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## Themis v. Xiezh: Assessing Judicial Independence in the People's Republic of China under International Human Rights Law

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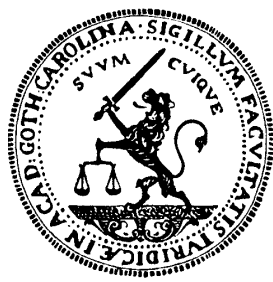
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*THEMIS V. XIEZHI:*  
ASSESSING JUDICIAL INDEPENDENCE  
IN THE PEOPLE'S REPUBLIC OF CHINA  
UNDER INTERNATIONAL HUMAN RIGHTS LAW

BY

JONAS GRIMHEDEN

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***Abstract***

China's international human rights obligations are gradually expanding to the independence of the judiciary. Thus, this study seeks to assess the Chinese judiciary's compliance with the requirements of judicial independence under international human rights law.

The first of three parts in this study elaborates on international human rights law and drawing on the most essential international instruments and jurisprudence, the criteria constituting judicial independence are distilled as a framework for assessment. The point of departure is that judicial independence is a necessary guarantee for the enjoyment of human rights rather than a privilege of judges. The criteria necessary for this independence are presented in a chart format, which groups the criteria into three strands: independence, impartiality, and public confidence. Independence is concerned with insulating the judiciary from pressures, while impartiality deals in particular with judges' unbiased consideration of cases. Public confidence includes aspects such as transparency and representativity that are designed to strengthen public trust in the judiciary and its independence. These charts and strands are the basis for the subsequent assessment of judicial independence in China.

The second part commences with a discussion on comparative law. Firstly, a method of analogy as a tool for a profound understanding of foreign legal institutions and functions is elaborated upon. Secondly, based on modern research findings, previous misunderstandings of the legal history in China are discarded. In particular the existence and development as well as the application of law and legal procedures are explored. Fundamentally, and contrary to common perceptions, even judicial independence was part of the Chinese history although, of course, not as defined in international human rights law.

The third part considers the judiciary in China and assesses its independence. First the modern history is described with its many foreign influences and state of flux. Second, the contemporary structure and legal framework pertaining to the independence of the judiciary are laid out. Challenges to independence are analyzed with particular reference to the reform process under way. Based on the three strands developed in the first part, formal guarantees for judicial independence in various Chinese legal texts show the lack of guarantees for the independence and public confidence strands in particular, but also to a lesser extent the impartiality strand. However, the guarantees are developing in line with international requirements; this is also the case for the actual practice. The recent constitutional pledge to human rights may help bridge the lack of commitment to international human rights law and contribute toward building a truly independent judiciary.

### *Abstract in Chinese*

中国所承担的国际人权义务已逐渐扩展至司法独立领域。因此，本论文试图评估中国司法机构遵守国际人权法有关司法独立方面的要求的情况。

论文分三个部分。第一部分阐述了相关的国际人权法。在该领域内最重要的一些国际文书和判例法的基础上，归纳和总结出了构成本论文评估框架的一系列标准。这些标准的出发点就是：司法独立是享有人权的必要保障，而不是法官的一种特权。本部分以图表的形式将有关司法独立的标准归纳为三类：独立、无偏倚和公共信任。独立是指使司法机构不受外部压力的干扰，无偏倚特指法官在审理案件的过程中不受任何偏见的影响，而公共信任是指透明度和代表性等旨在加强公众对司法机构及其独立性的信任的一些标准。这些图表和分类构成了本论文下一部分评估中国司法独立的基础。

第二部分讨论了有关的比较法问题。该部分首先阐述了用以深入理解外国法律制度和功能的一种推理方法。其次，在最新研究成果的基础上，否定了一些有关中国法制史的错误理解。该部分特别探讨了法律和法律程序在中国的存在、发展和适用。从根本上说，与人们一般所认为的相反，在中国历史上也存在着司法独立。当然，这种司法独立有别于国际人权法中所定义的司法独立。

第三部分研究中国的司法机构并对其独立性做出了评估。本部分描述了受到许多国外影响并且不断变化的中国近代历史，介绍了与司法独立相关的中国现代社会结构和法律框架，并在目前正在进行的改革的背景下分析了中国司法独立所遇到的各种挑战。基于论文第一部分所总结出的三类不同标准的分析表明，在中国各种法律文件中所规定的有关司法独立的正式保障系统中最缺乏的是独立和公共信任这两个方面的因素，而无偏倚方面的保障也存在缺陷，虽然其程度没有前两者严重。但是，中国目前正在按照国际人权法的要求在法律上和实践中不断完善以上这三个方面的保障。最近通过的宪法修正案中有关保障人权的承诺有助于加强中国在国际人权法方面的义务，并将为在中国建立一个真正独立的司法系统而做出贡献。



## *Preface*

*Themis*,<sup>1</sup> or *Justitia*, the ancient Greek goddess is still the most commonly recognized symbol for justice in the Eurocentric Western world. *Xiezhi*,<sup>2</sup> the corresponding Chinese symbol for justice, even though possessed with the similar attribute of being able to determine true from false, may at first glance be assessed as little more than a revenging beast. If used to compare Western and Chinese legal systems, *Themis*, human and graceful, carries the scales and sword as her insignia to balance right from wrong and to defend what is just, while *Xiezhi* stands for brut force, prodding with its one horn those guilty of crime. East is therefore superficially placed in stark contrast to the West.

Such polarization is apparent in the field of comparative law, where legal systems traditionally are sorted into different ‘families’. Chinese law is defined as distinct from common-law and civil law traditions, with Chinese law suggested to have its basis in a Confucian, collectivistic, non-litigious, and conciliatory tradition. Also in the legal reform process in China judicial independence is described as non-existent, which further sharpens the polarization. This dichotomy is apparent when the political leaders in China state that their reform efforts will never lead to a full-fledged independent judiciary or result in a separation of three co-equal powers, or even democracy, as ‘they have in Western countries’. This polarization is the background and incentive for this study. International human rights law as universal minimum standards similarly seek to bridge this contemporary gap.

Independence, as it turns out, is therefore herein not merely related to the judiciary but also independence of the discourse from ostensible historical vestiges like an exclusive European development of judicial independence. By searching for judicial independence in the Chinese history, I am following a tradition of research on China that is increasingly gaining support. This tradition has achieved vigor during the last decades not least due to new archaeological findings and from more detailed analyses of Chinese case-law.<sup>3</sup>

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<sup>1</sup> See generally RIPA’S *ICONOLOGICA: QUELLEN - METHODE – ZIELE*, 1977; see also HALL’S *DICTIONARY OF SUBJECTS AND SYMBOLS IN ART*, 1993; roots of *Themis* are believed to be from Egypt, *Ma’at* (the possible root for the word magistrate), meaning truth, was the divine order of creation, P. G. MONATERI, 2000, p. 538; see also Martin LOUGHLIN, 2000, p. 55; Dennis E. CURTIS and Judith RESNIK, 1987, p. 1729; *LEXICON ICONOGRAPHICUM MYTHOLOGIAE CLASSICAE (LIMC) VIII*, 1997, p. 1201.

<sup>2</sup> In trying to understand the importance of *Xiezhi*, I have benefited from discussions with Professor CHEN An at the law faculty of Xiamen University and Professor XIA Yong of the Institute of Law, Chinese Academy of Social Sciences.

<sup>3</sup> More archeological legal findings have been made which await interpretation. One Chinese expert in the field commented that this will surely further revolutionize the

These developments provide an ever more complete picture of the Chinese legal history that supports a more nuanced position of Chinese law: Such findings show the early existence and advanced development of law in ancient Chinese history, and a less dominant role of Confucianism in the legal system. They also show the existence of not only criminal but also of civil law, and the use of separation of powers, checks and balances, and various forms of supervision to oversee justice, including forms of judicial independence. Further elaboration and development of the findings of this tradition of research is called for given the lingering, predominant understanding of Chinese law by what could be seen as the dominant tradition, not the least among Sinologists and the Sino-legal scholarship, but also within the broader field of comparative law.

Professor Jerome Cohen already in the late 1960s addressed the issue of biased research on judicial independence in China. He argued that even though judicial independence is restrained in a number of ways, the ideas professed differ considerably from the actual practice. Cohen stressed that foreign commentators on China often claim a lack of judicial independence in China but do so without explaining what the problems actually are. It would therefore be tempting to conclude that the special history and culture of China was not suitable for the development of judicial independence, which was even argued by leading Chinese commentators at the time.<sup>4</sup> In Cohen's words however:

It is commonplace that the writing of foreign observers often reveals as much about the assumptions of their own society as it does about the society they observe. Certainly, five centuries of Western commentary on the administration of justice in China support this proposition.<sup>5</sup>

Cohen elaborates with examples of Portuguese merchants and Spanish missionaries who had already noted in the latter half of the sixteenth century that the Chinese judges were much better and fairer than their European counterparts. Over time, the depiction in Europe evolved so that by the mid-eighteenth Century Chinese justice was understood as a product of the Sun of Heaven guided by Confucian morals. In this way Europe constructed an idealized perception of the Chinese justice that "nicely contrasted with a situation at home that cried out for reform".<sup>6</sup> The view of Chinese justice in more modern history has however been perceived as less developed. Cohen

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understanding of traditional law in China. Discussion with Professor LIU Hainian, 16 December 2003.

<sup>4</sup> Jerome A. COHEN, 1969, pp. 971–975, 1004.

<sup>5</sup> *Id.*, p. 967.

<sup>6</sup> *Id.*, p. 968; see also similar accounts in John H. WIGMORE, 1936, pp. 154 *et seq.*, 177.

concluded however that China lacks a tradition of judicial independence on the basis of the mixed nature of administrative and adjudicative tasks at the lowest level in the Chinese administrative hierarchy.<sup>7</sup> In contrast, I inquire into the Chinese history of law in search for judicial independence. By doing so I seek to normalize the view on law in the Chinese history that will better enable an unbiased and constructive perspective on progress and challenge in contemporary China.

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<sup>7</sup> Jerome A. COHEN, 1969, p. 1006; this is also the common conclusion of contemporary Chinese scholars, as will be discussed below.

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## *Acronyms and Glossary*

- ACHPR – The African Commission on Human and People’s Rights
- ALL – The Administrative Litigation Law
- ASEAN – Association of Southeast Asian Nations
- AU – African Union
- BCE – Before Common Era, BC
- BPC – Basic People’s Court
- CAT – The Committee against Torture
- CCJE – The Consultative Council of European Judges
- CCP – The Chinese Communist Party
- CCPR – The Human Rights Committee
- CE – Common Era, AD
- CEDAW – The Committee on the Elimination of Discrimination of Women
- CERD – The Committee on the Elimination of Racial Discrimination
- CLNET – Chinese Law Net
- CPPCC – The Chinese People’s Political Consultative Congress
- CRC – The Committee on the Rights of the Child
- CSCE – Conference on Security and Cooperation in Europe
- Dao – ‘The Way’, the method rather than the goal in Daoism
- DIC – The Discipline Inspection Committee of the CCP
- ECHR – The European Convention for the Protection of Human Rights and Fundamental Freedoms
- ECJ – The European Court of Justice
- ECtHR – The European Court of Human Rights
- EU – The European Union
- Fa – Law (法)
- Fa – Punishment (罚)
- FYRP – The Five-Year Reform Platform
- GMD – Guomindang (KMT)
- Guanxi – Contacts, connections
- HDI – Human Development Index
- HPC – High People’s Court
- Huibi – Recusal system, rules of avoidance
- IACHR – The Inter-American Commission on Human Rights
- IACtHR – The Inter-American Court of Human Rights
- IBA – The International Bar Association
- ICC – The International Criminal Court
- ICCPR – The International Covenant on Civil and Political Rights
- ICESCR – The International Covenant on Economic Social and Cultural Rights
- ICJ – The International Court of Justice
- ICTR – The International Criminal Tribunal for Rwanda
- ICTY – The International Criminal Tribunal for former Yugoslavia
- IPC – Intermediate People’s Court
- JGBP – The Bangalore Principles of Judicial Conduct
- KMT – Kuomintang (GMD)
- LABS – LAWASIA Basic Statement of Principles on the Independence of the Judiciary in the LAWASIA Region
- LAWASIA – The Law Association for Asian and the Pacific
- Li – Rituals
- NGO – Non-Governmental Organization
- NPC – The National People’s Congress
- OAS – The Organisation of American States
- OAU – The Organisation of African Unity
- OSCE – The Organization for Security and Cooperation in Europe
- PCIJ – The Permanent Court of International Justice
- PLA – People’s Liberation Army
- PRC – The People’s Republic of China
- SPC – The Supreme People’s Court
- SPP – The Supreme People’s Procuratorate
- Themis – The goddess of justice, Justitia
- UCJ – The Universal Charter of the Judge
- UDHR – The Universal Declaration of Human Rights
- UDIJ – The Universal Declaration on the Independence of Justice
- UN – The United Nations
- UNBP – The United Nations Basic Principles on the Independence of Judges
- WTO – The World Trade Organization
- Xiezhi – A unicorn believed to be able to distinguish wrong from right
- Xing – Law/Punishment (刑)
- XUAR – Xinjiang Uygur Autonomous Region





## ***Introduction***

Judicial “independence connotes freedom from external pressures and interference. Impartiality is characterized by objectivity in balancing the legitimate interests at play”.<sup>1</sup> The purpose of the broader concept of judicial independence, including impartiality, is ultimately the guarantee for the respect of human rights rather than as a privilege of judges.<sup>2</sup> It is this human rights approach to judicial independence that underlies this analysis of the judiciary. To cope with prevailing stereotypical perceptions, two fundamental considerations are essential for an assessment of the independence of the judiciary in China based on international human rights law. These are the concept of judicial independence, and the understanding of the object of assessment – the Chinese judiciary.

Firstly, judicial independence is at times used in assessments in its rhetorical fully unrestrained way, even though all judiciaries have various forms of restraints for the sake of preventing judicial corruption and guaranteeing credibility and legitimacy of the judiciary.<sup>3</sup> Independence of the judiciary must be matched with restraints such as requirements of transparency, accountability, and appointment and discipline procedures. Independence is maintained when the judiciary is restrained through a “non-controlling transparency . . . [with] clear and regularized contact points”.<sup>4</sup> Such restraints, that I would call positive, must be acknowledged and distinguished from negative restraints that seek to control the judiciary on specific issues or politically influence the judiciary. Negative restraints, or undue influences, refers in its most obvious forms to case-specific influence, limiting decisional independence of the judges in individual cases; extreme examples would be

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<sup>1</sup> *Kanyabashi* case, ICTR-96-15-A, Appeals Chamber, 3 June 1999, Decision of the defence motion for interlocutory appeal on the jurisdiction of Trial Chamber I, Joint and separate opinion by Judge MacDonald and Judge Vohrah, para. 35.

<sup>2</sup> The formulation is inspired by Article 1 of the Conclusions of a Council of Europe supported conference on legal co-operation between judicial councils in Central and Eastern Europe, entitled “Guarantees of the Independence of the Judiciary in a State Governed by the Rule of Law”, Warsaw and Slok, 23–26 June 1997, forming part of the so called ‘Themis Plan’, see [www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/legal\\_professionals/Judges/Co-operation\\_activities/VARSOVIE.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/Judges/Co-operation_activities/VARSOVIE.pdf).

<sup>3</sup> See e.g. Stephen B. BURBANK and Barry FRIEDMAN, 2002 (b), p. 12; see also Rolf LAMPRECHT, 1995, p. 17, who argues that judicial independence is a myth “Das Zauberwort ‘Unabhängigkeit’”; Peter H. RUSSELL, 2001 (a), p. 301; Eli M. SALZBERGER, 1992, p. 352; Richard DELGADO, 1999, pp 433–451; Torstein ECKHOFF, 1965, p. 11, who argues that assessments of independence of the judiciary tend to rely on criteria originating from a given national system, typically that of the (foreign) observer, p. 11, note 1.

<sup>4</sup> OPEN SOCIETY INSTITUTE (Ed.), 2001, p. 19.

various forms of what has been labeled in other jurisdictions as telephone justice, *apparatchik* justice, or *Kabinettsjustiz*.

Judicial systems tend to be equipped with emphasis on either some form of *ex ante* screening through appointment or election of judges or *ex post* monitoring by way of controlling the careers or salaries of the judges.<sup>5</sup> In a well functioning system such controls are positive restraints. Independence of the judiciary is therefore more appropriately described as a matter of optimization rather than maximization, trying to find a balanced form of restraints.<sup>6</sup> The optimized nature of independence is generally taken into consideration in elaborations on judicial independence but risks being overlooked for the benefit of a maximized independence in assessments of judicial independence. Failure to also acknowledge the positive restraints on the independence renders consistent and credible assessment impossible. International human rights law, being a minimum standard regardless of any particularities, provides a tool for assessing judicial independence beyond stereotypes.

A second fundamental consideration often overlooked but important to consider is the development of structures in China's history that were aimed at the same purpose of fairness in adjudication. The extensive procedural guarantees for fair trial found in the Chinese legal history must be considered to determine the extent of the development of independence of the judiciary. Conversely, judicial independence is most often described as a solely European historical development.<sup>7</sup> Historical *exposés* of judicial independence both in English and Chinese language literature typically commence in classical Greek philosophy and then continue through history to explain a well-rooted system in the European context.

English language commentators on the evolution of judicial independence regularly start with Plato, Aristotle, and Cicero and dwell on the theories of Locke and Montesquieu.<sup>8</sup> More detailed descriptions of the development of

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<sup>5</sup> J. Mark RAMSEYER, 1998.

<sup>6</sup> Owen M. FISS, 1993 (a), pp. 66–67; and Owen M. FISS, 1993 (b), p. 56.

<sup>7</sup> On the development of judicial independence in other societies, see e.g. on Southern Asia A. R. B. AMERASINGHE, 2000, pp. 13 *et seq*; on pre-colonial Africa, see e.g. Michelo HANSUNGULE, 2002, pp. 5–6; and Makau wa MUTUA, 2000, pp. 168–169, drawing on e.g. Kwasi Wiredu; on the Muslim world, see e.g. Martin M. SHAPIRO, 1981, pp. 205–207.

<sup>8</sup> See e.g. T. R. S. ALLAN, 1998; Robert D. NICHOLSON, 1993, p. 406; Eli M. SALZBERGER, 1992, p. 349 and notes 1 and 2; Robert D. NICHOLSON, 1993, p. 406; see also Brian BERRY, 1996; Joakim NERGELIUS, 1999, pp. 39, 49 *et seq*; Das Basu DURGA, 1994, p. 368 *et seq*; on the philosophy of judicial independence, see e.g. Samuel I. SHUMAN, 1962; Montesquieu more likely referred to the King, the Lords and the Commoners than the executive, legislative, and the adjudicative, and in actuality he was not really describing England but rather a dream country like he did in the *Lettre persanes*, Richard A. BAUMAN, 2000, pp. 83, 91, 93; see also

judicial independence discuss the division of functions since medieval times in Europe based on a papal theory of division of labor among the offices of the church that later came to be applied also by kings.<sup>9</sup> The developments of the English Declaration of Rights of 1689 and the Act of Settlement of 1701, which established tenure during good behavior, and among other issues the King's loss of the power to remove judges is typically discussed.<sup>10</sup> Furthermore, the influential Max Weber wrote about the exclusiveness in the West of the development of public law as a result of separation of powers and judicial independence.<sup>11</sup>

Also writings in China commonly treat the concept of judicial independence as originating in England, Europe at large or the US.<sup>12</sup> China, in contrast, is described as having no separation of powers and lacking a historical development of the concept.<sup>13</sup> One of the first modern monographs dealing exclusively with judicial independence in China, written by two Chinese Supreme Court judges in the late 1990s, describes the long history of China as lacking separation of powers and judicial independence.<sup>14</sup> The origin of judicial independence is discussed in the first chapter of the book, drawing on among others Aristotle, Locke, and Montesquieu.<sup>15</sup> Only after a third into the book do the authors talk about the Chinese experience of judicial independence. The authors then describe the end of the Qing Dynasty in the late nineteenth Century as though judicial independence was a new phenomenon. This is representative of the way judicial independence is described in China. Montesquieu is almost the exclusive starting point of an analysis of judicial independence in China by Chinese authors.

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Torstein ECKHOFF, 1965, p. 22; Montesquieu is also believed to have confused judges with the jury, Robert STEVENS, 2001, p. 158.

<sup>9</sup> See e.g. Mirjan R. DAMAŠKA, 1986, p. 187; see also M. J. C. VILE, 1998, pp. 28–30, influential philosophers at this time were e.g. Jean Bodin, Thomas Aquinas, and Marsilius of Pradu.

