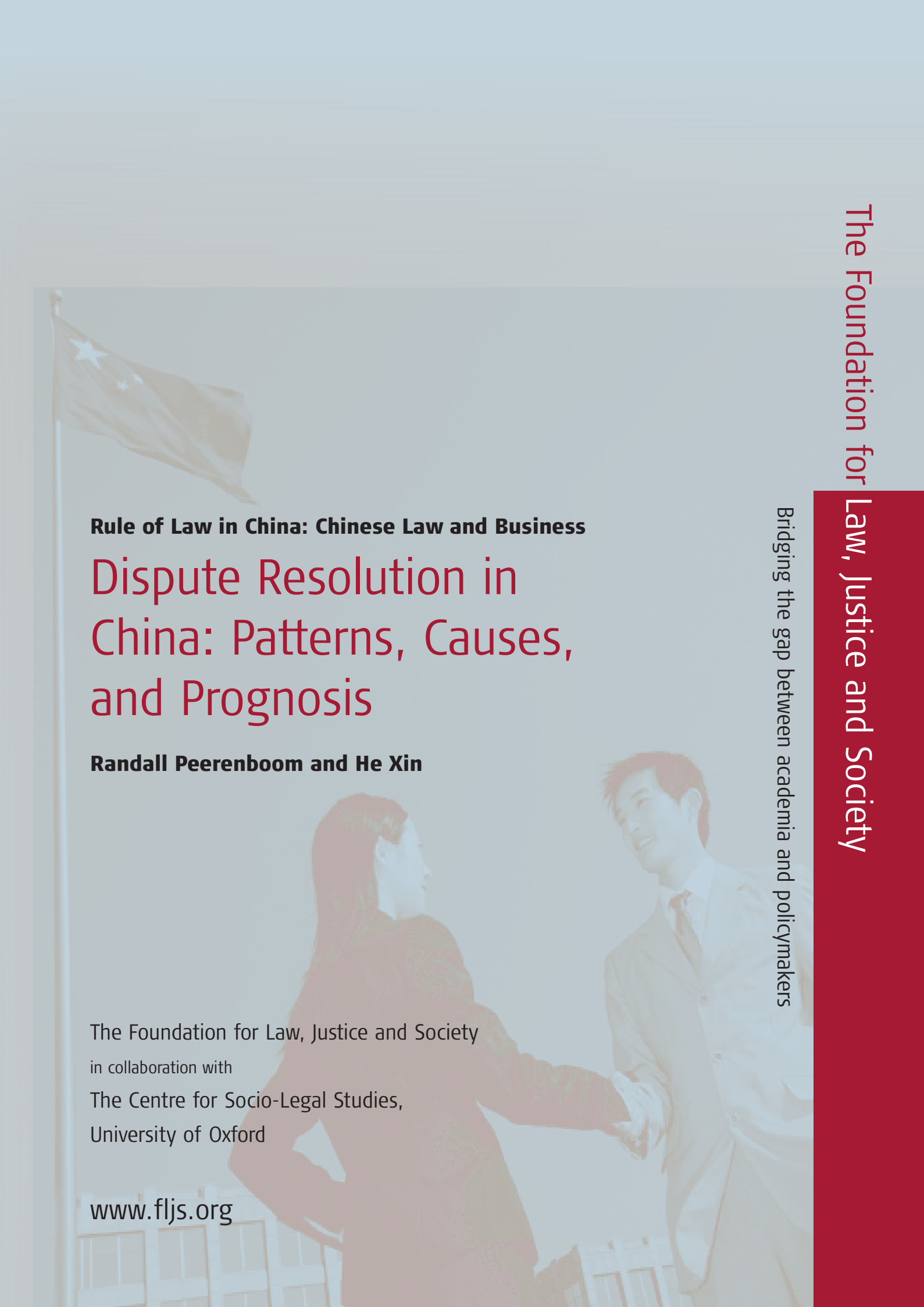

Rule of Law in China: Chinese Law and Business

Dispute Resolution in China: Patterns, Causes, and Prognosis

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Since the reform era began in 1978, there have been significant changes in the nature and incidence of disputes, conflicts, and social disturbances, as well as the mechanisms for addressing them. As with economic and governance reforms, the government has adopted a pragmatic, problem-solving approach as it has attempted to meet the broad and, at times, conflicting goals of justice and efficiency while maintaining sociopolitical stability and rapid economic growth. The result has been continuous experimentation leading to the creation of new mechanisms, the reform of existing mechanisms, and the return to older mechanisms in some cases when newer ones proved disappointing. This is generally true across a range of areas: commercial disputes, constitutional and administrative law, socio-economic issues (pension, welfare and medical claims, labour disputes, land takings and environmental issues), criminal law, and civil and political rights. However, reforms have been more active, progress has been more noticeable, and the path of reforms has been more consistent and direct in some areas than others.

We begin with a brief overview of significant developments in the handling of commercial disputes, socio-economic claims, and public law (administrative and constitutional law) disputes. Three general patterns stand out: firstly, the much better performance of institutions for handling disputes in urban areas compared to rural areas; secondly, the significantly greater progress in handling commercial law disputes compared to socio-economic claims; and thirdly, the more advanced state of development of administrative law compared to constitutional law. We then summarize some of the key factors underlying these patterns and the dynamics of reform, providing a necessarily partial and attenuated account of why the government has opted for a particular mix of mechanisms to handle a certain type of dispute at any given time, why that mix has changed over time, and why there has been more progress in some areas than others. We conclude with some thoughts on what can be expected in the future, and some policy recommendations to help overcome some of the existing problems.

Commercial law

Dispute resolution in the commercial area is characterized by: (i) demonstrable overall progress; (ii) considerable efforts to improve the regulatory framework and respond to investor needs, thus reducing vertical disputes and tensions between businesses and the state; (iii) a rapid rise in litigation to resolve horizontal commercial disputes among business operators through the late 1990s followed by relative stability; (iv) improvements in enforcement, particularly in more developed urban areas; (v) notwithstanding considerable progress, ongoing problems with litigation, including significant regional differences in the nature of the economy, the nature of disputes and institutional capacity, and (vi) a renewed emphasis on judicial mediation in response to ongoing problems.

Improving the business environment: market-friendly regulations and improved governance

The importance of law and a functional legal system to economic development in Asia has often been slighted because so much of the focus has been on the role of courts in enforcing contract rights (Clarke 2003; Upham 2002; Clarke et al. 2006). However, equally if not more important is the creation of a business-friendly environment, including market-friendly regulations and institutions capable of enforcing the regulations effectively and efficiently. The primary complaint of foreign investors has not been weak courts unable to enforce contractual rights but lack of transparency in the

making of laws and regulations, inconsistent implementation of laws, excessive red tape, and predatory government behaviour. In addition to these concerns, domestic businesses have complained about systematic biases against the private sector, including limitations on access to capital provided on soft loan terms to state-owned companies.

The business environment is now considerably more favourable to both foreign and domestic investors. Restrictions on foreign direct investment have been removed or relaxed in many areas (see, e.g., the Revised 2007 Catalog of Foreign Investment Industries). There are new forms of investment, including various ways of participating in China's debt and equity markets, such as through Qualified Foreign Investment Institutions and RMB-denominated corporate debt issued in Hong Kong, and new types of business entities, including partnerships, franchises, and branch offices.

The importance of the domestic private sector has been recognized and given a firm basis in the constitution. Institutions have been created to facilitate market activities, including the China Securities Regulatory Commission, which overseas China's stock markets, and the China Banking Regulatory Commission, which oversees the banking industry. The approval and licensing system has been overhauled as a result of State Council initiated reforms and the passage of the Licensing Law, although most projects still require numerous licenses. The recently passed Property Law, Bankruptcy Law and Anti-Monopoly Law have filled gaps in the regulatory framework. The Legislation Law, China's World Trade Organization (WTO) accession agreement, and other regulations have led to increased public participation in processes of making, interpreting, and implementing laws and regulations. There has been an increase in the number of public hearings and opportunities for public comment prior to the passage of key laws and regulations, a trend that will be further strengthened with the passage of the Administrative Procedure Law, currently being drafted.

