

## CHAPTER 10

# China: The Quest for Procedural Justice

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### I. Introduction

This essay is contributed in recognition of Don Wallace's dedication to furthering procedural justice in the U.S. and abroad. Don's interests are wider than anyone else's I can think of. Even though China and Chinese law are not represented in his published scholarship, in the course of our long friendship he has expressed thoughtful interest in many ways, including his constructive participation in the first delegation of the American Bar Association to visit China, which I escorted in 1978, and his later visits to China. Under Don's leadership as Director of the International Law Institute at the Georgetown Law School, the Institute has provided technical assistance and capacity training support in China for many years.

This is a summary discussion of specific aspects of the struggle to strengthen the enforcement of individual rights in China. Although the Chinese Constitution sets forth principles of such rights, it is a programmatic document that is not justiciable.<sup>1</sup> This essay first reviews the failure of attempts to convince the courts to permit citizens to rely on the Constitution as a basis for adjudicating claims that rights enumerated in that document have been violated. It then turns to administrative law, which is sometimes invoked by inventive lawyers and law reformers searching for what some have called "sub-constitutional" laws that could function as partial substitutes for the Constitution. It closes with brief

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\* This essay is based on a paper originally prepared for the Conference on Social Change and the Chinese Constitution, Berlin, June 15-16, 2012.

<sup>1</sup> Frank Ching, *China's Constitution in Name Only*, THE CHINA POST (Jan. 16, 2013), available at <http://www.chinapost.com.tw/commentary/the-china-post/frank-ching/2013/01/16/367558/Chinas-constitution.htm>

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discussion of recent suggestions that closer links between courts and local political authorities could increase the effectiveness of the courts.

The field of administrative law has expanded dramatically since the promulgation of the Administrative Litigation Law (ALL) in 1989, which authorized suits against administrative organs for infringement of private rights. Since then, much legislation has established procedures that Party-state<sup>2</sup> agencies, including local governments, must follow in exercising their powers, such as issuing or denying licenses or taking real property for a recognized public use. As the Chinese and Western scholarship reviewed here demonstrates, these laws have not yet been successfully invoked to substitute as sources of constitutional rights.

There are two aspects of administrative litigation in China that demonstrate the difficulties of developing an administrative law that effectively supervises the conduct of state agencies and protects the rights of citizens affected by the exercise of state power by those agencies:

- (1) the high rate of withdrawals that mark suits by citizens, reflecting pressure on them by the agencies sued, and
- (2) a policy imposed on the courts in recent years by the Chinese Communist Party (CCP) which favors mediation over adjudication. This approach has weakened the power of the courts to adjudicate cases in favor of plaintiffs complaining about violations of law by agencies of the Party-state.

The essay concludes by noting that trends detected by scholars in their research suggest that courts and Party might be able to act in coordination to strengthen the power of administrative law over the organs of the Party-state. The CCP, concerned to maintain its relevance in Chinese society, may be engaged in "softening" its authoritarianism by various means. One author calls this an attempt to construct a "consultative authoritarianism."

The relevance of this development to administrative litigation is suggested in a noteworthy empirical study by an experienced authority on the Chinese courts who focused on the handling of administrative law cases by an Intermediate Court in Jiangsu Province, and found that the court reached out successfully to local Party and municipal officials to

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<sup>2</sup> The term "Party-state" is frequently used in academic discussions of China as a shorthand term for the closely intertwined bureaucratic hierarchies that together govern the People's Republic of China ("PRC").

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increase its effectiveness and authority. It is not possible to predict whether the use of this approach will bear fruit, but it signals the ongoing search for procedural justice.