<sup>10</sup> See e.g. Robert D. NICHOLSON, 1993, p. 407; Some commentators even trace judicial independence back to the *Magna Charta Libertatum* of 1215, Manfred NOWAK, 1993, p. 236; The Magna Carta is however believed to have had very little impact on the courts since these had already assumed that role before King John signed the Charter, Theodore L. BECKER, 1970, p. 367.

<sup>11</sup> Max WEBER, 1954, p. 58.

<sup>12</sup> See e.g. Hanhua ZHOU, 1999, pp. 4–9, 13–20; Min ZHANG and Huiling JIANG, 1998, pp. 1 *et seq*; Chongyi FAN (Ed.), 2003, pp. 446 *et seq*.

<sup>13</sup> See e.g. Lixian LIU and Zhijun ZHANG, 2000, p. 28; Pingping SI, 1989, p. 15; Junju MA and Dezong NIE, 1998, p. 26; Shigui TAN, 1999, p. 12; Weifang HE, 2001, pp. 115 *et seq*; Jian ZHANG, 2003, pp. 33 *et seq*.

<sup>14</sup> Min ZHANG and Huiling JIANG, 1998, p. 132.

<sup>15</sup> The typical commentators starts from Montesquieu when elaborating on judicial independence, see e.g. Yanjin YI, 2000, p. 739; Dehai LI, 2000, p. 34; Desen ZHANG and Youyong ZHOU, 1999, p. 22.

Rather than claiming an absence of judicial independence in China's legal history, this study argues that judicial independence has been a feature of Chinese legal development since early record. This view enables a better understanding of the contemporary judiciary and its many challenges, which includes the need for further development of the essential components required for an independent judiciary. The rationale and need for judicial independence has been understood and effectuated in China, even though more recent Chinese history shows failed efforts of alternative solutions through the Soviet and Maoist forms of judicial structures. Claiming an exclusive European, Anglo-American, or English tradition of judicial independence biases assessments of all other traditions. Erroneous descriptions of judicial independence as exclusively originating from the Western culture reduce the universal legitimacy of the concept.<sup>16</sup> As part of universal human rights law, judicial independence shares worldwide contributions to its nature and scope. Therefore, I have placed the two aspects important to an assessment at the core of this study – the nature and the origin of judicial independence.

### **Independence: Control or Legitimacy**

In support of the human rights perspective that this introduction proposes, where judicial independence is a guarantee for human rights, other perspectives seek to explain the underlying rationale for judicial independence. Professor Martin Shapiro is in his seminal book on courts discusses the development from an archaic triadic form of dispute settlement with a neutral third party to modern courts.<sup>17</sup> The role as a neutral third party is reasonable when the court is involved with conflict resolution but when entering what Shapiro calls social control, when the government is involved as a party or as interest-holder, the court has to prove itself a credible neutral actor. As the relationship between the disputing parties changes from a horizontal plane to vertical – when it becomes the government versus the individual – the court has a more difficult job proving and maintaining its independence. For this reason the various roles of the courts, including conflict resolution and social control, have to be interdependent to boost its credibility, Shapiro argues.<sup>18</sup>

Other attempts to explain judicial independence include a law and economics perspective,<sup>19</sup> a method to control bureaucracy,<sup>20</sup> and risk-

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<sup>16</sup> See e.g. Alhadi KHALAF, 1999 who argues similarly in relation to human rights in general.

<sup>17</sup> Martin M. SHAPIRO, 1981, pp. 1–2; see also Martin M. SHAPIRO, 2001, pp. 273–274; Christopher M. LARKINS, 1996, p. 608.

<sup>18</sup> Martin M. SHAPIRO, 2001, pp. 275–276.

<sup>19</sup> William M. LANDES and Richard A. POSNER, 1975; see also Eli M. SALZBERGER, 1992, pp. 359 *et seq*; Eli M. SALZBERGER and Paul FENN,

aversion.<sup>21</sup> The latter model is in particular interesting for China. According to Professor J. Mark Ramseyer, as governments in democratic systems occasionally lose power, an independent judiciary in place will provide a counter-balance to their opponent's power. The political turnover therefore functions as repetitions in a game theory and assures that the judiciary will remain independent.<sup>22</sup> Ramseyer, together with Eric Rasmusen further explains judicial independence with rational players in a prisoner's dilemma constructed on contending political forces in which they seem to be saying that with multi-party (at least two) democracy, judicial independence will be forthcoming.<sup>23</sup> Would the establishment of judicial independence in a one-party state, such as the People's Republic of China therefore be impossible?

A general human rights approach would respond to this question with the premise that judicial independence is necessary for the sake of guaranteeing human rights and therefore considering it possible. However, Shapiro would argue that for functional civil court dispute settlement, independence would also be needed in cases concerning administrative and criminal matters. Ramseyer and Rasmusen elaborate by describing three alternative scenarios based on what kind of regime is in question: (1) the Alternating-Party Regime, (2) the Dominate-Party Regime, (3) and the End-Period Regime. The first regime is then the norm with contending parties in a stable system. The second represents systems where a dominant party expects to stay in power for a predictable future and therefore exerts more influence on the courts. Finally, the third is where the regime faces a likely end, such as through loss of governing power through general elections and thus tries to extend their hold on power through manipulations of the judiciary.<sup>24</sup> The Chinese regime would fit squarely with the second but with tendencies toward the third scenario.

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1999, pp. 846–847; Mathew C. Stephenson has described possible explanations for judicial independence from two other, but similar perspectives to that of Landes-Posner: what he terms 'public backlash' and 'blame deflection'; public backlash would explain the existence of judicial independence as the public opposing political interference with court decisions; blame deflection on the other hand would explain the desire for judicial independence because politicians need to let courts decide some controversial issues to avoid political turmoil, Mathew C. STEPHENSON, 2003, pp. 5 *et seq.*

<sup>20</sup> McCubbins-Schwartz, with the 'fire-alarm' approach, discussed in J. Mark RAMSEYER, 1998, pp. 383 *et seq.*

<sup>21</sup> J. Mark RAMSEYER, 1998, pp. 383 *et seq.*, also for a general overview of the rationale for judicial independence; see also Torstein ECKHOFF, 1965, pp. 30–31.

<sup>22</sup> J. Mark RAMSEYER, 2001, p. 88; see also Shannon Ishiyama SMITHEY and John ISHIYAMA, 2000 for support as regards the relationship between judicial independence and political competition in a number of post-communist countries.

<sup>23</sup> J. Mark RAMSEYER and Eric B. RASMUSEN, 2003, p. 123.

<sup>24</sup> When parties in a repeated game fear that the game will soon end, e.g. due to a military take over, the higher the odds are for such an end, the higher the odds are

According to Ramseyer and Rasmusen, the time-horizon is crucial in the second scenario. Whether the actors have a short-term or long-term perspective is related to the perceived benefits in relation to judicial independence. A long-term view enables the disadvantages of an independent judiciary to be balanced with the advantages. Controlling the bureaucracy, for example, is worth the price of an independent judiciary in the long term given that the power-hold of the regime is not eternal in one way or another.<sup>25</sup> A shorter perspective would allow for a less independent judiciary. China seems with its judicial reform process to be moving toward an increasingly longer perspective on independence as a strategy to enhance the legitimacy of the regime, and ideally as a consequence towards an independence of the judiciary that can guarantee human rights.

The dilemma of the Chinese regime in this respect is an apparent willingness to at least a partial submission to the scrutinizing international human rights regime, with increased domestic and international legitimacy as consequences, while at the same time staying in full control over the domestic developments, including the courts. However, with the Communist Party's continued power monopoly claimed as essential for maintaining stability of the country, which in turn, it is argued, is the precondition for economic and social development,<sup>26</sup> the dilemma arises as regards judicial independence.

Only an independent and competent judiciary is capable of sustaining the long-term social and economic progress, which ultimately provides political legitimacy to the current government.<sup>27</sup>

On the one hand, the Chinese regime considers the unitary Party rule as essential for social development while on the other judicial independence is seen as a required component for maintained social stability. Over the last two and a half decades and in particular in the last few years, the Party has been forced to withdraw from some decision making.<sup>28</sup> The remaining influence and power of the Party is however critical for maintaining power. That the Party sees itself as essential in sustaining social stability rests on the assumption that Party rule is a requirement for the unity of the country and the consequent well

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that the parties will defect and instead ensure a dependent judiciary, this is by Ramseyer-Rasmusen labeled 'endgame tactics'.

<sup>25</sup> J. Mark RAMSEYER and Eric B. RASMUSEN, 2003, pp. 145–147, 159; see also John FERREJOHN, 1999, p. 383, on the same argumentation.

<sup>26</sup> See e.g. Amartya SEN, 2000 (b), p. 6. (as printed) on the importance of legal progress in social and economic development, see also p. 10 on judicial independence as confidence generator.

<sup>27</sup> Qianfan ZHANG, 2003, p. 101.

<sup>28</sup> See e.g. Randall PEERENBOOM, 2002, pp. 188 *et seq.*

being of its people. Also due to institutionalized corruption, the need for rule of law to strengthen the legitimacy of the government is apparent and a more independent judiciary is needed among other reforms.<sup>29</sup>

Hence, judicial independence is a crucial element in the construction of the new society based on the rule of law and indeed as a requirement in safeguarding the maintenance of the country as a single and unified entity. However, judicial independence requires a balance between control and legitimacy, namely surrendering some government authority to the judiciary.<sup>30</sup>

Professor Jacques deLisle holds that the globalization “has given [the] Chinese leaders compelling domestic reasons . . . to eschew the rogue’s role in the international legal order”.<sup>31</sup> The need also for international legitimacy has increased with evolving internationalization. Such globalization-forces are not only resulting in an increased commitment to international human rights law but also submission to the international trade regime. As the last century came to a turn, globalization and world trade added stimulus to the efforts to pursue an independent judiciary. In the late 1990s China signed the two major human rights covenants and later also ratified the International Covenant on Economic, Social and Cultural Rights. Even though the Covenant on Civil and Political Rights that encompasses the requirements for judicial independence awaits ratification, China is now obliged under the WTO’s requirements to provide an ‘impartial’ judiciary, since it became a member on 11 December 2001. Arguably, international undertakings in the area of human rights law could have a greater impact, given the obligations falling onto the state, than undertakings in areas of greater self-interest to the state, such as in multilateral trade liberalization. The attractiveness of benefits from free trade appear however as greater and seemingly less risky than a stronger human rights commitment.

With the WTO commitments, China undertook to provide independent adjudication at least in so far as trade related disputes are concerned.

China shall establish, or designate, and maintain tribunals . . . for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings . . . Such tribunals shall be impartial and

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<sup>29</sup> See e.g. Richard E. MESSICK, 1999, p. 123, who argues that inefficient court procedures and management often leads to rent-seeking among judges.

<sup>30</sup> On judicial independence as a required component for credibility of a government, see e.g. Herbert JACOB, 1996, pp. 391–392; see also Jianlin BIAN, 2000, p. 124, who refers to the dilemma as a double edged sword; deLisle even argues that law in China may be an intended option to a full-fledged multi-party democracy, as a means of supervision, to prolong the economical development that will purchase political stability, Jacques deLISLE, 2001, pp. 12, 10.

<sup>31</sup> Jacques deLISLE, 2000, p. 275.



independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.<sup>32</sup>

China's WTO-membership obliged the establishment of a transparent, open, and fair legal system. China's chief negotiator for entering the WTO, LONG Yongtu, reaffirmed China's pledge to provide an independent judiciary but stated: "The government will push for [the changes] from day one upon the WTO entry but we cannot guarantee that every [domestic] enterprise and regional [authority] will carry them out immediately or effectively . . ."<sup>33</sup> In early 2002, the Supreme People's Court issued regulations to improve civil and commercial matters involving foreign parties making the intermediate and high people's courts the appropriate initial forums, thus bypassing the basic level courts.<sup>34</sup>

The commitments under the international trade and human rights regimes bring China closer to the world community but the need to provide credible neutral adjudication to resolve the multitudes of old and novel issues that China is battling is pressing.<sup>35</sup>

### **Structure and Methodology**

This assessment of judicial independence in China from a human rights law perspective is divided into three parts: international human rights law, comparative law, and Chinese law respectively. The first part deals with judicial independence by scrutinizing relevant international human rights standards and subsequent elaborations on these by authoritative bodies. This is done in order to delimit the concept and distill the most essential elements or components of judicial independence that subsequently will be used for assessment. Chapter I considers the global and regional human rights instruments related to judicial independence. Regional standards being influential on as well as influenced by the global standards are a relevant

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<sup>32</sup> Protocol on the Accession of the People's Republic of China, 23 November 2001, WT/L/432, p. 4: Part I 2 (D) para. 1, extracted from GAO's (US General Accounting Office) Electronic Database of China's WTO obligations available at [www.gao.gov](http://www.gao.gov); see also the same report, P.I.2.(D).2., on the "opportunity for appeal"; see also Working Party III. Framework for Making and Enforcing Policies 4. Judicial Review (WP.III.4.76.) and (WP.III.4.78.) on statement of obligation by the Working Party and the response and commitment by the Chinese representative as regards independent tribunals.

<sup>33</sup> SOUTH CHINA MORNING POST, 20 December 2000.

<sup>34</sup> US GAO WTO: Observations on China's Rule of Law Reforms, Statement of Susan S. Westin, 6 June 2002 (GAO-02-812T), p. 5.

<sup>35</sup> On China and its WTO obligations and judicial independence, see e.g. Fuzhi WU, 2003, pp. 769-770; Shigui TAN, 2002.

source also beyond the region in question. In the second Chapter, I analyze the international human rights law jurisprudence on judicial independence and application of the standards, elaborating on the various relevant circumstances that affect the independence of the judiciary as developed by case-law. Through a schematic comparison of key instruments and case-law, I extract the basic criteria and issues to be assessed. These form the key parts in defining judicial independence and can serve as basis for assessment.

The second part takes its starting point in comparative law; conventional comparison in comparative law tends to emphasize differences between legal systems. Such methodology has however an inherent risk of exaggerating particular features in a legal system that is counterproductive to the aim of making foreign systems intelligible. I propose a straightforward analogy method for comparison and assessment based also on greater recognition of similarities. This methodology aims at enhancing the understanding through greater contextual consideration. This comparative law approach is supported by a brief discussion that includes a more general social science approach to cross-cultural comparison. In order to explain the causes and effects of the often-negative contemporary view on law in China that the methodology is intended to address, I discuss what I have termed 'legal orientalism'. This expression encompasses the historical construction of China and the 'East' as counter polarity to Europe and the 'West' and the effects of this development also in the present use of for example comparative law. This method of analogy is then applied to Chinese legal history, using modern research to counter skewed perceptions that continue to dominate the discourse on law in China. The first Chapter (III) in this part tackles methodologies in comparative law, discussing how to address stereotypical perceptions of a legal system and how to enhance mutual understanding between legal cultures. Chapter IV looks into the early phase of legal development in China, in particular the origin of law and scrutinizes Confucianism, the school of thought ascribed to be of major influence in not only China but in all of Eastern Asia. The Chapter continues with an elaboration on fundamental aspects of law and the application of law in Chinese history with emphasis on institutional and procedural aspects of the judiciary, aspects that even included judicial independence.

The concluding third part provides an assessment of judicial independence in contemporary China. This is achieved on the basis of the standards elaborated in the first part, and considering the comparative law approach developed in the second part. The first Chapter (V) in part three starts from the end of the imperial dynasties and the extensive foreign influence on the legal system and concludes with contemporary China. This description provides the background to the foundations of the present judicial system with the last century's foreign influences interplaying with the traditional legal system. The final Chapter (VI) elucidates the contemporary judicial system and the ongoing reform process. In a brief format, I present the judicial organization and procedures as they relate to judicial independence. This serves as the

foundation for the subsequent detailed analysis of the basic concerns with the present system and for the final assessment of judicial independence in the People's Republic of China from an international human rights law perspective.

### *Sources*

This study relies on literature, primary, and secondary sources, interviews and field observations. I have generally relied on legal documents and academic literature but also on discussions with academics and practitioners, mainly Chinese. I have focused the search on English language literature and only to some extent other European languages but I also draw significantly from Chinese language literature.

As stated, the point of departure for my study is international human rights law and I cover global and to some extent regional instruments as well as case-law related to judicial independence and academic commentaries on the subject. I have used Chinese language sources more extensively in the discussion of legal reform in China, where I am able to draw important insight from Chinese language literature as well as law sources that are often lost to the broader discussion-taking place in English language literature. Given the traditional emphasis on judicial independence in countries relying extensively on the common-law system, the literature used predominantly originates from these countries. Much of the external research on law in China is done or at least published in the US. The discourse on Chinese law is also dominated by Americans studying China and by Chinese studying the US legal system in particular. For this reason, this study almost by necessity, when discussing China relies extensively on American literature supplemented with Chinese. Since Europeans are often seen as mid-way between US and China, not only geographically, they therefore have a role to play in bridging artificial divides and detecting common ground between China and the Western world.

In addition to law literature, I have also relied on more philosophically oriented texts when dealing with comparative law; on historical accounts in relation to the Chinese legal development; and on some more political science oriented legal literature when discussing the rationale for judicial independence in China. This broader scope of literature enables a greater contextual consideration, needed in particular when studying more 'obscure' legal systems such as China's. A broader approach to literature is also required when involving 'area studies' as well as legal science. I draw on this broader literature especially when discussing the comparison between China and the Western world. This discourse has been extensively dealt with in other fields than law and the discussion provides a key to my core arguments, and also more generally to the deeper understanding of legal development in China. Generally I included material through 31 December 2003, but also recent literature in some cases.

### *Concepts and Terms*

International human rights law stipulates an ‘independent and impartial’ judiciary. I use the term ‘judicial independence’ as encompassing impartiality unless a distinction between the two terms is needed. I am however concerned with both – independence and impartiality. Many commentators do not make much of a distinction between the two and quite a few even seem to confuse the terms.<sup>36</sup> Regional human rights courts treat judicial independence as the presupposition of impartiality.<sup>37</sup> Similarly, in the Canadian landmark Supreme Court case of *Valente*, impartiality was interpreted as a state of mind and was therefore considered to be part of the larger concept of judicial independence. The Court also concluded that lack of independence could indicate lack of impartiality but lack of impartiality alone must not mean lack of independence.<sup>38</sup>

‘Independence’ relates to the judiciary as a whole remaining free from undue influences, in particular from the executive, the parliament, and political parties, through for example appointment, promotion, or other employment conditions. Impartiality refers to the requirement of having as unbiased judges as possible. This is assured through measures such as limiting judges’ pre-trial involvement and providing for a bench or a jury that has no self-interest in the outcome of the case. Legal education and professional standards assist in this impartiality. A number of definitions of the two terms have been attempted in national, regional, and international case-law as well as by commentators. The gist of most of these defines independence as institutional, while impartiality is about having unprejudiced views. In the first part below, I will develop the meaning of and the distinctions between these concepts in more detail. In brief however, independence of the judiciary as distinct from impartiality refers to insulation from influence from in particular the executive, through appointment procedures and terms of office, and also the provision of general guarantees from outside pressure to prevent influence.

Impartiality according to the United Nations Human Rights Committee “implies that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.<sup>39</sup> In *Valente*, the Canadian Supreme Court stated that impartiality was impossible to achieve but also not desirable, since judges may

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<sup>36</sup> Theodore L. BECKER, 1970, p. 141.

<sup>37</sup> The Inter-American and the European courts, Peter RÄDLER, 1998, p. 728.

<sup>38</sup> *Valente v. The Queen*, [1985] 2 S.C.R. 673, Ian GREENE, 1988, pp. 189–191, 194.

<sup>39</sup> *Karttunen v. Finland*, Communication No 387/1989, 5 November 1992, CCPR/C/46/D/387/1989, para. 7.2; Roman law used the phrase *sine ira ac studio*, without bias or favor, for the principle of impartiality, Max WEBER, 1954, p. 351.

need to fight for certain interests.<sup>40</sup> In an early British case in 1852 the mere fact of judicial interest in the outcome was enough to prove partiality.<sup>41</sup> In later British cases this interest factor has been further extended to include, for example, the strong commitment that one of the members of the House of Lords in the *Pinochet* case had, which was indicated by membership in Amnesty International.<sup>42</sup> Another Canadian case limited such commitment to exclude a judge's life experience in general.<sup>43</sup>

Moreover, I am concerned with judges and courts in national jurisdictions. National judges and courts have many parallels with the international equivalents but also some particularities so I am only drawing on general provisions on independence and impartiality when considering international courts, but the discussion I am entertaining on judicial independence is specifically related to national courts and judges.<sup>44</sup> Distinguishing between common-law and civil law traditions is a common feature. The authority of a court with a pronounced mandate to make law, as in common-law jurisdictions, is certainly greater, but all courts, including in the civil-law tradition, do create law even though without the same pronounced authority to that effect. The discussion on the rationale of judicial independence is however pertinent to both legal traditions.

