's national legislative body comprised largely of Party members—and its Standing Committee.⁹³ This confusion between state and Party influence, as well as the meaning of Party membership, highlights the difficulty of identifying specific instances of Party influence.⁹⁴

The Party is primarily controlled by the Party Standing Committee—composed of seven members—and the Politburo, a twenty-five-member body that includes the members of the Party Standing Committee.⁹⁵ The state is run by the National People's Congress, a unicameral legislature with

legality" was continued with Jiang Zemin's use of "socialist rule of law" and China's "socialist market economy" in 1992).

⁸⁶ See *Judicial Reform in China*, ENGLISH.NEWS.CN (Oct. 9, 2012), http://news.xinhuanet.com/english/china/2012-10/09/c_131895159_2.htm.

⁸⁷ See *supra* Part II.A.

⁸⁸ See LAWRENCE & MARTIN, *supra* note 7, at 28.

⁸⁹ See SPENCE, *supra* note 34, at 489–90.

⁹⁰ Suli, *supra* note 16, at 54–55.

⁹¹ *Id.* at 55.

⁹² See *id.* at 54–55; DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 186 (2d ed. 2009).

⁹³ See CHOW, *supra* note 92, at 181–87. "Recent changes in the voting patterns of the NPC and NPC Standing Committee indicate that these bodies have become less docile and subservient to Party instructions." *Id.* at 182. "The Party itself is not monolithic and it is known that there have been factions and disagreements within the Party elite." *Id.* at 186.

⁹⁴ *Id.* at 185.

⁹⁵ See LAWRENCE & MARTIN, *supra* note 7, at 20–28.

its own Standing Committee.⁹⁶ Despite the structural separation between the state and the Party, the Party exerts influence over the legislature.⁹⁷

China has thirty-four provincial-level governments but lacks a federal system.⁹⁸ Despite the national government's ability to trump the provincial governments at any time, provinces enact laws separate from national laws, have their own revenue streams, and have considerable freedom to experiment with economic and social policy.⁹⁹ Officials at the national bureaus located in each province prioritize provincial interests because provincial leadership determines that official's future assignments.¹⁰⁰

C. China's Judicial System and Structure

China's court system has four levels: the Supreme People's Court, the provincial courts, the intermediate courts, and the local courts.¹⁰¹ These courts operate more like small bureaucracies responsible for implementing policy than courts of law as envisioned in the Western world.¹⁰²

Caseloads are high at all levels.¹⁰³ In fact, the Supreme People's Court heard over 11,000 cases in 2013, and local courts heard over 14 million cases.¹⁰⁴ Additionally, both Chinese citizens¹⁰⁵ and judges prefer mediation over utilizing the judicial system.¹⁰⁶ This is symptomatic of the continuing force of the traditional Chinese value of social harmony¹⁰⁷ and stigma

⁹⁶ *Id.*

⁹⁷ See CHOW, *supra* note 92, at 185 (explaining that "although it is clear that the NPC and, to a lesser extent, the NPC Standing Committee, are no longer the docile rubber-stamp of the Party core, the levels of dissent registered in these bodies is far below comparable levels in democratic countries").

⁹⁸ LAWRENCE & MARTIN, *supra* note 7, at 9–10.

⁹⁹ See *id.* at 10.

¹⁰⁰ See *id.*

¹⁰¹ Judge Jianli Song, Essay, *China's Judiciary: Current Issues*, 59 ME. L. REV. 141, 144 (2007).

¹⁰² See Stanley Lubman, *Chinese Courts and Law Reform in Post-Mao China*, in EAST ASIAN LAW: UNIVERSAL NORMS AND LOCAL CULTURES 205, 212 (Arthur Rosett, Lucie Cheng & Margaret Y.K. Woo eds., 2003).

¹⁰³ See ZHOU QIANG, REPORT ON THE WORK OF THE SUPREME PEOPLE'S COURT 52 (2014). Zhou is the Chief Justice, Party Secretary, and President of the Supreme People's Court of China. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Lubman, *supra* note 102, at 205–06.

¹⁰⁶ See *id.* at 211.

¹⁰⁷ See ZHOU, *supra* note 103, at 58–59.

against private conflicts becoming public.¹⁰⁸ Almost 4.8 million cases were resolved through mediation in 2013.¹⁰⁹

As for litigation, a panel of judges hears a case in court, and that panel is typically subject to a judicial committee.¹¹⁰ The judicial committee is composed of members who are first selected by the president of that court and then appointed by the local government.¹¹¹ The role of the judicial committee is to make an advisory decision that binds the panel of three judges who heard the case.¹¹² The purpose of such consultation reflects the bureaucratic nature of Chinese courts.¹¹³ Cases referred to the judicial committee are those in which the subject matter is classified as “difficult” or “complicated,” and those are generally cases that may affect local governments.¹¹⁴ Furthermore, judicial committees are based on the concept of substantive justice and are designed to ensure legal expertise in each case, similar to how precedent guides lower courts in common law nations.¹¹⁵

China’s judicial system allows for open trials, except for cases regarding state secrets, crimes committed by minors, and those that involve matters of personal privacy.¹¹⁶ Increasingly, the facts and evidence in cases are made public, public debate is encouraged, and trials are broadcast.¹¹⁷ In fact, the China Court Trial Live Broadcast Network covered 45,000 trials in 2013.¹¹⁸ The Supreme People’s Court and various lower courts regularly use social media to disseminate information to the public.¹¹⁹

¹⁰⁸ See Lubman, *supra* note 102, at 220.

¹⁰⁹ ZHOU, *supra* note 103, at 58.

¹¹⁰ See Song, *supra* note 101, at 144.

¹¹¹ See *id.*

¹¹² See *Where Is the Supreme People’s Court Headed with Judicial Committee Reform?*, SUP. PEOPLE’S CT. MONITOR (Dec. 21, 2014) [hereinafter *Judicial Committee Reform*], <http://supremepeoplescourtmonitor.com/2014/12/21/where-is-the-supreme-peoples-court-headed-with-judicial-committee-reform>.

¹¹³ Lubman, *supra* note 102, at 211.

¹¹⁴ *Id.*

¹¹⁵ See *Judicial Committee Reform*, *supra* note 112.

¹¹⁶ See Song, *supra* note 101, at 144.

¹¹⁷ See ZHOU, *supra* note 103, at 69.