### II. The Constitution in the Courts

#### A. *Invocation of the Principle of Due Process of Law*

As Professor He Haibo has noted,

it has been widely recognized that the Chinese legal tradition has generally not emphasized due process, and that, for the most part, procedural norms were absent from Chinese law.[and] received scant attention from the government of the newly founded People's Republic in the first decades after 1949. China's legal academic community remained almost completely unacquainted with the idea of due process until the early 1980s, when the study of administrative law resumed after the Cultural Revolution.<sup>3</sup>

Administrative law began to awaken in 1989 with the adoption of the ALL, which (Art. 54) expressed a judicial standard for evaluating the legality of administrative acts, "violation of statutory process," that is, violation of procedure expressly stipulated by a legal norm. During the period from the enactment of the ALL until 2005, the courts wholly or partially invalidated administrative acts in 297 cases, and in 36 of them, or 12%, "violation of statutory process" was cited as the sole basis for invalidation. This, He argues, shows that a standard had "established a foothold in judicial practice."<sup>4</sup>

The standard has followed an uncertain path in the courts, beginning with a case in 1997 in which a county court reviewed an administrative penalty and stated that the "illegal process" was so serious that it warranted validation of the penalty involved.<sup>5</sup>

The case was published in the Gazette of the Supreme People's Court (SPC), in which significant decisions, directives, and interpretations are published. Professor He cites it as the first case that

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<sup>3</sup> Haibo He, *The Dawn of the Due Process Principle in China*, 23 COLUM. J. ASIAN L. 57, 59-60 (2008).

<sup>4</sup> *Id.* at 68.

<sup>5</sup> *Pingshan County Bureau of Labor and Employment v. Pingshan County Bureau of Local Taxation*, 2 SUP. PEOPLE'S CT GAZ. 71 (1997).

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displayed the SPC's desire to impress on the courts the need to review closely whether agencies had adhered to administrative procedure. Since then, the Court has not used such interpretations to develop due process norms, and "violation of statutory process" has not been invoked to fortify the principle of due process.

The concept of due process received some recognition in several cases in which students sued their university. In *Tian Yong v. University of Science and Technology*, a student sued after his expulsion from the university, and the Haidian District Court of Beijing ruled that the expulsion decision-making process was flawed because the university had not notified the student or allowed him to argue in self-defense. Although no specific legal provisions were mentioned in the court's decision, the Chief Judge of the court declared that the case was handled "in the spirit of the law."

The decision was published in the SPC Gazette and thereafter the language of the decision was subsequently changed. The revised decision stated that the student's right to petition had been overlooked, and that "such act of administrative management does not possess legality." Another case involved a student who had not been notified of punishment for bringing notes to an examination; Wuhan courts upheld his claim, characterizing the process as "inconsistent with relevant rules."<sup>6</sup>

In yet another case a Ph.D. student sued Beijing University for rejecting his dissertation without any formal notification. The Haidian District Court decided that the university should have allowed the applicant to express his views, "based on the principle of full protection of the degree applicant's legal rights." Professor He cites this case as one in which Chinese judges "began consciously to introduce the due process principles into their verdicts."<sup>7</sup>

In 2004 a Chinese court explicitly invoked the "requirement of due process" as a basis for overturning a decision by a city government that revoked a resident's house deed. This decision, too, was published in the SPC Gazette. Other courts have applied the principle, and some local courts have issued guiding documents on procedural norms, specifically invoking "due process."

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<sup>6</sup> *Wang Chang bin v. Wuhan University of Technology*, discussed in He Haibo, *supra* note 3, at 82.

<sup>7</sup> *Id.* at 88. Professor He then describes a number of cases in which due process principles was applied, even though the phrase "due process" was not stated.

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The recent history traced by Professor He shows the limited introduction of the concept of procedural justice into the vocabulary of a small number of courts via the SPC Gazette. Although he argues that judges' awareness has been "getting consistently stronger," he also acknowledges, however, that there are only "a few positive cases" among over a million administrative cases, and that even the cases he discusses have not generated "predictable rules for future court decisions."<sup>8</sup> Also, the principle has not yet been applied to "abstract" administrative acts, i.e., "rule-making activities by administrative authorities" while "concrete" acts are "aimed at specific events."<sup>9</sup>

The due process principle still has hurdles to overcome: More litigation and more legislation are necessary, statutory law must be made more complete, and judicial authority must be stronger.

