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Enhancing Credibility and Transparency Through Judicial Reforms

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At the Third Plenum of the 18th Central Committee in November 2013, the Communist Party of China (CPC) announced a decision to reform its judicial system.¹ It emphasized ‘exercising jurisdiction and prosecutorial power in an independent and impartial manner in accordance with the law’, and improving the mechanism for exercising judicial power. In particular, it stipulated that ‘public trials and prosecutorial work must be made more transparent’ and to ‘press ahead with publicizing court judgment documents that have come into effect’.² This was an important, though not wholly new, departure.

¹Decision on Some Major Issues Concerning Comprehensively Deepening the Reform.

²Third Plenary Session of the 18th CPC Central Committee, “Decision of CCCPC,” 33–4.

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In a bid to create more judicial transparency, the Chinese courts had already introduced a series of reforms. For example, the Supreme People's Court had brought out several publications³ with a view to promoting judicial transparency to 'safeguard people's rights to know, participate in, express and oversee the work of the People's Courts, protect the legitimate rights and interests of the litigants, improve the level of judicial democracy, regulate judicial acts, and promote judicial impartiality'.⁴ They also aimed to 'protect fully the litigation rights of the litigants, willingly accept the supervision by litigants, take the initiative to invite the National People's Congress (NPC) and its Standing Committee to supervise its work, appropriately deal with public opinion supervision by the media, and build a fair, efficient and authoritative socialist justice system by enhancing transparency in court trials'.⁵ Enhancing judicial transparency would, it was thought, improve relations between the courts and society.

In compliance with the people's requirements, the courts are expected to expand the scope, as well as diversify the forms, of judicial transparency. The Chinese courts need to strengthen their judicial legitimacy because they are facing a crisis of confidence. To counter this and build judicial credibility, it is essential to establish legitimacy. Therefore, one of the key tasks facing the courts is how to establish judicial legitimacy through transparency within the existing political framework.

'Legitimacy' is a complex concept. In that judicial legitimacy encompasses both law-based and socially recognized legitimacy, which one should we consider more important? It is generally believed that judicial legitimacy should be based on *legality*, yet legality is nothing other than law-based legitimacy, namely the procedural legitimacy of the justice system. Therefore, exemplifying the courts' search for procedural legitimacy is the fact that they (the courts) regard the regulation of judicial acts as an important objective of judicial transparency. At the same time, however, the courts also seek socially recognized legitimacy, although to a more

³Regulations on Strictly Implementing the System of Public Trials (1999), Several Opinions on Enhancing Transparency in Trials in the People's Courts and Provisions on Transparency in Enforcement in the People's Courts (2007), and Six Provisions on Judicial Transparency (December 2009).

⁴China.com, "Judicial Transparency."

⁵Lawtime, "Opinions on Enhancing Transparency."

limited extent. Judicial transparency is not only an important means by which the courts seek to please society and ensure judicial authority, but it is also a way of regulating the political acts of other state organs and, by promoting political reforms through social forces, ensuring the authority of the justice system within the political framework. By advocating judicial transparency, the courts are in effect seeking socially recognized legitimacy, which I shall here call 'substantive legitimacy'. In this regard, the courts need to answer a number of important questions. For example, why are they pursuing both procedural and substantive legitimacy? What value lies in establishing legitimacy, and what are its limitations? And how are the courts supposed to set about enhancing judicial transparency?

In this chapter, I first analyse the concept of legitimacy before going on to discuss the value and limitations of procedural and substantive legitimacy in the justice system. I then look at some of the problems confronting judicial transparency in China and the strategies that Xi Jinping's regime are using to enhance it.

The Meanings of Judicial Legitimacy

The Concept of Legitimacy

Judicial transparency is about legitimacy. Judicial legitimacy is essential to both the justice system and to social relations, but the concept of legitimacy is complex. In an empirical sense, judicial legitimacy exists where judicial procedures are in place and the public recognizes it as such. If a judicial authority is unable effectively to control the trial process and the outcomes of trials, such trials will be in name only and the system will be unsustainable. Society has no need for an incompetent judicial authority controlled by external forces. A judicial authority must reinforce the establishment of legitimacy if it is to acquire authority. We should not confuse judicial legitimacy with the operational capacity of the justice system, for a judiciary with relatively strong judicial capacity does not necessarily carry sufficient legitimacy. If a court has legitimacy, the trials conducted in it are in conformity with the law and the public recognizes and respects its decisions.

The importance of the concept of ‘legitimacy’ is self-evident. Coicaud states that ‘the importance of the notion of legitimacy is recognized, as is attested to by the fact that the observers of political life cannot prevent themselves from referring to it. But this recognition goes hand in hand with a reluctance to broach the question of political judgment’.⁶ As Habermas commented, ‘political theories occupied themselves with the issue of the rise and fall of legitimate domination, at the latest since Aristotle, if not since Solon’.⁷ Although the concept of legitimacy is frequently used, it has very vague meanings and there is a lack of clear definition.⁸ From a descriptive viewpoint, however, legitimacy at least highlights that one cannot rely on coercive power alone to sustain a regime. There is a vast difference between a regime that the people recognize wholeheartedly and one that forces them to obey its authority—the former has legitimacy, the latter does not. Political practices in human society show that, although political domination is inseparable from violence or material force, resorting to violent coercion alone only achieves a temporary conquest, rather than effective long-term domination. Any kind of coercive force has to be tested against the criteria of legitimacy, otherwise it will degenerate into violent coercion, which means that its effectiveness will not last. Therefore, stable authorities are always seeking to legitimize their domination. Only by establishing legitimacy can coercive power become a meaningful and legitimate form of state power.

‘Legitimacy’ refers mainly to the fact that people recognize the political power. It conveys two levels of meaning—being legitimate and being legal. Being legitimate means to conform to established legal norms based on the doctrine of legal positivism. It also, however, implies the people’s support of and loyalty to the political power because of its compliance with value-based norms, which goes beyond legal positivism. As Habermas noted:

⁶Coicaud, *Legitimacy and Politics*, 1–2.

⁷Habermas, *Communication and Evolution*, 186–7.

⁸Przeworski believes that the notion of legitimacy is so vague that it lacks any substantive content, and therefore should be abandoned (Przeworski, *Transition to Democracy*, 47–63). Stillman also points out that the concept of political legitimacy needs to be reviewed, because people have not been aware of the significant arbitrariness and prejudice contained therein (Stillman, “The Concept of Legitimacy”, 32–56).