¹¹⁸ *Id.*

¹¹⁹ See *id.* at 70. Government entities in China often use Sina Weibo and WeChat, popular social media platforms in China, to release information and familiarize the public with government roles. *Id.* Sina Weibo has over 212 million active users and is “the premier platform for important political and social discourse in China.” *Sina Weibo*, TECHINASIA, <https://www.techinasia.com/tag/sina-weibo> (last visited Jan. 30, 2016). WeChat has over 600 million active users and is hugely profitable, targeting the international market. Michael De

Procedurally, a litigant is permitted one trial and one retrial before the claim is exhausted.¹²⁰ A retrial differs from the concept of an appeal, or review by a higher court;¹²¹ a retrial is a *de novo* hearing.¹²² China's procedural rule of one trial (first instance) and one retrial (second instance) is called the "second instance being final" doctrine.¹²³ Nevertheless, judgments rendered by a court are not truly final.¹²⁴ Even after the second instance, the court that rendered the opinion may reopen the case, and higher courts can *sua sponte* review lower court decisions that have already taken effect.¹²⁵ This procedural practice stems from the substantive justice value of prioritizing outcomes rather than processes.¹²⁶

An important feature to the Chinese criminal system is its inquisitorial nature.¹²⁷ As opposed to the adversarial system in which the defense and prosecution present information to lead the fact-finder to its own outcome,¹²⁸ the inquisitorial model is defined by all of the judicial players working together as "an integral part of a single, coordinated mechanism."¹²⁹ The criminal investigation is conducted not only by the public security bodies and the procuratorate¹³⁰ but also by the judge.¹³¹ The inquisitorial system is not unique to China.¹³²

Waal-Montgomery, *WeChat Really Wants You to Understand What It's All About*, VENTUREBEAT (Sept. 7, 2015), <http://venturebeat.com/2015/09/07/wechat-really-wants-you-to-understand-what-its-all-about>.

¹²⁰ See ZHOU, *supra* note 103, at 66.

¹²¹ See *Appeal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹²² See *Trial de novo*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹²³ See Song, *supra* note 101, at 145.

¹²⁴ See Lubman, *supra* note 102, at 211.

¹²⁵ See *id.*

¹²⁶ See Song, *supra* note 101, at 145.

¹²⁷ See CHOW, *supra* note 92, at 261.

¹²⁸ See *id.* at 262.

¹²⁹ *Id.* at 197.

¹³⁰ *Id.* at 218. A procuratorate is the Chinese analogue of a prosecutor and acts as a legal supervisor over a case. *Id.*

¹³¹ See *id.* at 262.

¹³² Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 JUDICATURE 109, 109 (1992) (noting some European and civil law nations also use the inquisitorial system).

A distinct Chinese concept in its inquisitorial system is the “guilty line.”¹³³ The guilty line describes the phenomenon of only serious crimes being prosecuted.¹³⁴ In Western systems, even a technical violation of a statute constitutes an offense worthy of prosecution,¹³⁵ but in China, those lesser offenses at most receive an administrative fine.¹³⁶

[M]ost conduct which is treated as innocent in Chinese criminal law because it is below “the guilty line” would constitute a crime in other legal systems. Thus, the seriousness of an act and the seriousness of its social consequence determine whether the act constitutes a crime or not and dictate punishment accordingly¹³⁷

Rather than contemplating that a civil law, inquisitorial system may have unique challenges—just as a common law, adversarial system does¹³⁸—China’s one-party governance is blamed for lack of rule of law.¹³⁹ Instead of identifying the true sources of systemic judicial challenges, the United States often blames those problems on China’s lack of rule of law and existence as a one-party state, summarily dismissing the challenges as unsolvable without an overthrow of the Party.¹⁴⁰

Often, the peculiar features of the Chinese legal system are indeed barriers to achieving judicial independence.¹⁴¹ But the judicial reforms posed in the Fourth Plenum *Decision* have the potential to achieve judicial independence by directly targeting the Chinese judiciary’s main problems:

¹³³ Deborah Cao, *Linguistic Uncertainty and Legal Transparency: Statutory Interpretation in China and Australia*, in TRANSPARENCY, POWER, AND CONTROL 13, 19 (Vijay K. Bhatia et al. eds., 2012).

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ Wang Shizhou, Professor of Law, Peking University, Lecture to University of Missouri-Kansas City School of Law China Summer Law Program 2015: Introduction to the Criminal Law of the People’s Republic of China (May 19, 2015).

¹³⁷ Cao, *supra* note 133, at 19 (citation omitted).

¹³⁸ *See* Strier, *supra* note 132, at 109.

¹³⁹ *See* Josh Chin, ‘Rule of Law’ or ‘Rule by Law’? *In China, a Preposition Makes All the Difference*, WALL ST. J. (Oct. 20, 2014), <http://blogs.wsj.com/chinarealttime/2014/10/20/rule-of-law-or-rule-by-law-in-china-a-preposition-makes-all-the-difference> (stating the Fourth Plenum reforms more closely mirror “rule by law,” which “aim[s] to give courts independence from local government but still keep them within the cage of Communist Party control”).

¹⁴⁰ *See id.*

¹⁴¹ *See supra* Part II.C.

corruption, education of judges and lawyers, judicial review processes, and boosting the legitimacy of the judicial system as a means of fairly resolving disputes.¹⁴² These reforms, therefore, are not an attempt to change the system's structure or, more significantly, China's form of governance.

III. WHAT IS RULE OF LAW?

Upon the Communist Party of China's announcement of rule of law as a topic for the Fourth Plenum, Western media was skeptical about China's intentions for legal reform.¹⁴³ The meaning of the Chinese word for rule of law was quickly determined to be more closely translated as "rule *by* law."¹⁴⁴ However, the determination of whether the preposition is "of" or "by" does little to clarify the meaning or use of the phrase in China because an English translation is still couched in the Western meaning of either phrase.¹⁴⁵

Chinese government officials use the Chinese word *fazhi*¹⁴⁶ to describe the method of governance that the judicial reforms are designed to achieve.¹⁴⁷ A direct translation of *fazhi* into English is challenging.¹⁴⁸ Its use by native Chinese speakers is not straightforward.¹⁴⁹ *Fazhi* is unclearly defined in Chinese, and the translation of *fazhi* as "rule of law" by Chinese authorities is "misleading."¹⁵⁰ Attacking China's use of the English "rule of law" veils the United States' ideological battle.

Even with the direct translation of *fazhi* set aside, dialogue between East and West on political issues is compromised because of historical tension between the two.¹⁵¹ The Party uses idioms not easily understood by the

¹⁴² See *infra* Part IV.

¹⁴³ See Gewirtz, *supra* note 10.

¹⁴⁴ See Chin, *supra* note 139.

¹⁴⁵ See Janet E. Ainsworth, *Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China*, 43 HASTINGS L.J. 273, 280 (1992). "Scholarship that ignores these [linguistic] problems suffers precisely because the scholar is not conscious of the Western cultural assumptions intrinsic to the analysis." *Id.*

¹⁴⁶ The characters for this word are 法治 (*fǎzhì*). The entire phrase used is 中国特色社会主义法治体系 or Socialist rule of law with Chinese characteristics. *Decision Translation*, *supra* note 8, at art. I.

¹⁴⁷ See Chin, *supra* note 139.

¹⁴⁸ See *id.*

¹⁴⁹ See Gewirtz, *supra* note 10.