### ***B. Constitutional Disputes: Recent History and Recent Developments***

Professor Keith Hand identifies signs of an opening to enforcement of the Constitution that had previously been lacking, after an amendment was adopted in 1999 that added the principle of "ruling the country in accordance with the law."<sup>10</sup> This was followed the next year by the adoption of the Legislation Law, which contains a provision for citizens to challenge the constitutionality of administrative rules and regulations by appealing to the Standing Committee of the National People's Congress.<sup>11</sup>

In 2001 in the *Qi Yuling* case, the SPC ruled that a plaintiff could obtain damages on the grounds that identity theft by a fellow student violated the right to an education that is stated in the Constitution. The plaintiff prevailed, although direct citation of the Constitution until that time had previously been avoided by the court. The case inspired considerable debate. Internal directives ordered that the case should not be taken as a precedent, and in 2008 the SPC annulled its opinion in *Qi Yuling*.

In the *Wang Denghui* case decided in 2008, a district court decided a case that inspired more debate. A factory worker who had been injured

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<sup>8</sup> *Id.* at 110.

<sup>9</sup> JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 223 (Martinus Nijhoff, Leiden, Boston 2008).

<sup>10</sup> Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PENN. E. ASIA L. REV. 51 (2011).

<sup>11</sup> Legislation Law of the People's Republic of China, available at <http://www.china.org.cn/english/government/207420.htm>.

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while returning at night from work filed a request with the local labor bureau for compensation by the factory. The employer argued that the worker had violated a factory rule that workers could not spend the night outside the factory, and that therefore the injury was not work-related. The local district court disagreed, citing the constitutional rights of freedom of the person and freedom of residence. The court deemed the factory rule “contrary to the spirit of the Constitution” and refused to uphold it. Professor Hand notes that the case “set off alarm bells in the Party-state ranks.”<sup>12</sup>

After 2004, policy retreated from a previous focus on the courts and law reform and moved to emphasize dealing with cases by mediation rather than adjudication. Under current policy the courts must mediate rather than arbitrate, especially in controversial cases. Even before this development, the weakness of the courts was so clear that discussion here is unnecessary. In more recent years, this approach has further weakened the power of the courts to adjudicate cases in favor of plaintiffs complaining about violations of law by agencies of the Party-state.

### *1. Bargaining and Consultation in Constitutional Disputes*

Hand reviews a variety of constitutional disputes. Legislative conflicts may arise between lower level legislation and provisions in the Constitution or between lower level administrative regulations and State Council administrative regulations or national legislation. A complex consultative process is used to deal with potential conflicts: Committees of the National People’s Congress and its Legislative Affairs Commission consult with the agency that promulgated a norm that seemed to necessitate investigation for resolution of a conflict. The consultative process has been used so extensively that no formal decisions have yet been issued annulling a lower level norm.

### *2. Conflicts between People’s Congresses and the Courts*

In the Chinese system, local courts are subject to supervision by local People’s Congresses. The process was illustrated in a widely publicized case in Henan: A judge in a civil case centering on a seed contract decided that the local People’s Congress had fixed a rule for pricing the seed that was inconsistent with a national law, and declared the local law “spontaneously invalid.” After the General Office of the

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<sup>12</sup> Hand, *supra* note 10, at 71.

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provincial People's Congress argued that the judge had no power to invalidate the law, her judicial credentials were canceled. Subsequently the SPC decided that the judge lacked the power to invalidate the local law, and the Provincial People's Congress decided not to cancel the judge's credentials. The SPC has since established a rule that in the case of inconsistencies between lower-level and central legislation, the court may not rule on the effectiveness of one or the other.<sup>13</sup>

### 3. *Mediation in Administrative Litigation: Issues*

In recent years, control over the courts has been strengthened and the courts have been instructed to consider the political implications of their decisions, not just the law. However, Chinese society is becoming more complex, making the task harder: Legal consciousness among citizens is increasing, disputes are increasing in numbers, and concern is rising about the difficulty of dealing with complex cases that involve "intersecting interests of multiple parties and levels of the Party-State."<sup>14</sup>

Hand argues that bargaining, consultation, and mediation can be used to resolve constitutional disputes. Courts are instructed to take into consideration not only formal sources of law but the opinions of the masses, together with "community norms, government interests and relationships, the political interests of the Party, public policy and economic development, social stability and other factors."<sup>15</sup>

These policy considerations are infused into administrative lawsuits using mediation. Mediation was formally prohibited under the ALL, but now the prohibition is evaded by denominating the alternative to adjudication as "reconciliation."