Court is the general term for a judicial organ. This is especially the case when referring to a court in a national hierarchy of courts with a general mandate, such as civil and criminal matters. Tribunal is usually referring to a more specialized court not falling within the hierarchy of a state, such as a thematic, an international, or an ad hoc court, for example a military tribunal.<sup>45</sup>

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<sup>40</sup> Ian GREENE, 1988, p. 192.

<sup>41</sup> *Dimes v. Proprietors of Grand Junction Canal*, House of Lords, UK, (1852) 3 HL Cas. 759, Nihal JAYAWICKRAMA, 2002, p. 519.

<sup>42</sup> *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No.2), house of Lords, UK, [1999] 1 LRC 1, Nihal JAYAWICKRAMA, 2002, p. 519.

<sup>43</sup> *R v. S.* Supreme Court of Canada, [1997] 3 SCR 484, Nihal JAYAWICKRAMA, 2002, p. 519.

<sup>44</sup> For elaborations on judicial independence in international courts, see e.g. also the discussion below in relation to the Universal Declaration on the Independence of Justice; see also e.g. L. E. PETTITI, 1985; Dinah SHELTON, 1996; Martin M. SHAPIRO, 2001; [www.pict-pecti.org](http://www.pict-pecti.org).

<sup>45</sup> In the words of the International Covenant on Civil and Political Rights (ICCPR), tribunal possesses the identical characteristics of a court and the former also entails the concept of independence and impartiality, Manfred NOWAK, 1993, pp. 240, 244–246; In the specific European context, tribunal has come to be defined broadly so as to include any body with the power to decide according to set procedures and rules of law and in doing so, is able to change decisions of subordinate bodies on issues of law and fact. In this way a number of organs traditionally not perceived as courts or tribunals have come to be treated as such, Hans DANELIUS, 1997, p. 151; P. van DIJK and G. J. H. HOOF, 1998, p. 451.

Tribunal can generally be understood as a broader term than court.<sup>46</sup> Referring to courts in general however, will by necessity become very schematic. Courts on different levels in a national hierarchy typically deal with cases of different nature: the highest court would be more susceptible to political influence in that it will largely deal with key issues while local courts will be concerned with relatively minor, local issues of lesser political sensitivity. Cases do travel up the hierarchy, but appeal is restricted. Hence, an appeal court may become the highest available court in a case of great political sensitivity. My discussion on courts and judges in general is therefore most relevant to higher courts rather than courts in general. In my discussion on courts in China the situation is more specific, but more will follow on this topic below.

‘Judiciary’ and ‘judicial’ as in judicial independence or independence of the judiciary refers generally to courts and judges. ‘Judiciary’ in some countries has a broader meaning. In the Chinese system, the ‘judiciary’ (*sifa*) also includes the procuratorate, the combined supervisory and prosecuting organ found in countries influenced by the Soviet legal system.<sup>47</sup> When discussing judicial independence in China therefore, the procuratorate is commonly included in the discussion. Under international human rights law, the intended addressee of the independence of the judiciary is the courts and the judges but not the procuratorate nor any prosecuting organ. Official Chinese versions of for example United Nations documents translate ‘judicial independence’ into ‘*sifa dili*’ (as does the abstract above), which then in China come to include also the procuratorate and at times even administration of justice in general.<sup>48</sup> The debate in China on judicial independence suffers from this often-overlooked difference: the non-distinction between the courts and the procuratorate in relation to the requirements for independence of the courts.<sup>49</sup> The different nature of the procuratorate and the courts, where the procuratorate, even though with a certain degree of independence, works as the arm of the executive while the courts are to work independently, requires the distinction between these to be made, and especially so across language barriers. This study is however focused on the judiciary in a narrow sense, only the courts and the judges even though I will discuss the procuratorate in the context of influence on the courts.

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<sup>46</sup> For a further definition of court, see e.g. Keith O. BOYUM, 1983, pp. 2–3.

<sup>47</sup> See e.g. Xiabing HU and Renqiang FENG, 2000, pp. 43–44.

<sup>48</sup> See however the *Draft additional Protocol to the European Convention on Human Rights* (the Palermo Declaration), adopted by the Association of European Magistrates for Democracy and Freedoms (MEDEL) 16 January 1993, which includes in article 9 the Procurators and provides them with equal protection to that of the judges.

<sup>49</sup> E.g. the Criminal Procedural Law revised in 1996 includes in article 5 an independence criteria with reference to both the procuratorate and the courts without distinguishing between the two.

I have so far talked about China. The title specifies the area of study as the People's Republic of China (PRC) which in practical terms excludes Taiwan, irrespective of the legal status of the territory.<sup>50</sup> The two Special Administrative Regions of Hong Kong<sup>51</sup> and Macao<sup>52</sup> are excluded since they have separate legal systems that confluence with the legal system of China only at its highest levels.<sup>53</sup> China is used herein as shorthand for this more narrow geographical area of the PRC commonly referred to as 'mainland China'. What remains after this geographical delimitation still poses challenges given the risk of generalization regarding a country almost the size of Europe (considering the 45 member states of the Council of Europe) and slightly larger than the US, and with a population twice that of Europe and five times that of the US. The thousands of courts in such a vast country make it even more difficult to generalize. I will provide a glimpse of contrast to show the extreme difference in conditions under which courts in developed Shanghai and those in inland Xinjiang operate. To also show the difference between the levels of the four-tier court structure would make my task insurmountable. Therefore I talk about courts in general even though for example political sensitivity, as stated, can be quite different at the central court in Beijing than that of the local court in for example Kashgar in Western Xinjiang. Similarly, the problems faced differ depending on the level of the court in the hierarchy. Due to the sheer size of

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<sup>50</sup> For discussions on judicial independence in Taiwan, see e.g. Tay sheng WANG, 1997, pp. 145 *et seq*; Tsung fu CHEN, 2003, pp. 397 *et seq* and generally p. 386.

<sup>51</sup> The judicial independence in Hong Kong has been a hotly debated topic since the area was returned to China in 1997, see e.g.; Karmen KAM, 2002; Emily JOHNSON BARTON, 2003; Steve TSANG (Ed.), 2001; Johannes M. M. CHAN, 1999; Jill COTTRELL and Yash GHAI, 2001; A. A. BRUCE, 1997; see also CCPR/C/79/Add.117 in particular paras. 236–238, When Hong Kong was seeded back by the UK to China in 1997, the government of China informed the UN Secretary-General on 20 June 1997 that human rights treaties applicable in Hong Kong would remain in force; the Basic Law of Hong Kong, article 85, reads: "The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently . . .".

<sup>52</sup> Since Macao was returned to China in 1999 the status of the judiciary has received fairly modest attention compared to that of Hong Kong. Some literature is however available, see e.g. Maria Leonor Machado Esteves de CAMPOS E ASSUNÇÃO, 1997; Ian D. SEIDERMAN (Ed.), 2002, pp. 130–132; see also CCPR/C/79/Add.115, response of the Human Rights Committee to the Portuguese State Report as it concerns Macao, para. 6 states i.a.: "The Committee also notes with satisfaction that Portugal and China reached agreement in March 1998 on the principles underlying the new organization of the legal system, which guarantee the non-removability of judges and the autonomy and independence of the judiciary; When Macao was seeded back the government of China informed the UN Secretary-General on 13 December 1999 human rights treaties applicable in Macao would remain in force.

<sup>53</sup> See e.g. Albert H. Y. CHEN and Anne S. Y. CHEUNG, 2004, p. 258.

China, the impact of centrally proposed reform measures to address the vast array of problems has consequently quite different potentials for success depending on the level and the location of the court.





**JUDICIAL INDEPENDENCE**

COMPARING COMPARISONS

ASSESSING CHINA'S JUDICIARY

## Judicial Independence

The role of the judiciary has gained in importance, especially in developing countries with increasing urbanization and industrialization.<sup>1</sup> The global campaign for the rule of law makes the central concept of judicial independence a commonly studied phenomenon that is even used as an indicator of the general level of legal development.<sup>2</sup> Judicial independence forms an essential part in not only rule of law and fair trial,<sup>3</sup> but is also ascribed as a key institution in promoting economic growth,<sup>4</sup> fighting corruption,<sup>5</sup> and maintaining political legitimacy.<sup>6</sup> Fundamentally, judicial independence is essential for protecting human rights.<sup>7</sup>

Although judicial independence is elemental, the concept is far from clear-cut. While it may be viable to maintain judicial independence as a dynamic concept that can be interpreted to encompass issues understood to be problematic in a given system, some of the criteria constituting judicial independence are essential. However, the meaning of judicial independence under international human rights law has not been clearly determined.<sup>8</sup> To establish the law to the extent possible, the recognized listing of sources on which international law is based would be the starting point. Article 38 (1) of the Statute of the International Court of Justice (ICJ), provides: (a) application of conventions; (b) custom; (c) general principles of law; (d) judicial decisions

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<sup>1</sup> See e.g. Peter H. RUSSELL, 2001 (a), pp. 301, 307, who argues that more developed judicial systems hands over more authority to the courts, requiring them to deal with legal-political borderline cases and even with public policy issues which demand greater autonomy but also increased accountability; see also Shimon SHETREET, 1985 (a), p. 593.

<sup>2</sup> See e.g. Boaventura de SOUSA SANTOS, 2000, p. 253.

<sup>3</sup> Christopher M. LARKINS, 1996, p. 606; Jr FALLON, 1997, p. 9; see also e.g. the statement by the United Nations Human Rights Committee on the requirement of judicial independence for a sound administration of justice, maintenance of democracy and the rule of law, CCPR/C/79/Add.86. Belarus. 19 November 1997, Para. 14.

<sup>4</sup> See e.g. Beatrice WEDER, 1995; see also Charles M. CAMERON, 2002, pp. 135–142.

<sup>5</sup> See e.g. Beatrice WEDER, 1995, pp. 24–25.

<sup>6</sup> Shannon Ishiyama SMITHEY and John ISHIYAMA, 2000, p. 180: courts have greater power than other political institutions to confer legitimacy on a regime; It is also oft argued that an independent judiciary will prevent the majority from oppressing the minority or the unpopular individuals inadequately represented in political organs, A. E. HOWARD, 2001, p. 89; Archibald COX, 1996, p. 572; see however Terri Jennings PERETTI, 2002, p. 120: claiming that courts not necessarily are the great defender of rights and minorities.

<sup>7</sup> See e.g. Charles M. CAMERON, 2002, p. 144.

<sup>8</sup> Peter RÄDLER, 1998, p. 727.

and teaching of the most highly qualified publicists.<sup>9</sup> In the case of judicial independence, these sources are not fully indicative. The wording of the treaties does not develop the concept beyond the principle that courts are to be independent and impartial.<sup>10</sup>

Even though traditionalists advocate that the sources stipulated in article 38 (1) of the ICJ Statute are the exhaustive listing of legal sources, the functionalists argue that the implications of the sources beyond the ICJ itself is open to debate.<sup>11</sup> Added to this is the quite separate nature of human rights law. The intra-state nature of traditional international law is in some respects quite distinct from human rights law with the beneficiaries being individuals and groups within countries. When the Statute of the International Court of Justice was drafted in 1945, the elaborate complaint mechanisms such as that of the Human Rights Committee and regional human rights courts, for instance the European Court of Human Rights, were not in existence. To strictly apply the same state-centered sources to human rights law as to international law seems to potentially limit the very purpose of human rights and also to limit a positive human rights law development.

A human rights oriented approach to sources for the determination of concepts such as judicial independence would therefore need slight modification, relying firstly on international and regional treaties and secondly on case-law from treaty bodies and regional human rights courts. The logic of including also regional standards will be discussed along with elaborations on the case-law from the European Court of Human Rights. Thirdly, to further determine the meaning of judicial independence it is useful to include non-binding instruments like the UN Basic Principles on judicial independence, endorsed by the UN General Assembly and relied on by in particular the UN treaty bodies. Professional and NGO documents are also referenced as an

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<sup>9</sup> See e.g. Peter MALANCZUK, 1997, pp. 35–62.

<sup>10</sup> In order to determine custom, in the sense of general practice accepted as law, a survey of national practice is required; the existence of this custom is to some extent supported by judicial decisions and authoritative publications but an authoritative conclusion on this point is lacking; the former UN Special Rapporteur on Independence of Judges and Lawyers, mandated by the Commission on Human Rights, concluded nevertheless (E/CN.4/1995/39) that: “. . .the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law. [para. 32] . . . the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore, an international custom in the sense of Article 38 (1) (b) of the Statute of the International Court of Justice.” (para. 35).

<sup>11</sup> Douglas M. JOHNSTON, 1988, p. 31, especially note 96.

overview of the development and the history of the concept and the texts.<sup>12</sup> This listing of sources is the basis for the subsequent discussion on the content of judicial independence under international human rights law in the following two chapters.

The first Chapter provides an overview of the standards of independence as stipulated in international and regional human rights law instruments. Chapter II presents subsequent jurisprudence based on these standards developed by international bodies through developing case-law and commentaries that further elaborate on the concept of judicial independence. The standards discussed in these first two chapters are not so much intended to provide details on the threshold levels of the various proxies or criteria constituting judicial independence but rather to distill which areas and criteria of judicial independence are the essential constituting parts.

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<sup>12</sup> See e.g. Ellen HEY, 2003, pp. 7, 13, on non-binding instruments as a process of law-making.



# JUDICIAL INDEPENDENCE

I. INTERNATIONAL INSTRUMENTS

II. INTERNATIONAL JURISPRUDENCE

# COMPARING COMPARISONS

III. COMPARATIVE LAW: COMPARING CHINA

IV. FIAT LEX: LEGAL HISTORY IN CHINA

# ASSESSING CHINA'S JUDICIARY

V. FIAT FLUX: MODERN HISTORY

VI. THE CONTEMPORARY JUDICIARY

## ***I. International Instruments***

Following the discussion above on sources for determining judicial independence, this Chapter elaborates on provisions in international and regional human rights law instruments pertaining to judicial independence. In an effort toward exhaustiveness I have included references to judicial independence from international human rights law and also from international humanitarian law and statutes of various international courts to show the wide acceptance of the concept. The provisions include non-binding instruments that have been adopted by the respective organizations, such as the UN Basic Principles on the Independence of the Judiciary and the Council of Europe Recommendation No. R (94) 12 to Member States on the Independence, Efficiency and Role of Judges. The instruments also include general comments of the treaty bodies, which are broadly cited distillations of the specific case-law. The Chapter moreover analyzes professional and NGO-driven instruments that are influential on the further development of binding law.

### **A. The United Nations and other International Organizations**

Independence and impartiality of the judiciary is provided for in a number of international instruments. The Universal Declaration of Human Rights of 1948 (UDHR) is the source of the subsequent Covenants and at least in part reflects customary law or even peremptory norms of general international law, *jus cogens*.<sup>1</sup> Article 10 deals specifically with independence and impartiality:<sup>2</sup>

[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

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<sup>1</sup> On the customary law status of UDHR, see Gudmundur ALFREDSSON and Asbjørn EIDE, 1999, pp. xxxi–ii; see also Ian D. SEIDERMAN, 2001, p. 66; for the background on UDHR, see Mary Ann GLENDON, 2001, in particular pp. 33–34, 132–134 on the importance of the Chinese delegate (of the Nationalist Government) ZHANG Pengchun (Peng-chun CHANG) as vice chairman of the Commission on Human Rights; see also Åshild SAMNØY, 1999; Jakob Th. MÖLLER, 1999.

<sup>2</sup> Article 10 elaborates on article 8 which reads in part: “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”



A more detailed elaboration was saved for the treaty codification that was to follow the Declaration.<sup>3</sup> The resulting provision in the International Covenant on Civil and Political Rights (ICCPR) is found in the beginning of article 14 (1):

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>4</sup>

The requirement of an independent and impartial tribunal is valid for both criminal and civil matters. The latter commonly also include administrative cases.<sup>5</sup> In the drafting process of article 14 (1), the United States was influential with the concept of due process.<sup>6</sup> Paragraph 1, and the sentence on independence and impartiality was voted on favorably by the Commission on Human Rights in 1949, and again when extended versions of the paragraph were submitted in subsequent years. The Third Committee of the General Assembly finally adopted the paragraph in 1959 with 70 votes in favor, none against and with 3 abstentions.<sup>7</sup> Judging from the reservations to the paragraph, in particular some Western countries were concerned with the reference to judicial independence.<sup>8</sup> No state parties have however made total reservations

<sup>3</sup> Lauri LEHTIMAJA and Matti PELLONPÄÄ, 1999, p. 225.

<sup>4</sup> The rest of article 14 (1) relates to public trials: “The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.”; The Chinese version of the crucial second sentence of article 14 (1), “independence and impartiality” reads: “*duli de he wu pianyi de*” [独立的和无偏倚的], ; the authentic version still used on Taiwan reads however “*duli wusi*”. [独立无私]

<sup>5</sup> Manfred NOWAK, 1993, pp. 241–243.

<sup>6</sup> *Id.*, p. 236; The Drafting Committee used “competent and impartial” but the United States proposed in the Human Rights Commission of 1947 to rephrase it into: “independent and impartial” which was accepted, others found the phrase of “independent and impartial” to be without legal meaning, see Marc J. BOSSUYT and John P. HUMPHREY, 1987, p. 287.

<sup>7</sup> Marc J. BOSSUYT and John P. HUMPHREY, 1987, p. 290; For the final vote on ICCPR (106 for, none against, no abstentions, 16 absent (out of which one later wished to have its vote recorded as in favor of the adoption of the Covenant), see Dusan J. DJONOVICH (Ed.), 1975, p. 51.

<sup>8</sup> Manfred NOWAK, 1993, p. 237.

to the requirement of judicial independence and impartiality under article 14(1).<sup>9</sup> France though has however a reservation related to disciplining in the army;<sup>10</sup> and Egypt has made so-called global reservations to the Covenant as a whole in cases of conflict with Islamic Shariah.<sup>11</sup>

Article 14 was however not deemed essential enough to be included in the list of non-derogable rights in article 4 (2).<sup>12</sup> A report to the United Nations Sub-Commission on the Promotion and Protection of Human Rights proposed that the rights in

article 14 of the International Covenant on Civil and Political Rights are inherent in the Covenant as a whole and should accordingly be considered to be non-derogable, particularly because they are necessary to protect other non-derogable rights<sup>13</sup>

In General Comment No. 29 of 2001 by the UN Human Rights Committee, on states of emergency, the Committee noted that non-inclusion of a right in article 4 (2) does not mean that derogation at will is possible (paragraph 6).<sup>14</sup> The Committee also stressed that for example article 14 (1) of the ICCPR in relation to the requirement of non-discrimination in article 26 excludes the possibility of discrimination also during states of emergency (paragraph 8). In cases of death penalty, derogation from articles 14 and 15 of the Covenant is moreover excluded (paragraph 15).

Israel proposed to make parts of article 14 (1) non-derogable during the Covenant negotiations but finally it was not included in the list.<sup>15</sup> Under the American Convention, the Inter-American Court has in advisory opinions however concluded that judicial independence is a non-derogable right. The Court concluded, “the active involvement of an independent and impartial judicial body [is required in order to have] the power to pass on the lawfulness

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<sup>9</sup> E/CN.4/Sub.2/2002/34, 8 August 2002, working paper preparatory to the submission of the expanded working paper by Françoise Hampson submitted in accordance with the Sub-Commission decision 2002/17, and E/CN.4/Sub.2/1999/28; see also the work under way by the International Law Commission, [www.un.org/law/ils](http://www.un.org/law/ils); see also Liesbeth LIJNZAAD, 1995, pp. 187 *et seq*, on the argument of the list of non-derogable rights being the “object and purpose” of the Covenant.

<sup>10</sup> “. . . the article cannot impede enforcement of the rules pertaining to the disciplinary régime in the army . . .”.

<sup>11</sup> Global reservations are however unlikely to be accepted should a dispute arise.

<sup>12</sup> See e.g. Alfred DE ZAYAS, 1998, p. 671; see also article 15 of the European Convention on Human Rights, also not listing non-derogable article 6 dealing with fair trial guarantees.

<sup>13</sup> E.CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1, para. 3.