Legitimacy means that there are good arguments for a political order's claim to be recognized as right and just; a legitimate order deserves recognition. Legitimacy means a political order's worthiness to be recognized. This definition highlights the fact that legitimacy is a contestable validity claim; the stability of the order of domination (also) depends on its (at least) de facto recognition.⁹

However, 'if belief in legitimacy is conceived as an empirical phenomenon without an imminent relation to truth, the ground[s] upon which it is explicitly based have only psychological significance'.¹⁰ From the above discussion it is clear that legitimacy entails a value judgement from a normative perspective.

It must be pointed out that, although legitimacy has a normative value orientation, it does not simplistically refer to the idea of conformity to a particular value. Undoubtedly, all societies have their established values, but legitimacy cannot be inferred by relying solely on such values. Parsons argues that any action relies on established norms, values, and belief systems;¹¹ however, these are abstract, general, and imperfect, therefore they may not be used as guidelines for specific actions under particular circumstances and conditions. Parsons defines 'legitimation' as a process by which actions in specific situations are appraised in terms of established values, norms, and beliefs that are based on specific provisions under particular situations.¹² For an action to be recognized by others, it must be explained with the aid of established beliefs, values, and norms. In fact, such an explanation may not be related to the true motives of the action, but rather its purpose is only to allow the action to be accepted by others. Therefore, legitimacy cannot be acquired by purely relying on established beliefs, values and, norms, but can only be achieved when the specific situations under which established beliefs, values, and norms are applicable have been taken into consideration. It should be clear from the above that the establishment of legitimacy is a dynamic process rather than just a set of static values. All societies have their established values,

⁹ Habermas, *Communication and Evolution*, 206.

¹⁰ Habermas, *Legitimation Crisis*, 97.

¹¹ Parsons, *Structure and Process*.

¹² *Ibid.*, 175.

but relying on these alone will not infer legitimacy. For an authority to have legitimacy, it is essential to consider the relationship between established values and the specific social context. It is of paramount importance to recognize the above argument, otherwise the emphasis on legitimacy will collapse into dogmatism and a resultant crisis of legitimacy.

Procedural Legitimacy of the Justice System

Law plays a decisive role in modern societies where the procedural legitimacy of the justice system is mainly manifested in the form of 'legality'. The rule of law is the most important basis on which legitimacy is established in modern Western societies. This is what Weber defines as 'rational-legal authority'. 'Rules are a potent resource of legitimating power. They fix with precision the scope and limit of official authority, thus offering seemingly clear tests of accountability.'¹³ The very nature of the rule of law establishes legitimacy for authorities to exercise their power. The public can express its level of recognition and obedience to the political and legal systems by assessing the deviation between individual actions and the legal rules prescribed by the state, based on their inner value systems. In view of the value of the legal system, the public can also understand why the state is entitled to regulate individual actions by exercising its power. Weber believes that in today's Western society, 'the most common form of legitimacy is the belief in legality, the compliance with enactments which are formally correct and which have been made in the accustomed manner'.¹⁴ Under rational-legal authority, the political consensus is mainly achieved between the ruling regime and those being ruled by way of procedures and systems. If a political decision is made, or an action taken in accordance with established systems and procedures, and the operation completed through the prescribed channels, it is naturally legitimate to comply with and support such a decision or action. Whether the people support a judicial authority depends on how it is run, how orders are made, and the nature of the procedures and outcomes. What kind of judicial processes are needed to acquire legitimacy?

¹³ Nonet and Selznick, *Law and Society*, 68.

¹⁴ Weber, *Economy and Society*, 37.

Well, it all comes down to passing judgments in accordance with the law and insisting on procedural fairness. Procedural fairness, that is legality, is the most important factor in winning people's support.

Why is law so important for a modern political authority? The Weberian interpretation is that the transformation from a traditional to a modern society is a process of secularization and rationalization, as well as a process during which people become disenchanted with former world views. In a secular society, the law has to be evoked to defend any social order. The formal rules and procedures embedded in the legal community are sufficient to legalize political decisions. The law itself requires no further legalization; it does not even need substantive support. Fuller identified eight principles about laws: (1) they must be designed in a manner that can generally be applied; (2) they must be widely promulgated; (3) they should be prospective rather than retroactive; (4) they must be clear; (5) they must be non-contradictory; (6) they must not impose impossible standards; (7) they should remain relatively constant; and (8) there must be congruence between the actions of law enforcement officials and the laws.¹⁵ From the above characteristics, it is clear that the fundamental feature of the rule of law is that it overcomes arbitrariness. One of the main reasons why a judicial procedure fails to realize its prescribed functions or has limited effects is that the system lacks adequate authority, with the result that the rules are not strictly and conscientiously implemented. To achieve greater judicial legitimacy, the actions of the judicial authority should be legalized and judicial actions strictly regulated.

The procedural legitimacy of the justice system is important because the latter is stable and constant. Judicial actions should consist of predictable judicial decisions based on a stable system rather than on the interests of individuals or on a utilitarian calculation of benefits. A judicial action is not stable if it is built on utilitarianism, or if a judicial decision is accepted only because it is beneficial to the community. This is because changes in people's interests always occur faster than the interests of a stable system. Rather than inclining towards the changing interests of various parties, a judicial authority needs to rely on a stable legal system to maintain long-term legitimacy. How can a stable judicial

¹⁵ Shen, *Modern Western Jurisprudence*, 58–62.

system be created? Douglas suggests that the fundamental principle in creating stable concepts or institutions is the naturalization of social classifications so that they become normal, undoubted, and acceptable. After being naturalized, institutions become part of the universe and are therefore ready to stand as the grounds of argument for other issues.¹⁶ Douglas discussed three specific mechanisms for achieving naturalization, namely that institutions should (i) confer identity and shape people's thinking habits, (ii) enable social groups to remember and forget, and (iii) make classifications and put things into different categories. Once law becomes a faith, the legal system will attain stability and, quite naturally, the justice system will acquire long-term legitimacy.

Procedural legitimacy of the justice system is very important because it emphasizes the value of procedural fairness. As social value systems become more diverse, the importance of procedures as the basis of judicial legitimacy becomes increasingly more apparent. Without procedures, it is impossible to achieve a fair justice system and judicial adjudication becomes out of the question. Judicial legitimacy not only implies that the community desires, or at least accepts, the result of a judicial ruling, but also that such a result is achieved through certain procedures that are acceptable to the community. Procedural fairness is of paramount importance. Some judicial decisions may achieve the desired social influence, but if the procedural rules have been violated, such judicial actions will lack legitimacy. Conversely, a judicial action that follows the procedural rules may be ineffective if it fails to achieve satisfactory results; but, nevertheless, it will have legitimacy.