Whatever the process is called, resorting to mediation in administrative lawsuits poses problems because of the power of the agencies that are sued. When sued they may try to keep the courts from accepting the cases, interfere with the courts, fail to send officials to testify in court, or refuse to comply with judgments. Courts may consult with Party committees, local governments, local people's congresses, and higher-level courts before they accept cases for filing. Pressure from agencies on plaintiffs may result in withdrawal of many administrative

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<sup>13</sup> *Id.* at 111.

<sup>14</sup> *Id.* at 135, citing Randall Peerenboom, *More Law, Less Courts*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA* 175, 191 (Tom Ginsburg & Albert Chen eds., 2008).

<sup>15</sup> *Id.* at 136.

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lawsuits.<sup>16</sup> He Haibo, using statistical data, interviews, and written reports, concludes that the number of cases withdrawn by plaintiffs is extremely high.<sup>17</sup>

By resisting administrative lawsuits, agencies “provide incentives for reaching mediated settlements.” Despite the explicit prohibition of mediation of cases brought under the ALL, in practice many cases are settled through compromise.<sup>18</sup> One Chinese article describes this as “mediation without the written mediation agreement.”<sup>19</sup> Michael Palmer notes that “a mediated case can degenerate into an arbitrary process in which the judge exercises his authority informally.”<sup>20</sup> Methods include not focusing on the essential issues; using pressure on the parties as by raising the threat of adjudication or inducements; procrastinating; or using the threat of state power to frighten the plaintiff. These tactics are so widespread that one survey found that in four out of five cases that were withdrawn there was an element of coercion.<sup>21</sup> Reflecting the imbalance of power between plaintiffs and the government agencies they sue, a recent study of litigation in the Shanghai courts concluded that defendants won in over 95 percent of the 232 administrative cases concluded in 2008-2009.<sup>22</sup>

Recent scholarly studies reflect changes in Chinese society. Chinese administrative law has grown in complexity since the ALL was adopted, officials exercise wide discretion, and citizens have more rights. Citing “confidential discussions” with legislators working on revising the ALL, Palmer asserts that “the government and the people no longer maintain confrontational, antagonistic relationships but increasingly enjoy and identity of interest...and mutual trust.”<sup>23</sup> He argues that what is needed is

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<sup>16</sup> *Id.* at 141, citing Wang Qinghua, *Zhongguo Xingzhen Susong: Duozhong Xin Zhuyi de Sifa (China's Administrative Litigation: Polycentric Adjudication)*, 5 ZHONGWAI FAXUE (PEKING U.L.J.) 513 (2007).

<sup>17</sup> He Haibo, *Litigations without a Ruling? The Predicament of Administrative Law in China*, 3 TSINGHUA CHINA L. REV. 257 (2011).

<sup>18</sup> Michael Palmer, *Controlling the State?: Mediation in Administrative Litigation in the People's Republic of China*, 16 TRANSNAT'L J. INT'L L. & CONTEMP. PROBS. 165 (2006-2007).

<sup>19</sup> *Id.* n.102.

<sup>20</sup> *Id.* at 184.

<sup>21</sup> *Id.*

<sup>22</sup> Xin He & Yang Su, *Do the 'Haves' Come Out Ahead in Shanghai Courts?*, 10(1) J. EMPIRICAL STUD. 120 (March 2013).

<sup>23</sup> *Id.* at 185.

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not a complete ban on mediation, but “rather the development of a more open and accountable system.”<sup>24</sup>

The Chinese leadership under Hu Jintao pressed for using mediation to reduce the number of all types of cases that courts conclude with adjudication. The consequences are the subject of serious study. An article by Professor Benjamin Liebman focuses on medical malpractice cases, which have increased in recent years, sometimes accompanied by dramatic public protests.<sup>25</sup> He finds support for arguments “that courts are evolving into institutions with roles that extend well beyond the application of legal standards: courts seek to mollify parties....”<sup>26</sup>

Liebman also says that this often occurs in cases involving protests, and notes that sometimes judges do this on their own, but at “other times they do so in consultation with or at the instruction of local Party-state officials.”<sup>27</sup> Liebman also finds that court decisions “reflect strong concerns about equity, with courts awarding compensation in numerous cases absent findings of medical error.”<sup>28</sup> In some cases, compensation is awarded although there was no finding of error by the competent medical review board.<sup>29</sup>