<sup>14</sup> CCPR/C/21/Rev.1/Add.11/, 31 August 2001.

<sup>15</sup> E/CN.4/515/Add.6, p. 1.

of measures adopted in a state of emergency".<sup>16</sup> Efforts were actually made to raise the importance of article 14 by making it (as well as article 9) non-derogable through a third optional protocol to the ICCPR as will be further discussed below.<sup>17</sup>

### *1. Detailed UN Instruments*

The detailed work in the UN of defining the concept of independence of the judiciary began in 1978 on a request by the then Sub-Commission on Prevention of Discrimination and Protection of Minorities, which led to the appointment in 1980 of Mr. Singhvi as Special Rapporteur and the consecutive appointment of Mr. Cumaraswamy in 1994.<sup>18</sup> Mr. Cumaraswamy was replaced in 2003 by Mr. Leandro Despouy of Argentina.<sup>19</sup> Additionally a series of reports were submitted to the Sub-Commission on how to implement the standards.<sup>20</sup> A study was also done on the right to a fair trial.<sup>21</sup> In response to the work on judicial independence, the Human Rights Commission initiated a number of steps, one of these being the establishment of an open-ended working group to draft a third optional protocol to the ICCPR containing provisions for a fair trial at all times as well as for an effective remedy.<sup>22</sup> This initiative seems to have failed, in part due to the already established nature of the principle.

One key-document deals exclusively with judicial independence and often serves as benchmark for the Commission on Human Rights and the UN treaty bodies.<sup>23</sup> The UN Basic Principles on the Independence of the Judiciary<sup>24</sup> and

<sup>16</sup> Inter-American Court, Advisory Opinion OC-8/87, 30 January 1987; Inter-American Court, Advisory Opinion OC-9/87, 6 October 1987; see also 1982, p. 310; see however Stanislav CHERNICHENKO and William TREAT, 1994, paras. 35, p. 157.

<sup>17</sup> Alfred DE ZAYAS, 1998, pp. 676–677, and also 682–683; and the mentioning of the Siracusa Principles, p. 674, note 14; in a case before the United Nations Human Rights Committee, the Committee did not take derogation into consideration, possibly however due to that it was not invoked, *Zelaya v. Nicaragua*, 328/1988; see also: 1986; An effort to make standards always applicable is the Minimum Standards of Humanity, what is also known as the Declaration of Minimum Humanitarian Standards (Turku Declaration), E/CN.4/Sub.2/1991/55, where article 9 stipulates ". . . regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations."

<sup>18</sup> E/CN.4 Sub.2/L731, 14 August 1980 on initial appointment of Singhvi; Dato' Param CUMARASWAMY, 1998, p. 13.

<sup>19</sup> [www.unhchr.ch/html/menu2/7/b/mijl.htm](http://www.unhchr.ch/html/menu2/7/b/mijl.htm).

<sup>20</sup> The final report was Louise JOINET, 1993.

<sup>21</sup> By Stanislav CHERNICHENKO and William TREAT, 1994.

<sup>22</sup> See e.g. E/CN.4/Sub.2/Res/1993/26, para. 3; and E/CN.4/Sub.2/Res/1993/24, para. 49 and Annex II.

<sup>23</sup> Louise JOINET, 1993, Part Two, para. 2.

its Procedures for the Effective Implementation of the Basic Principles were adopted in 1985 at the Milan Congress.<sup>25</sup> The Basic Principles are rather general and basic; they are the result of negotiations where in particular East European states rejected more detailed formulations.<sup>26</sup> The Basic Principles consists of 20 paragraphs, organized under six headings:

- Independence of the Judiciary
- Freedom of Expression and Association
- Qualifications, Selection and Training
- Conditions of Service and Tenure
- Professional Secrecy and Immunity
- Discipline, Suspension and Removal

The Procedures for the Effective Implementation are directing the states on various measures to effectuate the Basic Principles. A supervision mechanism over the Basic Principles was also foreseen that fared poorly. The Economic and Social Council adopted a resolution (1986/10, section V) where the states were to submit a report every five years starting in 1988 on the progress of implementing the Basic Principles (Procedure 7). Ten years after the adoption of the Basic Principles the UN Crime Prevention and Criminal Justice Branch in Vienna sent questionnaires to all member states to gather information on measures taken to implement the principles. About 50 per cent responded, of which many only briefly stated that their constitutions are covered the Principles.<sup>27</sup> The result of this questionnaire may indicate the view that judicial independence in many countries is a non-issue that needs no further consideration.

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<sup>24</sup> Initially adopted by the UN Congress on the Prevention of Crime and Treatment of Offenders at its 7<sup>th</sup> Congress in Milan, 1985, endorsed by UN General Assembly the same year; Dato' Param CUMARASWAMY, 1998, p. 13; see also The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted under General Assembly resolution 43/173 of 9 December 1988. The Principles stated that detained persons must be entitled to take proceedings before a "judicial or other authority" which must afford guarantees of "impartiality and independence".

<sup>25</sup> Endorsed by the General Assembly in 1989.

<sup>26</sup> Dato' Param CUMARASWAMY, 1999, p. 67.

<sup>27</sup> Dato' Param CUMARASWAMY, 1998, p. 16; see also the Report of the UN Secretary-General on the implementation of the Basic Principles, A/Conf.144/19, 30 May 1990.

## 2. *Other Instruments*

A number of other international and UN instruments also deal with judicial independence.<sup>28</sup> The International Covenant on the Elimination of All Forms of Racial Discrimination requires states to provide “everyone within their jurisdiction effective protection and remedies, through the competent national tribunals” (article 6). The Convention on the Elimination of All Forms of Discrimination against Women uses terms such as “competent national tribunals” (article 2 (c)). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concerns an impartial investigation by the competent authorities (articles 12 and 13).

The Convention of the Rights of the Child provides for children deprived of their liberty to have the right to challenge “before a court or other competent, independent and impartial authority . . .” (article 37 (d)). Also, if a child is suspected of or has committed a crime, the right provides that “the matter [be] determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law . . .” (article 40 (2) (b) (iii)).

The Convention relating to the Status of Refugees of 1951 and the Convention relating to the Status of Stateless Persons of 1954 in their respective articles 16 refer to ‘courts’. The Special Rapporteur on judicial independence has observed that in the absence of any discussion of the nature of these courts, they must be assumed to be required to be independent and impartial.<sup>29</sup>

Within the field of humanitarian law the underlying principle in the non-derogable article 3 common to the four Conventions,<sup>30</sup> “afford[s] all the judicial guarantees which are recognized as indispensable by civilized peoples.” (3 (1)(d))<sup>31</sup> The two additional protocols provide slightly more details. Article 75 (4) of Protocol I, applicable in international armed conflicts specifies that:

No sentence may be passed [other than] to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure

Article 6 (2) of Protocol II, similarly applicable as the common article 3 to the four Geneva Conventions in internal armed conflicts, and an authoritative

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<sup>28</sup> The International Convention on the Protection the Rights of All Migrant Workers and Members of their Families in article 6 refers to judges or judicial officers; see also e.g. the ‘Bonn Agreement’ of 15 December 2001 in relation to the future of Afghanistan, Section II (2), stipulates an independent judicial power to be rebuilt.

<sup>29</sup> E/CN.4/1995/39, paras. 48–49.

<sup>30</sup> International Protection of the Independence of the Judicial Process, 1982, p. 311.

<sup>31</sup> See e.g. Chrisophe SWINARSKI, 1997.

interpretation of article 3,<sup>32</sup> requires all sentences to be passed “by a court offering the essential guarantees of independence and impartiality.” In this context the Declaration of Minimum Humanitarian Standards, the Turku Declaration, of 1991 is also of relevance.<sup>33</sup> The Declaration (in article 9) is basically restating article 6 (2) of Protocol II.<sup>34</sup>

Under the auspices of the United Nations the final document of the World Conference on Human Rights in 1993 was also adopted where the commitment to judicial independence was renewed.

Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.<sup>35</sup>

The Vienna Conference also discussed proper funding of institutions concerned with administration of justice and the need for technical assistance from the United Nations to many countries. The United Nations is moreover said to be developing tools for assessment of human rights, including judicial independence.<sup>36</sup> The International Labour Organisation is concerned with judicial independence in individual case handling, for example.<sup>37</sup>

### *3. International Courts*

International courts, even though quite distinct from national courts, have references to judicial independence in their respective statutes with increasing use of international human rights law language. For the International Court of Justice (ICJ), the Statute contains references to independence and impartiality

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<sup>32</sup> International Protection of the Independence of the Judicial Process, 1982, p. 312.

<sup>33</sup> See e.g. E/CN.4/Sub.2/1991/55.

<sup>34</sup> On the Convention relating to the Status of Refugees and its Protocol in relation to the judiciary, see Stanislav CHERNICHENKO and William TREAT, 1994, para. 56.

<sup>35</sup> A/CONF.157/23, Vienna Declaration and Programme of Action, 12 July 1993, part I, para. 27.

<sup>36</sup> Craig G. MOKHIBER, 2000, p. 5, note 18, related to the Common Country Assessment (CCA).

<sup>37</sup> E.g. under Conventions 29, 87, and 98; on ILO and Human Rights, see Lee SWEPSTON, 2001.

(articles 2, and 16 through 20) and the Rules of the Court further elaborate on the meaning (article 4).<sup>38</sup>

The statutes of the two international ad hoc criminal tribunals, established by Security Council resolutions and the International Criminal Court (ICC) are established by a treaty to regulate the provisions on judicial independence and impartiality somewhat differently from previous statutes mentioned. The Statute of the International Criminal Tribunal for former Yugoslavia (ICTY) briefly mentions the independence (of the judges) under the provision on the composition of the Court (article 12 (1)) and the impartiality under the qualifications of the judges (article 13). In subsequent articles the conduct of the trial proceedings are spelled out to be fair and state the accused is entitled to a fair trial (articles 20 and 21 (2) respectively). There are also in the Rules of Procedure and Evidence detailed regulations for disqualification of judges (Rule 15) with rights to any party to apply for disqualification. For the International Criminal Tribunal for Rwanda (ICTR) the setup is identical save the numbering of the articles.<sup>39</sup> The model is based on the Statute and the Rules of Court of the ICJ.

The experience from the ICTY and the ICTR, as will be elaborated upon below, has made the Statute of the ICC more detailed as regards the definition of independence and impartiality. The impartiality is however still mentioned in relation to the qualifications of the judges (article 36 (3) (a)) and in the same article a requirement for fair representation of female and male judges is spelled out ((8) (a) (iii)). Article 40 is devoted to and under the heading of independence of the judges: 40 (1) “[t]he judges shall be independent in the performance of their functions”; 40 (2) “[j]udges shall not engage in any activity that is likely to interfere with their judicial functions or to affect confidence in their independence”; 40 (3) “[j]udges required to serve on half-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.”

Again, in a subsequent provision the rights of the accused are specified, but here in more detail (67 (1)):

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality

In the drafting of the ICC Statute the human rights element has been strengthened, drawing as they did on article 14 (1) of ICCPR as well as the

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<sup>38</sup> The International Tribunal for the Law of the Sea (ITLOS) also has provisions to the same effect, articles 2 (1), 7 (1) and 11, also the Rules, article 5.

<sup>39</sup> Articles 11 (1) and 12 respectively for the provisions on independence and impartiality and articles 19 (1) and 20 (2) for the provisions on fair trial.

experience from the ad hoc tribunals. The actual independence of such international courts is however often criticized in particular for composition based on country of origin of the judges, government nomination, and competency of the judges.<sup>40</sup>

Case-law from the two ad hoc tribunals will be elaborated upon in the next Chapter showing these courts' reliance on regional human rights case-law related to judicial independence.

## **B. Regional Organizations**

With the regional developments in mainly the Americas, Africa and Europe, global standards on judicial independence have been reiterated, sometimes with a modified wording. It is not clear if such modifications actually lead to a substantial difference in applying the standards but so far a healthy exchange between the regional systems as well as with the international systems takes place with a common standard emerging based on the sometimes-different forms of wordings in the instruments.

### *1. The Organisation of American States*

Under the Inter-American system for human rights protection falling within the Organisation of American States (OAS), the American Declaration on the Rights and Duties of Man and its article 18 deals with the right to a fair trial while article 26 deals with the right to due process of law. Article 26 (2) stipulates:

Every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws

The American Convention on Human Rights, the so-called Pact of San José, of the OAS, elaborates further in the extensive article 8 (1) under the heading of the right to a fair trial:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substitution of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature.

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<sup>40</sup> See e.g. Sylvia de BERTODANO, 2002.



This provision has a more explicit reference to all types of cases. Article 25 on ‘Right to Judicial Protection’ specifies that everyone has the right to a competent court or tribunal and the state has the corresponding duty to provide for such institutions.

The Inter-American Court of Human Rights is itself regulated in terms of independence with detailed provisions in the American Convention on Human Rights: on qualifications of the judges and composition of the Court (mainly in article 52), on separate court Secretariat to maintain independence (article 59), on incompatible activities affecting independence or impartiality (article 71), and on compensation and budgetary allocations (article 72).

The Inter-American Commission on Human Rights (IACHR) has developed a series of documents related to judicial independence. A study was commissioned by the General Assembly of the Organisation of American States from the Commission on ‘Measures necessary for rendering the autonomy, independence and integrity of the members of the Judicial Branch’.<sup>41</sup> The Study highlights the following issues:

- Non-interference by the executive or legislative branches into matters that are the purview of the judiciary;
- Political support to the judiciary to fully guarantee human rights;
- Ensure exclusive jurisdiction for the courts, eliminating special courts;
- Guarantee tenure of the judges and screening of unethical conduct only by panel of judges;
- Preserve rule of law and avoiding state of emergency to the greatest extent possible and always make sure the independence of the branches is not affected;
- Ensure unrestricted access to the courts and legal remedies;
- Assure judges the mandate of disposition and supervision of persons detained; and
- Remove procedural obstacles that can make the proceedings overly lengthy.

The Commission has also called for ensuring authentic juridical, administrative and economic independence of judiciaries.<sup>42</sup> The principle of separation of powers is seen as fundamental and must be upheld, and the countries must also ensure the “security, the autonomy, independence and integrity . . . ” of the judiciary.<sup>43</sup>

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<sup>41</sup> Annual Report for 1992/3, pp. 214–215, *Measures necessary for rendering the autonomy, independence and integrity of the members of the Judicial Branch more effective*; Thomas BUERGENTHAL and Dinah SHELTON (Eds.), 1995, p. 380.

<sup>42</sup> Annual Report for 1985/6, pp. 193–194.

<sup>43</sup> Annual Report for 1992/3, p. 214.

## 2. *The African Union*

What basically used to be the Organization of African Unity (OAU) is now the African Union (AU).<sup>44</sup> The Union maintains the mandate of its predecessor including the African Charter on Human and Peoples' Rights. Article 7 (1) (d) of the Charter is of particular relevance with the wording "the right to be tried within a reasonable time by an impartial court or tribunal". This in comparison to the other instruments' briefer wording which omits the requirements of competency and independence but is complemented with the competency provision under article 7 (1) (a). Article 26 however specifically obliges the state to provide for independent courts and the Guidelines for National Periodic Reports elaborate somewhat on the concept, highlighting in particular tenure and recruitment criteria.<sup>45</sup> The Protocol for the African Court of Human and People's Rights, stipulates impartiality (article 16) and independence (article 17) and also the fair representation of women judges (article 14).<sup>46</sup>

The African Commission on Human and People's Rights (ACHPR) adopted a Resolution on judicial independence in 1996.<sup>47</sup> The Resolution on the Respect and Strengthening of the Independence of the Judiciary elaborated on the importance of the judiciary for social equilibrium but also for social development as well as the need for an independent judiciary that enjoys the confidence of the people in order to provide for a sustainable democracy and development. The Resolution calls upon African countries to, among other things:

- Repeal all legislation inconsistent with the respect for judicial independence;
- Provide the judiciary with sufficient resources (with the help of the international community);
- Provide judges with decent living and working conditions;
- Incorporate into their legal systems principles establishing judicial independence, especially tenure; and
- Refrain from taking action that would threaten the independence and the security of judges and magistrates.

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<sup>44</sup> [www.africa-union.org](http://www.africa-union.org).

<sup>45</sup> *Guidelines for National Periodic Reports*, Part IV (3), available at Rachel MURRAY and Malcolm EVANS (Eds.), 2001, p. 70.

<sup>46</sup> See e.g. *The African Court on Human and People's Rights*, 2000, p 6, available at [www.african-court.org/african%20Court.pdf](http://www.african-court.org/african%20Court.pdf); the protocol establishing the Court came into force on 25 January 2004.

<sup>47</sup> Ninth Annual Activity Report of the African Commission on Human and People's Rights 1995–1996, Adopted 3 April 1996, Annex VII, Resolutions of the 19<sup>th</sup> Session.

### 3. *The Council of Europe*

Under the auspices of the Council of Europe, the European Convention for the Protection of human rights and Fundamental Freedoms (ECHR) deal with independence and impartiality in article 6 (1):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

There is a clear correlation in the ECHR with the provisions of the ICCPR and the UDHR.<sup>48</sup> Some differences exist in the text, such as in relation to the scope (civil rights), but no change in meaning was intended from the UDHR to the ECHR rather than to get the English language version of the ECHR in line with the French version.<sup>49</sup> According to the text, the provision is applicable to criminal cases as well as other types of cases, as it relates to rights. The case-law of the European Court of Human Rights (ECtHR) has elaborated on article 6 (1), which also applies to administrative cases when of a civil nature.<sup>50</sup> It is the prerogative of the ECtHR to decide the classification of disputes, be it for example civil or criminal, and the Court has applied the rules accordingly.<sup>51</sup> In criminal cases it is not even possible to defer the right to judicial independence and impartiality.<sup>52</sup> Some disputes have however been found to be beyond the scope of article 6 (1).<sup>53</sup> For the Judges of the ECtHR, there are also provisions on independence after Protocol 11 to the ECHR came into effect and formed the new Court (article 21 (3)).<sup>54</sup>

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<sup>48</sup> The new European Charter of Fundamental Rights of the European Union uses a language similar to that of the ECHR and the ICCPR (article 47) and the draft Constitution for Europe of 2003 has included the Charter in Part II (article II-47 on judicial independence), CONV 850/03, 18 July 2003.

<sup>49</sup> Lauri LEHTIMAJA and Matti PELLONPÄÄ, 1999, p. 232; see also P. van DIJK and G. J. H. HOOFF, 1998, pp. 397 *et seq.*, and pp. 451 *et seq.*; Clare OVEY and Robin WHITE, 2002, pp. 144 *et seq.*, and pp. 160 *et seq.*; on 'civil rights', see e.g. Christian RASENACK, 1970.

<sup>50</sup> See e.g. *Ringeisen v. Austria*, 17 July 1961, para. 94; *Pudas v. Sweden*, 27 October 1987, para. 30; see also *Bentham v. The Netherlands*, 23 October 1985, para. 32; *Balmer-Schafroth and others v. Switzerland*, 26 August 1997, para. 32.

<sup>51</sup> *König v. Germany*, 28 June 1978, para. 96.

<sup>52</sup> Hans DANELIUS, 1997, pp. 159–161.

<sup>53</sup> *Id.*, p. 135.

<sup>54</sup> Even though the human rights mandate in Europe largely lies with the Council of Europe, the European Union has been increasingly concerned with standards pertaining to human rights; the Treaty of Rome (article 167 and article 168 (a) (3) in relation to the Court of First Instance) requires judges of the European Court of

The Committee of Ministers of the Council of Europe issued the 1984 ‘Recommendation No. R (94) 12 to Member States on the Independence, Efficiency and Role of Judges’.<sup>55</sup> The Recommendations refer to article 6 of the ECHR as well as the UN Basic Principles. Six principles of the Recommendations elaborate on the following areas:

- Independence of judges: no revisions other than by appeal; terms of office; remuneration; the court should be the only decision-maker on jurisdiction; career-considerations for judges only on objective criteria; and distribution of cases;
- The authority of judges: all persons, including state bodies, should be subject to this authority;
- Proper working conditions: remuneration, training, career, support staff and safety matters;<sup>56</sup>
- Associations: judges should be free to form associations to safeguard independence and protect interests;
- Judicial responsibilities: to remain independent and impartial; withdraw when conflict of interests; use clear and precise reasoning; and
- Failure to carry out responsibilities and disciplinary offences: disciplinary committee.