Legitimacy is based on people's subjective evaluation of the judicial process. When the public evaluates the legitimacy of judicial actions, its main concern is whether the procedures used in reaching judicial decisions are fair. The judicial outcomes themselves are not the psychological basis on which legitimacy is evaluated.¹⁷ Procedural fairness is the most important principle of judicial actions. It means that people can participate in the procedures in an equal manner and that the procedures

¹⁶Douglas, *How Institutions*, 82–3.

¹⁷The reason why gamblers accept the results regardless of winning or losing the game is because gambling has fair procedures. See Rawls, *A Theory of Justice*, 80–3.

are transparent. Therefore, the legitimacy of China's judiciary should centre on the procedural fairness of the justice system. Only by acting fairly and in accordance with the procedures and rules can the judiciary acquire legitimacy.

It is evident that procedural legitimacy is very important and rests on some kind of established judicial system. Hamilton et al. pointed out that:

The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.¹⁸

The above assertion acknowledges that the legitimacy of the judicial system is very important and does not come from external coercive forces, such as violence or financial power, but from a specific system based on the principles of democracy, neutrality, and impartiality. Similarly, judicial legitimacy does not come from elections, for it is not based on majority rule. In this sense, the will of the people or public opinion must not influence judicial judgments. Judicial legitimacy has to come exclusively from the fact that the people have voluntarily accepted it. It is self-evident that every citizen has a moral obligation to obey judicial decisions.

Although procedural legitimacy is a vital part of the establishment of judicial legitimacy, we must recognize that it also has its limitations. From the perspective of *law as it ought to be*, too much emphasis on the procedural legitimacy of the judiciary may eventually move towards legal positivism. However, legal positivism cannot explain how positive laws acquire legitimacy and is likely to equate legitimacy with legality. Therefore, the limitations of procedural legitimacy have to be recognized. The laws upon which the justice system is based can only acquire legitimacy if they reflect values the public recognizes and cater for the interests of the community. As Unger noted, 'some precautions are needed at the outset. First, formality is always a matter of degree: law is never purely

¹⁸Hamilton, Madison and Jay, *Federalist Papers*, 391.

formal, nor can formality ever vanish'.¹⁹ He discussed the limitations of formality by examining the relationship between formality and equity:

The more equity is sacrificed to the logic of rules, the greater the distance between official law and the lay sentiment of right. As a result, the law loses its intelligibility as well as its legitimacy in the eyes of the layman; he knows it either as a chest of magical tools to be used by the well-placed or as a series of lightning bolts falling randomly on the righteous and the wicked.²⁰

Therefore, procedural legitimacy is not equivalent to legitimate procedures or legitimacy. All judicial systems require procedures and legal forms to a certain extent, but for a judicial authority to be recognized by the people, substantive legitimacy must be considered.

Substantive Legitimacy of the Justice System

It is widely believed that judicial legitimacy arises from compliance with established procedures and legal principles; however, this is far from satisfactory in a sociological sense. Judicial legitimacy cannot simply be understood as legality, nor can it be classified as being purely an issue of judicial procedures. From a sociological perspective, in addition to adhering to procedural fairness, the courts should present an image to the public of being fair and impartial during trials. This depends on both the ability of the court to present its fair image, and on the public's perception of, and preference for, what constitutes a fair action by the court. As stated in the documents published by the Supreme Court, justice should be 'visible justice', judicial efficiency should be 'efficiency that can be felt', and judicial authorities should be 'authorities that have been recognized'.²¹ Not only does a judicial action need to be fair, but such fairness should also be visible and felt. Therefore, judicial legitimacy involves both procedural and substantive legitimacy. The notion of substantive legitimacy refers to

¹⁹ Unger, *Law in Modern Society*, 190.

²⁰ *Ibid.*, 191.

²¹ Lawtime, "Opinions on Enhancing Transparency."

the public perception of the judicial system, and such perception relies on judicial democracy. In modern democratic societies, judicial legitimacy must be established through designated procedures or mechanisms if it is to achieve transparency and prudence, and it must meet the needs of the public. That democracy is being increasingly considered as a factor of judicial legitimacy means that the values and beliefs of the citizens must be taken into account when making court judgments.

The focus of substantive legitimacy is judicial democracy. Judicial legitimacy is mainly manifested through people having real faith in the judicial authority, or giving de facto recognition to the judiciary through their actions. Democratic discourses and democratic procedures thus become the most powerful evidence of these conditions. In a rational modern society, where 'God has died' and the sanctity of religion can no longer be relied on to justify the legitimacy of modern politics, democracy is taking over. Historical evidence suggests that, throughout the 20th century, democracy had become a universal value as well as the main driving force behind political and social development in the world. Democracy is not a perfect system, for social inequality in the real world hampers its realization. Participatory democracy and deliberative democracy are constantly emerging, but political legitimacy is the reason why democracy has continued to thrive. There is a Chinese saying that 'win the people's support and you will win the world'. In today's world where the concept of equality is deeply rooted, it is very difficult to win people's support and sustain it in the absence of democracy. Therefore, democracy must be incorporated into the system to establish judicial legitimacy and harmonize the relationship between the judiciary and society, with an emphasis on judicial democracy.

Taiwanese scholar Lian-Gong Chiu asserts that judges should serve the litigants, and so must step down from their 'pedestal' to do so. This is a system in which the judiciary is meant to serve the public: the judges are regarded as the litigants' servants and the justice system is perceived of as warm and humane.²² The courts are places where people come to resolve disputes; in other words, they are the courts of the people. Because the people grant the judges their jurisdiction, they should exercise it for the

²²Chiu, *Judicial Modernization*, 17.

people's benefit. As such, the judges must abandon the principle of *ex officio* in terms of their professional ideologies. They must respect all parties involved in the litigation and treat litigants from all parties equally, if they are to achieve real transparency at every stage of the trial rather than superficial transparency aimed at litigants.

Substantive legitimacy, which deals with the relationship between the judiciary and society, requires judicial neutrality. The logic of the justice system is that the courts and litigants from both sides form a triangle during the dispute resolution stage. Such a relationship is subject to continuing tensions because the courts are always under pressure from the litigants. Ideally, the courts should act independently as a third party and acquire legitimacy through their judgments. However, a court has to decide which side to support, so it cannot satisfy the litigants on both sides. Judicial neutrality becomes particularly important under such circumstances, which is why it forms the basis of judicial legitimacy.