A particular type of mediation is “grand mediation,” which, Hand says, Chinese scholars define as a mechanism to maintain stability and resolve disputes,

...by incorporating (1) top-down integration and deployment of state, Party, and social resources, and (2) a synthesis of people’s mediation, administrative mediation, and judicial mediation designed to resolve complex disputes at the basic level and ensure social stability<sup>30</sup>

Grand meditation was introduced in 2002 and is aimed at accomplishing a synthesis of Party-state and social actors, ranging from courts, Party committees, and administrative agencies to social organizations such as people’s mediation committees and the women’s

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<sup>24</sup> *Id.*

<sup>25</sup> Benjamin L. Liebman, *Malpractice Mobs: Medical Dispute Resolution in China*, 113 COLUM. L. REV. 181 (2013).

<sup>26</sup> *Id.* at 210.

<sup>27</sup> *Id.* at 240.

<sup>28</sup> *Id.* at 216.

<sup>29</sup> *Id.*

<sup>30</sup> Hand, *supra* note 10, at 143.

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federation and industrial associations. In this view, local courts are central and court leaders participate in directing grand mediation.

Professor Carl Minzner has characterized grand mediation cases as “political conferences” intended to coordinate Party-state responses. He points out that some cases might be decided according to legal principles, but in others the process is “an exercise of state power by local bureaucrats under the guise of tradition.”<sup>31</sup> This suggests that in practice, grand mediation might resemble the kinds of consultations that judges, faced with a controversial case, might have with the local Political-Legal Committee and other officials at the same level.

Hand believes that citizens seeking to protect rights may be able to exert some influence on the process because the Party-state will evaluate proposed settlements in light of an assessment on their influence on stability. He describes grand mediation as “an indigenous dispute resolution model that is consistent with the demands and limitations of China’s current political environment and would regularize existing, informal constitutional dispute resolution practices that emphasize those dynamics.”<sup>32</sup>

Liebman argues that this innovation does not signal increased autonomy for legal institutions, but is intended to “insulate courts from direct protest.”<sup>33</sup> This is true not only in medical malpractice cases but in land, labor, and mass torts. He then goes on to underline the strength of the tendency to take cases out of the courts altogether or “within the courts to be resolved without reference to law on books.”<sup>34</sup>

The transformation of legal issues into non-legal issues raises concerns about the relations between the Party-state and the courts. Liebman sees a contradiction:

Rather than stepping back and allowing the legal system to resolve disputes, the Party-state continues to micro-manage individual disputes and to encourage and at times require local officials to intervene. At the same time, however, the Party-state

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<sup>31</sup> Carl Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935, 946-47 (2011) citing Hualing Fu, *The Politics of Mediation in a Chinese County: The Case of Luo Lianxi*, 5 AUSTRALIAN J. ASIAN L. 107, 122 (2003).

<sup>32</sup> Hand, *supra* note 10, at 52.

<sup>33</sup> Liebman, *supra* note 25, at 245.

<sup>34</sup> *Id.* at 249.

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continues to devote extensive resources to developing China's legal infrastructure.<sup>35</sup>

As already noted, current policy requires that the courts must make maintaining social stability their priority.<sup>36</sup> It is widely recognized that, as one recent article puts it, "When highly controversial cases regarding issues of high public instability come before lower-level courts, fears of social instability can undermine the judiciary's authority to adjudicate the dispute."<sup>37</sup> Mediation, the authors argue, can be used in such cases to assist the parties to reach a mutually acceptable solution and "permit the courts to avoid politically sensitive, marginally enforceable decisions."<sup>38</sup>

These observations on mediation overlap to some degree with recent studies of CCP attempts to enlist social organizations to help maintain social stability, which can only be noted briefly here. One article discusses current efforts of the CCP to reach out to grassroots NGOs and non-profit enterprises, which may—or may not—advance an organization's "core interests."<sup>39</sup> Another recent study argues that the development of what the author calls "consultative authoritarianism" encourages the simultaneous development of "a fairly autonomous civil society and the development of more indirect tools of state control."<sup>40</sup>

Both articles cited above suggest that the CCP has been attempting to create links with civil society organizations by consulting rather than commanding them, thereby changing at least the face of the political system that has governed China since 1949. This perspective may be relevant to the conduct of informal dispute resolution by the courts, because even without seeking independence, the courts and Party may each welcome mutual links to increase the effectiveness of the courts and promote some Party interests such as maintaining social stability.