¹⁵⁰ See Chin, *supra* note 139. "'Using 'rule of law' is profoundly misleading, and I think intentionally misleading,' says John Delury, a China historian at Yonsei University." *Id.*

¹⁵¹ See St  phanie Balme, *Law and Society in Contemporary China*, in CHINA, DEMOCRACY, AND LAW: A HISTORICAL AND CONTEMPORARY APPROACH 603, 647 (Mireille Delmas-Marty & Pierre-  tienne Will eds., Naomi Norberg trans., 2012).

international community to describe its policy,¹⁵² and the West has its own terminology that lacks mutual comprehension.¹⁵³ Even among liberal democracies, Western concepts of the rule of law are not so concrete as to form a proper comparison.¹⁵⁴ Furthermore, various Western concepts have developed out of different traditions.¹⁵⁵

The relationship between language and interpretation of legal texts is important in all cultures,¹⁵⁶ making the definition of “rule of law” essential for international dialogue. Confucians in China objected to written laws based on the belief that a “fixed” law becomes “deliberately misinterpreted.”¹⁵⁷ Daoists in China believed that defining terms actually “obscure[s]” the meaning of the text.¹⁵⁸ Therefore, not only does linguistic ambiguity of the phrase within Western and Chinese meanings create problems, comparing the two becomes nearly impossible.¹⁵⁹

¹⁵² See *id.*

¹⁵³ See *id.* In addition to “rule of law,” Balme points out that “good governance” and “judicial independence” are common idioms that do not “systemically entail a shared understanding of their foundations.” *Id.*

¹⁵⁴ See Karen G. Turner, *Introduction: The Problem of Paradigms*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 3, 5 (Karen G. Turner et al. eds., 2000) (describing how Western meaning of the rule of law has become less “categorical”).

¹⁵⁵ See Delmas-Marty, *supra* note 85, at 573–74.

Initially associated with a state’s political construction, the concept [of rule of law] goes back to French seventeenth-century authors, then to Montesquieu, who contrasted government by law with the despotism of government by men. Systematized in the nineteenth century by German authors, rule of law was appropriated in France in the twentieth century, where the conception known as *État de droit* synthesizes the legal formalism of the German *Rechtsstaat* and the Anglo-American rule of law, which is tied to a more procedural view of the law.

Id. (citations omitted).

¹⁵⁶ See Turner, *supra* note 154, at 14.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*; *Daoism: Texts and Textual Theory*, STAN. ENCYCLOPEDIA OF PHILO., (June 28, 2007), <http://plato.stanford.edu/entries/daoism/#Texts> (explaining Daoist philosophy defies rational clarification and is averted to exposition of texts).

¹⁵⁹ See Turner, *supra* note 154, at 14–15.

A. *Western Use of Rule of Law*

Rule of law enjoys almost unanimous approval across the globe.¹⁶⁰ “It implies a sense of rationality over arbitrariness, predictability over uncertainty, and fairness over partiality.”¹⁶¹ Rule of law means laws should be “general, knowable, and performable.”¹⁶² Few legal scholars, however, can formulate a workable definition upon which most around the world, and even within judicial systems, can agree.

Noted legal philosopher Lon Fuller interpreted what is now considered rule of law to mean the following eight criteria: (1) generality; (2) notice or publicity; (3) prospectivity; (4) clarity; (5) non-contradictoriness; (6) conformability; (7) stability; and (8) congruence.¹⁶³ However, these characteristics essentially require that there must be rules, and those rules must be capable of being followed (i.e., the rules must be general, knowable, and performable).¹⁶⁴

Black’s Law Dictionary does not have a usable definition of rule of law, describing it as “[t]he doctrine that general constitutional principles are the result of judicial decisions determining the rights of private individuals in the courts.”¹⁶⁵ The American Bar Association describes rule of law as “difficult to define” and “more of an ideal that we strive to achieve, but sometimes fail to live up to.”¹⁶⁶

The World Justice Project, which enjoys global support for its Rule of Law Initiative,¹⁶⁷ has created a four-principle definition, summarized here as: accountability of government officials, clear and publicized laws, a fair process of enacting law, and justice delivered by an independent representative.¹⁶⁸ The World Justice Project’s lengthy definition is

¹⁶⁰ See Li, *supra* note 63, at 712.

¹⁶¹ *Id.*

¹⁶² Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L L. 43, 82 (2001).

¹⁶³ Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 785 (1989) (quoting LON FULLER, *THE MORALITY OF LAW* 33 (rev. ed. 1964)).

¹⁶⁴ See Radin, *supra* note 163, at 785–86.

¹⁶⁵ *Rule of law*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁶⁶ A.B.A., *DIALOGUE ON THE RULE OF LAW* 4 (2008), <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/FinalDialogueROLPDF.authcheckdam.pdf>.

¹⁶⁷ See *What is the Rule of Law?*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/what-rule-law> (last visited Jan. 31, 2016) [hereinafter WORLD JUSTICE PROJECT]; Kenneth Rapoza, *Top 10 Countries Where Justice Prevails*, FORBES (Mar. 6, 2014), <http://www.forbes.com/sites/kenrapoza/2014/03/06/top-10-countries-where-justice-prevails>.

¹⁶⁸ See WORLD JUSTICE PROJECT, *supra* note 167.

supplemented by an additional nine factors, each containing multiple sub-factors.¹⁶⁹

These attempts to meaningfully define rule of law are based on assumptions about legal cultures and societies.¹⁷⁰ The phrase is used frequently despite being vague and uncertain.¹⁷¹ Furthermore, rule of law initiatives are “premised on Western liberal democratic principles”¹⁷² and are often incompatible with other legal systems.¹⁷³ Rule of law initiatives also suggest “legal imperialism,”¹⁷⁴ a reminder of Western domination and subordination.¹⁷⁵

This “global-standards approach” to rule of law defines the principles so generally that no one would object to them and then prescribes solutions for adoption “as if they were uncontroversial, rather than the site for intense political struggles between different interest groups.”¹⁷⁶ This approach overlooks politics, cultural differences, and theoretical problems ingrained in the belief systems of every nation.¹⁷⁷

One problem with the Westernization of the rule of law in the context of China is the assumption that democracy is the only way to achieve it. In principle, the rule of law does not require democracy; yet, legal scholars frequently fail to distinguish the two.¹⁷⁸ In the West, the concepts of democracy and the rule of law developed simultaneously and continue to operate as normative political principles in those nations.¹⁷⁹

¹⁶⁹ See *id.*

¹⁷⁰ See Orts, *supra* note 162, at 74.

¹⁷¹ *Id.*

¹⁷² Li, *supra* note 63, at 713.

¹⁷³ See Legal Systems, Legal Information Institute, CORNELL UNIV. L. SCH., http://www.law.cornell.edu/wex/legal_systems (last visited Jan. 31, 2016). For example, nations with strong religious traditions have dual systems of religious and secular laws and courts. *Id.*

¹⁷⁴ Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Reform Projects in the People’s Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 65 (2000).

¹⁷⁵ See *Imperialism*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/topic/imperialism> (last visited Mar. 12, 2016). “Because it always involves the use of power, . . . imperialism has often been considered morally reprehensible.” *Id.*

¹⁷⁶ Antoine Garapon, *A New Approach for Promoting Judicial Independence*, in JUDICIAL INDEPENDENCE IN CHINA 37, 38 (Randall Peerenboom ed., 2010).

¹⁷⁷ See *id.*

¹⁷⁸ See Orts, *supra* note 162, at 101–02.

¹⁷⁹ *Id.* at 102.

Rule of law principles are assumed to “transcend national circumstances and cultures.”¹⁸⁰ But as applied to non-Western nations with vastly different legal traditions and notions of justice, the intertwining of democracy and rule of law is problematic. The assumption that democracy and rule of law are interrelated leads to the notion that a non-democratic nation can never achieve rule of law. Furthermore, regardless of whether China can or should become a democracy, China will not soon become a democracy.¹⁸¹

The United States and other nations committed to implementing independent judiciaries worldwide should abandon the use of the phrase “rule of law” when dealing with China and realign their focus on judicial independence within China’s current political and social framework. In abandoning the phrase, the United States can clear the way to supporting China’s judicial reform and simultaneously protect its own interests.

