

ASSESSING CHINA'S LEGAL REFORMS

BENJAMIN L. LIEBMAN*

I. INTRODUCTION	18
II. LEGAL CHANGE IN THE REFORM ERA	19
III. CHALLENGES TO THE FUTURE OF CHINA'S LEGAL REFORMS	23
IV. CONCLUSION	30

* Professor of Law and Director, Center for Chinese Legal Studies, Columbia Law School. Much of this essay is drawn from three works. See Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1 (2007); Benjamin L. Liebman, *A Populist Threat to China's Courts*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN POST-REFORM CHINA (Mary Gallagher & Margaret Woo eds., forthcoming 2010); Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in MAO'S INVISIBLE HAND (Elizabeth Perry and Sebastian Heilmann eds., forthcoming 2010).

Prepared for "The 30-Year Anniversary of Reform and Opening Up": An International Academic Seminar Forum for Social Development and Social Policy, Dec. 16–17, 2008, Academic Division of Social, Political and Legal Studies, Chinese Academy of Social Sciences.

I. INTRODUCTION

Over the past thirty years China has engaged in what is perhaps the most rapid development of any legal system in the history of the world. The Chinese legal system has been fundamentally transformed since 1978. At the beginning of the reform era there were few laws or trained personnel. Today, China has sophisticated legal institutions, thousands of laws and regulations, and the third largest number of lawyers in the world. Law has begun to regulate both state and individual behavior in ways that were inconceivable in 1978. Commitment to the rule of law has become an important part of state ideology and state legitimacy. Popular understanding of law has expanded dramatically and the legal system has become an important route for addressing grievances and resolving disputes.

Despite this progress, however, many observers note that legal reforms have often trailed economic reforms, that law still fails to limit state power, that courts and other institutions continue to confront a range of problems, and that popular confidence in the legal system remains low. This essay will begin with a short summary of the dramatic changes in China's legal system during the reform era and will then discuss challenges that the legal system is confronting today. These include the need to balance populism with respect for legal institutions, excessive discretion, rising inequalities and unequal access to justice, lack of transparency, and the need to make courts more autonomous and independent. China is not alone in facing these challenges. Yet the ways that these problems are manifested in China differ significantly from those in other countries, reflecting both China's history and the institutional framework in which the Chinese legal system exists. The central theme that emerges from surveying reforms already undertaken and contemporary challenges is the unique context and content of China's legal reforms. Legal reforms have helped to facilitate economic development and, more recently, to balance development with efforts to address rising inequality. The distinctiveness of China's reform experience, however, has come from the dramatic progress that has been made absent significant institutional change. The adaptability of reforms to existing institutional environments helps to explain their success. Yet addressing many of the major problems facing

the legal system today may also require greater institutional reform, both inside and outside the legal system.

II. LEGAL CHANGE IN THE REFORM ERA

A full examination of legal reforms is beyond the scope of this essay.¹ Instead, I will highlight five characteristics of legal reforms during the past thirty years. These trends demonstrate much of the progress that has been made. They also help explain some of the challenges confronting legal reforms today. My own research has focused largely on China's courts, and thus this essay largely discusses developments in the courts. Important reforms have also been undertaken in other areas of the legal system.

First, law has become an important aspect of state ideology and of popular consciousness.² The Chinese Party-state has focused tremendous resources on strengthening the legal system and increasingly articulates key state policies in legal terms. Law has come to play an important role in regulating conduct in a range of areas. These include not only economic development, investment, and business, but also consumer rights, environmental protection, and labor and employment relationships. Law today not only facilitates economic development, it is increasingly used to regulate such development. Law is also being used to create norms, rather than simply being enacted only after state policies are determined and implemented, as was often the case in the early years of the reform era. Legal reforms have also been part of China's successful efforts to assume a prominent role in the international community. Many legal reforms, in particular those in criminal law and intellectual property law, have sought to bring China into line with international practice.