Substantive legitimacy also requires the courts to be responsive; in other words they need to demonstrate their openness to society through judicial transparency and open procedures. If they adhere to these standards, the courts acquire legitimacy and the judicial system becomes more democratic. Courts of law must always remember that judicial legitimacy originates from judicial neutrality and not from punitive forces, elections, or fiscal policies. Therefore, the establishment of judicial legitimacy should be based on fair procedures rather than on external power. As a system or power built on a thin definition of democracy, the judiciary must be responsive. In a democratic society, the justice system should incorporate responsive courts and respond to the needs of society in a timely manner.

It is evident that judicial transparency is essential to achieving substantive legitimacy. Generally, public trust in the judiciary depends on the extent to which procedures are predictable, which in turn depends on how transparent and stable they are. Decisions made through predictable and controllable procedures are more likely to be accepted. Although fair procedures do not necessarily result in fair outcomes, they are under normal circumstances more likely to produce fairer outcomes than opaque ones. This is because the fairness of litigation procedures ensures that all parties to the litigation are able to participate equally in the process, thus protecting the dominant position of the litigants and allowing them to accept the legitimacy of the judgment. Fair procedures are manageable, transparent,

and able to be monitored. They are the prerequisites to achieving substantive fairness because they can restrict the self-expansion of jurisdiction and reduce interference in judicial judgments from extra-legal influences. The level of judicial transparency and the commitment to achieving it directly determine whether the public perceives the justice system as fair and just. As the German jurist Gustav Radbruch commented:

The series of principles adopted in litigation, including the adversarial principle, principle of orality, principle of direct trial and principle of concentration, in essence boil down to transparency. In particular, they need to be supervised by the press and the parliament. Judicial transparency should not be aimed at supervision only. The fact that the public are actively involved in legal activities will gain people's trust in the legal system. Meanwhile, such trust is the prerequisite for them to participate in these activities, such as jury trials, autonomy and the parliamentary system.²³

In summary, although different people interpret the concept of legitimacy differently, judicial legitimacy undoubtedly involves institutional legitimacy in cases where complying with a system is the only means of acquiring legitimacy. Not only should the courts respect procedural fairness, but they should also show society that they do. As a form of political power, the justice system is weak and neutral in that it has to build its image of impartiality and neutrality through procedures. As such, the only way forward is to promote a prudent and transparent judicial system through judicial transparency.

Characteristics and Challenges of Judicial Transparency in China

Characteristics of Judicial Transparency

Because of the value of judicial transparency in enhancing judicial legitimacy, since 2009 the Chinese courts have been actively exploring new ways to push judicial transparency towards all round transparency, full procedural transparency, and substantive transparency.

²³Radbruch, *Introduction to Legal Science*, 125–6.

The first stage is to advance from procedural to substantive transparency. Procedural transparency involves admitting members of the public to hearings in public galleries and allowing them to access the judgment papers of cases held in a closed court. It also entails permitting journalists to report the cases openly in the media. Substantive transparency involves granting the public open access to information, such as admissible evidence, findings of fact, and judgments on liability. To implement these reforms, the courts are gradually improving their methods of pre-trial evidence exchange and regulating the way judges are able to control actions during trials. This is with a view to enabling the litigants to present disputed facts, adduce evidence, and have a full debate on disputed matters and liabilities in court in an open and comprehensive manner. A system whereby witnesses in criminal cases are required to give evidence in court has also been developed and now, to ensure transparency and objectivity in evidence submission and cross-examination, key witnesses and expert witnesses must attend court. Four procedures on public hearings²⁴ have been enacted and implemented. These stipulate that reviews of major litigation matters involving retrial applications submitted by litigants, objections to enforcement actions, requests for state compensation, and applications for reduced sentences and parole for offenders shall all take place in public hearings. The purpose of having open, transparent, and equitable hearing procedures is to protect the litigants' rights to know, participate, and oversee, to safeguard the litigation rights of the litigants effectively, and to defend the interests of all parties involved in the litigation in an equal manner.

The second stage is the move from transparency in the litigation process to transparency in the grounds for reaching judgments. The former entails elucidating the specific stages of the litigation process, including initiating the court case, submitting evidence, and the court debate. The latter consists of ensuring that the process of reaching decisions, the reasons for making those decisions, and the grounds on which they are made become more transparent. This is to ensure that the litigants are fully informed and aware of the procedures throughout the process. Some courts have laid down their opinions on how to resolve several important

²⁴ These include regulations on the application for a public hearing or for rehearing cases.

issues concerning the paperwork arising from the court's judgments. These include the stipulation that the judgment papers should fully reflect the hearing procedures of the cases, should accurately summarize the disputes between the parties, and fully elucidate the grounds for determining whether or not evidence is admissible. They should also clarify how facts are obtained and describe the basis on which laws are applicable; if the litigants are to understand exactly what is going on they need access to a proper analysis of the laws and regulations in language that is easily accessible to them. There is also a case for regulating the interpretation stage of the hearing process by requiring judges to provide full and reasonable explanations during case hearings, regardless of the type of case, how it is closed, or what queries the litigants have raised. This is to ensure that the litigants are 'able to make sense of the decisions' and are 'fully aware of the reasons for winning or losing the case'.

The third stage is to advance from open access to information to litigation guidance. There is a clear need to revamp the judicial concepts and replace the narrow pursuit of an authoritative judgment with a more people-oriented approach to justice. It is also necessary to change working methods by replacing the old inquisitorial system based on an *ex officio* authority with an adversarial system emphasizing litigation guidance. In addition to keeping the litigants informed of the litigation matters and workflows, it is necessary to take active measures to provide guidance, for instance by distributing leaflets on litigation risks and regulating the way information is divulged and interpreted. This is to ensure that litigants are well informed of their rights and obligations as well as the risks at various stages of the case's initiation, preservation, hearing, and enforcement. By helping litigants exercise their rights properly, such as the right to apply for relevant persons to be excluded to avoid conflicts of interest and the right to appeal, it is hoped that unfavourable outcomes caused by the litigants' lack of knowledge can be largely prevented.