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<sup>35</sup> *Id.* at 252.

<sup>36</sup> See, e.g., Yang Su & Xin He, *Street as Courtroom: State Accommodation of Labor Protest in South China*, 44(1) L. SOC. REV. 157 (2010).

<sup>37</sup> Jonathan Kinkel & William Hurst, *Review Essay—Access to Justice in Post-Mao China: Assessing the Politics of Criminal and Administrative Law*, 11 J. E. ASIAN STUDIES, 467, 487 (2011).

<sup>38</sup> *Id.*

<sup>39</sup> Patricia M. Thornton, *The Advance of the Party: Transformation or Takeover of Urban Grassroots Society?*, 213 THE CHINA Q. 1, 15 (2013).

<sup>40</sup> Jessica C. Teets, *Let Many Civil Societies Bloom: The Rise of Consultative Authoritarianism in China*, 213 THE CHINA Q. 19 (2013).

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A study of administrative litigation in a city in Jiangsu Province by Professor Xin He is suggestive. The article observes that “caught between unruly administrative agencies and legal rhetoric, the courts seek support from the Party to enhance their authority. [Their tactics] are often effective, because agencies adjust their behaviors accordingly.”<sup>41</sup>

Professor He identifies strategies devised by the Intermediate Court that he studied. Notably, the court convinced the local political authorities to notify the chief officers of administrative agencies that they had to appear in court when summoned. The court also used grand mediation, sending judicial suggestions to local authorities, applying the law innovatively, and generally adopting a cooperative approach with the government and other agencies. To the extent that it sought any form of independence, “it was independence from illegal interference in the litigation process by other administrative agencies at the same level.... The court’s request is carefully cast as an effort to advance Party interests.”<sup>42</sup>

### III. Conclusion

It may well be that the CCP’s struggle for relevance in a post-revolutionary China could lead to the fashioning of a coherent and *relatively* depoliticized version of mediational dispute settlement consistent with at least a “thin” rule of law recognized as such in the West. On the other hand, greater uncertainty and continued lack of emphasis on procedural justice could well result from aggressive politicization of justice.

Underlying attempts to define the role of the courts are issues of Chinese legal culture—and politics, of course—whose interactions and influences over legal institutions are in constant play. Any desire to see the rule of law fostered and grow must yield to the pressure of certain aspects of Chinese society and politics. In recent years, law reform has been blocked. In 2010, Jiang Ping, one of China’s outstanding law reformers, said “we are in a period where the rule of law is in retreat. Or perhaps, building the rule of law, judicial reform, and political reform are

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<sup>41</sup> Xin He, *Judicial Innovation and Local Politics: Judicialization of Administrative Governance in East China*, 69 CHINA J. 20 (JAN. 2013). In this connection, see also the statement of Palmer, *supra* note 18 at n.24.

<sup>42</sup> He, *supra* note 41, at 27.

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all moving backwards.”<sup>43</sup> It remains to be seen whether the leaders who came to power in 2012 will modify the path of legal reform.

As the CCP struggles to retain its relevance and power in a society in which it unleashed forces of social change that can be steered only with enormous difficulty, the path of legal development is deeply uncertain. China is yet another arena for the encounter between Western ideals of the rule of law and very different practices in some developing nations. Legal institutions remain enveloped by the bureaucracy of the Party-state, and political reform must precede major advances in legal reform. Absent such a development, law reform is likely to be only around the edges of an otherwise intractable system.

Don Wallace has been in the forefront of American legal scholars who have been deeply concerned to promote procedural justice in the legal systems of developing economies. It is in the spirit of that endeavor that this essay is offered in his honor.

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<sup>43</sup> *China's Rule of Law is in Full Retreat* (Feb. 21, 2010), [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2010/03/jiang-ping-chinas-rule-of-law-is-in-full-retreat.html](http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/jiang-ping-chinas-rule-of-law-is-in-full-retreat.html).