These changes are reflected in empirical surveys. China ranked thirty-fourth out of 131 countries in the 2007–2008 World Economic Forum's Global Competitiveness Index, and fifty-seventh out of 127 countries on the Business Competitiveness Index. In 2008, the World Bank ranked China ninety-second out of 178 countries for doing business overall. China has been one of the most open developing economies in the world. Its average tariff rate of 10 per cent is much lower than that of Argentina (32%), Brazil (31%), India (50%), and Indonesia (37%). Its ratio of imports to gross domestic product (GDP) is almost 35 per cent, compared to 9 per cent for Japan (Branstetter and Lardy 2005: 12). China has also been more open, and relied more heavily on foreign direct investment, than South Korea, Japan, or Taiwan. In 2003, the ratio of the stock of foreign investment to GDP was 35 per cent in China, compared to 8 per cent in Korea, 5 per cent in India, and 2 per cent in Japan (Wolf 2005). Reflecting the considerable investment in institution-building, China now outperforms the average in its income class on World Bank's indexes for government effectiveness, regulatory quality, and rule of law (Kaufmann et al. 2007).

At the same time, many problems remain. Security markets are dominated by firms in which the state continues to hold a majority share, which has hampered the development of corporate governance and a legal regime to protect minority rights. Starting a business is time-consuming and difficult, with numerous approvals and licenses required. Despite some improvements, including a recently passed freedom of information act, transparency of government policymaking remains an issue. Corruption also continues to be a problem, with China only slightly outperforming the average in its income class in 2006 (Kaufmann et al. 2007).

Investors have relied mainly on lobbying to address these issues, arguing generally that reforms are in China's own national interests (although administrative litigation and other mechanisms, discussed below, also provide disgruntled parties avenues for challenging government acts).Lobbying by the business community is frequently combined with bilateral and multilateral

pressure, although the two processes are not always in lockstep, as when the US congress publicly reprimanded the American Chamber of commerce for opposing labour-friendly provisions of the 2007 Labour Contract Law.[1]

China's leaders, now more acutely aware of the many ways in which rich countries erect trade barriers to protect their own national economies, are beginning to rethink China's open door policies.

The Chinese government, for its part, has remained committed to market reforms, albeit with periods of indecision, most notably in 1989 in the wake of the Tiananmen demonstrations and more recently when conservative factions argued that China's open-door economic policies have led to rising income inequality, environmental degradation, and a host of social ills from increased crime to rampant prostitution. There are also signs that China's leaders, now more acutely aware of the many ways in which rich countries erect trade barriers to protect their own national economies, are beginning to rethink China's open door policies (Williams 2007). At present, however, the general trend seems to be toward continued openness, albeit with limited retrenchment in some areas (Ross 2007; AmCham 2007).

Given the Chinese Communist Party's dependence on economic growth as the mainstay of its claim to legitimacy, government leaders have had little choice but to press on with reforms. In so doing, they have relied mainly on an incentive structure for promotion that places great weight on economic growth to ensure that local officials create a business-friendly environment. At times, the incentive structure has worked too well, as lower-level officials ignore central policies or engage in protectionist measures to achieve local development.

General trend toward more litigation

The transition to a market economy not only increases transactions but creates new property rights: rights in land and buildings; security interests over land, buildings, and other property; rights of homeowner associations vis-à-vis developers and management companies; property interests in stocks and other securities; intellectual property rights; and rights to business licenses and to be free from government predation. In some cases, the new rules alter or replace existing norms and rules, in the process transferring assets from less productive users to higher productive users. These new rights must be protected, often, but by no means exclusively, through litigation in the courts. The general trend in the commercial area has been for an increase in litigation with an expansion of the range of justiciable disputes, while mediation has decreased and arbitration has remained relatively stable and limited (Zhu 2007: 21, 26). The number of first-instance economic cases increased from 44,080 in 1983 to 1,519,793 in 1996, while the number of first-instance civil cases increased from 300,787 in 1978 to 3,519,244 in 1999 (China Law Yearbooks).

Between 1983 and 2001, economic disputes increased an average of 18.3 per cent a year, an increase twice the rate of civil disputes, and four times the rate of criminal cases (Clarke et al. 2006). Contract disputes are the major cause of litigation (He 2007; Zhu 2007: 221). First-instance purchase and sale contract cases increased from 23,482 in 1983 to 422,655 in 1996. Cases involving the contracting out of land in rural areas increased from 21,459 in 1983 to 87,503 in 1995. Money-lending cases increased from 1264 in 1983 to 558,499 in 1996 (China Law Yearbooks).

1. The annual report of the American Chamber of Commerce in China contains a number of recommendations for the US government, including to make visas more easily accessible for Chinese business people and government officials, relax export restrictions on dual use technology, and most fundamentally avoid the politicization of trade issues by focusing on particular issues such as the trade deficit or by pressing for dramatic but counterproductive changes such as radical revaluation of the RMB (AmCham 2007).

A number of procedural reforms have increased the efficiency and fairness of the process, including reforms of the case management system, rules regarding evidence, and time limits for the completing cases and various stages of the litigation process (Supreme People's Court Drafting Group 2007). In 2006, 95 per cent of all first-instance cases were completed within the time limits (SPC Work Report 2007).

Nevertheless, the utility of litigation to protect commercial actors is affected by many factors, including limitations on the right to sue, the use of other means to achieve similar ends, conflicting policy goals, and the strength and independence of the courts. These factors affect certain areas of law and types of cases more than others.

Shareholder rights and anti-dumping

As **Wang Jiangyu** demonstrates in his policy brief in this volume, until recently, shareholder rights were mainly protected through criminal sanctions and fines. The 1993 Company Law appeared to limit private shareholders to injunctive relief rather than damages. In 2001, the Supreme People's Court (SPC) issued an interpretation preventing shareholders from bringing suits, and then four months later issued another interpretation allowing shareholders the narrow right to sue for misrepresentation where the China Securities Regulatory Commission (CSRC) had issued a report finding misrepresentation. The restrictions were justified on a variety of policy grounds, including that the judges lacked experience handling such cases, jurisdictional rules had yet to be worked out that would prevent different courts from issuing different awards for suits arising out of the same cause of action but brought by shareholder plaintiffs located in different areas, and large damage awards against listed state-owned companies would result in significant loss of state assets.

In 2003, the SPC issued a third, much more detailed, interpretation. Although the interpretation did not expand the subject matter for litigation, it did clarify a number of procedural and evidentiary issues. After experience had been gained from further study of the issues and the handling of several cases, the Company Law was amended in 2005 to strengthen the rights of minority shareholders to bring suit. Courts have now begun accepting suits for reasons other than misrepresentation, and the SPC appears to be set to issue another interpretation based on the experience gained from these cases.

Whereas the general trend in securities litigation and bankruptcy proceedings has been to provide a more rule-based system that strengthens the hand of private actors, anti-dumping remains an area that is much more politicized and dependent on administrative discretion, as the policy brief by Wang Jiangyu makes clear. China is one of the most frequent targets of anti-dumping claims, and appears to pay a rising-power premium.[2] On the other hand, China has increasingly turned to anti-dumping actions against others doing business in China.

The Ministry of Commerce (MOFCOM) is charged with both investigating the existence of dumping and recommending whether duties should be imposed. Anti-dumping proceedings remain shrouded in mystery. Parties are not allowed access to confidential information subject to protective order, to staff reports in particular cases, or even to MOFCOM's standards for calculating the dumping margin and industry damage. As in other countries, decisions appear to be driven by domestic political concerns to protect certain vulnerable industries, rather than by principles of free trade or legal considerations.

Enforcement in urban areas

While enforcement is often portrayed as difficult in China, recent studies have found significant improvements in urban areas, where more than half of creditor-plaintiffs receive 100 per cent of the amount owed, and three quarters are able to receive

2. Noting the parallel to the demonization of Japan in the 1980s, Bown and McCulloch (2005) describe 'unprecedented' discriminatory policies against China by the US that protect domestic industries and favour China's competitors. For example, Chinese companies face the most anti-dumping actions, are the most likely to have duties imposed, and suffer the highest duties – a 'China premium' of an additional 80% – making China 'public enemy number one'.

partial enforcement, a situation explored in more detail in **He Xin's** policy brief. Moreover, the main reason for non-enforcement is that defendants are judgment-proof: they are insolvent or their assets are encumbered (Peerenboom 2002). No legal system is able to enforce judgments in such circumstances.

Although cross-country comparisons can be misleading, it would appear that enforcement in China may be less problematic than in many jurisdictions, including in rich countries such as the United States, the United Kingdom, or Russia (He policy brief 3). In the World Bank's 'Doing Business 2008' survey, China ranked twentieth out of 178 economies in enforcement of contracts. The survey measures the time, cost, and number of procedures involved from the moment a suit is filed until payment is made.

The main reasons for the improvement in enforcement are changes in the nature of the economy; general judicial reforms aiming at institution building and increasing the professionalism of the judiciary; and specific measures to strengthen enforcement (He policy brief 3). The economy in many urban areas is now more diversified, with the private sector playing a dominant role. The fate of a single company is less important to the local government, which has a broader interest in protecting its reputation as an attractive investment environment. As a result, the incentive for governments to engage in local protectionism has diminished (Gechlick 2006; Peerenboom 2002).