B. Inconsistencies Within the Western Rule of Law Model

The Western rule of law model exhibits a “dogmatic insistence” on a theoretical framework that in practice reveals inconsistency.¹⁸² Examples of rule of law being “threatened” and “dismantled” in the West include executive power consolidated in “sensitive areas,” such as terrorism, immigration, globalization, and the rise of international law.¹⁸³ International law lacks clear rules and “is not easily accepted by all states, even democratic ones.”¹⁸⁴

Other Western democracies criticize the United States’ form.¹⁸⁵ Specifically, the United States’ idealism fails to produce the intended outcome: “American jurisprudence illustrates the inconvenient truth that reality does not have the neatness of theory.”¹⁸⁶ In particular, U.S. policymakers operate as though the U.S. model of government is “self-evidently” the best model.¹⁸⁷

In a study conducted by the World Justice Project and reported in the *American Bar Association Journal*, the United States was shown to lag behind other highly-developed nations on several rule of law measures,

¹⁸⁰ Garapon, *supra* note 176, at 38.

¹⁸¹ See Meng, *supra* note 15.

¹⁸² Li, *supra* note 63, at 747.

¹⁸³ Delmas-Marty, *supra* note 85, at 595–97.

¹⁸⁴ *Id.* at 596–97.

¹⁸⁵ See James Podgers, *Survey Says . . . Study Measures Adherence to Rule of Law by U.S. and Other Nations*, 96 A.B.A. J. 61, 61 (Jan. 2010).

¹⁸⁶ Li, *supra* note 63, at 747.

¹⁸⁷ Orts, *supra* note 162, at 91. See also Garapon, *supra* note 176, at 50–51.

especially in areas of international law.¹⁸⁸ In contrast to vague definitions outlining a theoretical sense of rule of law, the survey emphasized real-life experiences with various elements of each nation's justice system, including law enforcement, government agencies, and the courts.¹⁸⁹

Western rule of law operates on procedural justice: the results will be fair if the procedures used to obtain them are strictly followed.¹⁹⁰ This is in contrast to substantive justice, which seeks a just and fair result.¹⁹¹ The Western rule of law model has been criticized because it has "legalized existing social inequality and failed to take account of new interests and circumstances through its rigid adherence to precedent and its mechanical application of rules."¹⁹² China often points to systemic racism and rampant crime in the United States as examples of the rule of law model's shortcomings.¹⁹³

C. Problems with the Western Rule of Law Model as Applied to China

Use of the rule of law model in dealing with China reduces the credibility of the United States and is unproductive toward China's legal reform. Establishing rule of law is an internal, domestic process, and foreign aid alone—because of a lack of local knowledge—cannot effectively shape the outcomes.¹⁹⁴ Thus, the United States does not benefit from criticizing China's judicial reform efforts.

The Western rule of law model is unhelpful when applied to China because its legal tradition has not developed on a rule of law track.¹⁹⁵ Instead, "China's great contribution to legal thought [is] its understanding

¹⁸⁸ See Podgers, *supra* note 185, at 61.

¹⁸⁹ See *id.* at 62.

¹⁹⁰ See Shen, *supra* note 79, at 31.

¹⁹¹ See *id.*

¹⁹² *Id.* at 35.

¹⁹³ See Xiang Bo, *Full Text of Human Rights Record of the United States in 2014*, ENGLISH.NEWS.CN (June 26, 2015, 10:19:17 AM), http://news.xinhuanet.com/english/china/2015-06/26/c_134357934.htm. "The U.S. is a country with grim problems of racial discrimination, and institutional discrimination against ethnic minorities continued. Serious racial bias persisted in the police and justice systems. Minority groups and indigenous people are subject to unfairness in environment, election, health care, housing, education and other fields." *Id.*

¹⁹⁴ See Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in JUDICIAL INDEPENDENCE IN CHINA 69, 88 (Randall Peerenboom ed., 2010).

¹⁹⁵ See Turner, *supra* note 154, at 7.

early on that the rule of man can never be avoided in any system and its attention to finding reliable methods to recruit and control good officials.”¹⁹⁶ Because legal culture in China never contemplated restraining its officials through form of government, the nation sees no reason to do so now.¹⁹⁷

In China, among its leaders and its citizens, a centralized state “plays a decisive role in achieving [the nation’s] objectives” of stability and order.¹⁹⁸ For ordinary Americans, centralization of the government is feared and must be limited, but China looks to government to authoritatively solve the nation’s most complex problems.¹⁹⁹

Much of the disharmony between Western notions and Chinese governance stems from China’s urban-rural divide.²⁰⁰ China has been rapidly urbanizing, a subject at the forefront of global economic news for years.²⁰¹ But that is not the whole story: “Even as China is rapidly urbanizing, in 2013 still just under half of the population remained rural. In the countryside, the expectation for leaders to act in a traditional, paternalistic, and authoritarian manner remains.”²⁰²

The suggestion that China should implement Western rule of law runs counter to much of the population’s notions of justice.²⁰³ Procedural justice does not always resonate with China’s citizens, judges, and lawyers.²⁰⁴ Furthermore, China’s procedural legal system is underdeveloped.²⁰⁵ Laws and procedures may read clearly, but in practice, they are not consistently enforced.²⁰⁶

¹⁹⁶ *Id.* (paraphrasing Judge Jerome Frank, American legal philosopher of the legal realism movement).

¹⁹⁷ *See id.* at 7–10.

¹⁹⁸ LAMPTON, *supra* note 44, at 49.

¹⁹⁹ *See id.*

²⁰⁰ *See id.* at 59.

²⁰¹ *See, e.g.,* WAYNE M. MORRISON, CONG. RES. SERV., RL33534, CHINA’S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES (2015), <http://fas.org/srg/crs/row/RL33534.pdf>.

²⁰² LAMPTON, *supra* note 44, at 59.

²⁰³ *See* Shen, *supra* note 79, at 31–32. “China’s unique social structure and related political organizations discouraged the emergence of formal rationality.” *Id.*

²⁰⁴ *See* Yuchao Zhu, *Deviation in Legal Practice: Rule of Law with Chinese Characteristics*, in MODERN CHINESE LEGAL REFORM: NEW PERSPECTIVES 65 (Xiaobing Li & Qiang Fang eds., 2013).

²⁰⁵ *See* Shen, *supra* note 79, at 33.

²⁰⁶ *See* Zhu, *supra* note 204, at 59–60. “China’s legal regime in relation to matters of application of the law remains in a state of flux. The legal result, either just or unjust, is actually very much ad hoc . . .” *Id.* at 70.