Particularly noteworthy is the emphasis under the second Principle on authority of the judges. The Council of Europe has also supported legal co-operation between judicial councils in Central and Eastern Europe.<sup>57</sup> The conclusions discussed judicial independence and the role in this regard of judicial councils (referred to as High Councils of Judges). ‘Balance’ between the three powers was the starting point, and also that judicial independence should be seen as a guarantee for the respect of human rights rather than a privilege of the judge (article 1). Appointment, promotion, administrative management, funding of

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Justice to be independent, the draft Constitution for Europe of 2003 includes the same provision (article 28), CONV 850/03, 18 July 2003; see also 2 C.M.L.R. 217 (No. 2) Opinion 1/92, 10 April 1992, regarding the Draft Treaty on a European Economic Area.

<sup>55</sup> Adopted 13 October 1994.

<sup>56</sup> A reference is also here made to Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts.

<sup>57</sup> The main Conference was entitled “Guarantees of the Independence of the Judiciary in a State Governed by the Rule of Law”, Warsaw and Slok, 23–26 June 1997, forming part of the so called ‘Themis Plan’, see: [www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/legal\\_professionals/Judges/Co-operation\\_activities/VARSOVIE.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/Judges/Co-operation_activities/VARSOVIE.pdf); see also the work of the ‘Venice Commission’, [www.venice.coe.int](http://www.venice.coe.int).

the court and tenure were deemed the most fundamental criteria to assure judicial independence (articles 3 and 4). The conclusions also suggested Judicial Councils were to be composed of representatives from various organs of the state as well as legal practitioners but should have a majority of judges (article 6), and should be concerned with mainly appointments (article 7) and discipline (article 8) of judges.<sup>58</sup>

The European Charter on the Statute for Judges was adopted in 1998 by judges from the European countries and representatives from Pan-European judges associations.<sup>59</sup> The Charter does not have an official status with the Council of Europe but it is nevertheless intended to strengthen the status of the judges in Europe. In 2000 The Council of Europe established a Consultative Council of European Judges (CCJE) that is issuing opinions on how to achieve judicial independence in the European countries based on submission of country description from the member states and participation of country representatives in the conferences; by the end of 2003, three opinions had been issued, dealing with tenure, funding and management, professional ethics, and early settlement of disputes.<sup>60</sup>

The third Opinion, ‘on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality’ is the more constructive.<sup>61</sup> The Opinion draws on previous instruments of the Council but also on the UN Basic Principles as well as the Bangalore Principles. The Opinion seeks to answer what standards of conduct should apply, how to formulate these standards, and what, if any, criminal, civil and disciplinary liability should apply to judges (paragraph 6). Confidence in the justice system is described as increasing with the globalization of disputes and wide circulation of judgments (paragraphs 9 and 22). A high degree of professional awareness is needed which requires basic and further training (paragraph 25). The Opinion also proposes establishment of bodies having advisory roles in responding to requests from judges on activities in their

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<sup>58</sup> See also the emphasis placed on the organs responsible at present in most countries for the judiciaries, e.g. judicial councils in the Conference entitled “Independent Justice – A Guarantee for Stability in South Eastern Europe” held in Budapest, 1–3 March 2000.

<sup>59</sup> This was also a part of the ‘Themis Plan’, DAJ/DOC (98) 23, and draws on the UN Basic Principles and the Council Recommendation No. R (94)12, [www.coe.int/Judges/Instruments\\_and\\_documents/charte%20eng.pdf](http://www.coe.int/Judges/Instruments_and_documents/charte%20eng.pdf).

<sup>60</sup> See [www.coe.int/Judges/CCJE/\\_Summary.asp](http://www.coe.int/Judges/CCJE/_Summary.asp).

<sup>61</sup> CCJE (2002) Op. N<sup>o</sup> 3, Strasbourg, 19 November 2002, available at [www.coe.int/Judges/CCJE](http://www.coe.int/Judges/CCJE); The Opinion also provided in an annex a useful chart over some 30 of the 45 member states of the Council of Europe, but additionally also over Japan, being one of the five countries with observer status. The chart has been a basis for the development of the Opinion and maps the practice in the countries, in relation to the existence of codes of conduct, the contents of judges’ obligations, incompatibilities with judgeships, and the liability system.

private sphere that may not be compatible with their status as judges (paragraphs 29, 49 (iv)). National codes of conducts are also lauded (paragraph 47), as they exist in at least 8 of the Council of Europe member states. The Opinion stresses however that such codes are never exhaustive on legitimate or illegitimate activities of the judges (paragraph 48).

On liability of judges, the Opinion deals with criminal, civil, and disciplinary matters. Even though some countries can punish judges for gross negligence, the Opinion discourages such practices as enabling influence of judges' decisions (paragraphs 52-54). The situation is similar as regards civil liability with a few countries having provisions of liability due to gross negligence but it is recommended that the usage should be limited to cases of willful default (paragraphs 55-57). It is moreover stressed that codes of conducts should not be the source for liability other than disciplinary in serious and flagrant cases (paragraph 60). The Opinion deals in great detail with questions on disciplinary liability: what conduct should make the judge liable, who should initiate such proceedings, who should determine, and what sanctions should be available? (paragraphs 60-74). The answer to these questions basically refers to general fair trial requirements (paragraph 77).

#### *4. The Organization for Security and Cooperation in Europe*

Commitments to judicial independence, even though of a political nature, have been made by the participating states of the Organization for Security and Cooperation in Europe (OSCE), which even includes states at the very boarder of China.<sup>62</sup> The participating states agreed that “the independence of judges and the impartial operation of the public judicial service will be ensured;” as part of the “inalienable” rights of all human beings.<sup>63</sup> They also agreed to

respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including *inter alia* the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights; . . . [and] ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice,

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<sup>62</sup> Three countries bordering China are participating (since 1992) in the OSCE: Kazakhstan, Kyrgyzstan, and Tajikistan; on OSCE, see Nils ELIASSON, 2001; on the Human Dimension, see Arie BLOED, 2001; note also the emerging Asian version of the OSCE, the Conference on Interaction and Confidence-Building Measures in Asia (CICA), and the commitment to international human rights in Principle VIII of the Declaration of Principles Guiding Relations Between the CICA Member-States, Almaty 1999, [www.mfa.kz/eng/php/meeting.php?meeting=1](http://www.mfa.kz/eng/php/meeting.php?meeting=1).

<sup>63</sup> Para. 5.12, Copenhagen 1990, Second Conference on the Human Dimension of the CSCE.

paying particular attention to the Basic Principles on the Independence of the Judiciary<sup>64</sup>

Specific mention is also made regarding: prohibiting improper influence on judges, preventing revision of judicial decisions by administrative organs, protecting the judiciaries' freedom of protection, ensuring non-discriminatory selection and training of judges, ensuring tenure and appropriate conditions of service for the judges, respecting conditions of immunity, and ensuring disciplining only according to law.<sup>65</sup>

##### *5. Asian and Other Regional Initiatives*

For the sake of comprehensiveness of human rights documents concerned with judicial independence, there are also other regional instruments than the Inter-American, African, and European. As for human rights mechanisms in Asia however, there are none. Already in the mid-1960s the idea of drafting an Asian convention on human rights was discussed at a seminar in Afghanistan under the auspices of the United Nations. This initiative was followed up in the Commission on Human Rights with an ad hoc study group and in the UN General Assembly with requests to convene seminars that eventually evolved into annual seminars on the establishment of a human rights mechanism in the Asia-Pacific. So far the seminars have stimulated promotion of human rights education and national initiatives on human rights protection.<sup>66</sup> Regional organizations have the potential to establish a human rights mechanism and most prominently of these is the ASEAN, the Association of Southeast Asian Nations.<sup>67</sup> The Inter-Parliamentary Organisation (AIPO) of the ASEAN adopted in 1993 a Human Rights Declaration that is very general and does not deal with judicial independence or any other more detailed provisions but it does reaffirm the observance of the UDHR.<sup>68</sup> But inter-governmental instruments concerned with judicial independence have not been produced.<sup>69</sup> An initiative by the association LAWASIA will however be analyzed below.

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<sup>64</sup> Para. 19.1–2, Moscow 1991, Third Conference on the Human Dimension of the CSCE.

<sup>65</sup> Para. 19.2 i–vii, see also para. 20 on the importance of judges' associations, training, and promotion of dialogue and exchange between judges' associations and various groups in society.

<sup>66</sup> Jiarong YAN, 2001, pp. 731 *et seq.*

<sup>67</sup> See [www.aseansec.org](http://www.aseansec.org); Vitit MUNTARBHORN, 1999.

<sup>68</sup> [www.aipo.org](http://www.aipo.org); the Declaration is published in e.g. TOWARDS AN ASEAN HUMAN RIGHTS MECHANISM, 1999, pp. 53 *et seq.*

<sup>69</sup> Among NGO-initiatives, the Asian Human Rights Charter of the Asian Human Rights Commission is prominent, but it contains no reference to judicial independence but a general endorsement of rights contained in international instruments (para. 3.1), [www.ahrchk.net](http://www.ahrchk.net).

In the Arab region the instruments concerned with human rights include the Universal Islamic Declaration of Human Rights of 1981, which states “[n]o person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal.”<sup>70</sup> Since then, the Arab Charter of 1994 has been adopted, which reaffirms the two Covenants of 1966 and provides for presumption of innocence and a “lawful trial” before a judge.<sup>71</sup> At the First Arab Conference on Justice in Beirut, Lebanon, 14–16 June 1999 the Beirut Declaration was adopted containing a set of recommendations, many of which pertained to judicial independence.<sup>72</sup> The Second Arab Justice Conference in 2003 adopted the Cairo Declaration on Judicial Independence.<sup>73</sup>

### C. Professional and Human Rights NGOs

Professional organizations, often with the support of human rights NGO initiatives in the field of judicial independence, have been highly influential in the development of for example the UN Basic Principles. In the late 1950s, in particular among organizations of jurists, judicial independence gained momentum and there began a process of determining fundamental requirements for the independence of the judiciary that later took off in the early 1980s.<sup>74</sup> The International Congress of Jurists, meeting in 1959 in New Delhi and 1961 in Lagos, Nigeria<sup>75</sup> discussed the issue.<sup>76</sup> The process was given

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<sup>70</sup> Adopted 19 September 1981 by the Islamic Council, Article V (a), text available at e.g. [www.alhewar.com/ISLAMDECL.html](http://www.alhewar.com/ISLAMDECL.html); The Islamic Conference adopted in 1990 the Cairo Declaration on Human Rights in Islam which refers to “all guarantees of defense” in a “fast” trial, article 19, adopted 5 August 1990, text available at e.g.:

[www.humanrights.harvard.edu/documents/regionaldocs/cairo\\_dec.htm](http://www.humanrights.harvard.edu/documents/regionaldocs/cairo_dec.htm).

<sup>71</sup> Approved by a majority of the members of the League of Arab States, 15 September 1994, but so far without any ratifications and with only one signature (Iraq); available at <http://www1.umn.edu/humanrts/instreet/arabhrcharter.html>; see also Dato’ Param CUMARASWAMY, 1998, p. 14.

<sup>72</sup> Beirut Declaration, 2000.

<sup>73</sup> Cairo, 21–24 February 2003, available at: [www.undp-pogar.org/activities/justice/recommendations.pdf](http://www.undp-pogar.org/activities/justice/recommendations.pdf); The United Nations Development Programme (UNDP) is moreover running a program on governance in the “Arab Region” that has among other things commissioned research on judicial independence in 22 countries, <http://www.pogar.org/resources/judiciary.html>.

<sup>74</sup> The full process is described in detail in Shimon SHETREET, 1985 (b), pp. 394 *et seq*; many of the texts mentioned below are included in *The Independence of Judges and Lawyers: A Compilation of International Standards*, 1990.

<sup>75</sup> The overall theme was rule of law but one section was devoted to judicial independence.



new momentum in 1980 with a conference organized in Berlin by the International Bar Association (IBA). In 1981 the International Commission of Jurists together with the International Association of Penal Law convened a meeting (in Syracuse, Italy, resulting in the Draft Principles on the Independence of the Judiciary),<sup>77</sup> as did the IBA (in Lisbon), to elaborate on principles of the independence of the judiciary. The two initiatives were merged in the following year and after another set of conferences in 1982 (in Jerusalem; Noto, Sicily, 'the Noto Principles' on lawyers; and New Delhi), what was labeled the International Bar Association Code of Minimum Standards of Judicial Independence was adopted in 1983.

The IBA Standards deal extensively with preventing influence from the executive and the legislative, terms and nature of judicial appointments; judicial removal and discipline, the influence of media, standards of conduct for the judges, internal independence, securing impartiality, and the independence of military justice. Many national examples were brought up in the preparatory conferences that contributed to the formulation of the standards. These efforts contributed to the UN sponsored Montreal Convention in 1983 where the Universal Declaration on the Independence of Justice was adopted.<sup>78</sup> The Declaration was later also endorsed by the Commission on Human Rights.<sup>79</sup> The Convention had representatives from various organizations including the International Court of Justice, the International Commission of Jurists, LAWASIA, the European Court of Human Rights, and Amnesty International. From this document the UN Basic Principles on the Independence of the Judiciary emanated.<sup>80</sup>

The Universal Declaration on the Independence of Justice was divided into five different areas, dealing with international judges, national judges, lawyers, jurors, and assessors. The second part included 49 paragraphs dealing with the independence of national judiciaries. The Declaration is organized somewhat differently from the IBA standards. It starts off with a general elaboration on independence addressing issues such as no interference from colleagues or superiors, independence from the executive and the legislative, and the court must have full jurisdiction over all judicial issues. Subsequent areas covered by the Declaration include: qualifications, selection, and training, under which issues such as posting, promotion, and transfer, tenure, immunities and privileges; disqualifications, discipline and removal. The Declaration also deals

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<sup>76</sup> The Lagos Conference, 1985, p. 492.

<sup>77</sup> See e.g. Manfred SIMON, 1985.

<sup>78</sup> E/CN.4/Sub.2/1985/18/Add.6, Annex IV; Jules DESCHÊNES, 1985; text available in Shimon SHETREET and Jules DESCHÊNES (Eds.), 1985, pp. 447–477; the principles were to a large extent drafted by the Canadian judge Jules Deschênes, Michael KIRBY, 1985, p. 9.

<sup>79</sup> Resolution 1989/32.

<sup>80</sup> Shimon SHETREET, 1985 (b), p. 394.

with court administration as well as miscellaneous aspects such as execution of judgments, and judges' obligations to stay informed about and to implement international human rights instruments.

The work on instruments detailing judicial independence continued. In 1994 the International Commission of Jurists took the lead in organizing a meeting of experts to elaborate on the relationship between judicial independence and media.<sup>81</sup> A set of principles emanated from this meeting known as the Madrid Principles.<sup>82</sup> A proposed additional protocol to the European Convention on Human Rights was adopted by the Association of European Magistrates for Democracy and Freedoms (MEDEL) at its congress in Palermo on 16 January 1993.<sup>83</sup> The so-called Palermo Declaration concerns the role of judges and their independence but also the independence of the prosecutors. The Victoria Falls Proclamation of 1994, carrying the subtitle 'For an Independent Judiciary through Judicial Education' added to the list of documents.<sup>84</sup> Another relevant document in this list was the Cairo Declaration of 1995.<sup>85</sup> A charter adopted in 1994 by the Organization of the Supreme Courts of the Americas (OSCA) that came into effect in 1996, states (article II) that a fundamental objective is to promote and strengthen judicial independence and the rule of law.<sup>86</sup> More recently, the stream of documents produced includes the Latimer House Guidelines<sup>87</sup> in 1998 with participants from 20 Commonwealth countries and the document of the Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts in 1998.<sup>88</sup>

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<sup>81</sup> The Commission also co-organized a series of seminars on judicial independence where recommendations were adopted; see e.g. *The Independence of the Judiciary and the Legal Profession in English-Speaking Africa*, 1987, pp. 79–93 (Lusaka), pp. 142–152 (Banjul); *The Independence of Judges and Lawyers in South Asia*, 1988, pp. 53–67.

<sup>82</sup> *The Madrid Principles on the Relationship between the Media and Judicial Independence*, 1994; see also *The Madrid Principles*, 1995.

<sup>83</sup> Reprinted in the Annex of Louise JOINET, 1993; see also: [www.cidadevirtual.pt/asjp/medel/novos/medel-internacional.html](http://www.cidadevirtual.pt/asjp/medel/novos/medel-internacional.html).

<sup>84</sup> *The Tenth Commonwealth Conference of Magistrates and Judges*, held at Victoria Falls, 1994, pp. 1364–1365.

<sup>85</sup> *Conférence des ministres de la Justice des pays ayant le français en partage*.

<sup>86</sup> Juan R. TORRUELLA and Michael M. MIHM, 1996.

<sup>87</sup> *The Latimer House Guidelines for the Commonwealth*, 1998, pp. 1356–1368; John HATCHARD and Peter SLINN (Eds.), 1999, pp. 1356–1368; *Latimer House Principles and Guidelines for the Commonwealth*, 2000.

<sup>88</sup> *Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts*, Caracas, 4–6 March 1998; a series of national declarations on judicial independence have also been produced, by way of example: *Declaration Of Principles On Judicial Independence Issued by the Chief Justices of the Australian States and Territories of 1997*, and *The Yandina Statement: Principles of Independence of the Judiciary in Solomon Islands of 2000*.

Parallel to the international initiative in the early 1980s, a regional scheme was under way through LAWASIA, the Law Association for Asia and the Pacific, a professional association of representatives from the Asia-Pacific region, called the Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (the Tokyo Principles) from 1982. A revised version of the Tokyo Principles is available from 2001, entitled the Beijing Statement.<sup>89</sup> The Statement takes its starting point in the UDHR and the ICCPR but also relies on the UN Basic Principles, and elaborates on general provisions related to independence. In particular the Statement stresses that judicial independence should be expressed in constitutions or laws (article 4); the courts shall have full jurisdiction in all justiciable matters (articles 3 (b) and 33–34); hierarchy, grade or rank of judges shall not interfere with the judges' decision making (article 6); and the judges should have freedom of association (articles 8–9). The Statement also deals with appointment, tenure, remuneration and resources, administration, relationship with the executive, and emergency situations.<sup>90</sup> The Statement bears much resemblance with the Declaration on the Independence of Justice. More recent documents include the International Commission of Jurists' Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System from 2000<sup>91</sup> and the Universal Charter of the Judge from 1999, of the International Association of Judges.<sup>92</sup> The Charter is a relatively concise document with 15 articles giving general minimal norms, mainly aimed at independence and impartiality.

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<sup>89</sup> The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region; the Principles were updated in 1995 (Beijing) and amended in 1997 (Manila) and formally adopted in 2001 (Christchurch, New Zealand) by the LAWASIA Council, see [www.lawasia.asn.au](http://www.lawasia.asn.au); the Principles were first developed in 1982 by the Human Rights Standing Committee of LAWASIA, Fali S. NARIMAN, 1985; see also Julie DEBELJAK, 2001, pp. 7–8 as printed; David K. MALCOLM, 1998; Text of the Beijing Statement of Principles of the Independence of the Judiciary, 1998; see e.g. Hui ZHAI, 2003, pp. 68–69 on the importance of these standards for China.

<sup>90</sup> The Statement was signed by altogether 25 Chief Justices and their representatives, including the Vice-President of the Supreme People's Court of the PRC, but can not be seen as an obligation of the PRC to comply with the Statement.

<sup>91</sup> Adopted by an expert group convened by the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, February 2000; CIJL Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, 2001.

<sup>92</sup> Unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on 17 November 1999, attended by delegates from over 40 countries (including the Republic of China (Taiwan) but not PRC); [www.iaj-uim.org](http://www.iaj-uim.org).

An international code of judicial conduct has also been developed that elaborates in great detail on the impartiality aspects of judicial independence in particular. The Bangalore Principles of Judicial Conduct forms part of the United Nations Global Program against Corruption.<sup>93</sup> The Bangalore Principles partially draws on instruments related to judicial independence,<sup>94</sup> as well as codes and guidelines from a number of countries and states.<sup>95</sup> In the process of developing the Code, consultations were made with inter alia, the Council of Europe, the American Bar Association, and senior judges from various countries around the world.<sup>96</sup> Being a code of conduct, the Principles are more developed in terms of distinguishing between independence and impartiality and specify the requirements of the two concepts (principles 1 and 2 respectively). The Principles emphasize the need for the judiciary to promote public acceptance of the courts (principle 4). The underlying value formulated is ‘propriety’ and the appearance of such, all in an effort to raise the dignity of and faith in the institution. The Principles also stress integrity, equality, and competence and diligence.