In contrast, enforcement is predictably more difficult in rural areas, where the economy is less developed and diversified, and judicial corruption and competence are more serious issues.

Limitations of litigation: judicial competence

Despite the progress, a variety of problems limit the effectiveness of litigation in some circumstances. Firstly, the quality of the judiciary remains a concern, particularly in basic level courts in poorer regions. Critics often note that only slightly more than half of all PRC judges have college degrees, not all of which are in law. While true, the education level of judges in higher level courts in urban areas is often quite high. For instance, over one-third of High Court judges and nearly one-third of Intermediate Court judges in Shanghai have Masters or Doctorate degrees in law. Education levels also vary by division within the same courts.

Moreover, 80 per cent of Chinese courts are basic level courts, most of which are in rural areas. Much of their caseload consists of the types of small claims and minor property disputes that in other countries would be handled by magistrates and other laypersons without any, or any significant, formal legal training. Further, in many cases, parties in rural basic courts are seeking a decision that comports with local norms rather than a technically correct decision based on formal state law. As we shall see, the vast majority of disputes that make their way to court are settled through judicial mediation. Some studies have found that young college graduates who formalistically rely on the law to settle disputes are perceived as less effective than older judges with less legal training who are more familiar with local norms and customs (Su Li 2000).

Popular attitudes toward the court

The policy brief by **Ethan Michelson** examines public perceptions of the judicial system, finding that Chinese citizens have surprisingly positive attitudes toward the courts, although the results vary widely by region, type of case, amount of actual experience with the courts, and the nature of the plaintiff.

One large survey using GPS readings to generate a representative sample concluded: 'Courts are generally perceived as effective and fair, despite the popular lore about corruption' (Landry et al. 2008). In a survey of business people in Shanghai and Nanjing between 2002 and 2004, almost three out of four gave the court system a very high to average rating, compared to 25 per cent who rated the system low or very low (Clarke et al. 2006).

In his survey, Ethan Michelson found that Beijing respondents are more trusting of the courts than their Chicago counterparts, and evaluate the performance of the courts more positively. Respondents in Beijing were twice as likely as Chicago residents to agree with the claim that courts are 'doing a good job'. Moreover, whereas over 40 per cent of Chicago residents *disagreed* or *strongly disagreed* that the courts generally guarantee everyone a fair trial, only 10 per cent of Beijing residents and 28 per cent of rural residents held similar negative views.

To be sure, there is still room for improvement. Chinese citizens with actual experience of the courts tend to be less satisfied, although that is also true elsewhere. There are also significant differences between rural and urban residents (Michelson policy brief 6). Urban residents are much more likely to litigate, and more likely to be satisfied with their experience, than rural residents.

The background of the parties also matter. Gallagher and Wang (forthcoming) found that while parties' feelings of dissatisfaction are mitigated by gains in internal efficacy, older urban disputants employed in the state sector are more prone to feelings of disillusionment, powerlessness, and inefficacy. Younger rural disputants employed in the non-state sectors are more likely to have positive evaluations of their legal experience and to embrace the legal system as a potential space for rights protection. This reflects different perceptions of substantive justice. Older state-owned employees feel that they have been cast aside in the process of SOE downsizing, in breach of the implicit social contract where they worked for low wages in exchange for lifetime security. Thus, they are often not happy with the court's decision even when it is legally correct. In any event, the majority of people who are dissatisfied are still likely to sue (Gallagher 2006).

Interestingly, as Michelson's brief shows, cadres, party members, and other political elites are less likely to have disputes in the first place, more likely to turn to the courts if they have disputes, but no more likely to be satisfied with the courts than other parties.

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Judicial independence

Judicial independence is a complicated topic, as there are many different ways influence can be exerted on the judiciary, and courts may enjoy more independence in some areas, such as commercial cases, than in other politically sensitive areas.[3] Moreover, the experiences of many developing countries demonstrate that judicial independence must be balanced against the need for judicial accountability: enhancing the authority and independence of incompetent or corrupt judges does not lead to more justice (see generally Transparency International 2007; for China, see Cai 2005a).

Some investors and commentators continue to worry about Party or government interference in particular cases involving key SOEs or key industrial sectors, where the amount at stake is high or the legal issue particularly significant to national or local interests, or where the outcome of the case might affect particular government officials who, for example, might have been involved in corrupt behaviour or responsible for decisions that would lead to losses for the defendant company.

Fuelling such concerns are government policies that seek to protect domestic industries. In 2006, the State Council announced that seven industries were to remain under 'absolute' state control: armaments, electricity, oil, telecommunications, coal, civil aviation, and shipping. In addition, several others would remain

3. The Foundation held a workshop on judicial independence in China in December 2007. Publications from the workshop will be published on the Foundation's website in summer 2008.

under 'relatively strong' state control, including manufacturing, automobiles, electronics, architecture, steel, metallurgy, chemicals, surveillance, science, and technology. The goal is to produce thirty to fifty globally competitive enterprise groups. The government is also developing a system similar to that in the United States to investigate the impact of economic transactions on national security, and to investigate and retaliate against trade barriers in other countries.[4] Further, the Anti-Monopoly Law does not adequately address administrative monopolies and sectors dominated by large SOEs. And the bankruptcy law contains a carve-out for certain SOEs, while anti-dumping cases appear to be heavily influenced by political factors, with the MOFCOM rather than the courts playing the dominant role.

Mediation

While the general trajectory for commercial litigation has been relatively consistent and progressive, the nature, incidence, and government sponsorship of mediation has been more varied. Mediation has always been a major form of dispute resolution in China, with ongoing debates about whether its popularity during the imperial era was attributable more to cultural factors, such as the Confucian emphasis on harmony, or institutional constraints, such as the limited budgets provided magistrates for resolving civil disputes. During the Mao era, mediation continued to be the most popular means for resolving civil disputes. However, in contrast to the traditional era, there was less emphasis on social harmony and more emphasis on political ideology and mediation as a tool for educating, reforming, and advancing society (Huang 2005).

Today, there are various types of mediation: mediation by People's Mediation Committees; specialized mediation such as labour mediation; informal and formal commercial mediation, the latter by professional third-party mediation organizations; judicial mediation; and mediation during arbitration. The popularity of all types of mediation had been decreasing until recently, except for formal third-party commercial mediation, which has never been popular (Peerenboom and Scanlon 2005). For instance, the percentage of civil and economic cases resolved through judicial mediation decreased from 69 per cent and 76 per cent in 1989 to 36.7 per cent and 30.4 per cent in 2001 (Fan forthcoming).

Most fundamentally, the reason for this decline was that mediation came to be seen as inconsistent with rule of law. People's mediators often lacked legal training. Even in judicial mediation, many cases were decided based on factors other than law, with judges sometimes pressuring parties to accept settlements, thus depriving them of their legal rights.

In addition, the increased professionalization of judges and lawyers, and the streamlining of the litigation process, made litigation more attractive. With heavier caseloads and stricter time deadlines for completing cases, judges discovered that mediating cases took more of their time on an hourly basis than simply trying the case.

There were also more one-off, high-value contractual disputes between arms-length parties who simply wanted to have their legal rights enforced. The total value of contract disputes rose 40.9 per cent on average from 1983 to 1998, while the average value of the disputes increased 11.9 per cent per year on average (Clarke et al. 2006).

Moreover, several studies found that mediated settlements were not necessarily any easier to enforce than final judgments, with non-compliance rates ranging from 50 to 80 per cent. Parties were in effect using the mediation process as a delay tactic.

Despite the overall decline, mediation has varied by region and level of court.[5] Mediation in urban courts dropped dramatically: the mediation rate in Guangdong

4. See Chapter VII of the 2004 Foreign Trade Law. The Law calls for investigations of the impact of foreign trade on the competitiveness of domestic industries as well as national security, and contemplates such remedies as anti-dumping measures, countervailing duties, or safeguards.

5. Measures to hold judges responsible for wrongfully decided cases and performance evaluation criteria created some incentive for judges to mediate cases. Some courts used the number of appeals or party complaints to measure performance. As a result, some judges sought to mediate disputes or persuade the plaintiffs to withdraw their suit, particularly when the law was not clear, rather than risking reversal on appeal or complaints from parties unsatisfied with the result.

courts fell from 67.7 per cent in 1989 to 23.6 per cent in 2001, while Shenzhen courts mediated less than 12 per cent of cases in 2001 (Fu and Cullen forthcoming). In contrast, although mediation rates also decreased somewhat in most basic level rural courts, many such courts continued to mediate 50 to 70 per cent of cases.