Moreover, China's rich legal tradition²⁰⁷ has developed with a "dissymmetry" between categories of rights.²⁰⁸ Civil, political, economic, cultural, and social rights are not treated alike in China—or even around the globe—but are often expected to be equal under a Western rule of law model.²⁰⁹

In addition to developing counter to the rule of law model, China's government also harshly criticizes the United States and its model.²¹⁰ In fact, Chinese academics point to flaws in the implementation of the U.S. Constitution, such as its exploitation of popular masses and oligarchs who monopolize capital for political gain.²¹¹

One prominent critic, Eric X. Li,²¹² argues American democracy and its effects have been devastating to the United States: "[S]ince winning the Cold War, the United States has, in one generation, allowed its middle class to disintegrate. Its infrastructure languishes in disrepair, and its politics, both electoral and legislative, have fallen captive to money and special interests."²¹³ Elections and multi-party politics do not inherently create

²⁰⁷ See Chenjun You, *How a "New Legal History" Might Be Possible*, in RESEARCH FROM ARCHIVAL CASE RECORDS: LAW, SOCIETY, AND CULTURE IN CHINA 533, 534 (Philip C. C. Huang & Kathryn Bernhardt eds., 2014).

Although it may be an exaggeration to say that all Western scholars neglected the field of Chinese legal history prior to the 1990s, it is true that most Western scholars ignored or misunderstood the role law played in everyday Chinese life. Moreover, they often gave short shrift to China's rich legal history.

Id.

²⁰⁸ Delmas-Marty, *supra* note 85, at 582.

²⁰⁹ See *id.*

²¹⁰ See Wang Hailou, *US Constitutionalism Is Unworthy of the Name*, CHINA COPYRIGHT & MEDIA (Aug. 7, 2013), <https://chinacopyrightandmedia.wordpress.com/2013/08/07/us-constitutionalism-is-unworthy-of-the-name-wang-hailou>.

²¹¹ See *id.*

²¹² Eric X. Li is a venture capitalist from Shanghai, China, who writes and argues against the concept of democracy in China. See Eric X. Li, HUFFINGTON POST, <http://www.huffingtonpost.com/eric-x-li> (last visited Jan. 31, 2016). He is known in the United States primarily for two public appearances challenging Western views of China: A TED talk and an Aspen Institute debate. Eric X. Li, *A Tale of Two Political Systems*, TEDGLOBAL 2013 (June 2013), http://www.ted.com/talks/eric_x_li_a_tale_of_two_political_systems; Eric X. Li, James Fallows & Minxin Pei, *China and Democracy*, ASPEN IDEAS FESTIVAL (July 2012), <http://www.aspenideas.org/session/china-and-democracy>.

²¹³ Li, *supra* note 66.

good governance, he argues, because those who may be good leaders encounter great difficulty in becoming elected.²¹⁴

Another critic, Zhang Weiwei,²¹⁵ argues that modern American democracy fails to meet its own objective of governance by the people.²¹⁶ The Chinese believe democracy is “the least bad option.”²¹⁷ The Chinese state strives for “the best of the best,” accomplished by methodically selecting good leaders through a meritocratic system.²¹⁸

One Western critic, Daniel A. Bell,²¹⁹ emphasizes a major strength of China’s “flexible constitutional system” is national stability.²²⁰ The lack of separation of powers and lack of federalism allow experimentation at the lower levels of government.²²¹ Leaders’ ten-year terms in office allow for long-term plans and increase the ability and likelihood for those plans to be carried out.²²² These and other benefits are best exhibited in a one-party state.²²³

²¹⁴ *See id.*

²¹⁵ Zhang Weiwei is a professor of international relations at Fudan University in Shanghai, China, and was an English interpreter for Chinese leaders, including Deng Xiaoping. *See Zhang Weiwei*, HUFFINGTON POST, <http://www.huffingtonpost.com/zhang-weiwei> (last visited Jan. 31, 2016); ZHANG WEIWEI, *THE CHINA WAVE: RISE OF A CIVILIZATIONAL STATE* (2012).

²¹⁶ *See Zhang, supra* note 67.

Indeed, Abraham Lincoln’s ideal of “government of the people, by the people, for the people,” is by no means easy to achieve, and American democracy is far from meeting this objective. Otherwise the Nobel economics laureate Joseph E. Stiglitz would not have decried, in perhaps too critical a tone, that the U.S. system is now “of the 1 percent, by the 1 percent, and for the 1 percent.”

Id.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Daniel A. Bell was born in Montreal, Canada, and teaches political theory at Tsinghua University in Beijing, China. *Daniel A. Bell*, DANIELABELL.COM, <http://danielabell.com/about> (last visited Jan. 31, 2016). He writes on China, politics, and democracy. *See, e.g.*, DANIEL A. BELL, *THE CHINA MODEL: POLITICAL MERITOCRACY AND THE LIMITS OF DEMOCRACY* (2015).

²²⁰ Bell, *supra* note 68.

²²¹ *See id.*

²²² *See id.*

²²³ *See id.*

China is highly unlikely to change its legal culture to conform to the Western notion of the rule of law.²²⁴ This is because of historical and cultural differences between the two systems and because China's system of governance is strong.²²⁵ Instead of conforming to Western rule of law, China can achieve legal reform and judicial independence through structural changes within the current system.

D. Why Judicial Independence?

Like rule of law, judicial independence is a touchstone for good governance and stability.²²⁶ It "remains disturbingly contested and unclear even in economically advanced liberal democracies."²²⁷ Unlike rule of law, however, judicial independence depends much more on the particularities of the regime regardless of categorization of that system of governance.²²⁸ A one-party or even authoritarian regime can achieve judicial independence, and a democratic one may fail at it.²²⁹

Separation of powers is less important in China than in a liberal democracy. In rule of law models, separation of powers is essential to combat power grabs and imbalance in government.²³⁰ In China, however, the Party has undisputed and firm control, and the power structure flows from the top down.²³¹ Therefore, the line between legislative authority and executive authority does not need to be clarified through separation of those powers.²³² In the same way, a judiciary with authority from the Party to independently decide cases ensures a fair and impartial legal system without the need for the liberal democratic notion of separation of powers.

Instead of criticizing the legal reform for not conforming to Western notions of rule of law, the United States should carefully examine the proposals and encourage those that establish judicial independence within China's current political framework. It is in the United States' best interest

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See* Randall Peerenboom, *Introduction* to JUDICIAL INDEPENDENCE IN CHINA 1, 1 (Randall Peerenboom ed., 2010).

²²⁷ *Id.* at 1–2.

²²⁸ *See id.* at 3.

²²⁹ *See id.* at 3–5.

²³⁰ *See* Garapon, *supra* note 176, at 42–43 (discussing what is meant by "power" and "authority" and analyzing the different roles governmental entities play).

²³¹ *See id.* at 42.

²³² *See id.* (explaining the Party leads in an abstract way that does not derive from a formal system of governance).

to refrain from perpetuating the demonstrably false hope that China will transition to a Western democracy with rule of law characteristics.²³³

IV. THE FOURTH PLENUM OF THE EIGHTEENTH CENTRAL COMMITTEE

The Fourth Plenary Session of the Eighteenth Central Committee of the Chinese Communist Party²³⁴ met in late October 2014 to discuss legal reforms.²³⁵ The Eighteenth Party Congress announced the plenary session topic as rule of law three months prior to the session.²³⁶ Because of the advance notice, legal reform was at the forefront of political discussion in China and around the world.²³⁷ At the conclusion of the plenum, the Committee publicly released the *Chinese Communist Party Central Committee Decision (Decision)*,²³⁸ which took eight months to draft.²³⁹

The *Decision* is “soberly” realistic about the nation’s “many problems.”²⁴⁰ The Committee listed the following weaknesses early in the *Decision*:

[L]aw enforcement and the judiciary are . . . not standardized, not strict, [and] not transparent. . . [T]he consciousness of . . . members of society to abide by the law, trust in the law, respect the law, use the law, and safeguard their rights . . . about handling affairs according to the law is not strong, and their abilities are insufficient, and it still occurs that laws are knowingly violated, one’s word replaces the law, the law . . . suppresses through power, and the law is bent for relatives and friends. These

²³³ See MANN, *supra* note 20, at 26–27.