The fourth stage of introducing transparency is to take it from court trials to judicial affairs. There should be more transparency in trial procedures, processes, outcomes, and the grounds for making decisions. More transparency in judicial affairs would allow the public to participate in the proceedings in a better informed, more appropriate, and timely manner

and would ensure a more equal and more efficient distribution of legal aid. Relevant measures include:

- Providing case updates via a quick search service to keep litigants abreast of information relating to their cases;
- Hearing processes and case transferrals;
- Regularly publishing the names of retired staff and lawyers excluded from making legal representation in particular courts (this is to guarantee the right of litigants to apply for the exclusion of certain relevant people);
- Posting notice of a hearing on the Internet so that the public can observe cases when the court is sitting;
- Helping litigants make enquiries by providing them with the office phone numbers of the judges in their cases and posting the duty officer contact numbers of all courtrooms and other service departments on the Internet;
- Providing the public with prompt information about trial updates and other relevant matters by holding news conferences and broadcasting information on the Internet.

The fifth and final stage is to proceed from granting the litigants full rights to information to allowing open access to the public. The former allows the litigants to retrieve the relevant information and to participate fully and effectively in the proceedings, whereas the latter allows the wider public to access and scrutinize the judicial work. The following measures are under consideration:

- Establish working mechanisms such as allowing the public to observe cases freely when the court is sitting;
- Invite appropriate people to observe case hearings;
- Raise public awareness of the laws and regulations;
- Fully implement jury supervision and law enforcement supervision by electing people's jurors and appointing special law enforcement supervisors;
- Provide updates on trials in a timely, objective, and comprehensive manner by actively exploring different ways of publicizing legal activities, such as live coverage of trials, webcast and newspaper articles;

- Enhance the transparency and credibility of judicial work by publishing judgment documents of closed cases on the Internet.

Challenges Facing Judicial Transparency

For more than a decade now the Chinese courts have been introducing reforms with a view to improving judicial transparency. A publication entitled *Essentials of the Five-Year Reform Programme for the People's Courts* proposed the full implementation of a system of public trials. Since then, the Supreme People's Court has published a number of other documents on the subject.²⁵ Transparency in court trials has advanced considerably since the days when it was confined solely to public hearings. In 2013, the Supreme People's Court brought out several publications with a view to implementing the decisions of the Third Plenary Session of the 18th CPC Central Committee.²⁶ Although the reform on judicial transparency is in full swing and has made significant progress, it still faces social, political, and technological challenges.

The social challenges, in the form of doubts about judicial credibility and the public's unwillingness to recognize the courts, are rooted in the conflicts accompanying the transitional period and the increase in public political participation that the Internet age unleashed. In fact, society's lack of respect for the judiciary and defiance of the law have become matters of concern, with the number of court cases across China more than doubling from 825,405 in 1992 to 2,508,242 in 2010. At the same time, the compulsory enforcement rate of the courts remains at a high level of around 20 % (see Fig. 3.1). Fuelled by 'a primitive sense of justice', public dissatisfaction with court decisions will always, to a greater or lesser extent, raise questions about judicial legitimacy: the public cannot help but suspect the presence of judicial corruption and wonder about

²⁵These include Regulations on Strictly Implementing the System of Public Trials (1999); Several Opinions on Enhancing Transparency in Court Trials in the People's Courts (2007); Provisions on Transparency in Enforcement in the People's Courts (2007); and Six Provisions on Judicial Transparency (December 2009).

²⁶Several Opinions on the Effective Implementation of Justice for the People; Vigorously Strengthening a Fair Judiciary and Continuously Enhancing Judicial Credibility; and Opinions on Promoting the Construction of Three Major Platforms of Judicial Transparency.

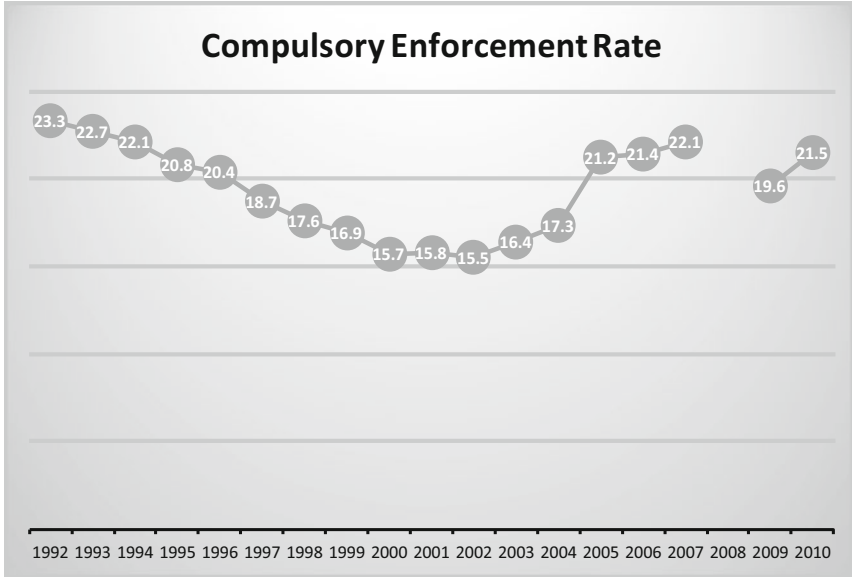


Fig. 3.1 National compulsory enforcement rate of the courts, 1992–2010 (%)

its independence. In other words, society has lost faith in its legal system; the issue is about legal culture and the establishment of a society based on the rule of law. The judiciary and society have a shared responsibility to tackle the low credibility of the laws and the justice system. The only way to retrieve such credibility would be through the joint efforts of the state and society, through practising the rule of law and extensive education.

On the second issue of political challenges, judicial transparency undoubtedly not only has a significant effect on judicial trials and judicial administration, but it also impinges on judicial politics. Since the 16th National Congress of the Communist Party of China, ‘exercising state power in accordance with the law’ has become the fundamental mode of governance of the CPC in the new historical period. What has always been a difficult issue is the need for careful consideration about how to improve the way the CPC leads the judiciary to achieve the organic unity of the principle of ‘ruling the country in accordance with the law’ and adherence to CPC leadership. On the one hand, the concept of judicial transparency has impinged on the judicial and political systems as

it helps the judiciary resist interference from external political forces. On the other hand, judicial transparency inevitably calls on the CPC and judiciary to adopt new leadership styles. In terms of the scope and mode of judicial transparency, the Party Committee and Politics and Law Commission make recommendations in accordance with the law rather than interfere with individual judicial cases. Therefore, in the context of 'exercising state power in accordance with the law', the impending task is to resolve the problems in the judicial system brought about by judicial transparency and further promote judicial reforms.