¹ Extensive literature in both China and the West has surveyed changes since 1978. See, e.g., STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (2002); RANDALL PEERENBOOM, *CHINA'S LONG MARCH TO RULE OF LAW* (2002); 贺卫方, 二十年法制建设的美与不足 [He Weifang, *Positives and Insufficiencies During 20 Years of Legal Construction*], 中外法学 [ZHONG WAI FA XUE], No. 5, 1998, at 8; 贺卫方, 司法改革的难题与出路 [He Weifang, *Problems Facing Judicial Reform and Solutions*], 南方周末 [SOUTHERN WEEKEND], Sept. 17, 2008; 朱景文, 中国法律发展报告——数据库和指标体系 [ZHU JINGWEN, REPORT ON CHINA'S LEGAL DEVELOPMENT - DATABASE AND PARAMETERS] (2007); 李曙光, 中国改革三十年: 从人治到法治的转型 [Li Shuguang, *Thirty Years of China's Reform's: Transforming from "Rule by Man" to "Rule of Law"*], 人民网 [PEOPLE'S NET], Mar. 24, 2008, <http://politics.people.com.cn/GB/30178/7035623.html>; 李林, 改革开放三十年与中国法制建设 [Li Lin, *30 Years of Reform & Opening Up and China's Construction of its Legal System*], 社会科学管理与评论 [MANAGEMENT AND REVIEW OF SOCIAL SCIENCES], No. 4, 2008.

² This is most clearly evidenced by the inclusion of the principle of "rule of law" into China's constitution in 1999.

At the same time, however, an instrumentalist approach to law continues to dominate, with law often following, rather than leading, changes in state policy. There is nothing unique about law being used as a tool of the state. As Liang Zhiping argues, the distinct characteristic of China's reforms has been the nature of the instrumentalist goals: law continues to be used as a tool to transform society and legal reforms, at least until recently, have largely focused on protecting the state's interests.³ Legal reforms, especially in the first two decades of the reform period, have paid relatively little attention to protecting individuals against the state.⁴ In the view of many western and Chinese legal academics, the legal system needs to do both. Likewise, legal reforms, although impressive and important, have often appeared to lag behind economic reforms. One of the interesting paradoxes of China's reform era, at least in the view of some western academics, remains how China has managed to enjoy remarkable economic development without robust legal institutions. Western literature, in contrast, has generally argued that strong legal protection for property rights is crucial to ensuring economic development.

Popular consciousness of law has increased dramatically. Today individual grievances are aired far more often in legal terms than they were thirty years ago. This includes greater use of the courts and of adjudication than in the past. Increased popular understanding of law, however, also means that when individuals pursue grievances outside formal legal channels they often do so with reference to law. Ordinary people are increasingly aware of their legal rights and believe that law should and can be used to protect their interests. Law has become a tool that ordinary people use to resolve disputes and to challenge what they perceive to be unjust decisions or state actions. Much of the rise in legal consciousness reflects the tremendous emphasis on education about law over the past three decades, in particular state efforts to publicize new laws and the attention to law in the mass media.

Second, legal reforms have begun to limit state as well as individual conduct. Reforms have created rules that regulate, regularize, and limit state conduct, as reflected in the growth of administrative law and the creation of new laws and regulations in areas such as land regulation. Rules now exist governing how administrative entities should act and the rights of individuals to challenge such actions. There are, to be sure, many problems in administrative law and many opportunities for further reform. Nevertheless, the reforms that have been undertaken to date are signifi-

³ 梁治平, 法治在中国:制度、话语与实践 [LIANG ZHIPING, RULE OF LAW IN CHINA: SYSTEM, DISCOURSE AND PRACTICE] 130-31, 140-42 (2002).

⁴ These goals are not mutually exclusive: for example, the state's use of law to limit misconduct by local officials also serves the interests of individuals.

cant. Legal reforms, even if they do not always limit state power or provide effective redress for individuals against the state, have created rules governing state behavior and mechanisms for exposing and challenging state conduct when such rules are breached. Legal reforms have also shifted expectations regarding how state entities should act and, as a result, have laid the groundwork for further reforms. Law now shapes state behavior even if it does not always constrain it.