## Conclusions

Judicial independence has been included in a number of human rights law instruments at both international and regional levels. At the international level in particular, professional groups of lawyers have been influential in the development of more detailed standards that eventually have been adopted at an inter-state level, such as the UN Basic Principles on the Independence of the Judiciary. At the inter-governmental level the Asia-Pacific region is still

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<sup>93</sup> Prepared by the Judicial Group on Strengthening Judicial Integrity, consisting of 8 Chief Justices from Asia and Africa, chaired by Judge Weeramantry, former ICJ Vice-President and the Rapporteur is Justice Michael Kirby of the Australian High Court of Justice, with which the former UN Special Rapporteur is associated, second meeting, Bangalore, February 2001; revised in 2002, entitled The Bangalore Principles of Judicial Conduct, E/CN.4/2003/65, 10 January 2003, pp. 18 *et seq.*, available at e.g. [http://www4.worldbank.org/legal/publications/Bangalore\\_principles.pdf](http://www4.worldbank.org/legal/publications/Bangalore_principles.pdf); the reports (1–3) of the Judicial Group are available at [www.unodc.org/unodc/en/crime\\_cicp\\_publications.html](http://www.unodc.org/unodc/en/crime_cicp_publications.html).

<sup>94</sup> The ‘Siracusa Principles’, the IBA-standards, the UN Basic Principles, the Draft Universal Declaration on judicial independence (‘Singhvi Declaration’), the Beijing Statement of Principles, the Latimer House Guidelines, the European Charter on the Statute for Judges.

<sup>95</sup> Alaska, Australia, Bangladesh, Canada, Idaho, India, Iowa, Kenya, Malaysia, Namibia, New York, Nigeria, The Philippines, Pakistan, the Philippines, Solomon Islands, South Africa, Tanzania, Texas, Uganda, the US, Virginia, Washington, and Zambia.

<sup>96</sup> Report of the Special Rapporteur, E/CN.4/2003/65, paras. 32–36.

lacking a comprehensive human rights mechanism akin to the Inter-American, African, and European.

Common to these documents is the emphasis on independence from the executive and the legislature, and to guarantee impartial adjudication. Additional and more detailed requirements call for stipulations on independence in constitutions or laws; the need to ensure adequate funding to the courts including remuneration, tenure, and other conditions of service;<sup>97</sup> freedom of association for the judges; objective promotion criteria; civil immunity; and establishment of fair procedures and criteria for disciplining and disqualification. Many of the texts stress that: the judiciaries themselves be the only authority to determine their jurisdiction; judges should be independent within the court from pressure from superiors or colleagues; judges' should have freedom of expression; the courts should be ordinary and rely on previously established procedures; judges' qualifications should be maintained and developed; there should be no discrimination in appointing judges; case assignment should be determined by the court; and that disciplining should be independently reviewed. Even though the professional instruments often stress aspects of apparent self-interest rather than for the sake of human rights, these texts have been influential on the development of inter-governmental texts.

The following chart of selected documents on judicial independence provides an overview of the coverage even though it does not fully express the extent and the detailed formulations of the various requirements. It is based on the 21 provisions of the United Nations Basic Principles on the Independence of the Judiciary (UNBP, from 1985) with an additional nine key-provisions covered in other influential texts.<sup>98</sup> As a forerunner to the Basic Principles, the

<sup>97</sup> Some countries have introduced provisions in their constitutions with a fixed rate of funding for the judiciary, such as Costa Rica, El Salvador, and Honduras, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, 2002, The Costa Rican Constitution sets aside 6% to the administration of justice out of which about 2.5% goes to the judiciary, p. 165, see also p. 180 with comparative figures on budget allocation to judiciaries, e.g. the Philippines with just over 1%; in 2000 the percentage for Nepal was 0.4, for Cambodia 0.3, and for Pakistan less than 1%, JUDICIAL INDEPENDENCE: OVERVIEW AND COUNTRY-LEVEL SUMMARIES, 2003, p. 19.

<sup>98</sup> The criteria given in shorthand concerns in more detail: (1) independence stipulated in constitution or law; (2) there shall be no improper influences, as elaborated upon above; (3) jurisdiction should be over all matters of a judicial nature and it is up to the judiciary to decide if it is; (4) no revision should be possible by other than judicial organs; (5) courts shall be ordinary and run according to established principles; (6) fair trial and impartiality shall be assured by the judges; (7) states should provide adequate resources; (8) judges shall have freedom of expression, belief, association, and assembly with due consideration of maintained independence and impartiality; (9) freedom of association for judges to protect their interests; (10) judges shall be appointed and promoted based on objective criteria; (11) there should be now discrimination in appointment of judges on the basis of

Universal Declaration on the Independence of Justice (UDIJ, Part II, 1983) is included, as are basic Council of Europe texts (R (94) 12, 1994, and the European Charter on the Statute of Judges, CoE CE, 1998) to contrast the Asian texts (LABS, LAWASIA Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region, revised 2001). Additionally the Chart is composed of the two more recent documents pertaining to global coverage, the International Association of Judges' The Universal Charter of the Judge (UCJ, 1999) and The Bangalore Principles of Judicial Conduct, as revised (JGBP, 2002), produced by the Judicial Group on Strengthening Judicial Integrity. Parenthesized references indicate a partial coverage.

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race, color, sex, religion, political or other opinion, national or social origin, property, birth, or status; (12) conditions of service such as security, remuneration, pensions, and retirement age should be adequately secured by law; (13) guaranteed tenure until mandatory retirement or expiration of term of office; (14) promotion of judges should be based on objective factors, ability, integrity, and experience; (15) assignment of judges to cases is an internal matter for the judiciary; (16) the judiciary shall be bound by secrecy regarding deliberations and confidential information acquired during duties other than public trials and shall not be compelled to testify on such matters; (17) judges should enjoy personal immunity from civil suits for monetary damages caused in the exercise of their judicial functions; (18) a complaint against a judge in the professional capacity shall be dealt with expeditiously and fairly under appropriate, confidential, and fair procedure; (19) judges can be suspended or removed only due to incapacity or behaviour that renders them unfit to discharge their duties; (20) disciplinary, suspension, or removal proceedings shall be determined in accordance with established standards of judicial conduct; (21) such decisions should be subject to an independent review; (22) established criteria for self-disqualification/recusal when a judge is biased; (23) requirements for an efficient handling of cases; (24) internal independence stemming from hierarchical systems with fellow judges, court leaders, and superior courts; (25) requirements of measures to secure public confidence in the judiciary and its independence and impartiality; (26) no assignments of the judge should be conflicting with the judicial task; (27) the composition of the judiciary should fairly correspond to that of the society in terms of e.g. ethnicity and sex (with due regard given to the possibility of positive discrimination through lowering qualification demands); (28) judicial councils providing insulation from influence; (29) requirement for judges to be trained in international human rights law; (30) requirement for transparent court proceedings.

## I. Overview of Coverage; Selected Documents on Judicial Independence

		UDIJ	UNBP	R (94) 12	CoE EC	LABS	UCJ	JGBP
1	Prescribed in const. or law		1	I 2a		4	2	
2	Prev. improper influences	2	2	I 2b, d		3(a), 38, 4	2, 3	1.1
3	Jurisdiction self-determined	5	3	I 2a iii, II		3(b) 33-4		
4	No revision by adm. body	(4)	4	I 2a i, iv				
5	Established, ordinary court	6	5			(2)	1	
6	Fair trial/impartial	45	6	V	1.5	10	1	2.1
7	Adequate resources	41-2	7	III	1.6	31-2, 41-2	14	
8	Freedom - expression	10	8		(4.2)	8		
9	Freedom - association	10	9	IV	(1.7, 4.2)	8, 9	12	4.13
10	Qualifications secured	11, 15	10	I 2c, V 3g	2.1-3	11-12		6
11	No Discrimination	12	10		2.1	13		
12	Conditions of service	21	11	I 2a iii, II	6	31, 40	13	
13	Tenure	19-23	12	I 3	3	18-21	8	
14	Objective promotion	16-18	13	I 2c	4.1	17	9	
15	Case assignment	43	14	I 2e		35		
16	Professional secrecy	25	15					
17	Immunity (civil)	24	16		5.2	32, (22)	10	
18	Discipline - fair hearing	32-3, 35	17	V 3	5.1(-3)	26, 29-30	8	
19	Suspension - unfit, etc	38	18	I 2f	7.1	37763	11, 8	
20	Discipline - est. procedures	34	19	VI	(5.1)	27	11, 8	
21	Indep. review of discipl.	37	20	V 3	1.4	(36)		
22	Disqualification/Recusal	26-31		V 3c				2.5
23	Efficiency	6b				(37)	6, 1	6.5
24	Internal indep. (hierarchy)	3	(4)			6	2, 4, 11	4
25	Public Confidence	10			(4.3)	7	5	1.3, 2.2, 3, 4
26	No conflicting assignments	26-30			4.3	(7)	7	4, 6.7
27	Fair reflection of society	13						
28	Judicial Councils			I (2c i), V 3	1.3-4	15-16, 36	(9, 11)	
29	Int'l human rights law	48				(10)		6.4
30	Transparency							4.2, (1.5)

The UN Basic Principles are, as stated, the result of government negotiations that drastically reduced the level of detail from its precursor the Universal Declaration on the Independence of Justice, from some 50 articles to 20. Articles prescribing rules for disqualification and stipulations on conflicting

assignments are omitted, as are pronounced efficiency requirements. Promotion of the principle of fair reflection in the judiciary as well as public confidence, international human rights law, and internal independence are not included. The Basic Principles moreover, by now almost 20 years of age, compares to documents such as the Beijing Statement adopted by LAWASIA in 2001, as quite general. The Beijing Statement is more detailed on for example allocation of resources, jurisdiction, qualifications, tenure, disciplining, and also more constructive in terms of advocating judicial councils (judicial service commissions) (articles 15–16, 37).

The European Charter on the Statute of Judges, being similar in scope to the Council of Europe Recommendation No. R (94) 12, deals with most issues found in the UN Basic Principles and also recommends judicial councils. The two European instruments in contrast to the Universal Declaration on the Independence of Justice however, do not explicitly deal with the appearance of justice or public confidence in any explicit way, even though this is part of the jurisprudence of the European Court of Human Rights in particular through the objective impartiality. Neither do the two deal with internal independence explicitly or with the need for awareness of international human rights law and the requirement of the composition of the judiciary reflecting society. The scope of the two European texts in comparison with the LAWASIA Basic Statement, are quite similar however.

Contrasting the United Nations Basic Principles with the Bangalore Principles, even though the latter is more of a code of conduct addressed to the behavior of the judges, shows that the Bangalore Principles elaborate in great detail on the meaning of improper influence, impartiality, and qualifications. Additionally, not covered by the Basic Principles, the Bangalore Principles deal with disqualification of judges when biased or appearing to be biased (2.5), public confidence and appearance of impartiality in more general terms (1.3, 2.2, 3, 4), the need for international human rights law awareness (6.4), and internal independence in adjudication from colleagues and hierarchical structures (4). In particular the inclusion of the requirement of public confidence lacks explicit provision in the Basic Principles. Also the Universal Declaration on the Independence of Justice, the Universal Charter, and the Beijing Statement, and to a limited extent the European texts cover the requirement of public confidence in the independence and impartiality.

The three most recent documents, the Universal Charter, the Beijing Statement, and the Bangalore Principles, as well as the Universal Declaration on the Independence of Justice from 1983, all include an efficiency requirement, which is closely related to the public confidence demand. Even though the principle that the judiciary should fairly reflect the composition of society in terms of for example ethnicity is also closely related to the credibility of the judiciary, only the Universal Declaration on the Independence of Justice



stipulate this criterion.<sup>99</sup> In particular the regional documents advocate judicial councils, serving as a buffer in relations with the government. The CCJE scheme of the Council of Europe recommended moreover in one of its opinions that an advisory body should be created where judges can turn for advice on the appropriateness of activities that may conflict with their role as judge. Some form of council or body may also be used to screen the financial and other interests that judges may have so as to ensure impartiality, but also to counter and check on corruption. The Bangalore Statement also lists transparency and international human rights law awareness as important components of judicial independence.

In order for the Chart to be operationalized beyond this contrasting of the documents, there is a need for a simpler and more concise structure. The thirty criteria used in the Chart above can be arranged in various clusters, the formation of which may differ depending on for example whether the addressee of the criteria is considered or the type of criteria. In the following I divide and group the criteria under the three headings of independence, impartiality, and measures for public confidence (in independence and impartiality). Most of the criteria fall within the independence cluster and this can be divided in two sub-clusters: those criteria aimed at institutional independence and those aimed at insulation of the individual judge from undue influence. The sub-cluster of institutional independence contains the following criteria: provisions for independence in law or constitution (also of impartiality), courts should be ordinary and operate in accordance with established procedures, the jurisdiction in a given case should be determined by the judiciary itself, and revision should only be possible by another judicial body. These criteria as grouped could be termed 'structural'. A second group contains the provision of sufficient resources as well as efficiency requirements, which can be labeled 'resources'.

The second sub-cluster under independence concerned with individual independence can be subdivided into three groups. The first includes: appointment of qualified judges without discrimination, tenure with suspension only on predetermined grounds such as when unfit, conditions of service (salary, pension, etc.) reasonable and guaranteed, objective promotion grounds, disciplining only according to established and fair procedures and with an independent review, and the use of judicial councils in determining matters such as appointment, promotion, and conditions of service. This group can be referred to as 'occupational'. A second group can be called 'internal structure' and includes independence of the individual judge from hierarchical influence and a case assignment system that is not subject to undue influence. Finally, a third group consists of criteria concerned with freedom of association and expression so judges are enabled to defend their independence, but also the

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<sup>99</sup> Fair representation of women was also prescribed in the Protocol for the ACtHPR and the Statute of the ICC.

promotion of awareness and application of international human rights law standards pertaining to judicial independence. In this group the requirement of professional secrecy may also be included as a partially corollary to freedom of expression. This group can be labeled ‘Rights of Judges’.

The second cluster is that of impartiality and guarantees for a fair trial. Impartiality should be upheld by judges so as not to have conflicting assignments with adjudicative roles: ‘non-conflicting assignments’. Another sub-cluster is concerned with judges being disqualified or recusing themselves when they risk bias. This sub-cluster also includes judges’ enjoyment of immunity in their adjudicative work from civil charges. This can be termed ‘recusal’ after the dominant feature. Finally, the third cluster, public confidence, consists of the criteria of transparency in activities and that judges as a whole should fairly reflect the composition of society in terms of for example ethnicity and gender.<sup>100</sup> This cluster is maintained under the two labels of ‘transparency’ and ‘representativity’.<sup>101</sup>

In brief, based on the criteria listed in the United Nations Basic Principles on the Independence of the Judiciary, an extensive chart can be condensed into three strands. These three main categories are (1) insulation from improper influences from in particular executive and legislative powers through for example work conditions, (2) impartiality requirements on behalf of the judges through components such as disqualification and recusal, and (3) measures to assure public confidence in the judiciary and the independence and impartiality through for instance transparency. The schematic clustering reads as follows:

- Independence
  - Collective Independence
    - Structural
    - Resources
  - Individual Independence
    - Occupational
    - Internal Structure
    - Rights of Judges
- Impartiality
  - Recusal
  - Non-Conflicting Assignment
- Public Confidence
  - Transparency
  - Representativity

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<sup>100</sup> See also e.g. Peter H. RUSSELL, 2001 (b), pp. 3–4, who argues that to assess whether judicial independence has been adequately established or maintained requires a broad consideration of not the least the practical acceptance of the institution.

<sup>101</sup> Again, representativity may come into conflict with the demands for non-discrimination in the appointment of judges through positive discrimination.

It is not possible nor is it probably beneficial for the sake of potential progressive development to determine the requirements for fulfillment of the dynamic concepts of judicial independence and impartiality. Rather than selecting components relevant for judicial independence applicable under all circumstances at a very detailed level, which may even be counterproductive in limiting the scope, judicial independence should be conceived as consisting of multiple strands that are complexly interlinked and depending on the context, the most essential strands must be chosen.<sup>102</sup> Relying on the instruments and jurisprudence from international human rights law to define such strands or clusters, the complexity of the concept of judicial independence is reduced and made less obtuse. The core strands in the instruments are broadly these three clusters: independence, impartiality, and public confidence in the judiciary and its independence and impartiality. These clusters will be used in the subsequent elaboration on international jurisprudence and eventually in the assessment of judicial independence in the People's Republic of China.

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<sup>102</sup> See Jr FALLON, 1997, p. 6, arguing for this approach in relation to the rule of law.



# JUDICIAL INDEPENDENCE

I. INTERNATIONAL INSTRUMENTS

II. INTERNATIONAL JURISPRUDENCE

# COMPARING COMPARISONS

III. COMPARATIVE LAW: COMPARING CHINA

IV. FIAT LEX: LEGAL HISTORY IN CHINA

# ASSESSING CHINA'S JUDICIARY

V. FIAT FLUX: MODERN HISTORY

VI. THE CONTEMPORARY JUDICIARY

## ***II. Interpretation and Application***

The right to a fair trial is among the concepts that are being developed most dynamically by the organs established to protect international human rights law.<sup>1</sup> A number of international and regional fora have elaborated on and developed the meaning of independent and impartial tribunals; notably the Human Rights Committee and the European Court of Human Rights but also other UN treaty bodies and regional human rights mechanisms add to the jurisprudence.<sup>2</sup> This Chapter will elaborate on this jurisprudence in light of the clusters developed in the first Chapter.

### **A. United Nations Monitoring Mechanisms**

The monitoring mechanisms of the United Nations for the human rights performance of the state parties include notably the seven treaty bodies.

#### *1. The United Nations Human Rights Committee*

The Human Rights Committee has within its mandate to consider individual communications, which has created an extensive body of case-law through its optional protocol procedure.<sup>3</sup> This individual communication procedure along with the General Comments provides increasingly detailed interpretations of international human rights law.<sup>4</sup>

The case-law of the Committee, even though phrased as views and recommendations, delimits the practical application of international standards on judicial independence.<sup>5</sup> Article 14 (1) is an essential part of the Covenant

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<sup>1</sup> Lauri LEHTIMAJA and Matti PELLONPÄÄ, 1999, p. 225.

<sup>2</sup> This Chapter includes the state report scrutiny by the UN treaty bodies while it is closely related to their case-law even though it is not jurisprudence and it also includes the jurisprudence of the ad hoc tribunals and UN Special Procedures to the extent they have relied on international human rights law on judicial independence.

<sup>3</sup> Prerequisite is for the state suspected of the violation to be party to the first additional protocol to the ICCPR; by the end of 2003, over 100 states are parties to the Protocol out of the 150 state parties to the ICCPR and Communications have been received in respect of about 70 countries, [www.unhchr.ch](http://www.unhchr.ch); the Committee and its activities are described in e.g. a number of articles in Gudmundur ALFREDSSON et al (Eds.), 2001.

<sup>4</sup> By the end of 2003, over 1,200 communications had been registered with the Committee, of which some 300 are pending and over 400 cases have been decided on the merits; of these 400, more than three quarters disclosed a violation, [www.unhchr.ch](http://www.unhchr.ch).

<sup>5</sup> See Alfred DE ZAYAS, 2001, pp. 104–107.

and has been dealt with in a number of cases. In many of these cases a violation of the requirement to provide a fair and public hearing is found but rather few actually deal with independence and impartiality specifically. At times the Committee is applying the more general term of fair trial as found in the third paragraph.<sup>6</sup> The rate of violations of claims based on judicial dependence and impartiality are consequently quite low. The cases that do find their way through the system and result in a pronounced violation of the requirement for an independent or impartial judiciary are as a consequence quite straight forward, usually involving military courts, judges' prior involvement in the case, biased composition, or clear political influence.<sup>7</sup>

The Committee is also restricted in its application of international standards by the dominance of the doctrine of 'no fourth instance', advocated in particular by the common-law lawyers on the Committee. The doctrine, seen to flow from lack of mandate, limits the Committee's review of the application of domestic law as well as re-evaluations of facts made by the domestic court other than under special circumstances.<sup>8</sup> The doctrine has however been provided with a saving clause for cases when the ICCPR has not been interpreted and applied in good faith or when clear abuse of power can be determined.<sup>9</sup> The possibility for exemptions from the doctrine enables the Committee to screen fundamental provisions such as article 26 on equality before the law and prohibition of discrimination, and article 14 on fair trial.<sup>10</sup> The doctrine of no fourth instance can thus be seen as preventing scrutiny based on article 14 (1) and as such a partial explanation of the relatively few cases on judicial independence. Through this saving clause for a potentially more thorough investigation in cases where "it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice".<sup>11</sup>

The progress made by the Committee in applying factors influencing judicial independence has however led to elaborations in the area of political influence on the judiciary as a whole, and in clear cases of judicial bias. The cases dealing with judicial independence and impartiality are subdivided under the three headings corresponding to the clusters defined in the last Chapter: independence (political cases and executive influence), impartiality (biased judges), and public confidence in the judiciary (including transparency and

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<sup>6</sup> Article 14 (3) of ICCPR lists a number of 'minimum guarantees, in full equality', basically concerned with equality of arms-requirements.