The third issue concerns technological challenges. With the advent of the Internet age, achieving an open and transparent trial process via online broadcasting is not only an objective requirement of justice, but also a new requirement. Now the public is supposed to participate in the justice system, understand justice, and supervise the judiciary. At present, although many courts have opened accounts on micro-blogging sites to publish information, overall the courts are reacting slowly to the rapid development of the new media.

The judiciary faces a major dilemma in attempting to achieve transparency in this new situation, for it has to maintain neutrality while simultaneously considering online public opinion. In the light of this, the courts should consider how to manage online public opinion about unforeseen events and how to enhance public confidence in the judiciary via micro-blogging.

The fourth issue is in relation to judicial challenges. By examining first-instance judgments²⁷ between 1987 and 2010, almost 3 % were deemed to have been wrongly judged, as ruled by second-instance trial judges (see Fig. 3.2). The rehearing correction rate²⁸ of criminal retrial cases jumped from 26.1 % in 1988 to 54.9 % in 2010, while the statistics for civil rehearing cases multiplied from 18.9 to 50.6 %, and the rehearing correction rate of administrative rehearing cases increased

²⁷The error rate of first-instance judgments is the ratio of all cases where amended sentences, retrials, or settlements via mediation took place to the total number of closed first-instance cases, which reflects the quality of judgment in the first-instance cases.

²⁸The rehearing correction rate is the ratio of all closed rehearing cases where amended sentences, retrials, or settlements via mediation took place to the total number of closed rehearing cases, which reflects the quality of judgment in first-instance, second-instance, or rehearing cases.

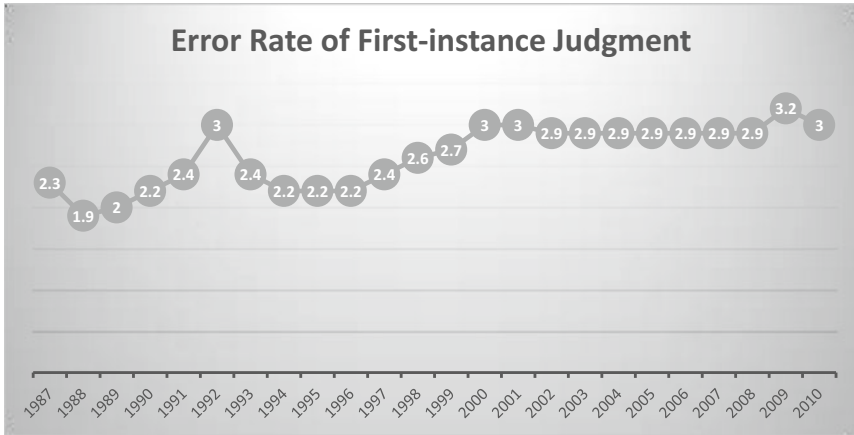


Fig. 3.2 Error rate of first-instance judgments by the courts, 1987–2010 (%)

from 17.8 to 36.6 % (see Fig. 3.3). The number of rehearing cases rose more than 3.9 times from 1,168,715 in 1988 to 5,730,722 in 2010.²⁹ The high judgment error rate and rehearing correction rate indicate that the judgments are of substandard quality. It also reveals the underlying reality of judicial corruption or the lack of operational capacity of the judiciary. This creates a huge challenge for judicial transparency, especially open access to court case files.

The Principles of China’s Reform on Judicial Transparency

China’s reform on judicial transparency should uphold the following principles. First, the leadership of the CPC must be upheld. In China, the historical tasks of the Chinese nation and the advanced nature of the CPC are what determine the leadership and governance of the latter. Only by being reassured of the power of the CPC can China successfully

²⁹ The data cited in this report are obtained from

Law Yearbook Editorial Committee,

Law Yearbook of China.

Zhu, *Towards Pluralist Legal Practice*.

Zhu, *Professionalization of Legal Workers*, unless otherwise specified.

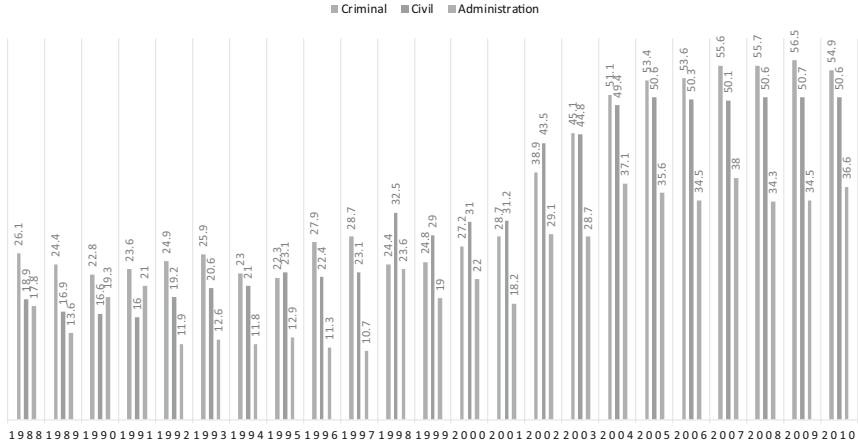


Fig. 3.3 Rehearing correction rate of the courts, 1988–2010 (%)

realize its various modernization tasks.³⁰ On the one hand, reforms or system improvements in the judicial field require the leadership and support of the CPC. Therefore, the CPC leadership must support and guarantee the reform on judicial transparency, though this concerns judicial politics as well as trials and administration. Placing undue emphasis on achieving a completely transparent justice system will inevitably affect the judicial and political systems and undermine the relationship between the judiciary and the political parties or other state organs. Although it is necessary to stress the importance of judicial transparency, it should by no means sway the leadership of the CPC. Therefore, the principle of upholding the leadership and ruling status of the CPC should not be abandoned or weakened by reforms or innovations of any kind, and judicial transparency is no exception.

The second principle is to adhere to procedural legitimacy when trying to achieve judicial transparency. The purpose of the innovations in the field of judicial transparency is to safeguard the rights of the litigants during the litigation process. Not only is judicial transparency backed by laws, such as the constitution, the procedural laws, and the Organic Law, but judicial power must also be exercised in accordance with the law. Reforms and innovations on judicial transparency must follow the

³⁰Wang, *Political Parties in Government*, Chap. 3.

principle of ‘ruling the country in accordance with the law’, and ensuring that the exercise of judicial power can be regulated by laws. The laws shall specify which institutions are subject to judicial transparency and confirm its scope and boundaries, as well as its associated procedures, processes, and outcomes. The laws must also stipulate who is responsible for implementing it.