Third, experimentation has been an important component of successful legal reforms.⁵ The emphasis on experimentation is not unique to the legal system; experimentation has been a hallmark of economic reform as well. But it has been particularly important in facilitating legal reforms and perhaps in helping to create stronger legal institutions. Experiments in law include not only the formal creation of new legal rules in certain local areas or the promulgation of trial regulations, but also willingness of courts and local governments to take actions that at times contradict national rules or laws. In some cases, experimentation has been an essential part of efforts to localize (本土化) new legal rules, adjusting them to actual conditions on the ground. Experimentation provides valuable experience that may be used to formulate national laws or regulations.

Experimentation may also be helpful in strengthening legal institutions as courts and other institutions develop both greater competence and greater confidence. Experimentation in law appears increasingly to be spreading horizontally, aided by the Internet, rather than only through the “point to surface” (从点到面) method that previously dominated. Courts (and other legal institutions) are able to learn about decisions elsewhere in China even absent such decisions being published in official publications, or being endorsed by the Supreme People’s Court or other central authorities. Such decisions may not formally be classified as precedent in the Chinese system but they are increasingly used as reference points by courts elsewhere encountering new or difficult legal questions. Whereas in the past courts had to look to superior courts for guidance, today they are able to use the Internet to consult decisions by equal level courts all across China. Judges are not the only beneficiaries of the ease with which information now spreads: the actions of procurators, lawyers, and ordinary citizens are also influenced by knowledge of legal developments elsewhere in China. Yet there is a risk, discussed further below, that tolerance of experimentation may also send a message that law is easily altered or ignored.

⁵ I discuss this point in more detail elsewhere. See Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in MAO’S INVISIBLE HAND (Elizabeth Perry and Sebastian Heilmann eds., forthcoming 2010) [hereinafter Liebman, *Populist Legality*].

Fourth, legal reforms have resulted in significant professionalization. Increased professionalism of legal actors and institutions is one of the most important accomplishments of legal reforms. Improved training for state actors in the legal system, in particular judges and procurators, has yielded significant benefits. Only a few years ago it was routine to read western or Chinese accounts of the courts that bemoaned the fact that few judges had formal legal education or had even been to university. Today the situation is dramatically different, the result of tremendous emphasis on training by the Supreme People's Court, new rules governing who can become a judge, and the introduction of the national judicial exam. The expansion of Chinese legal education has also resulted in far more legally-trained personnel in China (indeed, China now has three times as many law schools and legal departments as does the United States). Concurrently, however, legal reforms continue to be characterized by tensions between professionalism and populism. Although the early years of reform largely focused on shifting from populism to professionalism, in recent years we have seen somewhat of a return to an emphasis on populism in the legal system. As discussed below, populist pressures today are also leading to significant challenges to the authority of newly professionalized legal institutions.

Fifth, China's legislative and administrative systems have become vastly more complex and detailed than they were three decades ago. Hundreds of laws and thousands of new regulations have been adopted. China's legal framework is not yet complete, particularly in the public law area. But legislation has shifted from focusing primarily on areas crucial to economic development to a broader range of public and private law topics that are essential to creating a comprehensive legal system. China's legislatures are more important than they were thirty years ago, reflecting both the increased complexity of law and the increased professionalism and legal knowledge within people's congresses. At the same time, however, people's congresses are just beginning to explore ways in which they might do more to incorporate popular views in legislative drafting, including through publication of draft laws and holding public hearings.

Given the context of this conference, it is worth noting the crucial role that Chinese legal academics have played in China in advancing reforms over the past thirty years. Legal academics in China, and in particular those from the Chinese Academy of Social Sciences, have played important roles in shaping legal reforms. Hundreds, if not thousands, of Chinese law professors have now studied or conducted research overseas and have drawn on these experiences to contribute to reforms in China. Numerous legal academics have assumed roles as judges, officials, or public intellectuals, influencing public discussion and official debate on legal matters.

Legal academics have been important advocates of reform and have played crucial roles in helping to facilitate reforms, in particular by drafting new legislation and regulations. Academics have been involved in most major experiments in law. And today, academics are playing a crucial role in boosting the understanding of how law actually works through empirical legal research, thus helping to bridge the gap between law on the books and law in practice.