In 2002, the Supreme Court and Ministry of Justice began to re-emphasize mediation.[6] The SPC and the Ministry worried that more cases were being appealed, adding to the costs of the judicial system. Judges for their part did not want to be reversed on appeal, as a high number of reversals would diminish their chance for promotion or in some cases affect their salary and bonus. More fundamentally, the policy change can be traced to shortcomings in the litigation system mentioned earlier. Many parties were not satisfied with the results of litigation because of a perceived lack of judicial competence, actual or suspected corruption, the feeling that laws are at odds with local norms, difficulties in enforcing judgments, or simply the plaintiff's lack of understanding or unrealistically high expectations of what a legal system can do.

Another major reason behind the shift toward mediation was the inability of courts to provide an adequate legal remedy in the kind of 'growing pains' cases that arise in developing countries, such as land-taking cases, labour and environmental disputes, and cases involving socio-economic rights or entitlements including pensions, medical, and welfare claims (Peerenboom forthcoming). The courts' inability to provide an adequate remedy in such cases led to a huge increase in petitions to the courts and other government entities by disgruntled parties seeking relief, and a sharp spike in protests and social disturbances (Minzner 2006). The mediation of such disputes was thus part of the broader strategy to create a harmonious society (Fu and Cullen forthcoming).

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This emphasis however has led to some unintended consequences. Judges in some courts may be caught between solving cases in an efficient manner and the political requirement of a higher mediation rate. To maintain efficiency, some judges have transformed mediation in ways that consume less time and energy and yet satisfy the new push to increase mediation. They will, for example, hear the case to the end and then ask the parties if they are willing to settle the dispute. To achieve a higher mediation rate, some judges persuade, plead, and even force the litigation parties to accept a mediation result. Consequently, many litigants change their mind after they reluctantly sign the mediation letter, which may be leading to higher rates of compulsory enforcement. And in some default on bank loans cases, the banks and the borrower will sign a mediation agreement even though it is clear to all that borrowers have no ability to repay. However, the banks can use the settlement agreement to seek compulsory enforcement. Once that fails, they can then write off the loans as bad debt (Tang and Sheng 2006).

Arbitration

The PRC arbitration system consists primarily of the China International Economic and Trade Arbitration Commission (CIETAC), the China Maritime Arbitration Commission (CMAC), and almost 200 local arbitration commissions set up in large and medium-sized cities

6. In September 2002, the General Office of the CCP Central Committee and the General Office of the State Council issued 'The Opinion with regard to Further Reinforcing the People's Mediation Work in New Times by the Ministry of Justice and the Supreme People's Court'. See also, 'Several Provisions of the Supreme People's Court on the Application of Summary Procedures in the Trial of Civil Cases' (effective 1 December 2003); 'Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court' (effective 1 November 2004).

throughout China. **Cao Lijun's** policy brief focuses on CIETAC, which has been by far the most important in terms of foreign investors.

CIETAC is one of the busiest arbitration centres in the world. While overall arbitration is insignificant relative to the number of disputes resolved through mediation or litigation, CIETAC's caseload has risen dramatically in just twenty years from a mere thirty-seven cases in 1985 to over 900 cases per year today. By way of comparison, in 2005 there were 580 American Arbitration Association arbitrations, and 521 International Chamber of Commerce (ICC) arbitrations.

CIETAC has continually responded to criticisms and market demands by amending its rules – six times since 1988, the most recent in 2005. The revisions reflect two general trends: first, convergence with international best practices; second, more autonomy and flexibility for the parties.

Despite the recent rule changes, investors still find fault with CIETAC on several fronts. The Ministry of Justice has imposed limitations on the role of foreign lawyers, who are not allowed to interpret PRC law but must rather rely on PRC co-counsel. In addition, the pay for arbitrators is low by international standards, thus limiting the number of foreigners willing to serve in the crucial post of chief arbitrator. And ad hoc arbitration is not allowed.

There has also been criticism of CIETAC scrutiny of awards, although other arbitral bodies, including the ICC and Hong Kong Arbitration Commission, also scrutinize awards. Moreover, ICC scrutiny appears to be much more frequent and invasive than CIETAC scrutiny.

Socio-economic disputes

Socio-economic cases involving pension and other welfare claims, labour disputes, land takings, and environmental issues present problems for developing countries because institutions are weak and the state lacks the financial resources to address what are, in essence, economic issues. Dispute resolution of socio-economic cases has been characterized by: (i) notably less effective resolution than in commercial cases; (ii) a trend toward dejudicialization (in contrast to the judicialization of commercial disputes), as the government has steered socio-economic disputes away from the courts toward other mechanisms such as administrative reconsideration, mediation, arbitration, public hearings, and the political process more generally; (iii) a sharp rise in mass-plaintiff suits; (iv) a dramatic rise in letters, petitions, and social protests in response to the inability of the courts and other mechanisms to address adequately citizen demands and expectations; (v) a reallocation of resources toward the least well-off members of society as part of a government effort to contain social instability and create a harmonious society, combined with a simultaneous increase in targeted repression of potential sources of instability, including political dissidents, NGOs, and activist lawyers.

Pension and other welfare claims

Many reforms have sought to revamp the pension system, the most significant of which is the establishment of social security funds to which both the employers and the employees are required to contribute a part (Hurst and O'Brien 2002). Nevertheless, SOE reform and the transition to a market economy have led to many disputes over pension payments and other welfare benefits, including unemployment insurance, job relocation and training expenses, worker's compensation benefits, and medical care.

Many SOEs have gone bankrupt and ceased to exist or are insolvent. Others have been sold off or restructured. The new buyer or restructured company is unwilling or unable to assume the welfare obligations. Some enterprises are unwilling or unable to contribute their share to the social security funds for employees, or to provide retraining, unemployment, or social security payments for laid-off employees. In some cases, local government officials unilaterally decrease the amount of benefits. Meanwhile, some social security fund managers have refused to distribute the pensions or misappropriated funds.[7]

7. As widely reported, one billion yuan of the social security funds in Guangzhou has been misappropriated. See e.g., the *People's Court Daily*, 3 April 2007.

Yet few of these disputes are handled by the courts. Both government and party officials and the courts have preferred to solve these problems through political or administrative channels. These disputes usually involve a large number of pensioners who share a common history and grievance, increasing the likelihood that they will lead to mass protests (Hurst and O'Brien 2002). Thus, local party and government officials have a strong incentive to resolve these problems directly given the importance of maintaining social stability in their performance evaluations. If necessary, governments will often pay off the workers. Some governments, particularly in more affluent areas, have continually increased the pension standard to keep pace with inflation, thus preventing disputes from arising in the first place.

Another reason for the limited role of the courts in these cases is that the regulatory framework in this area is incomplete and sometimes inconsistent. For example, there has been an ongoing debate as to whether these pension claims should be considered a labour dispute or an administrative dispute (Shao 2007). A 2006 SPC interpretation provides that pension and social security disputes between the employer and the employee are considered labour litigation, while disputes between the employee and the agent charged with managing the funds will not be considered labour disputes. However, the interpretation does not expressly state that such disputes will be accepted as administrative suits.

Even when courts do accept these disputes, they have to work with various governmental institutions to find a solution acceptable to all of the relevant parties. Many SOEs were owned by government entities higher up in the administrative hierarchy than the courts handling the dispute, making it difficult for the court to hold against them. Accordingly, courts often emphasize mediation in solving these disputes (Huang and Yang 2006; Wang and Li 2006).

Many of these disputes end up being pursued through the petition system or other channels that seek to get high-ranking officials involved. For instance, the pensions of more than 10,000 female workers from the Victory Oil Field were terminated in 1997. The problem took almost ten years to be partially solved, and was only solved after their representatives successfully passed the grievance to high-ranking central government officials (Qi and Ji 2006). The happy ending is due to the large number of the affected workers. In contrast, politically less salient pensioners and welfare claimants are less likely to find relief by petitioning government officials.

Land takings

Economic development and urbanization inevitably involve the reallocation of land, usually from lower to higher productive users. In the process, some parties are made better off, often developers and corrupt government officials, but also the broad public, while some individuals lose out. Land takings have been common, and controversial, in China. They are one of the biggest sources of large-scale protests.

Land taking cases are complicated in part because of disagreements over how the windfall from rising real estate prices is to be allocated. Urban residents, especially those that worked for the government or SOEs, are often living in housing originally allocated to them by the state for free, and then sold to them at heavily subsidized rates. When the land is requisitioned, the court must decide how much the homeowners should be compensated. Should the current residents be entitled to fair market value for their housing *and* the land use rights, even though the land use rights may be unclear and they obtained the housing at subsidized prices? Those affected may argue that they worked hard for the state for years for low wages, and deserve the windfall. But they have already benefited relative to others who did not have the opportunity to purchase their housing at below-the-market prices. Similar issues arise in the countryside, although farmers may have a greater normative claim to the sales from land use rights given the discriminatory policies that transferred wealth from rural to urban areas through artificially low prices for agricultural products and the large wealth differential between rural and urban areas today.