The third principle is to adopt a prudent and steady approach. Reforms and innovations on judicial transparency are not only concerned with the interaction between the judiciary and society, they are also related to many areas of the judicial system and the relationship between the judiciary and other state organs. As such, a gradual and steady approach should be adopted, rather than allowing no flexibility by trying to change the system completely in one attempt. Judicial transparency both relies on and influences judicial reforms. However, not only is it hindered by traditional values, but it also requires the judges to improve their professional standards further. In view of the above, judicial transparency is also a judicial reform in the new era, which should follow a proactive and steady approach under the leadership of the CPC. Being proactive means having the determination to overcome difficulties once the necessity and legitimacy of the reforms have been recognized. Being steady means promoting the reforms in a prudent manner after careful consideration. A proactive and steady approach involves starting the easy tasks first before moving on to the more difficult ones; in other words, one should wade across the stream by feeling the way. It also means expecting and accommodating ups and downs during the reforms.

The judiciaries across China have very different characteristics. Their financial capacity and the judges’ professional standards vary greatly. The blind pursuit of judicial transparency at a time when the judiciary is not fully prepared for the changes will damage its credibility. This is especially true when there is an increase in the number of court cases, for the pursuit of judicial transparency inevitably brings numerous social conflicts into the judiciary when it still lacks the human, material, and financial resources to deal with them. Therefore, we should be cautious about the feasibility of transparency as well as its associated measures.

The fourth principle is to tailor the reforms to China’s national conditions. China and Western countries are at different stages of social

development. The judicial transparency needs of Chinese society differ from those of the West. While Western judicial systems are already in the post-modern era, the development of the rule of law in China is still immature and China's task is to build a modern judicial system.³¹ Therefore, it is inappropriate simply to compare and contrast the experience of other societies with that of China, or to use criteria from other countries to assess the situation in China. In addition, since there is no uniform or universal model for judicial transparency in the world, and since significant differences exist between civil law and common law systems, the Western model must not be copied in a simplistic manner. The functions of the courts vary across different countries; courts have legislative functions in common law countries, whereas in civil law countries they only deal with dispute resolution; therefore the focus of judicial transparency also varies across countries. If a court assumes legislative functions, it is bound to grant the public greater open access to information. By briefly observing the current situation of the Chinese People's Courts at all levels, it is clear that the main tasks facing China's current judicial reforms are to: improve the legal knowledge and social status of judges and other relevant personnel; achieve true judicial independence; and, by way of procedural rationality, firmly prevent judicial corruption.

The fifth principle is to focus primarily on procedural transparency while considering granting the public open access to information. Judicial transparency has two orientations—society-oriented open access to information and litigant-oriented procedural transparency. A long-standing weakness of China's judicial system is that it has always been subject to intervention from external forces, making it difficult to resolve problems effectively. If too much emphasis is put on granting the public open access to information, it will inevitably have a negative impact on the independent exercise of judicial power in accordance with the law. As such, at a time when the rule of law is still being developed, the guidelines should focus mainly on procedural transparency. Therefore, the fundamental tasks facing China's judicial transparency at present should

³¹ According to the reports of the 16th National Congress of the Communist Party of China, China will have completed the building of a moderately prosperous society by 2020. It may be anticipated that, prior to this time, the building of the rule of law will still be at its development stage, rather than at the reinforcement or simplification stage.

be the implementation of the three main procedural laws, focusing primarily on procedural transparency. The fundamental and key purpose of judicial transparency is effectively to protect the rights of the litigants and representatives as granted by the procedural laws, and to promote and guide the work of judicial transparency through procedural transparency. Although judicial transparency has the function of raising legal awareness and being close to the people, given that the Chinese courts do not currently engage in social policy development and legislation, the value of granting the public open access to information is not significant. Even if open access to information is to be emphasized, the scope of such access would still be limited. Therefore, the guidelines should focus primarily on procedural transparency while considering granting the public open access to information.

Strategies for Enhancing Judicial Transparency

The first strategy is to define clearly the basis of judicial transparency and revisit the procedural laws. The fundamental mission of the justice system is to protect human rights. Judicial credibility can naturally be achieved if human rights have been protected. Therefore, it makes sense that the International Covenant on Civil and Political Rights has made extremely detailed provisions for judicial transparency. Considering that China is at a stage where the rule of law is still being developed, the current priority is to implement the relevant procedural laws and protect the rights of the litigants. Therefore, judicial transparency is based on political rather than legal needs. China's reform on judicial transparency should be built on the constitution, the procedural laws and the Organic Law of the People's Courts. The emphasis should be on the protection of litigation rights at various stages, including transparency in case initiation, hearings, enforcement, and judicial affairs, with a view to promoting judicial reforms effectively, maintain justice, and enhance the authority of the judiciary. Without support from the legal system, the exploration of judicial transparency will lose legitimacy. This is especially true of the restrictions placed on judicial transparency, because not only is it difficult to achieve transparency without a clear legal basis, but misunderstandings

will also arise. Therefore, to enhance judicial transparency, it is necessary to define clearly its basis and revisit the procedural laws. The second strategy is to protect the rights of the litigants on the basis of transparency in proceedings.

Timely disclosure of information. To achieve transparency, the judiciary must strictly follow the disclosure timetables stipulated by the laws and judicial interpretations and ensure timely and complete disclosure of information within the statutory timeframes in accordance with the law. In cases where no disclosure timetable is prescribed, the judiciary should disclose relevant information as soon as possible within a reasonable timeframe. This is to ensure that the litigants and the public are informed of the work of the courts so that they can strengthen supervision in a targeted manner. Therefore, it is necessary to ensure the timeliness of judicial information disclosure in a legislative sense by developing timeframe standards for information upload through legislation. The courts at all levels should also implement the principle of timely disclosure in their practices of judicial transparency. This is the only way to protect better the public's right to know and participate.

Clearly specify the scope of transparency. By far the most comprehensive judicial interpretation of the scope of judicial transparency in China is the Six Provisions of the Supreme People's Court on Judicial Transparency. The Standards for Demonstrative Courts for Judicial Transparency, which is based on the aforementioned provisions, further refines the contents of judicial transparency and has become one of the specific bases on which it may be implemented by the courts. However, it is still not possible to define its scope by relying only on the constitution, the three procedural laws, or the relevant judicial interpretations issued by the Supreme People's Court, for there are still many unanswered questions. The existing laws and the Six Provisions have not made any comprehensive or specific provision on the disclosures of information in relation to court staff. China should further refine the provisions on the aforementioned disclosures during its legislative and judicial practices. Judicial transparency must not impede the judiciary's legitimate and independent exercise of jurisdiction. When judicial information is publicly disclosed, it is necessary to protect the lawful rights and interests of the litigants and participants in the proceedings.