<sup>7</sup> I have here benefited from discussions with Professor Martin Scheinin, member of the Human Rights Committee, September 2002.

<sup>8</sup> Alfred DE ZAYAS et al, 1985, p. 28; *Anna Maroufidou v. Sweden*, Communication No. 58/1979; Alfred DE ZAYAS, 2001, pp. 90–91; P. R. GANDHI, 1998, p. 206; cf the Margin of Appreciation in the Strasbourg system.

<sup>9</sup> Human Rights Committee Report, 1981, Annex XVII, para. 10.1 as quoted in Alfred DE ZAYAS et al, 1985, p. 28.

<sup>10</sup> Carla EDELENBOS, 2001; Alfred DE ZAYAS, 2001, pp. 104 and 112.

<sup>11</sup> *Hart v. Australia*, Communication No. 947/2000.

representativity), even though this has been dealt with explicitly to a very limited extent by the Committee.

### Independence

The Committee has handled a series of politically related cases concerned with judicial independence. In the case of *González del Rio v. Peru*,<sup>12</sup> the claimant, the 'author', was sentenced in 1986 for embezzlement of state assets but he appealed to the Supreme Court and the case finally reached the Constitutional Court where Court ordered the Supreme Court to change its decision. After continued processing, the author inquired into the development of his case at the Supreme Court and was told by the President of the Court that due to the political risk involved in the case, including the apparent changes for the author's benefit, the Court would postpone action for as long as possible. On this ground the Committee concluded that the Supreme Court was not independent (and impartial) and found for the author (paragraph 5.2).

In *Angel N. Oló Bahamonde v. Equatorial Guinea*,<sup>13</sup> Oló Bahamonde, a landowner and former civil servant in Equatorial Guinea, claimed that the President of the country and his political party controlled the judiciary. When the authorities expropriated his property in 1987 without compensation and subjected him to a series of harassments, he unsuccessfully sought redress through for example direct appeal to the President, the head of the executive branch of government which also controlled the court system. The Committee found the state party in violation of, among other things, article 14 (1). The Committee held that "a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal". (paragraph 9.4).

In *Y. L. v. Canada*,<sup>14</sup> the Committee declared the complaint inadmissible. The claimant was an author who complained that he was denied trial by an independent and impartial court. Having been dismissed from the Canadian army in 1967 due to alleged mental disorders, the author applied for disability pension but was denied by the Pension Commission. After a series of appeals and renewed applications the decision was unchanged. The highest authority reviewing his application was composed of civil servants of the executive branch. The Human Rights Committee found that while there was yet a possibility to appeal through a federal judicial review procedure, this was sufficient for the Canadian legal system to provide for an independent and impartial tribunal (paragraph 9.5). However, Committee members argued in an

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<sup>12</sup> Communication No. 263/1987.

<sup>13</sup> Communication No. 468/1991.

<sup>14</sup> Communication No. 112/1981, the Individual Opinion found the case inadmissible on other grounds.



Individual Opinion that while the option was not advised to the author by the state appointed lawyer after what he thought was the final appeal; Canada had failed to prove non-exhaustion of local remedies.<sup>15</sup>

In *Dergachev v. Belarus*,<sup>16</sup> the claimant in 1999 carried a poster with anti-regime text and claimed that since the President of the country appointed the judges who sentenced him, the court was not independent. The Committee found this claim unsubstantiated (paragraph 6.4). The case of *Des Fours Walderode and Kammerlander v. Czech Republic*,<sup>17</sup> concerned an effort to reclaim property that was confiscated in 1945. The applicants claimed state interference with the judiciary in 1993 proceedings to reclaim the property. The ground for the alleged interference was a letter from the then Prime Minister Vaclav Klaus, sent to party authorities and relevant ministries, which was included in the case dossier of the court. According to the Committee this did not prove influence on the decision (paragraph 8.2).

The case of *Busyo et al v. Democratic Republic of the Congo*, dealt with the dismissal of 315 Congolese judges in 1998.<sup>18</sup> Instead of the established procedures of taking judges before the judicial council, the Supreme Council of the Judiciary, in disciplinary matters, Congo had in this case issued a Presidential Decree with general references to immorality, irresponsibility, and corruption. The Committee found a violation on multiple grounds including judicial independence (paragraph 5.2).<sup>19</sup>

In a number of cases the Committee has dealt with military tribunals and their status. Article 14 (1) of the ICCPR only requires courts to be established by law and extraordinary courts are not prohibited in its totality. The Committee has therefore come to deal with these courts in relation to judicial independence. These cases are however typically positioned at the very gray zone between independence and impartiality where the Committee relies on both concepts in their findings. In *Cariboni v. Uruguay*,<sup>20</sup> the Committee found

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<sup>15</sup> The Opinion was written by Bernhard Graefrath, Fausto Pocar and Christian Tomuschat.

<sup>16</sup> Communication No. 921/2000; see also *Domukovsky et al v. Georgia*, four separate authors claimed that the courts in Georgia were not independent because of adverse media and public statement by the President of Georgia, where the Committee found Georgia in violation on other grounds however than article 14 (1), Communications Nos. 623/1995, 624/1995, 626/1995, 627/1995.

<sup>17</sup> Communication No. 747/1997.

<sup>18</sup> Communication No. 933/2000, Busyo et al represented 68 of these 315 judges.

<sup>19</sup> See also *Mikhail Pastukhov v. Belarus*, Communication 814/1998, where the Committee deemed the removal of a constitutional court judge before the end of his term a violation.

<sup>20</sup> Communication No. 159/1983; see also *Weinberger v. Uruguay*, Communication No. 28/1978, where one of the reasons for finding a violation by the state party was denial of fair and public hearing even though independence and impartiality was seemingly lacking as well.

the Military court that sentenced the claimant in 1979 was neither independent nor impartial. The Supreme Military Court added five years to the sentence the prosecution asked for, and in addition, given the state of affairs in Uruguay at that time, the Committee determined that the courts could not have been independent and impartial (paragraph 10).

*J. P. K. v. the Netherlands*<sup>21</sup> concerned a conscientious objector to military service as well as to substitute civil service. In the consequent trial by the Supreme Military Court in 1987, the applicant called into question the independence and impartiality. The state party submitted that the judges independence and impartiality could not be questioned for the following reasons: they were also judges in the Court of Appeal (Gerechtshof) in The Hague; they were appointed by the Crown; they did not hold any military function; their salaries were paid by the Ministry of Justice; they swore an oath of impartiality; they did not owe obedience nor were they accountable to anyone regarding their decisions; and that the trials as a rule are public. The author was unable to substantiate any additional claims in response to the state party's submission (paragraphs 6.4 and 4.2).

In *Campos v. Peru*,<sup>22</sup> Campos had been arrested in 1992 on terrorist charges and sentenced to life imprisonment. The Committee found trial by a tribunal established ad hoc, which may comprise serving members of the armed forces, the court cannot be deemed independent (paragraph 8.8).

In *Montejo v. Colombia*,<sup>23</sup> a military court sentenced a director of a newspaper in 1979, and the only available recourse was the same judge who confirmed the sentence. The Committee did however not find any substantiation of the claim that the court was not independent nor impartial. The Committee found however that article 14 (5) had been violated because of refusal of recourse to a higher tribunal (para 11). In *Ngalula Mpandanjila et al v. Zaire*,<sup>24</sup> the case concerned a number of Zairian parliamentarians critical of the President Mobuto regime. A State Security Court, with the judges being members of the presidential party, sentenced the 13 individuals to between 5 and 15 years imprisonment in 1982. The Committee referred to the more general phrase of denial of a fair and public hearing, avoiding the independence aspect (paragraph 10).

## Impartiality

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<sup>21</sup> Communication No. 401/1990; see also *Henricus A.G.M. Brinkhof v. The Netherlands*, Communication No. 402/1990; and *T. W. M. B v. The Netherlands*, Communication No. 403/1990.

<sup>22</sup> Communication No. 577/1994.

<sup>23</sup> Communication No. 064/1979; see also *Borda v. Colombia*, Communication No. 046/1979, where no violation was found however due to unsubstantiation.

<sup>24</sup> Communication No. 138/1983.

Claims about impartiality of judges, lay judges and juries are frequent matters before the Committee. In *Karttunen v. Finland*,<sup>25</sup> the applicant was a client of a bank that financed his business activities through regular loans. The applicant filed for bankruptcy and was subsequently charged with fraudulent bankruptcy. He was found guilty and sentenced in the district court in 1986 by a panel consisting of one professional judge and five lay judges. One of the lay judges was an uncle of one of the applicant's creditors, who was also alleged to have made statements against a witness for the defense during trial. Another lay judge was indirectly involved in the case before the trial started. The issue with the lay judges was not raised until appeal. At the appellate level, which was a consideration on the dossier only, the court found that the first of the two lay judges was deemed to be unsuitable but that the failure to disqualify him did not adversely affect the trial. The Committee found that it was the duty of the court to *ex officio* replace judges that ought to be disqualified. Since this was not done however, the Committee said that the appeal process should have been oral so as to enable a proper evaluation of the influence of the procedural flaw in the district court.

In *Clifton Wright v. Jamaica*,<sup>26</sup> the applicant had been in police custody for 20 hours at the time his alleged victim was murdered, according to the post-mortem estimate of the victim's time of death. The judge during the murder trial allegedly demonstrated an adverse attitude to the applicant and failed to inform the jury of the post-mortem evidence. The instructions to the jury were dealt with by the Committee, which held the instructions were "clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality". (paragraph 5.4) Especially since the death penalty was at stake,<sup>27</sup> the Committee found article 14 (1) to have been violated even though judicial independence and impartiality was not specifically referred to (paragraph 8.3). Jury instructions in Jamaica have been scrutinized by the Committee on a number of occasions but not always found to be violative of the requirement of impartiality.<sup>28</sup>

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<sup>25</sup> Communication No. 387/1989; see also *Näkkäljärvi v. Finland*, Communication No. 779/1997; see also similar cases from Finland within the domestic system, Supreme Court cases: KKO: 1997:59, where the established partiality was not seen as having affected the proceedings; and KKO: 1997: 194, where impartiality was not complied with.

<sup>26</sup> Communication No. 349/1989.

<sup>27</sup> See General Comment 6 (16), CCPR/C/21/Rev.1, p. 7.

<sup>28</sup> *Sawyers and McLean v. Jamaica*, Communications Nos. 226 and 256/1987 (unsubstantiated); *Reynolds v. Jamaica*, Communication No. 229/1987 (no violation); *McTaggart v Jamaica*, Communication No. 749/1997 (no violation); see also *Franklyn Gonzales v. Trinidad and Tobago*, Communication No. 673/1995 (unsubstantiated).

In the case of *J. L. v. Australia*,<sup>29</sup> the applicant, a lawyer, was given three weeks imprisonment in 1986 for contempt of court for failure to respect an injunction related to not paying an increased professional insurance fee. The applicant claimed that the collector of the fee was a state law institute with ties to the court, since the court was responsible for approving fees suggested by the Institute. The Committee found the case inadmissible because the applicant failed to substantiate the impotence of the connections between the court and the Institute (paragraph 4.3).

Similarly in *Robert Faurisson v. France*,<sup>30</sup> the applicant in a published interview doubted the existence of gas chambers used for extermination purposes during the Holocaust. After publication a private criminal charge was brought against the applicant and he was fined. In the appeal process that ensued in 1992, the applicant claimed the judge to be biased because “the President of the Chamber turned her face away from him throughout his testimony and did not allow him to read any document in court, not even excerpts from the Nuremberg verdict, which he submits was of importance for his defence” (paragraph 3.2). The Committee found the claim not to have been substantiated (paragraph 6.4).

In *Dole Chadee et al. v. Trinidad and Tobago*,<sup>31</sup> adverse pre-trial publicity allegedly made it very difficult to form an unbiased jury, but given the efforts taken by the court to secure an unbiased jury, no violation was found (paragraph 10.1). However, a dissenting opinion argued that while the laws enabling the changes to the jury composition were made in order to start the very trial in question, article 14 (1 and 2) was violated.<sup>32</sup>

The existence of bias is difficult to substantiate and in a number of cases the Committee has not been able to find a violation in such cases. In *Collins v. Jamaica*,<sup>33</sup> the applicant claimed that the judge was biased against him due to an adverse statement by that judge in a previous hearing on the same matter. An investigative officer was also alleged to have tried to influence members of the jury. The Committee was not able to establish a violation, either against the judge or the jury because the nature of the bias had not been substantiated and the objection had not been made during trial or appeal (paragraph 8.3).<sup>34</sup> To

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<sup>29</sup> Communication No. 491/1992; see also *Rogerson v. Australia*, Communication No. 802/1998 (unsubstantiated).

<sup>30</sup> Communication No. 550/1993.

<sup>31</sup> Communication No. 813/1998.

<sup>32</sup> Under 14 (1) fair trial was mentioned in the dissent (Mr. Scheinin) and not impartiality explicitly.

<sup>33</sup> Communication No. 240/1987.

<sup>34</sup> See for an example, of failed substantiation in a civil case, *Yves Morael v. France*, Communication No. 207/1986; see also *S.H.B. v. Canada*, Communication No. 192/1985; *Nicolov v. Bulgaria*, Communication No. 824/1998; see also Peter RÄDLER, 1998, p. 733, with reference to the same practice at the ECtHR.

successfully claim bias, a pre-requisite is that the issue has to have been raised in the domestic proceedings.<sup>35</sup>

In *Clyde Neptune v. Trinidad and Tobago*,<sup>36</sup> Mr. Neptune was sentenced in 1988 for murder by a judge who, at the time of the crime, was the head of the department of public prosecution that directed the police in the investigation of his case. The Committee did not however find the application admissible in this respect due to lack of substantiation (paragraph 4.3).<sup>37</sup>

Peruvian ‘faceless tribunals’<sup>38</sup> have been another issue for the Committee. *Arrendondo v. Peru*<sup>39</sup> concerned alleged terrorist activities. The victim, Mrs. Arredondo, was working as a human rights lawyer for indigenous groups. The applicant was accused of membership in an organization supposedly supporting *Sendero Luminoso*, and sentenced by ‘faceless judges’ to 12 years imprisonment. In 1995 a previous case, in which she had been accused of terrorist activities in 1985 but acquitted, was reopened and she was given a sentence of 15 years in 1997. The Committee referred to its jurisprudence on ‘faceless judges’ and found a violation (paragraphs 10.5 and 11). The Committee considers faceless judges to be contrary to the requirements of impartiality because the anonymity of the judges does not permit the accused to screen the competency of the judges or establish a basis to call for their recusal.

Similarly, in *José Luis Gutiérrez Vivanco v. Peru*, Gutiérrez Vivanco was condemned for acts of terrorism by a ‘faceless tribunal’ in 1994.<sup>40</sup> The Committee referred to previous case-law and found a violation on the grounds of among other things, lack of an independent and impartial tribunal. An individual opinion<sup>41</sup> however, spelled out that the system of faceless judges was not banned by the Committee’s view and that under very special circumstances it may be required, but those situations should be communicated to the Secretary General of the United Nations and due consideration given to the Committee’s General Comment on state of emergency. A case by the Committee on the Elimination of Racial Discrimination, *Narrainen v. Norway*,<sup>42</sup> also deals with a biased court and will be discussed further below.

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<sup>35</sup> *Adu v. Canada*, Communication No. 653/1995.

<sup>36</sup> Communication No. 523/1992.

<sup>37</sup> The issue that a prosecutor is not independent or impartial in the way the judges are supposed to be was raised in another 1988 case, *Kulomin v. Hungary* (para. 11.3), Communication No. 521/1992.

<sup>38</sup> A tribunal of faceless judges (*tribunal sin rostro*) could be established under a special anti-terrorist legislation where the judges could cover their faces so as to prevent them from being targeted by terrorist groups.

<sup>39</sup> Communication No. 688/1996.

<sup>40</sup> Communication No. 678/1996.

<sup>41</sup> By Mr. Shearer.

<sup>42</sup> Communication No. 3/1991.

## Public Confidence

A previously mentioned case, *Campos v. Peru*,<sup>43</sup> also concerned ‘faceless tribunals’. The Committee concluded that such a “system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial” (paragraph 8.8). This reference also to “be seen to be” opens discussion on the appearance requirement as applied by for example the ECtHR. The Committee has not however further developed this part of the concept of independence in their communications.

## General Comments and Dialogues with Governments

In the General Comments produced by the Committee, serving as a general restatement of principles accumulated and developed in individual cases, it is stated that:

a competent, independent and impartial tribunal established by law, as stipulated in article 14.1 of the Covenant, raises matters regarding the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.<sup>44</sup>

In the comments by the Committee to State Reports submitted under article 40 (2) of the Covenant, more detailed guidance on specific issues can be found by way of questions and recommendations. Questions asked by the Committee tend to focus on method of appointment and tenure.<sup>45</sup> Other issues raised are general questions on the practical guarantee of judicial independence but also issues such as backlogs in the court docket.<sup>46</sup> As to the comments and criticism after the initial issues have been raised, the level of detail differs from general

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<sup>43</sup> Communication No. 577/1994.

<sup>44</sup> General Comment 13, para. 3, HRI/GEN/1; see also para. 4 on extra-ordinary courts.

<sup>45</sup> Yemen, 2003, CCPR/C/75/L/YEM (List of Issues), para. 17; Republic of Moldova, 2002, CCPR/C/75/L/MDA, (List of Issues), para. 14; Syrian Arab Republic, 2000, CCPR/C/71/L/SYR, (List of Issues), para. 13; Monaco, 2001, CCPR/C/72/L/MCO, (List of Issues), para. 14.

<sup>46</sup> See e.g. Argentina, 2000, CCPR/C/70/L/ARG, (List of Issues), para. 20; see also Democratic People’s Republic of Korea, 2001, CCPR/C/72/L/PRK. (List of Issues), para.15 on fundamental questions of jurisdiction, procedures, and possibilities of appeal.

remarks on concern over the judicial independence<sup>47</sup> to insightful suggestions related to domestic procedures and practice.<sup>48</sup> Other more detailed recommendations are given such as the need for legislation regulating the independence,<sup>49</sup> constitutional reform,<sup>50</sup> or that judicial orders for release should be implemented.<sup>51</sup>

Allegations of,<sup>52</sup> and actual, interference by the executive is condemned,<sup>53</sup> as is that of the legislative power.<sup>54</sup> In Belarus the Committee criticized the President of the Republic for not respecting the decisions of the Constitutional Court.<sup>55</sup> The Police Complaints Authority in Guyana was questioned as to its independence in general.<sup>56</sup> The Committee inquired into the actual composition of the Supreme Council of Justice in Cameroon.<sup>57</sup> An especially interesting risk of interference from the executive and legislative was highlighted in relation to Hong Kong. The Committee was critical of the possibility of the Executive of the Hong Kong Special Administrative Region to request interpretations of the Basic Law of Hong Kong from the National People's Congress in Beijing and from which outcome would have a direct effect on future court decisions such as the one dealt with at that time by the Court of Final Appeal.<sup>58</sup> The superiority over the judiciary of the Parliament (Supreme People's Assembly or National Assembly) and its Standing Committee increases the risk of political

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<sup>47</sup> Tunisia, 1994, CCPR/C/79/Add.43 para. 9; France, 1997, CCPR/C/79/Add.80, para. 12, "prevailing malaise in the magistracy . . . concerning the independence of the judiciary"; Yemen, 2002, CCPR/CO/75/YEM, para. 19; Nepal, 1994, CCPR/C/79/Add.42, para. 10.

<sup>48</sup> See e.g. Uzbekistan, 2001, CCPR/CO/71/UZB, para. 14, concerning disciplinary measures against judges ruling incompetently; see also Italy, 1994, CCPR/C/79/Add.37, para. 16, on civil liability of judges.

<sup>49</sup> Guatemala, 1996, CCPR/C/79/Add.63, para. 31; Belarus, 1997, CCPR/C/79/Add.86, para. 14; Georgia, 1997, CCPR/C/79/Add.75, para. 30.

<sup>50</sup> Cameroon, 1994, CCPR/C/79/Add.33, para. 24.