A more serious problem in rural areas is that the local governments depend heavily on the proceeds from the sale of land to fund development and cover government expenses, both directly and indirectly by transferring the land to higher productive users, often industrial and commercial users, which then pay taxes (Whiting forthcoming). The new businesses are also a source of jobs. The generation of wealth and jobs, at least in theory, should contribute to social stability, one of the key criteria for promotion for local government officials.

Yet what upsets rural and urban citizens the most is the lack of transparency and corruption in land takings. Local governments often ignore the requirement to auction land. Instead, they requisition the land on behalf of a particular party, and then transfer the land at a pre-arranged price, only a portion of which goes to the original land users. Moreover, many government officials benefit personally from the transfer.

The courts on the whole have been ineffective in handling land taking disputes. Most cases involve a transfer to a more productive user, and thus legal challenges on the ground that the taking is not in the public interest fail in China as they do elsewhere (see e.g., *Kelo v. City of New London*). Given the dependence of courts on the local government for funding, judges are not in a position to aggressively pursue allegations of corruption on the part of local officials. Moreover, applying central legal standards to land disputes often fails to address local needs. Rather than enhancing social stability, some court decisions exacerbate social conflicts (Whiting forthcoming). In light of these challenges, some local courts have refused to accept land taking cases, with judges advising parties to file suit in a higher court or take up the issue directly with government officials.

The government's response has been to enact a series of measures to prevent land taking disputes from arising in the first place, including shifting the approval authority upward to provincial governments; re-emphasizing the need for local officials to hold hearings on taking decisions and compensation amounts; requiring that land sales be through a public bidding process; attempting to cool the red-hot real estate sector; and amending the Land Management Law and passing the Property Law to clarify and better protect people's rights (CECC 2004).

In addition, the government has sought to relieve the pressure on courts by limiting the ability of citizens to challenge taking and compensations decisions. In 2001, the State Council issued the Urban Housing Demolition Administrative Regulation, which requires developers negotiate a demolition agreement with residents and provides details for calculating compensation. However, the Demolition Regulation also provides that the developer can apply for a 'forced demolition' if the residents do not accept a developer's compensation proposal that has been approved by municipal authorities. And while the Demolition Regulation allows the residents to challenge a municipally approved compensation proposal in court, it also stipulates that the courts cannot stop or suspend a forced demolition that has been approved by the municipality.

These measures to reduce land taking disputes may have some impact, but more fundamental changes are likely to be needed. In particular, it may be necessary to address the incentive for rural governments to rely on land sales to provide the funds for development. One way to do this would be to increase central funding to local governments. As this is unlikely however, another more feasible approach would be to require that all funds from the sale of land use rights be transferred to the centre and then redistributed. This would also allow the government to reallocate funds from the wealthier areas to the poorer areas.

Labour

The issue of labour disputes is addressed by **Ron Brown** in his policy brief, which argues that their rapid rise is attributable to the transition to a market economy, the jarring process of SOE reform, and the pressures of economic globalization. Labour disputes grew from under 20,000 in 1994 to over 300,000 in 1996. Once again, there are significant regional variations. The more economically advanced areas such as Guangdong, Shanghai, Beijing, Jiangsu,

Zhejiang, and Shandong have more disputes, as do the areas with significant heavy industry and a large number of SOEs, such as Liaoning, Hubei, Fujian, and Chongqing. The subject matter of labour disputes ranges, in descending order, from wages, to termination, insurance, and work injury.

The resolution of labour disputes involves voluntary mediation, mandatory labour arbitration, and litigation if the parties are unsatisfied with the results of arbitration. While still common, mediation has declined in importance. Workers do not trust mediators, who are usually dominated by the Union, which is closely allied with the employer.

Workers win the vast majority of arbitration cases: they prevail in nearly four cases for every one by the employer and partially win a majority of the other cases. Nevertheless, employees are also the most likely to appeal, either because they were not satisfied with the arbitration result or the arbitration award was not enforceable.

Litigation of labour disputes plays a role somewhere between the role of litigation in commercial disputes and in other socio-economic disputes. On the one hand, litigation has become increasingly prevalent and effective, as in commercial law. Litigation cases increased to 122,405 in 2005. Whereas in the past, plaintiffs in labour suits often lost, with the court upholding the decision of the labour arbitration committee, today, the majority wins in court – with plaintiffs enjoying a higher success rate in courts than in arbitration (Michelson 2006).

On the other hand, the courts are often unable to provide effective relief for many of the same reasons that apply to other socio-economic disputes. Cases involving back pay and insurance claims are particularly difficult to enforce, in large part because many companies are operating on very thin margins or are even insolvent. Not surprisingly, many disputes are resolved through mediation at various stages of the process. In addition to the disputes resolved through enterprise mediation, about one-third of the disputes brought to arbitration are resolved through mediation, while about one-quarter of the cases resolved through litigation are mediated settlements. The inability of the courts to provide effective relief may also explain the reluctance to do away with the requirement that workers first go through arbitration before going to court. Although labour advocates have long called for the abolition of mandatory arbitration, a Supreme Court interpretation in 2006 provided only limited relief, allowing workers to go directly to court in wage arrears cases where they have written proof of unpaid wages from the employer and no other claims are raised.[8] In contrast, the 2007 Labour Dispute Mediation and Arbitration Law went the other way, providing for 'binding' arbitration in certain cases, including failure to pay wages or worker's compensation. The law also emphasized mediation and appears to create an additional administrative channel for workers to bring suit.[9]

The petition system

Another response to the failure of courts to provide adequate resolution of disputes was to encourage citizens to make use of the letters and visits system (*xinfang*, hereafter the petition system). The petition system serves a variety of purposes (Minzner 2006). In a very small percentage of cases, petitioners are able to obtain relief. Perhaps more importantly, the system allows citizens to blow off steam, and government officials, particularly at the central level, to obtain feedback about tensions in society and problems with lower level government officials.

The number of petitions rose dramatically until 1999, and then started to decline (similar to the rise in litigation). In 2005, the letters and visits offices

8. Several Issues Concerning the Applicable Law for the Trial of Labour Disputes Cases, 14 August 2006. Granted, one should not expect the SPC to forge new rights given their tenuous legal basis for issuing interpretations. Even the limited change in the SPC's interpretation would appear to be at odds with the Labour Law and thus technically invalid.

9. Whether the law will provide relief for the courts remains to be seen. The ranges of cases subject to 'final' arbitration is limited. And, rather oddly, the law still allows workers and even employers to challenge the limited range of cases subject to 'final' arbitration in the courts.

received a total of 12.7 million complaints, with the number of petitions declining in 2006 by 15.5 per cent to just over ten million (Fu and Cullen forthcoming). Petitioners may seek relief from a wide variety of sources, including Party organs, government agencies, the procuracy and the courts. Provincial courts at all levels handled a total of approximately 3.9 million letters and visits in 2006, or slightly fewer petitions than the 5.2 million first-instance civil cases. The 2006 figures were a decrease of 4.71 per cent from 2005, and more than 50 per cent from 1999, when the total number of complaints handled by the courts peaked at 10.7 million (Li 2007). In contrast, in 1999 China's courts handled 5.7 million first-instance cases.

According to one survey, 63.4 per cent of those who eventually brought their complaints to the central authorities in Beijing had first sought resolution in the courts (Yu Jianrong 2004). The courts declined to accept 43 per cent of the cases, in 55 per cent of the cases the courts decided against the petitioners, and in 2 per cent of the cases the courts were unable to enforce judgments in favour of the petitioners. Most complaints arise from the way cases were handled in rural courts.

In many cases, however, the parties do not understand the law or are unsatisfied with legally correct decisions. In other cases, there is nothing the courts can do. These cases include enforcement cases where the company is insolvent and judgment-proof; corruption cases involving local government officials; bankruptcy cases and land taking cases; and socio-economic issues such as claims for retirement benefits when the company is insolvent or the government lacks the funds to provide adequate medical care (Liebman forthcoming). Unable to obtain effective relief, many petitioners persist in their efforts, repeatedly petitioning the same entities for relief, broadening their appeals to a wider range of entities, and escalating the disputes by taking their cases to Beijing, where they besiege government offices in the hope that central authorities will look more kindly on their claims than local officials.