III. CHALLENGES TO THE FUTURE OF CHINA'S LEGAL REFORMS

Continued reform and strengthening of the legal system is essential to sustaining economic development and to preserving social stability. Many Chinese scholars have written in detail about the current problems in the Chinese legal system—from corruption to lack of competence to the need to limit external interference in the courts—and about possible paths to addressing such problems.⁶ For the purposes of this conference, I will highlight three issues that I think pose particular challenges to the legal system and in particular the courts. I focus on these three issues because they are important but also because they are somewhat overlooked in contemporary discussion of the legal system.

First, the Chinese legal system is still searching for a balance between respect for the authority of legal institutions and populism. I define populism broadly to include public opinion voiced through the media and also complaints raised through the letters and visits system. Although such complaints are often raised by individuals, they are effective in part because of concerns that escalation of such complaints could pose a threat to social stability.

In recent years courts have come under increased pressure from public opinion voiced through a range of mechanisms, including the traditional print and broadcast media, on-line media, and the letters and visits

⁶ See, e.g., Zhang Qianfan, *The People's Court in Transition: The Prospects of the Chinese Judicial Reform*, 12 J. OF CONTEMP. CHINA 34, 69–101 (2003); 张千帆, 三农问题的宪法学思考 [Zhang Qianfan, *Thoughts from a Constitutional Perspective on Agricultural, Rural and Peasant-Related Issues*], 法学研究 [LEGAL RESEARCH], No. 4, 2006, at 39; 李昌林, 从制度上保证审判独立——以司法独立的国际标准为参照 [Li Changlin, *Securing Adjudicatory Independence Through Institutional Arrangement – A Perspective from International Standards of Judicial Independence*], 西南政法大学学报 [SOUTHWEST CHINA UNIVERSITY OF POLITICS & LAW JOURNAL], No. 3, 2005; 李林 & 肖君拥, 全球化背景下中国法治面临的挑战 [Li Lin & Xiao Junyong, *Challenges to Rule of Law in China Against the Backdrop of Globalization*], 法制与社会发展 [THE LEGAL SYSTEM AND SOCIAL DEVELOPMENT], No. 5, 2002, at 34; 朱苏力, 送法下乡——中国基层司法制度研究 [ZHU SULI, *SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA'S BASIC-LEVEL JUDICIAL SYSTEM*] (2000).

system. Chinese courts have a difficult time resisting such pressures, in particular pressure from the media. Pressure on the courts is effective because court decision-making remains susceptible to intervention from Party-state officials: judges are concerned about public opinion because they know that it influences higher-ranking officials. Similarly, courts are concerned that petitioners may take their complaints to higher ranking officials, or even to Beijing, resulting in pressure on the courts. And intervention into pending cases remains a legitimate role for Party-state superiors.⁷

The effectiveness of popular supervision of the courts has resulted in both the popular perception that court decisions can be influenced by the media or by protest and courts' attempts to restrict media access to the legal system—with a resulting decline in transparency in the courts. Courts have also devoted tremendous resources to preventing and handling petitioning. Although some of these actions are positive, such as trying to ensure that litigants understand court procedures and the reasons behind court decisions, in some cases judges are also being distracted from their responsibility to decide cases according to the law. The difficult cases in China, as in other jurisdictions with stronger traditions of judicial independence, are those in which popular opinion clashes with existing law.

Media and popular scrutiny of legal institutions is important in most legal systems. Likewise, most legal systems struggle to achieve a balance between popular opinion and judicial authority and independence. In many systems, media oversight is key to the protection of judicial independence, as such oversight helps both to ensure that courts follow the law and that they are not subject to interference. Over the past decade the Chinese media has played important roles in exposing problems in the legal system, often highlighting unjust court decisions. As in most other countries, the vast majority of cases receive no media coverage, and greater transparency in the courts, as well as increased media coverage, would be beneficial. Likewise, the *xinfang* system has served to expose injustice and to correct wrongly decided cases. But there is nevertheless a challenge in balancing public oversight and a healthy role for public opinion with the need to respect the authority of legal institutions. At times in China it appears that popular opinion (through the media or through the *xinfang* system), not law, decides the outcome of court cases.