²³⁴ Plenary sessions are regular meetings of the National Congress’s Central Committee. See *Introduction to China’s Plenary Sessions and the CPC Central Committee*, CHINA BRIEFING (Nov. 11, 2013), <http://www.china-briefing.com/news/2013/11/11/introduction-to-chinas-plenary-sessions-and-the-cpc-central-committee.html>.

²³⁵ See *CPC Sets New Blueprint for Rule of Law*, ENGLISH.NEWS.CN (Oct. 23, 2014), http://news.xinhuanet.com/english/china/2014-10/23/c_133737845.htm.

²³⁶ See Shannon Tiezzi, *Zhou Yongkang and the Rule of Law with Chinese Characteristics*, DIPLOMAT (July 30, 2014), <http://thediplomat.com/2014/07/zhou-yongkang-and-the-rule-of-law-with-chinese-characteristics>.

²³⁷ See *id.*

²³⁸ *Decision Translation*, *supra* note 8.

²³⁹ Qian Gang, *A Backstage Glimpse at the Plenum “Decision”*, CHINA MEDIA PROJECT (Nov. 10, 2014), <http://cmp.hku.hk/2014/11/10/37015>.

²⁴⁰ *Decision Translation*, *supra* note 8, at art. I.

problems violate the principles of Socialist rule of law . . . and we must spend great efforts to resolve them.²⁴¹

The *Decision* begins by urging the nation to “[p]ersist in marching the path of Socialist rule of law with Chinese characteristics, [and to] build a Socialist rule of law system with Chinese characteristics.”²⁴² This language does not have one clear meaning or definition but is recognized as incorporating Chinese traditions, experience, and achievements with Socialist thought to improve on the existing legal framework in China.²⁴³ Stated another way, China’s legal reforms are not meant to transition away from one-party rule, move toward a common law system, or begin to implement an adversarial legal system; rather, the legal reforms address problems and improve the established system. In fact, the *Decision* is clear on this matter: “Letting Party leadership penetrate into the entire process and all aspects of ruling the country to the law is a basic experience of the construction of our country’s Socialist rule of law. . . . [I]t is where the foundations and the life-line of the Party and the State lie.”²⁴⁴

Instead of reforming the structure of the legal system, the *Decision* calls for judicial reforms that China rule of law expert Randall Peerenboom describes as falling into three main objectives:²⁴⁵ increasing efficiency and efficacy; improving the quality of and respect for legal professionals; and gaining independence for the court system in China.²⁴⁶ The *Decision* ultimately seeks to achieve judicial independence by granting the courts more authority in their decision-making.²⁴⁷ This objective “breaks new ground” and is the most crucial to achieving the goals of the *Decision*.²⁴⁸ Some specific reforms are outlined below.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See, e.g., *Xi Says China Adheres to Socialist Path in Rule of Law*, ENGLISH.NEWS.CN (Oct. 28, 2014), http://news.xinhuanet.com/english/china/2014-10/28/c_133748934.htm.

²⁴⁴ *Decision Translation*, *supra* note 8, at art. I.

²⁴⁵ See generally Randall Peerenboom, *Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?* (Nov. 6, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519917.

²⁴⁶ See *id.*; *infra* Part IV.

²⁴⁷ See Peerenboom, *supra* note 245, at 16.

²⁴⁸ *Id.*

A. *Eliminating Corruption, Local Pressures, and Other Undue Influences*

The first objective involves streamlining the legal process and making that process just and fair.²⁴⁹ In China, efficiency in judicial institutions directly relates to problems with impartiality.²⁵⁰ By streamlining administrative structures, local courts can achieve the necessary freedom to resolve cases on the merits according to the law, instead of according to budget and funding concerns.²⁵¹

Eliminating corruption is a strong theme in the *Decision*²⁵² and has been a major focus of Xi Jinping's leadership.²⁵³ That goal gained traction with former Standing Committee member Zhou Yongkang's expulsion from the Party²⁵⁴ and continued with the execution of Liu Han, a mining tycoon with connections to Zhou.²⁵⁵ Xi's anti-corruption campaign has targeted Party officials, accused them of corruption, and seeks to hold them accountable under the law.²⁵⁶ The announcement regarding Zhou Yongkang's expulsion came on the heels of the announcement of the Fourth Plenum topic of rule of law and lent legitimacy to Xi's efforts to reform the judiciary.²⁵⁷ This anti-corruption campaign is designed to place Party leaders under the law,²⁵⁸ and reduction in impropriety between the Party and the judicial system naturally follows.²⁵⁹

²⁴⁹ See *id.*

²⁵⁰ See Song, *supra* note 101, at 147.

²⁵¹ See *id.*

²⁵² See *Decision Translation*, *supra* note 8, at art. II(4).

²⁵³ See Tiezzi, *supra* note 236.

²⁵⁴ *Id.*

²⁵⁵ Liu Han was given the death sentence for being the ringleader of bribery, corruption, and murder schemes. See Carrie Gracie, *Chinese Tycoon Liu Han Sentenced to Death for Murder*, BBC (May 23, 2014), <http://www.bbc.com/news/world-asia-china-27533558>; *China Executes Mining Tycoon Liu Han*, GUARDIAN (Feb. 9, 2015), <http://www.theguardian.com/world/2015/feb/09/china-executes-mining-tycoon-liu-han>.

²⁵⁶ See Tania Branigan, *Xi Jinping Vows to Fight 'Tigers' and 'Flies' in Anti-Corruption Drive*, GUARDIAN (Jan. 22, 2013), <http://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption>.

²⁵⁷ See Cary Huang, *Zhou Yongkang Case to Put Rule by Law to the Test*, S. CHINA MORNING POST (Dec. 6, 2014), <http://www.scmp.com/news/china/article/1656872/zhou-yongkang-case-put-rule-law-test>.

²⁵⁸ See *id.*

²⁵⁹ See Li Jing, *Top Party Law Body to Weed Out Zhou Yongkang's Influence*, S. CHINA MORNING POST (Jan. 22, 2015), <http://www.scmp.com/news/china/article/1688636/top-party-law-body-weed-out-zhou-yongkangs-influence>.

Undue influence by national Party leaders, however, only scratches the surface when compared with the judicial independence problems occurring on the local level. Financial dependence of the local courts on local governments is most detrimental to achieving legal reform in China.²⁶⁰ The dependence of local courts on local forces is unavoidable, whether those forces are the local economy, the local party, or the local government.²⁶¹ But this local protectionism can be solved through the *Decision*'s goal of unifying the nation's judiciary via uniform funding from the central government.²⁶²

The central government is "overloaded[,] . . . underinstitutionalized[,] and overcentralized."²⁶³ The national government cannot possibly be effective at overseeing on a local level such a geographically large and populated nation.²⁶⁴ Therefore, by empowering the local courts and governmental structures to work efficiently based on local need—without corruption—the burden will be removed from the central government.²⁶⁵ By eliminating corruption and streamlining funding of local courts across the nation, the judiciary in China has a chance to achieve judicial independence.