In the face of this upsurge in petitions and the increasing escalation of disputes to central authorities, the State Council amended the Regulations on Letters and Visits in 2005. The amendments strengthened the rights of citizens in some respects. For instance, the Regulations call for greater procedural fairness, increased powers for the letter and visits offices to respond to citizen complaints, and enhanced supervision of government officials involved in the process, including through the imposition of legal liability for those who do carry out their duties.

However, the authorities appear to be increasingly worried that too many people are blocking government offices, interfering with officials trying to do their work, and upsetting social stability. The Regulations limit the petitioners to three appeals to successively higher level administrative agencies, limit the number of representatives for each visit to five, and emphasize the need to obey the law and not disturb social order.

The 2005 Public Security Administration Punishments Law suggested that the government will start to crack down on those who repeatedly petition government offices. There have been numerous media reports of people detained for petitioning activities in recent years. In a 2007 survey of 560 petitioners who had come to Beijing, 70 per cent felt that local government retaliation had become more severe. Almost two out of three had been detained, with 18.8 per cent sentenced to prison or education through labour (a form of administrative detention) because of their petition activities (Yu 2007).

Mass plaintiff suits

Many socio-economic cases involve multiple plaintiffs. There were 538,941 multi-party suits in 2004, up 9.5 per cent from 2003 (SPC Work Report 2005). Land takings, labour disputes and welfare claims are three of the major types of multi-party suits. In 2004 alone, Shanghai Intermediate Court No. 1 handled twenty-one multi-plaintiff cases, of which seventeen involved land takings, relocations,

and real estate disputes (Shen 2005).[10] In 2006, there were 14,000 collective labour disputes (in 2005; 19,387) involving 350,000 workers (in 2005; 409,819), or just over half of the total number of workers involved labour disputes (see Brown policy brief 2).

Many of these disputes result in mass protests. The number of mass protests rose rapidly, from 58,000 in 2003 to over 74,000 in 2004. In 2001, 28.1 per cent of mass protests involved back pay, pension benefits, and other welfare claims; an additional 9.5 per cent involved decreased payments due to SOE restructurings and bankruptcies; and 13.5 per cent involved compensations in land takings and relocation cases (Liu 2005). Such protests, many of them violent, are a threat to social stability, and thus to sustained economic growth. According to the state media, over 1800 police were injured and twenty-three killed during protests in just the first nine months of 2005.

The courts have developed a number of techniques to reduce public pressure, including breaking the plaintiffs up into smaller groups, emphasizing conciliation, and providing a spokesperson to meet with, and explain the legal aspects of the case to, the plaintiffs and the media in the hopes of encouraging settlement or even withdrawal of the suit. Some courts also try to pacify the protesters through legal means, for example by providing accelerated procedures to access government sponsored funds (Lee 2002). Basic-level courts also often work closely with higher level courts and other government entities through the Social Stability Maintenance Offices (Gu 2007).

In a related move, in 2006, the All China Lawyers Association issued guidelines that seek to reach a balance between social order and the protection of citizens and their lawyers in exercising their rights.[11]

The guidelines remind lawyers to act in accordance with their professional responsibilities. Lawyers should encourage parties and witnesses to tell the whole truth and not conceal or distort facts; they should avoid falsifying evidence; they should refuse manifestly unreasonable demands from parties; they should not encourage parties to interfere with the work of government organ agencies; they should accurately represent the facts in discussions with the media and refrain from paying journalists to cover their side of the story. And they should report to and accept the supervision of the bar association. On the other hand, bar associations shall promptly report instances of interference with lawyers lawfully carrying out their duties to the authorities, and press the authorities to take appropriate measures to uphold the rights of lawyers. Where necessary, local bar associations may enlist support from the national bar association.

The government has closed down or put pressure on some NGOs and law firms that have become too active in pressing for change.

More generally, the government has closed down or put pressure on some NGOs and law firms that have become too active in pressing for change. Some individual lawyers have been arrested, experienced intimidation, or had their licenses revoked in the process of representing criminal defendants or citizens challenging government decisions to requisition their land for development purposes and the amount of compensation provided (Fu Hualing 2006). Meanwhile citizens seeking to protect their property rights, uphold environmental regulations, or challenge government actions have been beaten by thugs and gangs, sometimes with links to the local government, or detained for their efforts (CECC 2004).

Public law: administrative and constitutional law

Developments in public law are characterized by: (i) a manifest shift toward legalized, rule-based governance, though with limited judicialization,

10. The *China Daily* reported that over one million cases of illegal seizure of land had been uncovered between 1998 and 2005. See *China Daily* 2006.

11. Guidance Notice of the All-China Lawyers Association regarding Lawyers' Handling of Multi-party Cases, 20 March 2006.

with courts continuing to play a complementary role to political-administrative mechanisms in dispute resolution, and an even more limited role in the making of key policies; (ii) the development of a wide range of political-administrative mechanisms and channels for handling disputes, including administrative litigation, administrative reconsideration, administrative supervision, party discipline committees, and the petition system (OLA 2008; Minzner 2006); (iii) the limited effectiveness of various mechanisms in addressing citizen concerns, due less to technical or doctrinal issues than to systemic sociopolitical factors that vary depending on the type of case; (iv) more limited progress in constitutional law, with the constitution playing a limited role in dispute resolution (Wang Zhenmin policy brief 1; Cai 2005b).

Administrative litigation

Administrative litigation has been an important symbol of the government's commitment to law-based governance and rule of law. The Administrative Litigation Law (ALL) was passed in 1989. Since then, the SPC has issued two interpretations to clarify various issues, and amendments of the law are currently being drafted.

The number of annual ALL cases has ranged from 80,000 to 100,000 over the last decade (Zhu 2007). Determining how often the plaintiff 'wins' is difficult because about one-third of the cases are settled in other ways, such as rejecting the suit or mediation.[12] However, even counting all such results, as well as all cases where the plaintiff withdrew the suit as a loss for the plaintiff, and setting aside all plaintiff victories on appeal or through retrial supervision, the plaintiff would have prevailed in 17 to 22 per cent of cases between 2001 and 2004. These success rates stand in sharp contrast to success rates in the United States, Taiwan (both 12%), and Japan (between 4 and 8%) (Peerenboom 2002: 400).

Nevertheless, there remain serious problems with administrative litigation. Courts have only limited judicial review power. They do not have the power to review abstract acts (generally applicable administrative rules). Rather, they may only review specific acts, and then only for their legality rather than for their appropriateness.

Moreover, parties may only challenge specific acts that infringe their 'legitimate rights and interests', which has been interpreted to mean personal or property rights. Other important rights are thus excluded, most notably political rights such as the rights to march and to demonstrate, freedom of association and assembly, and rights of free speech and free publication.

The requirement that one's legitimate rights and interests be infringed has also been construed narrowly to prevent those with only indirect or tangential interests in an act from bringing suit. The narrow interpretation prevents interest groups or individuals acting as 'private attorney generals' to use the law to challenge the administration.

The main limitations, however, are systemic. The system for funding courts and appointing and promoting judges is undergoing reform, and varies by region. However, many courts still rely on local government for funding, and judges are still technically appointed by the local people's congresses after vetting by local party organs. This arrangement has led to difficulties in filing suits, external interference in the litigation process, and problems in enforcing judgments against the administrative defendants (Wang 2007).

Again, the nature and severity of the problems differ by region, level of court, and type of case. In general, administrative litigation is more effective in economically developed urban areas than in poorer rural areas. It is more difficult to file cases

12. From 1989 to 1997, the percentage of agency decisions upheld by the court dropped rapidly from over 50% to around 13%. Since then, the percentage has increased slightly to 15–18%. The rate at which the court quashes agency decisions in recent years has ranged from 12–16%. Since 2000, just over 30% of cases are resolved when either the plaintiff withdraws the suit or the suit is withdrawn after the agency changes its decision.

and prevail in basic-level courts in less developed areas where the local governments exercise more control over the courts.

Higher level courts are also less likely to be influenced by pressure from local governments. Not surprisingly, the number of administrative litigation cases appealed has risen steadily to almost 30,000 per year, or about 30 per cent of all such cases (Zhu 2007: 236). Plaintiffs prevail, as measured by decisions quashed or cases remanded to the lower court, in approximately 17 per cent of appellate cases.[13] Even after appeal, parties may petition for retrial pursuant to a discretionary supervision procedure. Rates of success, measured by reversal of the appellate decision or remand for retrial, ranged from 27 to 36 per cent between 2002 and 2004 (Zhu 2007: 242).