Emphasizing transparency in case initiation. In recent years, significant progress has been made in court trials from the perspective of procedural transparency, but more still needs to be done to ensure transparency in case initiation. Because Chinese society is in transition, the introduction of some legislation, such as the Criminal Procedure (Amendment) Law and the Administrative Enforcement Law, is likely to cause new social problems. If the judiciary restricts access to documents during the case initiation process by arbitrarily setting criteria and denying public access to information, it will inevitably lead to controversy. Therefore, judicial documents on case initiation should be open to the public upon approval by the People's Congress.

The third strategy is to focus on professional ethics and the professional development of judges. The premise of judicial transparency is the capability of achieving transparency. Judicial transparency would be of no value if there were frequent miscarriages of justice or if the judgment documents were roughly drafted. Such value can be obtained only if fair trials are carried out and if judgment documents are written in a scientific, legitimate, and stringent way. A convincing judgment document can achieve the desired legal and social effects or even academic value by clearly presenting its standpoints, grounds of argument, and reasoning. Otherwise, not only will the case-specific information be withheld from the public, but also the attitude and capacity of the caseworkers will be doubted. Therefore, training a team of judicial professionals is the first critical step towards establishing a modern justice system and realizing transparency. Improving the professional standards of judicial officers will help them to withstand undue influence from external forces and to achieve independence. A professional judicial workforce is required to support the expansion of the scope of judicial information disclosure. The current work on transparency should focus on the professional development of officers and the establishment of professional ethics.

The fourth strategy is to rationalize the relationship between the Party Committee and the judiciary in line with the principle of 'exercising state power in accordance with the law'. Judicial reforms can only be of practical value in the wider context of political reforms. At present, the priority is for the courts to revert to exercising jurisdiction and resolving social disputes through judicial adjudication. The legitimate and independent

exercise of judicial power is significant. If the Party Committee, the Politics and Law Commission, or the Standing Committee of the National Congress were to supervise individual cases, other authorities in society would also be able to supervise individual judicial cases, which would invalidate the authority and legitimacy of the justice system. Therefore, it is of paramount importance to promote judicial reforms in accordance with the principle of 'exercising state power in accordance with the law'.

The fifth strategy is to foster a culture of respect for the rule of law by granting the public open access to information. In fact, judicial transparency effectively raises legal awareness. It allows judges, prosecutors, and lawyers, through their activities inside and outside the court, to transmit their legal knowledge to the public, thus achieving the best result in social education at the lowest cost. To promote open access to information for the public, the judiciary should focus on building court websites and publishing material on the Internet. There should be two online judicial transparency facilities, the one offering open access and the other restricted access. The open access one would provide information relating to trials, such as booklets on litigation, case initiation information, notices of hearings, live broadcasts of trials, enforcement information, appraisals, auctions, judgment documents, case studies, and updates on high-profile trials. It may also include information on judicial affairs, such as unclassified judicial statistics, reports and updates on the work of the courts, information on court staff, normative documents, and press releases. The restricted access one would be open to litigants only and would allow them to request updates on the progress of a case and view electronic documents. Both facilities should have a built-in review module so that members of the public could express their opinions by leaving comments and suggestions relating to the work on judicial transparency.

The sixth strategy is to enhance transparency by gradually granting the public open access to written judgments. Apart from freely allowing the public to observe cases when the court is sitting, another way of enhancing judicial transparency would be to ensure that everyone has access to written judgments and details of the trials. This is undoubtedly a good way of providing transparency to the public. Understandably, many people would like the courts to make all written judgments public, but this idea is clearly unfeasible. First, even foreign courts do not publicly

disclose all their written judgments. Instead, these are published on a selective basis. Second, it is very costly to provide open access to all written judgments. For example, the courts in Beijing deal with as many as 400,000–500,000 cases a year. If the names were to be edited out from all written judgments, the courts would have to cope with an unprecedented workload with which they have neither the financial nor human resources to deal. Third, the professional standards of the judges vary greatly, which means that not every written judgment is of high quality. Therefore, providing every citizen with the opportunity to read written judgments by granting open access to these documents is a task that should be implemented gradually with the privacy of the litigants duly protected. When making written judgments publicly accessible, the personal details and full names of the litigants and relevant persons need not and should not be published, for example, this may be achieved by omitting one character from litigants' names.

On 17 February 2014, Xi Jinping delivered an important speech to the opening ceremony of the Symposium for Provincial Leaders and Cadres on Learning and Implementing the Spirit of the Third Plenary Session of the 18th CPC Central Committee. He pointed out that the overall objective of deepening the reforms was to improve and develop a characteristically Chinese socialist system and to promote the modernization of China's governing system and capabilities. The tasks the Chinese government faces for the next decade include deepening the reform on judicial transparency by establishing judicial legitimacy, improving the judicial systems and mechanisms, and enhancing judicial credibility. The successful completion of these tasks will contribute significantly to modernizing China's governing system and capabilities. Judicial transparency aims to manage the relationship between the courts and society; in other words, to serve the requirements of the people the people's courts need to expand the scope of judicial transparency and diversify its forms. In essence, this is a matter of judicial legitimacy. As stated in the documents published by the Supreme Court, justice should be 'visible justice', judicial efficiency should be 'efficiency that can be felt', and judicial authorities should be 'authorities that have been recognized'.³² However, the emphasis on judicial

³²Lawtime, "Opinions on Enhancing Transparency."

legitimacy reveals the real problem confronting China's judiciary, which is that the courts are facing a crisis of confidence in society. To ease this and build credibility, it is essential to establish legitimacy. Therefore, the government guidelines should focus primarily on procedural transparency while considering granting the public open access to information. It is also necessary to adopt a prudent and steady approach, tailor the reforms to China's national conditions, and promote the reform on judicial transparency. The current priorities are as follows:

- To define clearly the basis of judicial transparency and revisit the procedural laws;
- To protect the rights of litigants on the basis of transparency in proceedings;
- To focus on professional ethics and the professional development of judges;
- To rationalize the relationship between the Party Committee and the judiciary in accordance with the principle of 'exercising state power in accordance with the law';
- To foster a culture where the rule of law is highly regarded in society by granting the public open access to information;
- To enhance transparency by gradually granting the public open access to written judgments.

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