B. Improving the Quality of the Judiciary

The *Decision* seeks to improve the training of judges and lawyers.²⁶⁶ This includes recruitment and retention programs, a better system of selection (including a national qualification exam), and professionalism training.²⁶⁷ Qualified judges and lawyers are essential to judicial independence because they carry out the daily administration of justice.

²⁶⁰ See Zhang, *supra* note 42, at 363.

²⁶¹ See *id.* at 364.

²⁶² See Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 296 (2003).

²⁶³ LAMPTON, *supra* note 44, at 50.

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ See *Decision Translation*, *supra* note 8, at art. VI.

²⁶⁷ See *id.*

Recently, judges have been resigning at a rapid rate,²⁶⁸ primarily because wages for judges are low.²⁶⁹ Although this also occurs in many other nations, the respect associated with the position incentivizes qualified candidates to fill those roles and remain in them.²⁷⁰ This, however, is not the case in China where the role of judge has been viewed as powerless and lacking public respect.²⁷¹ Improving judicial selection and training will, over time, foster public respect for qualified judges.

The problem of judge retention and development of skills, however, is compounded by the courts' general lack of credibility: citizens believe judges are corrupt.²⁷² Enhancing the legitimacy of and increasing public confidence in judges is essential to achieving judicial independence.²⁷³ These problems go hand-in-hand with a better selection process.

Judges in China do not have life tenure, and from the time of their appointment, they serve at the pleasure of local officials.²⁷⁴ To achieve judicial independence, the selection of judges should not be at the whim of local officials who exert pressure on the judiciary in many ways.²⁷⁵ The *Decision* calls for a graduated promotion system in which a judge must first serve at a lower level, gaining experience and qualifications, before being promoted to a higher court.²⁷⁶ This meritocratic method will ensure the pool of judges considered for higher posts have at least minimum qualifications for those positions.

²⁶⁸ See Josh Chin, *China Tries to Hold On to Judges by Offering Freer Hand*, WALL ST. J. (Oct. 21, 2014), <http://www.wsj.com/articles/china-tries-to-hold-on-to-judges-by-offering-freer-hand-1413822462>.

²⁶⁹ See *Rule of Law: Realigning Justice*, ECONOMIST (Aug. 16, 2014), <http://www.economist.com/news/china/21612161-judges-are-often-impotent-chinas-courtrooms-might-be-changing-realigning-justice> [hereinafter *Realigning Justice*].

²⁷⁰ See, e.g., Jarret Hann, *Balancing the Scales: Judicial Compensation*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/sitecore/content/microsites/trends/home/monthly-trends-articles/2014/balancing-the-scales-judicial-compensation.aspx> (last visited Jan. 31, 2016) (listing judicial benefits, job security, prestige, and power as reasons judges accept arguably low compensation).

²⁷¹ See McPherson, *supra* note 74, at 799.

²⁷² See *Realigning Justice*, *supra* note 269.

²⁷³ See McPherson, *supra* note 74, at 799.

²⁷⁴ See Zhang, *supra* note 42, at 364.

²⁷⁵ See *id.*

²⁷⁶ *Decision Translation*, *supra* note 8, at art. VI(1).

One more basic proposal to solve the problem of judge selection and promotion is a national examination system.²⁷⁷ Expanding this method to the judicial branch eliminates corruption, local protectionism, and other problems in China's court system. Similarly, professionalism training for judges is necessary to counter myriad problems.²⁷⁸ For instance, judges in China are not incentivized to hear many cases, but it is their professional duty to do so.²⁷⁹ When judges hear more cases, they create more opportunities for their rulings to be overturned by a higher court, in turn, creating a disincentive to continue hearing more cases.²⁸⁰ Professionalism training, coupled with the national examination to regulate judicial qualification, will ensure judges have the autonomy to competently perform their role.

Reforming the selection and training of judges will likely resolve these problems. To achieve judicial independence, judges must be competent, well respected, and willing to act independently.²⁸¹

C. Judicial Committee and Appeals Reform

The Fourth Plenum *Decision* calls for reform of judicial committees and judicial oversight processes.²⁸² These reform measures regard "functional independence" of the hearing court and the supervisory powers of other judicial bodies as essential to achieving judicial independence.²⁸³

Judge Wang Bin of the Nanjing Intermediate Court has predicted the direction of judicial committee reform.²⁸⁴ One of these measures aims to redefine the purpose of the judicial committee from rendering decisions binding on the panel to providing guidance by selecting typical cases and issuing normative documents.²⁸⁵ Similarly, judicial committees are urged to decide cases on the law, not on the facts or disputed evidence.²⁸⁶ Furthermore, judicial committee reform will include a selection process based on professional competence.²⁸⁷ In addition, members of the judicial

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See Chin, *supra* note 268.

²⁸⁰ See *id.*

²⁸¹ See Orts, *supra* note 162, at 111.

²⁸² *Decision Translation*, *supra* note 8, at art. IV(2).

²⁸³ Peerenboom, *supra* note 194, at 81.

²⁸⁴ See *Judicial Committee Reform*, *supra* note 112.

²⁸⁵ See *id.*

²⁸⁶ See *id.*

²⁸⁷ See *id.*

committee will be required to express their reasoning and rationale on a case before casting their votes.²⁸⁸

Proponents of judicial committees believe review by more experienced judges promotes competent decisions and reduces the likelihood of corruption.²⁸⁹ But others point out that, under the current system, the hearing court has neither the independence to decide the case nor the power to make a determination.²⁹⁰ By removing the “subjective filter”²⁹¹ between the hearing panel and deciding panel, the hearing panel will be better equipped to decide each case on its merits. The judicial committees will then fulfill an important purpose: guiding the panel on the law without disrupting the fairness, objectivity, and accuracy of judicial decisions.

The *Decision* also calls for reform of the second instance being final doctrine.²⁹² The *Decision* seeks to resolve factual disputes in the first instance, ensuring the second instance only focuses on legal error, more like an appeal than a second *de novo* hearing.²⁹³ Reform of the second instance being final doctrine will help China on its path toward judicial independence because judges who hear cases will be able to independently decide outcomes, and the committees will properly guide the lower courts.

Reforms related to judicial committees and the second instance being final doctrine eliminate many of the bureaucratic elements of the Chinese judicial system that inhibit judicial independence. With the reforms in place, hearing courts will be able to competently decide each case on its merits with less fear of a reviewing body’s oversight.

D. Death Penalty Reform

Over the last several years, China has reduced its use of the death penalty through legal reform.²⁹⁴ A recent policy is that if the defendant killed a sole victim, the death penalty may not be implemented if the defendant surrenders or if the dispute was instigated among family or close

²⁸⁸ See *id.*

²⁸⁹ See Peerenboom, *supra* note 194, at 77–78.

²⁹⁰ See *id.* at 78.

²⁹¹ *Judicial Committee Reform*, *supra* note 112.

²⁹² *Decision Translation*, *supra* note 8, at art. IV(2); text accompanying *supra* notes 120–26.