The challenge of balancing popular opinion and court authority is perhaps greater in China than it is in legal systems in which legal institu-

⁷ Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005).

tions have a stronger history of independence and authority. In China, part of the problem is that courts have generally been perceived as less authoritative (and less fair) than the media. In addition, China has a strong tradition of permitting citizens to seek redress through non-legal channels, in particular the letters and visits system. Unlike most western countries, citizens do not generally perceive court decisions as authoritative and final. Widespread and widely reported problems in the courts have encouraged the view that courts need to be supervised so as to reduce misconduct and ensure justice. These factors, along with the continued legitimacy of intervention by Party officials into court decision-making, combine to make public opinion and populism particularly influential in China.

This rise in popular supervision of the courts has come just as courts have been seeking to professionalize and enhance their own ability to decide cases fairly. The growing sophistication of Chinese law also means that there may be an increasing volume and range of cases in which legal outcomes are in tension with popular concepts of morality. If so, courts that yield to populist pressures, whether raised in the media, online, or through petitioning, may not be deciding cases according to the law. Adjusting decisions in response to petitioning or to media scrutiny also sends a message that courts and law are easily manipulated or influenced. As noted above, courts are not wholly to blame for yielding to such pressures: the influence of populism reflects both continued oversight of the courts by officials and also a continued commitment to flexibility in the legal system.

Some in China appear to continue to be wary of excessive emphasis on professionalization, arguing that courts need to do more to take account of popular opinion, and that courts (as well as other legal institutions) are becoming elitist. Yet it is important to remember that professionalism and elitism are not equivalent. A professional legal system should not be one that is inaccessible or unintelligible to ordinary people. The challenge is to construct a system in which trained professionals apply the law consistently and fairly without external influence—but also in a way that is accessible and comprehensible to non-experts.

One additional reason popular opinion, petitioning, and protesting may be so influential in the Chinese legal system is that other mechanisms for citizen input remain underdeveloped. As a result, those with grievances focus on pressuring the courts in individual cases, rather than on altering laws or regulations. Likewise, media oversight of the legal system tends to be episodic, not systematic. Instead of regular monitoring of the legal system by the media, controversial cases burst into the public spotlight in sensational fashion. Media coverage of the courts thus can be

said to run to extremes—but also to be too rare. And “populism” and “public opinion” in China often refer to popular views that are selected or even encouraged by state actors, including the media and government officials: it remains difficult for genuinely autonomous popular views to be influential without such views being adopted or reflected by the media or officials.

China likewise lacks sufficient legal procedures for officials to voice concerns or respond to unpopular decisions in the legal system. In the West, and in particular in the U.S., it is common for political leaders and the public to express outrage at court decisions. Yet officials rarely seek to pressure courts to change their decisions, and intervening in a pending case is viewed as completely impermissible. Instead, the political process is used to craft legislative responses to court decisions (or, in a less positive example, to remove elected judges from office). Thus faced with a decision with which they disagree, political leaders or civil society organizations will seek to use the political process to change the relevant law either through the enactment of new laws through the democratically elected legislature or through referenda voted on by the public at an election. This was seen most clearly recently in California, where voters amended the state constitution and overturned a decision by the California Supreme Court granting equal rights to gay and lesbian marriage. It is also worth noting that in cases in which political leaders take such action, it is virtually always because they believe courts have misinterpreted the law—not the facts. The U.S. also has other mechanisms for state officials to express their views in cases, most notably through submission of government views in “friend of the court” legal briefs.⁸

In the U.S. it is also common to hear politicians criticize court decisions without seeking to take any action and without resulting in pressure on the courts. Indeed, the legitimacy and autonomy of courts is enhanced not just by issuing decisions that conform to popular views of justice but also by having political leaders respect decisions in cases in which law and popular morality diverge. In China it remains rare to hear a political leader argue that court decisions should be respected even if one disagrees with the outcome. Yet doing so is essential to increasing the authority of the courts; so long as courts are susceptible to external pressure, resourceful litigants will seek to apply such pressure to their advantage.