All else being equal, cases that involve commercial issues, such as the denial of a license or imposition of excessive fees, are easier for the courts to handle than socio-economic cases. Plaintiffs in the former type of case might still run into problems with local protectionism, government interference, or retaliation. Such problems might also affect administrative litigation cases involving socio-economic issues. However, plaintiffs in the latter are also likely to confront all of the additional obstacles that arise when courts handle socio-economic cases, including conflicting policy goals, central–local tensions, an insufficiently developed regulatory framework, and, most fundamentally, lack of resources to provide an adequate remedy.

Whereas in socio-economic cases, judges are often pressured to resolve the case through mediation, in administrative litigation cases, this has not been allowed under the ALL because of the fear that government officials would intimidate plaintiffs into settlement. However, in recent years, mediation of administrative litigation cases grew despite the prohibition, and an amendment of the ALL is being considered that would permit mediation.

Administrative reconsideration

Another response to problems in administrative litigation suits has been to emphasize administrative reconsideration and other political or administrative channels as an alternative. Unlike in some countries, China allows parties to initiate an administrative litigation suit without first exhausting administrative remedies, except in a narrow range of circumstances. As noted, recent regulations now require parties to first seek administrative reconsideration of the amount of compensation in land taking cases before turning to the court. More generally, the government has sought to encourage administrative reconsideration by making it more appealing.

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Administrative reconsideration offers a number of additional advantages over litigation under the ALL. Firstly, it is free. Secondly, administrative reconsideration bodies may consider both the legality and appropriateness of administrative decisions. Thirdly, parties may challenge not only the specific act but in some cases the abstract act on which it is based. If the reconsideration body finds the regulation inconsistent with higher legislation, it may annul the inconsistent regulation or, if it does not have the authority, it may refer the problem to the body that has such authority.

13. Interestingly, this number has declined over the last ten years, as has the success rate for appeals in criminal and civil cases, suggesting perhaps that judges in first-instance cases are becoming more qualified.

Administrative reconsideration was permitted by regulations issued in 1990. However, reconsideration was not popular. There were only 240,000 applications for administrative reconsideration from 1991 to 1998 (OLA 2008). The government then revised the regulations to encourage greater use of the procedure, and upgraded the regulations to a law. As a result, the number of applications for reconsideration has increased. In 2004, there were 81,833 applications, of which 72,620 were accepted and heard. Of those, 64,953 cases were concluded, among which 37,726 resulted in upholding the administrative agency decision or act (58%), compared to 1714 alterations, 9527 revocations, 401 confirmations of illegality, and 557 orders to the agency to discharge their legal duties (most likely in cases where agencies had failed to take an any action). Thus, the plaintiff obtained some form of relief in about 19 per cent of the cases accepted for reconsideration.

The low success rate would suggest that administrative reconsideration would not be an effective way of reducing pressure on the courts by screening out potential administrative litigation cases. However, it appears that many parties give up after losing in reconsideration. In 2002, Shanxi province had 912 administrative reconsideration cases, compared to 169 administrative litigation cases, of which only thirty-nine (23%) had gone through administrative reconsideration (Shanxi Legal Affairs Office 2002). In 2006, Shandong province had 6288 administrative reconsideration cases, compared to 9647 administrative litigation cases, of which 1043 (11%) had gone through administrative reconsideration (Shandong Legal Affairs Office 2006). Thus, in both places, the vast majority of parties seeking administrative reconsideration did not end up taking their claim to court: 96 per cent in Shanxi; 84 per cent in Shandong. Conversely, in both places, the vast majority of administrative litigation plaintiffs proceeded directly to court: 77 per cent in Shanxi and 89 per cent in Shandong. According to some national statistics, of the reconsideration cases that do go on to litigation, the court upholds the reconsideration decision in three of four cases (Banyuetan 2007).

Constitutional developments

Constitutional law has developed at a slower pace than administrative law. Constitutional law, and constitutional litigation in particular, serves three broad purposes: addressing division of power issues among state organs; resolving conflicts between the central and local government, including inconsistencies between lower level regulations and the constitutions; and protecting individual rights.

The main role of the constitution to date has been to provide an initial distribution of power among state organs. This then provides the backdrop against which legal reforms, which frequently affect the balance of power among key state actors, are negotiated. For example, the constitution now gives the procuracy the power to supervise the courts. In recent years, the procuracy has interpreted this power to mean that it has the authority to supervise final judicial decisions. As expected, the judiciary has argued that the procuracy's power of supervision should be eliminated, or at least limited to general oversight of the court or investigation of particular instances of judicial corruption. According to most judges, the procuracy should have no power to supervise individual cases. The courts have also come into conflict with the legislative branch over similar powers of individual case supervision and with administrative agencies over the power of judicial review of agency decisions.

In the absence of a constitutional court, however, most issues involving the balance of power between state organs, such as whether the procuracy and people's congress should be able to review court decisions, have been left to the political process, with the Party being the ultimate arbitrator when the conflicts become too intense or there appears to be a deadlock.

Constitutional law also provides the basis for addressing conflicts between the central government and lower level governments, which is a form of principal-agent conflict. The rapid pace of legislation and an incentive structure that rewards local officials for achieving high growth rates have led to numerous inconsistencies between lower level regulations and

higher level laws and the constitution. Rather than relying on the courts to strike down lower level laws that are inconsistent with the constitution, the main way for addressing inconsistent regulations is through a filing and review system, with the review performed by the administrative superior agency (OLA 2007).

The 2000 Legislation Law granted citizens and other entities the right to propose to the National People's Congress Standing Committee (NPCSC) that lower regulations were inconsistent with the constitution or laws. The policy brief by **Wang Zhenmin** describes how the government has now established a NPC committee to perform this task, and is in the process of working out the details of how this mechanism will work in practice. This has provided an opportunity to push for changes to protect citizens' constitutional rights and advance constitutional claims.

In a well-known case, Peking University law professor Gong Xiantian published two open letters arguing that the draft Property Law violated basic principles of socialism and a constitutional provision declaring that state property is inviolable. NPC spokespersons, including NPCSC Chairman Wu Bangguo, issued public statements defending the constitutionality of the draft law, and noting that the draft had been amended to provide greater protection to state property and avoid the fraudulent sale of state assets. Although delayed for a year, the Property Law was passed in 2007.

To what extent this new review mechanism will empower citizens remains to be seen. Citizens have submitted at least thirty-seven requests for review, but the NPCSC has yet to respond formally to any of these. Moreover, although the NPCSC issued two circulars setting out detailed procedures for handling proposals for NPCSC review of administrative regulations and judicial interpretations, these circulars do not provide much transparency into how the decisions are actually made.

More generally, while the NPCSC review creates a constitutional mechanism for dealing with one type of principal-agent problem, for the most part, principal-agent issues, including the problem of inconsistent regulations, are dealt with through other administrative and political mechanisms. The role of the courts is limited given their inability to strike down abstract acts.

Constitutional litigation to protect individual rights is only just beginning, and future progress is likely to be slow. In addition to the lack of a constitutional review body, the constitution is generally not considered to be directly justiciable. The SPC did rely on the constitution in reaching its decision in a civil case involving the right to education (Shen 2003). However, that case did not involve enforcing the constitution against the government. The case was also extremely controversial, with proponents of expanded constitutional litigation drawing hyperbolical comparisons to *Marbury v. Madison*, and critics arguing that the decision was at odds with the constitutional structure or unnecessary to provide relief in the particular circumstances. Since then, there have been no cases where a court has cited a constitutional right as the sole basis for its holding (although courts do sometimes cite specific constitutional provisions along with other laws and regulations to support their decisions).

The constitution has, however, been invoked in a series of discrimination cases. In one case that combined the right to education with a discrimination claim, three students from Qingdao sued the Ministry of Education for its admissions policy that allowed Beijing residents to enter universities in Beijing with lower scores than applicants from outside Beijing (Yu Meisun 2004).

Rural residents have also appealed to the constitution to protest discriminatory treatment. In one well-known case, three students were killed in a traffic accident. In China, compensation is based on average income, which differs significantly between rural and urban areas. Thus, the families of two of the victims who were urban residents received more than twice the compensation of the family of the victim who was a rural resident. The family of the rural victim brought a lawsuit to challenge the discriminatory compensation, arguing the standard violated the principle in Article 33 of the constitution

that all citizens are equal before the law. But the court held that the compensation was in accordance with existing law (Inner Mongolia News Net 2007).

Citizens have also drawn on constitutional principles to uphold privacy claims. In a much publicized case, a Shaanxi couple was awarded damages after police stormed into their bedroom while they were watching an adult movie and a scuffle broke out between the husband and police, resulting in injuries to the husband (Peerenboom 2007).

To be sure, most of these cases have been dismissed on technical grounds, including lack of jurisdiction, failure to apply to the proper court, or the lack of authority to overturn an abstract administrative act.