²⁹³ See *Decision Translation*, *supra* note 8, at art. VI(2); text accompanying *supra* notes 120–27.

²⁹⁴ See DUI HUA FOUND., *Deciding Death: How Chinese Judges Review Capital Punishment Cases*, HUM. RTS. J. (Nov. 18, 2014), <http://www.duihuahrjournal.org/2014/11/deciding-death-how-chinese-judges.html>.

neighbors.²⁹⁵ In addition, if the family of the victim agrees to more lenient punishment, the death penalty may also be waived.²⁹⁶

The Fourth Plenum judicial reforms call for an even more important change: institutionalizing legal representation in death penalty review.²⁹⁷ Death penalty review occurs at one of five tribunals, each with a regional and subject-matter specialty.²⁹⁸ A panel of three judges presides over each case, and the process may include in-person or video interviews with the defendant.²⁹⁹ If the panel of judges cannot reach a consensus, an adjudication committee of the Supreme People's Court lends advice.³⁰⁰

The right of a death penalty defendant to an attorney is a large leap toward a fair and impartial judicial system.³⁰¹ To illustrate the effect of this reform, consider a comparison of the United States and China. The United States and China are of approximately equal land area, but China has over four times the population.³⁰² To have only five death penalty tribunals in China, as compared to one for each state in the United States, exemplifies the strain on China's system. Not only does this mean caseloads and personnel are stretched thin, but also travel and communication become problematic as well.³⁰³ For each defendant to have an attorney is a step closer to procedural justice for the harshest possible penalty.

Death penalty reforms help achieve judicial independence in that the courts will more competently perform their roles in these cases. It also elicits the secondary effects of increasing public confidence in courts, empowering citizens by being represented in court, and increasing the prominence of notions such as societal fairness toward individuals.

²⁹⁵ See *id.* The family or close neighbor aspect of the rule reflects the tendency of Chinese society to keep private disputes private. See text accompanying *supra* note 108.

²⁹⁶ See DUI HUA FOUND., *supra* note 294.

²⁹⁷ See *Updated with Further Analysis: What Does the 4th Plenum Mean for Death Penalty Reviews?*, SUP. PEOPLE'S CT. MONITOR (Nov. 10, 2014), <http://supremepeoplescourtmonitor.com/2014/11/10/what-does-the-4th-plenum-mean-for-death-penalty-reviews>.

²⁹⁸ See *id.*; DUI HUA FOUND., *supra* note 294.

²⁹⁹ See DUI HUA FOUND., *supra* note 294.

³⁰⁰ See *id.*

³⁰¹ See *id.* (calling the death penalty reform "groundbreaking").

³⁰² See *Data: Land Area*, WORLD BANK, <http://data.worldbank.org/indicator/AG.LND.TOTL.K2/countries> (last visited Feb. 2, 2016); *Data: Population, Total*, WORLD BANK, <http://data.worldbank.org/indicator/SP.POP.TOTL> (last visited Feb. 2, 2016).

³⁰³ See DUI HUA FOUND., *supra* note 294.

E. Boosting Public Confidence in the Courts

Respect for the judiciary is essential to the independence of a court system. For judges to have an incentive to maintain impartiality, they must know the public believes they are fulfilling their duty. Today, many Chinese citizens understand the value of the court system but still do not believe it applies to them personally.³⁰⁴

Soon after the Fourth Plenum, the Standing Committee of the National People's Congress passed an amendment that more easily allows citizens to sue the government.³⁰⁵ The legislation primarily targets government breaches of contracts with citizens and has a learning component: the responsible officials must appear in court, a provision designed to promote awareness of the laws.³⁰⁶ Most importantly, however, is the citizens' awareness of their rights under the law, especially those among the large populations in rural areas of China.³⁰⁷ China law expert Susan Finder phrases it this way: "Getting the concept of law into people's heads . . . is a huge educational project."³⁰⁸

Public confidence in the courts is important.³⁰⁹ To achieve legitimacy, the courts must be viewed as the final arbiter of disputes.³¹⁰ Today, the average citizen does not believe the court system is relevant to his or her life,³¹¹ and the Fourth Plenum *Decision* seeks to change that.³¹²

V. THE UNITED STATES SHOULD SUPPORT CHINA'S JUDICIAL REFORMS

China faces many barriers to achieving judicial independence.³¹³ The most common criticism of the Fourth Plenum reform proposals is that the

³⁰⁴ See Peter Ford, *China Pushes More People to Say, 'See You in Court'*, CHRISTIAN SCI. MONITOR (Nov. 26, 2014), <http://www.csmonitor.com/World/Asia-Pacific/2014/1126/China-pushes-more-people-to-say-See-you-in-court>.

³⁰⁵ See Fu Peng, *China Amends Law to Support Citizens Suing Gov't*, ENGLISH.NEWS.CN (Nov. 1, 2014), http://news.xinhuanet.com/english/china/2014-11/01/c_133758622.htm.

³⁰⁶ See *id.*

³⁰⁷ See Ford, *supra* note 304.

³⁰⁸ *Id.*

³⁰⁹ See McPherson, *supra* note 74, at 799.

³¹⁰ See *id.*

³¹¹ See China Real Time, *Heard in the Hutong: China's Legal Reform, Interviews with Zhao Lei and Liang Chunhua*, WALL ST. J. (Oct. 24, 2014), <http://blogs.wsj.com/chinarealtime/2014/10/24/heard-in-the-hutong-chinas-legal-reform/tab/interactive>.

³¹² See *Decision Translation*, *supra* note 8, at art. 1.

³¹³ See *supra* Part IV.A–B.

plan only seeks to consolidate Party power.³¹⁴ But because China will continue to be ruled by the Party, it makes sense for the United States to encourage judicial reform within that consolidated power structure. As the Party embarks on implementation of the *Decision* in the coming months and years, it will face unexpected logistical problems. Still, the United States should encourage China to develop its judicial system and to put into practice the theoretical plans described in the Fourth Plenum *Decision*.

The United States consistently states that its goal is to develop a positive and cooperative relationship with China.³¹⁵ In addition to this intangible relationship of support and cooperation, the United States also gives monetary assistance to China, specifically for “advancing the rule of law.”³¹⁶ Cultivating a mutually positive and cooperative relationship while pushing China toward Western democracy is an ineffective way for the United States to achieve its goal.³¹⁷ It is in the United States’ best interest to understand China and tailor its foreign policy in an informed way. The Chinese judicial system is not like the U.S. judicial system, and assuming they should be similar is a mistake.

China’s legal reforms announced at the Eighteenth Plenum in October 2014 are realistic and attainable. Although the reforms may not conform to Western notions of the rule of law and are certainly not a step toward democracy, the United States should support China as it reforms its judiciary.³¹⁸

³¹⁴ See, e.g., Gewirtz, *supra* note 10; G.E., *supra* note 46.

³¹⁵ See *U.S. Relations with China*, U.S. DEP’T ST. (Jan. 21, 2015), <http://www.state.gov/r/pa/ei/bgn/18902.htm>.

³¹⁶ *Id.*

³¹⁷ See *supra* Part III.C.

³¹⁸ See Orts, *supra* note 162, at 115 (arguing for “a commitment for East and West to work together on promoting the rule of law rather than to concentrate dangerously on an ideological conflict over democracy”).