The ways in which populism influences Chinese courts highlight how the roles of judges and other legal professionals in China differ from

⁸ In addition, the majority of state court judges in the United States are elected; judges who issue unpopular decisions thus can also be voted out of office. In contrast, all federal judges have life tenure. Elections for judges are controversial, with campaigns often involving large amounts of money being spent by special interest groups with particular political (and economic) agendas.

those their namesakes play in the West. This is not a criticism: it is a description of reality and a warning that we should be wary of equating Chinese judges (and others in the Chinese legal system) with their western counterparts. Judges, prosecutors, and other professional actors in the Chinese legal system have obligations that extend beyond applying the law to the cases before them. Most significantly, they are responsible for ensuring that national goals, including the preservation of social stability, are met. This is made clear, for example, by the fact that evaluations of judges in many Chinese courts include evaluation of the social effect of their work, not just whether decisions are legally correct.

This concern with social stability helps explain the receptiveness of courts to popular oversight and why Party-state officials sometimes intervene in response to popular outcries concerning the legal system. At present, the formal legal system appears less interested in outcomes that are fair or consistent than in outcomes that avoid instability. In the long run, however, a systemic preference for stability over substantive or procedural justice would appear to impose costs, both for individuals and for the state. A system of populist justice is unlikely to be consistent or fair across a range of cases. As a consequence, it is unlikely to be an effective long-term mechanism for maintaining social stability.

A second challenge facing the Chinese legal system today is that legal development, like economic development, has been uneven. There is a large gap between the quality of legal professionals and the functioning of the legal system in major developed areas and in more remote or less developed interior areas. The Chinese media have reported on the continued problem of lack of legal personnel (and lack of competence of legal personnel) in less developed areas. As with populism, this is not a problem unique to China: all large countries have similar problems, to a degree. One only needs to read the pages of major U.S. newspapers to find similar accounts regarding the United States.

Yet inequality in legal development may pose a particular risk in China, where legal institutions have historically been weak. The risk is that inequality—and in particular resulting inconsistencies in how law is applied and the popular perception that law and legal institutions primarily serve the interests of the well-off—will undermine popular confidence in legal institutions. If legal institutions are to enhance their legitimacy in the eyes of the public, they need to do more to show that they are able to address grievances brought by those who have yet to reap the benefits of China's economic miracle. Failure to do so will encourage those with grievances to pursue non-legal mechanisms for resolving disputes, which may be a threat to social stability and to the legitimacy of legal institutions. More must also be done to make the legal system accessible. Chi-

na's construction of a legal aid system is one of the most impressive aspects of the last ten years of legal reform. Further efforts are needed to develop legal aid, in particular through encouraging a range of both state and non-state actors and organizations to provide legal assistance to those in need.

One consequence of legal reforms since 1978 is that tremendous emphasis on legal education and rights consciousness has created expectations among ordinary people that the legal system should protect their legitimate interests. Yet the legal system at present appears unable to meet these expectations; it has become common to hear complaints that the legal system only protects the well-off or well-connected, or that law cannot solve the problems of ordinary people. As a result, there is a risk of popular disillusionment with law and legal institutions as legal education and rights consciousness outpace reforms of the legal system.

One important cause of complaints regarding the Chinese legal system is a lack of popular confidence in the legitimacy of legal procedures. The focus of litigants (and petitioners) becomes outcomes, not whether litigants have been treated fairly. China thus differs from the U.S., where most litigants express confidence in the legal system and believe they have been treated fairly even when their claims have been unsuccessful.⁹ There is at present little evidence that litigants in China believe that they benefit by belonging to a society that respects legal procedures. If so, this lack of trust in the fairness of the system suggests limits to how far the process of institutionalization and legalization can go towards addressing China's increasing volume of complaints and unrest. Without greater respect for legal procedures, litigants will continue to seek ways to work around such procedures, including through appeals for official intervention. Adjusting outcomes in response to such appeals may achieve justice in individual cases, but it risks undermining the authority of legal institutions and social stability. If ordinary people are to be encouraged to respect the authority and finality of court decisions then officials outside the courts need to do the same.

Third, Chinese legal institutions continue to enjoy wide discretion. Flexibility is a key element of the legal system. Discretion itself is not a problem: courts in all systems enjoy discretion. Likewise, courts in all systems, including those in the continental civil law tradition and in Anglo-American common law systems, create new law as they make decisions. In China there has at times been criticism of courts that "make law" (造法). Such criticisms are misguided—courts that fill in the interstices of

⁹ TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH POLICE AND COURTS 172 (2002).

unclear laws are doing exactly what they should do. No legal system is able to codify the answers to all legal questions. Chinese courts do routinely make law, in areas ranging from contract law and tort law to administrative law and criminal law. Courts are serving to highlight issues that need greater clarification and are creating rules that govern a range of commercial and personal relationships in areas in which the people's congresses have not legislated. We should recognize this as a healthy sign of court development and of the increased use of formal legal institutions to resolve disputes.