In most cases, relief came in the form of a change in the laws, not a favourable court judgment, and was the result of a fortuitous conflux of circumstances, including media attention.

Moreover, in most cases, relief came in the form of a change in the laws, not a favourable court judgment, and was the result of a fortuitous conflux of circumstances, including media attention. For instance, the rural resident compensation case arose at a time when the Hu–Wen administration was announcing a new policy to create a harmonious society and address social injustice, including rising rural–urban inequality. After the case, which was again widely reported in the press, several provinces adopted a uniform compensation standard for urban and rural residents. SPC president Xiao Yang has also announced that the SPC would soon issue an interpretation changing its earlier interpretation to provide for a uniform compensation standard.

These quasi-constitutional cases generally have involved economic issues. They do not involve political dissidents or the right to free speech. Parties who invoke the constitution to criticize the government or call for greater democratization have been notably unsuccessful.[14] Further, most of the successful cases raised discrimination claims. Discrimination is less politically sensitive, and equality claims are easily understood and generally supported by the public.

Notwithstanding these qualifications, these cases signal an increasing willingness on the part of plaintiffs, lawyers, and courts to look to the constitution as the basis for norms and principles that may be applied in particular cases to expand protection of the rights of individuals, subject to current doctrinal, jurisdictional, and political limitations.

Explaining dispute resolution patterns

The three most striking patterns from this survey are: first, the much better performance of institutions for handling disputes in urban areas compared to rural areas; second, the significantly greater progress in handling commercial law disputes compared to socio-economic claims; and third, the more advanced state of development of administrative law compared to constitutional law.

The first pattern is largely explained by economic growth. As is generally true everywhere, there is a high correlation between wealth and the strength of legal institutions (Kaufmann et al. 2007; Peerenboom 2007). In richer urban areas, there are more and better judges, lawyers, and law schools (Zhu 2007). Overall, people have fewer complaints than their counterparts in rural areas. But when they have a dispute, they are more likely to resort to litigation to resolve them, and significantly more likely to be satisfied with the result. In the event of mass protests, urban governments are capable of allocating funds to pacify some of the disputants.

14. For instance, Wang Zechen was sentenced to six years for subversion for attempting to establish a Liaoning branch of the banned China Democratic Party, attacking the Party as a dictatorship, and advocating the end of the single party system and the establishment of a multi-party system with separation of powers. In court, Wang did not contest the facts but argued the acts were legal (Peerenboom 2007).

Given the greater importance of commerce in urban areas, there are also more commercial disputes. This leads to a demand for better legal institutions and more just and efficient ways of resolving disputes. The government has invested heavily in improving the investment environment, including strengthening the various mechanisms for commercial dispute resolution, particularly the courts. The government has done so because it relies heavily on economic growth for legitimacy, and because continued economic growth is essential if the government is going to continue to reduce poverty, improve human development, and create a harmonious society. At the same time, the government has ensured that the development of certain areas of commercial law that have broad-ranging significance for the national economy and sociopolitical stability, such as bankruptcy and competition law, remain subject to various political-administrative controls, with a limited role for private actors and the courts.

The second pattern is also largely explained by levels of wealth, and in particular, the related problems that lower income countries such as China lack the resources to resolve what are fundamentally economic issues; and existing institutions, particularly the courts, lack the means, competence, and/or independence to provide effective relief.

On the other hand, the government cannot simply ignore the problems. The transition to a market economy has led to greater income inequality, environmental degradation, and social injustice. People nowadays are much more conscious of their rights, and have much higher expectations of the government. When their needs are not addressed, they are increasingly likely to take to the streets to protest, or to travel to Beijing to beseech central leaders for assistance.

The government has responded by adopting policies that attempt to reallocate resources to those who have lost out, or not benefited as much from economic reforms; by emphasizing sustainable growth; by re-emphasizing traditional, non-judicial mechanisms for resolving disputes such as mediation, petitions, and administrative reconsideration; and by developing new mechanisms, such as greater public participation in the law-making, interpretation, and implementation processes.

Yet none of these mechanisms are likely to be adequate in the short term. Accordingly, the government has also increased targeted repression to ensure social stability. This approach generates criticism both from liberals, who feel that what is needed is not repression but more rapid liberalization and political reforms, and from conservatives, who feel that what is needed is tighter control to maintain law and order, and that greater liberalization would plunge China into the kind of chaos found in many other developing countries in Asia and elsewhere (Peerenboom 2007).

The third pattern, the more rapid development of administrative law in comparison to constitutional law, is explained in large part by the different benefits and risks to the central authorities. Administrative law is a useful means for central authorities to obtain information about, and to rein in, local officials. Regional diversity makes it difficult to design and implement national laws in a uniform way. Many laws are drafted in general terms, and allow local officials considerable discretion to pass implementing regulations that adapt the national law to local circumstances. In addition, the incentive structure puts pressure on local officials to achieve growth and social stability without significant support from the central government. As a result, local governments often disregard national laws and policies, creating significant principal-agency problems. The various administrative law mechanisms allow the government to use citizen complaints to monitor local officials. Of course, the developments in administrative law are also a response to citizen and investor demands for more effective governance. However, administrative law mechanisms are most effective when they are used against lower level entities on issues that the central government supports, rather than when used against the central authorities directly or indirectly by raising issues the central authorities deem politically sensitive.

Constitutional law developments are more problematic because they have the potential to alter the balance of power among state organs and challenge the basic principles of the political system. Nevertheless, the constitution has served those inside and outside government as a source of empowerment for legal institutions and the development of constitutional norms. In particular, the constitution has played a role in establishing broad grounds of legality, accountability, and justice, which activists and reformers have then drawn on to push for reforms.

However, there is as yet no constitutional review body. And even if a constitutional review body were to be established with jurisdiction over individual rights claims, progress would likely be slow, as it was in South Korea and Taiwan prior to democratization. While the courts might be able to address adequately certain discrimination claims, they are likely to be less effective handling civil and political rights, which are threatening to the ruling party, or socio-economic cases, for the reasons discussed.

Conclusion and policy recommendations

Given that many of the disputes are economic in nature and the problems with the institutions and mechanisms for resolving disputes are wealth-related, the government must continue to promote economic growth. At the same time, more resources should be allocated to rural areas to address underlying problems and thus prevent disputes from arising in the first place, and also to strengthen institutions.

Access to justice is a pressing issue. In April 2007, the State Council issued new standards for litigation fees in an effort to provide socially vulnerable groups better access to the court system. Litigation fees in some categories will be totally waived while others will be cut in half. There are also sporadic reports about courts enforcing judgments in favour of socially weak groups. These developments are largely in response to the central government's call to create a harmonious society and 'courts for the people'.

Although some low-income litigants might benefit from the new fee standards, the impact on the courts and ultimately on access to justice remains unclear. Many courts, especially rural courts in poor areas, cannot afford a decrease in litigation fees, which have been their main source of funding. Some rural courts have thus resisted implementation of the new policy, while others have decided to implement the standard for one year to see what the effect on court finances will be, and then to re-evaluate accordingly.

The centralization of funding for the judiciary, along with an increase of funding especially for poorer rural areas, would go a long way toward addressing many of the current problems, but an increase in funding alone will not be sufficient. The efforts to build institutional capacity must continue. The competence of judges needs to be raised through training programmes and strict adherence to the higher educational standards for recruiting judges. The quality of the legal profession must also be improved, particularly in rural areas, where there are few lawyers or legal service providers, and even fewer well-trained ones (Fu Yulin forthcoming).

Given the wide diversity in China, a varied approach is needed that takes into consideration local circumstances, including the nature of disputes, people's expectations, and the level of development of the economy and institutions. A highly technical, legalistic solution centred on the courts is not always the best approach. Mediation of some disputes may be more appropriate in the countryside, although there should be safeguards to ensure that people are not coerced into settlement, and that vulnerable parties are not discriminated against in the process. Rural areas in particular might benefit from the development of small claims courts.

More generally, dispute resolution should be rationalized by allocating disputes to effective channels. Courts should not be required to accept socio-economic disputes that they are ill-equipped to handle. However, if these disputes are to be allocated to political or administrative channels instead, then these mechanisms must be improved.

One lesson learned from the experiences of global law and development projects over the last forty years is that there is no single blueprint for reforms. Countries begin with different traditions and institutional endowments. Different stages of the development process present different challenges, as do different areas of law. There is therefore a need to adopt a pragmatic approach to reforms, to try out new methods, and to abandon current practices if they no longer serve their purposes. Much of China's success to date, whether in the area of economics, rule or law, or good governance, can be attributed to its pragmatic approach.

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