At the same time, however, widespread innovation and experimentation absent a system for standardizing outcomes can lead to the perception that law is inconsistent or easily malleable. All legal systems need mechanisms for resolving conflicts or inconsistencies in order to ensure that like cases are treated alike and that courts are not being swayed by non-legal factors. One problem today in China is that courts may in some ways enjoy both too little and too much autonomy. "Too little" refers to the fact that courts are still sometimes subject to external interference and pressure. Yet "too much" refers to the fact that absent such external pressure courts often have large amounts of discretion. As a result, it is common to see very different outcomes in cases that at least on paper look quite similar—including in some cases decisions issued from within the same court. More needs to be done to create a system for resolving conflicts among courts and for ensuring standardized decisions—for example, by giving provincial courts the power to issue legal interpretations. Judicial law creation is necessary and indeed positive. Nevertheless, if the creation of legal rules by courts is not subject to significant constraints there is also a risk that judicial lawmaking may come to be seen as an example of the arbitrariness with which legal rules are created and enforced in China.

Flexibility in legal reform has often been assumed to be a necessity brought about by the vagueness of many laws and the novelty of many legal issues and institutions. One source of such flexibility is that much legislation today continues to lack specificity and thus fails to provide sufficient guidance. But flexibility also remains a key ideology underlying legal reforms. Thus courts that yield to outside pressure are in some cases acting consistent with the design of the legal system—which demands that formal rules yield to concerns for stability or to other Party-state goals. Flexibility may be necessary at this stage of legal development, but excessive flexibility also risks undermining moves toward greater emphasis on procedure and greater professionalism. It also risks undermining popular confidence in the authority of law, as ordinary citi-

zens come to see law as malleable and implementation as subject to the whims of local officials.

The continuing emphasis on flexibility in the legal system, like the continued importance of populism, also reflects unresolved tension between trends toward professionalism and populism. It may also reflect continued distrust of excessive formality in the legal system. To a degree, the early years of China's legal reforms were characterized by emphasis on increasing professionalism and formality. More recently, we have seen a greater attempt to ensure that courts do not over-rely on professionalism and formality at the expense of flexibility. The challenge for China is not to choose either professionalism and formality or flexibility and populism. Rather, it is to construct a legal system in which professionalism and adherence to procedural norms is seen as consistent with protecting the interests of ordinary people.

There are of course other problems in the Chinese legal system, including the difficulty of implementing laws and of enforcing court decisions, corruption, continued problems with competence, and the close ties of courts to local governments. Addressing these is also crucial to ensuring popular confidence in the legal system and that the legal system is able to address the interests of the state and of ordinary litigants. My goal here is not to provide an exhaustive list; rather, it is to highlight issues that are sometimes overlooked and that may be unique to China at this stage of development. We have seen over the past thirty years much progress in addressing many of these problems. One of the lessons of the first thirty years of legal reform is that much can be done within the current system to increase the fairness and authority of courts, procuratorates, and other legal institutions.

IV. CONCLUSION

Deriving solutions from this short summary of progress and challenges is difficult. Yet even if there are no clear conclusions regarding the steps required for further legal reform there are nevertheless themes that may help us understand the unique challenges China faces as it enters the next phase of legal and economic reform.

First, the success of China's legal reforms has been due in part to the ability to select and adapt foreign models to domestic conditions. China has looked overseas for models. In some cases changes to Chinese law have come in significant part from a desire to bring China's legal system into accord with international practice. At the same time, reforms have also reflected and taken advantage of China's own traditions. I have re-

cently argued in writing that some important innovations in China that appear to be attempts to import western models also have historical pedigrees in China.¹⁰ These include attempts to reflect and adapt to popular opinion through the creation of public hearings and other input mechanisms, the creation of legal aid institutions, and the concept of *sifa weimin*, which encompasses reducing filing fees, making courts and court leaders more accessible, and increasing access to legal education. In creating these new practices, China looked to overseas examples. At the same time, however, such reforms have been possible in part because they have been consistent with China's historical tradition, including both Ma Xiwu practice and mass-line ideology. This suggests that China will need to continue to create innovative solutions to address problems in the legal system—solutions that do not simply consist of importing foreign models but rather look both to international best practice and to China's own legal and political traditions.

Second, we should acknowledge that China is attempting to create a legal system that is unique. China's legal reforms aim to create a fair system that serves both to further economic development and to address the rights and grievances of those left behind by such development. Ensuring social stability requires that the legal system accomplish both tasks. There are examples of largely fair legal systems operating within political systems that are similar to those in China today. Yet there are few, if any, legal systems that have engaged in such widespread and successful reform of legal institutions without significant political reform. My point here is not to say that legal reform cannot occur absent political reform or to dismiss the political reforms that have already occurred. All aspects of Chinese society and governance have been radically reformed since 1978, often in ways far beyond the most optimistic predictions of that time. Instead, my argument is that China is in many ways attempting to do something that is largely unprecedented as it creates a legal system that is more sophisticated and important than that created in virtually any other nation that has or has had similar political institutions. As a result, focus on western models may not be the best route forward.

The exceptional nature of China's legal reforms, however, is not merely a consequence of the institutional backdrop against which they have occurred. The distinctiveness also comes from mixing foreign imports and increased adherence to rule of law values into a system that continues to embrace flexibility and populism as core principles of the legal system. Consistent application of law and treating like cases alike are fundamental to most conceptions of the rule of law. As a result, it is

¹⁰ Liebman, *Populist Legality*, *supra* note 5.

common to see flexibility and populism as in tension with rule of law values. Yet China has embraced commitment to legal reform and made significant steps toward the rule of law while at the same time maintaining flexibility within the legal system. Increased commitment to the regularization that law brings exists side by side with a system that remains susceptible to populist demands and appeals to popular morality and local custom.

Such a mixture is at times problematic and may prove to be unsustainable: excessive flexibility may come to be understood as undermining legal reforms. One of the lessons going forward, however, is that reliance on increased formality and professionalism has not provided legal institutions with legitimacy. There now appears to be recognition that courts and other legal institutions need to actively cultivate popular support. The question is whether appeals to populism can be part of the solution both for increasing popular confidence in the courts and for increasing the autonomy of legal institutions, rather than being seen as undermining steps toward the rule of law. Western theory generally views appeals to populism as in tension with the independence of courts. Can China create a different model, one in which populism is key to strengthening legal institutions and to diminishing interference in the courts?

The challenge for legal institutions, and in particular for the courts, is to increase popular confidence in the courts without returning to populist mass justice. One mechanism for doing so is to increase court transparency. Another is to take further steps to show that courts can protect the interests of the less well-off members of society. Put differently, courts and legal institutions should focus on building popular support not through altering decisions in response to popular outcry but rather by taking steps in more routine cases that lead, over time, to the accretion of public confidence. Likewise, the Ma Xiwu method remains relevant, but must also be balanced with increased commitment to rule-based decision-making.

We should also recognize that there is a limit to what legal institutions can do on their own; strengthening the authority of the courts, for example, will also require changes in how other arms of the Party-state view and respond to the courts. In particular, officials outside the courts must learn to respect decisions by the courts even if they do not agree with them. Similarly, legal institutions will continue in many respects to reflect national policies and priorities, rather than to create them. But greater institutional change may be necessary to ensure that the legal system is able to operate fairly and without external interference.

China needs further legal reforms in order to ensure both continued social stability and economic development. Some needed reforms may look impossible or unrealistic given China's existing institutions. Yet one

of the lessons of the past thirty years is that China's legal institutions, legal professionals, and ordinary citizens have been tremendously innovative, adaptable, and resilient. Despite many continuing problems, legal reforms have accomplished more than virtually anyone expected in 1978. We may not be able to predict the form of future reforms, but the history of China's first thirty years of legal reforms also provides a basis for optimism about the possibility of future reforms.