<sup>51</sup> Dominican Republic, 1993, CCPR/C/79/Add.18, para. 6.

<sup>52</sup> Republic of Moldova, 2002, CCPR/C/75/L/MDA, (List of Issues), para. 14.

<sup>53</sup> Peru, 2000, CCPR/CO/70/PER, para. 10; Bolivia, 1997, CCPR/C/79/Add.74, para. 34, on the responsibility of the judicial police that should be transferred from the executive to the judiciary according to the Committee.

<sup>54</sup> See Peru, 2000, CCPR/CO/70/PER, para. 10, the wording is very explicit, naming three judges of the constitutional court that had been dismissed by the Congress in 1997; Sri Lanka, 1995, CCPR/C/79/Add.56, para. 19.

<sup>55</sup> 1997, CCPR/C/79/Add.86, para. 13.

<sup>56</sup> 2000, CCPR/C/79/Add.121, para. 11.

<sup>57</sup> 1994, CCPR/C/79/Add.33, para. 14.

<sup>58</sup> Hong Kong, 1999, CCPR/C/79/Add.117 (Hong Kong) in regard to article 24, paras. 2 and 3 of the Basic Law and the cases of *Ng Ka Ling* and *Chan Kam Nga* in the Court of Final Appeal.

influence on the judiciary.<sup>59</sup> Also the scarcity of qualified, professionally trained lawyers, and the lack of resources for the judiciary are highlighted in the case of Vietnam as exposing judges to political pressure.<sup>60</sup>

The *procuratura* system applied in some countries, with public prosecution functions combined with supervision over the courts is seen as incompatible with judicial independence and the abolishment of the *procuratura* system is recommended.<sup>61</sup> Also, the generally close relationships between procurators and judges are criticized.<sup>62</sup>

Frequent recommendations made by the Committee have a bearing on appointment, tenure, and remuneration. The Committee criticized Belarus for not complying with the standards on tenure, disciplining and dismissal of judges, and in particular that the President of the Republic can dismiss judges of the Supreme and the Constitutional Courts without safeguards.<sup>63</sup> Lack of security of tenure combined with possibilities to subject judges to criminal liability exposes judges to political pressure.<sup>64</sup> Appointment procedures have been criticized by the Committee in a number of countries<sup>65</sup> also on grounds such as political or executive influence, while other countries<sup>66</sup> have been applauded for their improved selection process. Electing judges has been seen as increasing the risk of political interference. In Armenia the system with judges being elected in addition to appointment for a fixed maximum term of six years was deemed to threaten judicial independence.<sup>67</sup> The remuneration of judges is another issue being brought up as a factor adversely affecting the independence of judges.<sup>68</sup>

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<sup>59</sup> Viet Nam, 2002, CCPR/CO/75/VNM, para. 10; Democratic People's Republic of Korea, 2001, CCPR/CO/72/PRK, para. 8.

<sup>60</sup> 2002, CCPR/CO/75/VNM, para. 9.

<sup>61</sup> Azerbaijan, 1994, CCPR/C/79/Add.38, para. 11; see also Latvia, 1995, CCPR/C/79/Add.53, para. 15.

<sup>62</sup> Georgia, 1997, CCPR/C/79/Add.75, para. 17.

<sup>63</sup> 1997, CCPR/C/79/Add.86, para. 13.

<sup>64</sup> Viet Nam, 2002, CCPR/CO/75/VNM, para. 10.

<sup>65</sup> Congo, 2000, CCPR/C/79/Add.118, para. 14; Slovakia, 1997, CCPR/C/79/Add.79, para. 18; Bolivia, 1997, CCPR/C/79/Add.74, para. 34; Sri Lanka, 1995, CCPR/C/79/Add.56, para. 34.

<sup>66</sup> Argentina, 2000, CCPR/CO/70/ARG, para. 6; Belgium, 1998, CCPR/C/79/Add.99, para. 5, also for their increased number of judges.

<sup>67</sup> 1998, CCPR/C/79/Add.100, para. 8; Hungary was also reminded by a member of the Committee of the downsides of electing judges, 1993, CCPR/C/SR.1241, para. 59, stated by Mr. Mavromatis; the same member also criticized the US for electing some judges, and for the frequency of election, 1995, CCPR/C/SR.1402.

<sup>68</sup> Kyrgyzstan, 2000, CCPR/CO/69/KGZ, para. 15; Georgia, 2002, CCPR/CO/74/GEO, para. 12.



The Committee has questioned the tenure of judges in many countries.<sup>69</sup> The Committee has also expressed concern over the lack of information on security of tenure in Paraguay,<sup>70</sup> and has criticized Azerbaijan for their system of appointment and tenure.<sup>71</sup> Algeria has received criticism for not providing immovability of judges until after ten years of service.<sup>72</sup> The Committee has recommended reviewing systems where judges are appointed for five to seven years after which reappointment is required, or where state practice requires recertification every seven years.<sup>73</sup> A four-year renewable term of the members of the Supreme Constitutional Court in Syria was deemed too short.<sup>74</sup> Appointment of judges in Uzbekistan to a term of five years only, especially when combined with the possibility to take disciplinary measures against judges issuing “incompetent rulings” makes them too vulnerable to political pressure.<sup>75</sup> Other countries that have received clear encouragement by the Committee on the improvement of tenure are Romania<sup>76</sup> and Portugal (regarding Macao).<sup>77</sup> The Lebanese delegation to the Committee even conceded that its appointment procedures of judges were far from satisfactory.<sup>78</sup> The Committee states that review of judges, should they take place, ought to be done by an independent professional body that would screen for judicial

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<sup>69</sup> The Republic of Korea, 1999, CCPR/C/79/Add.114, para. 16; Venezuela, 2001, CCPR/CO/71/VEN, paras. 13 and 14, reference is given in great detail to the domestic system; Georgia, 2002, CCPR/CO/74/GEO, para. 12; Kyrgyzstan, 2000, CCPR/CO/69/KGZ, para. 15; Peru, 2000, CCPR/CO/70/PER, para. 10.

<sup>70</sup> 1995, CCPR/C/79/Add.48 para. 20.

<sup>71</sup> Azerbaijan, 2001, CCPR/CO/73/AZE, para. 14.

<sup>72</sup> 1998, CCPR/C/79/Add.95, para. 14.

<sup>73</sup> Peru, 1996, CCPR/C/79/Add.67 para. 14; Kyrgyzstan, 2000, CCPR/CO/69/KGZ para. 15; Lithuania, 1997, CCPR/C/79/Add.87 para. 16; Uzbekistan, 2001, CCPR/CO/71/UZB para. 14; Republic of Moldova, 2002, CCPR/CO/75/MDA, para. 12; Appointment for at least seven years is prescribed, Manfred NOWAK, 1993, p. 245.

<sup>74</sup> Syria, 2001, CCPR/CO/71/SYR.

<sup>75</sup> Uzbekistan, 2001, CCPR/CO/71/UZB, para. 14.

<sup>76</sup> 1999, CCPR/C/79/Add.111, para. 4, the courts are also applauded for frequent references to international legal provisions.

<sup>77</sup> 1999, CCPR/C/79/Add.115, para. 6, China and Portugal reached agreement in March 1998 on non-removability of judges and autonomy and independence of the judiciary.

<sup>78</sup> 1997, CCPR/C/79/Add.78, para. 15.

competence only.<sup>79</sup> The establishment of this type of independent professional body in Belgium is one example commended by the Committee.<sup>80</sup>

Extra-ordinary courts, such as military or security courts, are also a frequent topic in the Committee dialogue.<sup>81</sup> To the extent the courts have a broader and in particular flexible jurisdiction that reaches beyond the members of the armed forces, the Committee finds it contrary to the Convention.<sup>82</sup> In Colombia the concept of service-related acts were broadened to enable transfers from civilian jurisdiction to military tribunals of many cases where the military and security forces were allegedly involved in human rights violations.<sup>83</sup> Similar issues were raised in relation to Brazil and its military police.<sup>84</sup> Lebanese military courts were criticized for the broad mandate also over civilians and the lack of supervision of ordinary courts over the military.<sup>85</sup> The trial and subsequent execution of Ken Saro Wiwa et al caused the Committee to question the role of special courts in Nigeria and the issue has remained on the agenda.<sup>86</sup> Special courts in North Korea have also been scrutinized.<sup>87</sup> ‘Faceless judges’ have been an issue also in the dialogue with Peru. These military courts tried people accused of terrorism, disregarding if they were civil or military.<sup>88</sup> The same military force that detained and charged alleged violators, sentenced them relying on judges that were active duty-officers largely without legal training and without a possibility for review by a higher tribunal.

On the progressive side of the Committee’s statements, Sudan was discussed for its lack of representativity of religious groups and women in the judiciary.<sup>89</sup> Syria was questioned on denial of disabled persons to assume posts

<sup>79</sup> Lithuania, 1997, CCPR/C/79/Add.87 para. 16; see also 1996, CCPR/C/79/Add.62, para. 16 where Zambia is criticized for the contents of a proposal by the Constitutional Review Committee; and Cameroon, 1994, CCPR/C/79/Add.33, para. 14, where the composition of the Supreme Council of Justice is criticized.

<sup>80</sup> 1998, CCPR/C/79/Add.99 para. 5 on the establishment of a Supreme Judicial Council.

<sup>81</sup> See e.g. the question to Syria, 2000, CCPR/C/71/L/SYR., para. 14, where the Committee asks for the composition and jurisdiction of the Higher State Security Court.

<sup>82</sup> Uzbekistan, 2001, CCPR/CO/71/UZB, para. 15; see also Libya, 1998, CCPR/C/79/Add.101 on the Revolutionary Security Courts.

<sup>83</sup> 1997, CCPR/C/79/Add.76, para. 18; Also the military courts themselves have been questioned as regards appointment, terms of tenure and service and the applicable disciplinary system, Colombia, 1999, CCPR/C/SR.1561.

<sup>84</sup> 1996, CCPR/C/79/Add.66, para. 10.

<sup>85</sup> 1997, CCPR/C/79/Add.78, para. 14.

<sup>86</sup> 1996, CCPR/C/SR.1494, para. 10; and 1998, CCPR/C/SR.1495.

<sup>87</sup> Democratic People’s Republic of Korea, 2001, CCPR/C/SR.1946, paras. 17–18.

<sup>88</sup> 1996, CCPR/C/79/Add.67, para. 12; see also Peru, 1996, CCPR/C/SR.1521, para. 3.

<sup>89</sup> 1997, CCPR/C/79/Add.85, para. 21, Sudan was also criticized for their supervision mechanisms being too influential, for the selection criteria for judges, and for the court neither being ‘independent in fact or appearance’.

in the judiciary.<sup>90</sup> Training<sup>91</sup> and the application of the UN Basic Principles on the Independence of the Judiciary are recommended to some countries.<sup>92</sup> Other countries have been requested to undertake reform so as to improve the independence of the judiciary.<sup>93</sup> Colombia was even asked to abolish their regional judicial system.<sup>94</sup> Another issue addressed by the Committee is threats to members of the judiciary.<sup>95</sup>

## 2. Other Human Rights Treaty Bodies

The other human rights treaty bodies have also dealt with judicial independence through their treaty reporting procedures.<sup>96</sup> The Committee on the Elimination of Racial Discrimination has questioned, for example, Morocco its rules providing for independence and impartiality in relation to article 2, the general article on prevention of discrimination of the Convention on the Elimination of All Forms of Racial Discrimination.<sup>97</sup> States have been asked to further strengthen the independence of the judiciary and provide training in human rights for the judges,<sup>98</sup> and to submit more detailed information on the independence of the judiciary.<sup>99</sup>

The Committee also dealt with an alleged impartial jury in *Narrainen v. Norway*.<sup>100</sup> In an illegal drug case, a foreign-born Norwegian citizen claimed that a racist remark made by one of the members of the jury during a break at

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<sup>90</sup> 2000, CCPR/C/71/L/SYR. (List of Issues), para. 13.

<sup>91</sup> Ukraine, 1995, CCPR/C/79/Add.52, para. 15; Congo, 2000, CCPR/C/79/Add.118, para. 14.

<sup>92</sup> Belarus, 1997, CCPR/C/79/Add.86, para. 14; Russian Federation, 1995, CCPR/C/79/Add.54, para. 36, with reference to the need of making international human rights norms widely known and the Committee recommends technical assistance from UN; Libya, 1998, CCPR/C/79/Add.101, para. 14; Italy, 1994, CCPR/C/79/Add.37, para. 16.

<sup>93</sup> Ukraine, 1995, CCPR/C/79/Add.52, para. 25, Ukraine should also encourage a “culture of independence”; Latvia, 1995, CCPR/C/79/Add.53, para. 25.

<sup>94</sup> 1997, CCPR/C/79/Add.76, para. 40.

<sup>95</sup> Argentina, 1995, CCPR/C/79/Add.46, para. 12; Brazil, 1996, CCPR/C/79/Add.66, para. 11; Colombia, 1997, CCPR/C/79/Add.76, para. 20.

<sup>96</sup> The work of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families has not been included given its recent commencement.

<sup>97</sup> 1994, A/49/18, para. 213.

<sup>98</sup> Russian Federation, 1996, CERD/C/304/Add.5, para. 21; 1998, CERD/C/304/Add.43, paras. 11 and 21; see also on general requests for improvement of judicial independence: Philippines, 1997, CERD/C/304/Add.34, para. 26; Burundi, 1997, CERD/C/304/Add.42, para. 29; Cambodia, 1998, CERD/C/304/Add.54, para. 6.

<sup>99</sup> 1999, CERD/C/304/Add.55, para. 21.

<sup>100</sup> Communication No 3/1991, 1994, CERD/C/44/D/3/1991.

the trial, for which the jury-member was not disqualified, affected the proceedings adversely. The applicant also held that the jury-selection system in Norway did not fairly reflect the composition of the Norwegian society in terms of ethnicity.<sup>101</sup> The Committee was not able to establish that the competent authorities had committed a violation of article 5 (a) of the Convention, to equal treatment before the tribunals, but still recommended Norway to take due consideration in jury selection, especially in cases such as the one under consideration.<sup>102</sup>

The Committee on Economic, Social and Cultural Rights found an independent judiciary a necessary element in the protection of economic, social and cultural rights. The Dominican Republic was commended for combating corruption within the judiciary, raised salaries of judges and increased transparency of the appointment process of judges to the Supreme Court.<sup>103</sup> A number of countries have been criticized for executive and/or legislative powers interfering with the judiciary.<sup>104</sup> One Committee-member quizzed a Sudanese state representative on tenure and remuneration of judges. Another member of the Committee added that even though their independence is guaranteed in the Constitution, it is the President as the head of the executive that is appointing the head of the judiciary.<sup>105</sup>

The Committee against Torture is more explicit in its references to judicial independence. The Committee regularly finds shortcomings, commonly referring to independence as a requirement to prevent torture and ill-treatment.<sup>106</sup> The tenure of the judges is another matter often criticized.<sup>107</sup> Other issues are the composition of the judiciary,<sup>108</sup> and criminal liability of judges.<sup>109</sup>

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<sup>101</sup> Drawing on the doctrine of “fair reflection”, the judiciary reflecting society; on the Doctrine, see e.g. Livingstone ARMYTAGE, 1996, pp. 56–57.

<sup>102</sup> Paras. 9.4, 9.5, and 10.

<sup>103</sup> See e.g. 1997, E/C.12/1/Add.16, para. 4.

<sup>104</sup> Guinea, 1996, E/C.12/1/Add.5, para. 12, and Kyrgyzstan, 2000, E/C.12/1/Add.49, para. 12, respectively; see also the criticism of Democratic People’s Republic of Korea (North Korea), 2003, E/C.12/Add.95, paras. 9 and 28.

<sup>105</sup> Sudan, 2001, E/C.12/2000/SR.38, paras. 19 and 34 and the Sudanese response in para. 24; see also Sudan, 2000, E/C.12/1/Add.48, paras. 19 and 30; see also e.g. Azerbaijan, 2003, E/C.12/Q/AZE/2 (List of Issues), para. 6 on the extent of judicial independence.

<sup>106</sup> China, 1996, A/51/44, para. 150 (i); Georgia, 2001, A/52/44, para. 119 (c); Uzbekistan, 2002, CAT/C/CR/28/7, para. 5 (e) and (f); Belarus, 2001, A/56/44, para. 45 (d); Slovakia, 2001, A/56/44, para. 105 (h).

<sup>107</sup> Kazakhstan, 2001, A/56/44, para. 128 (f); Kyrgyzstan, 1999, A/55/44, para. 74 (d); Azerbaijan, 1999, A/55/44, para. 68 (d).

<sup>108</sup> Saudi Arabia, 2002, CAT/C/CR/28/5, para. 8.

<sup>109</sup> Armenia, 2001, A/56/44, para. 39 (e).

Further training of judges is encouraged,<sup>110</sup> and the Committee refers to the international standards, in particular the UN Basic Principles.<sup>111</sup>

The Committee sometimes echoes the findings of the Human Rights Committee. They have criticized Peru for using so called ‘faceless judges’<sup>112</sup> and also questioned the independence of military tribunals with high-ranking officers as judges in cases involving terrorists, which are also in the military’s mandate to deal with through more conventional military means.<sup>113</sup> Military tribunals in Colombia have also been scrutinized as to their independence.<sup>114</sup> The Committee questioned in detail the appointment and tenure of Peruvian judges, referring to a report of the Working Group on Arbitrary Detention where it was stated that some 75 per cent of the judges in the country held no tenure.<sup>115</sup>

The questions posed by the Committee during examination of state reports are varied. China was asked “whether judges were still appointed by the Party and whether the procedures for their appointment and dismissal, as well as their status and their general career profile, were likely to ensure their impartiality”.<sup>116</sup> On examining Saudi Arabia, the state representative stated that the judiciary was completely independent as commanded by the Islamic *Shariah*.<sup>117</sup> The Cuban system (article 122 of the Constitution) of having the judiciary subordinated to the National People’s Assembly as well as under the Council of State, the legislative, and the executive, was condemned. Cuban jurists had complained to the Special Rapporteur on Human Rights of the dependency of the courts in Cuba, especially in political cases.<sup>118</sup> Ukraine was asked to explain NGO reports stating that the judiciary was very loyal to the executive and that a committee on crime-fighting had been set up jointly by judges, prosecutors and the Ministry of Internal Affairs. The dual function of prosecution and supervision of the *procuratura* was also a concern in respect of the independence of the judiciary.<sup>119</sup>

<sup>110</sup> China, 1996, A/51/44, para. 150 (g).

<sup>111</sup> Cambodia, 2003, CAT/C/CR/30/2, para. 7 (b); Saudi Arabia, 2002, CAT/C/CR/28/5, para. 8; Uzbekistan, 2000, A/55/44, para. 82 (c); Armenia, 2001, A/56/44, para. 39 (e); Cuba, 1998, A/53/44, para. 118 (e).

<sup>112</sup> See the case-law of the Human Rights Committee above.

<sup>113</sup> On faceless judges, see: Peru, 1995, A/50/44, para. 73 (a); Peru, 1998, CAT/C/SR.330, para. 11; and on military tribunals, see: Peru, 1999, CAT/C/SR.399, para. 25.

<sup>114</sup> Colombia, 1995, CAT/C/SR.238, para. 5.

<sup>115</sup> Peru, 1999, CAT/C/SR.399, para. 18.

<sup>116</sup> China, 1996, CAT/C/SR.251, para. 22.

<sup>117</sup> Saudi Arabia, 2002, CAT/C/SR.519, para. 32; as noted above, article 46 of the Saudi Arabian Constitution on judicial independence applies ‘except in the case of the Islamic Shari’ah’, quoted in Peter RÄDLER, 1998, note 42, p. 736.

<sup>118</sup> Cuba, 1997, CAT/C/SR.309, paras. 9 and 10.

<sup>119</sup> Ukraine, 2001, CAT/C/SR.488, paras. 20 and 41.

The Committee on the Rights of the Child has a standard paragraph recommending the state party concerned to assure “the rights of children deprived of their liberty, to due process of law and to the full independence and impartiality of the judiciary”.<sup>120</sup> More detailed guidance is also given on for example concern for executive influence on the judiciary<sup>121</sup> and lack of training,<sup>122</sup> but positive developments<sup>123</sup> in this regard are also commended. The Committee on the Elimination of Discrimination of Women finds, by way of example, in relation to Peru that the establishment of an independent judiciary is a “fundamental advance”.<sup>124</sup> With the new complaints procedure under the CEDAW Convention, more references to judicial independence are foreseen.

### 3 UN Special Procedures

Even though the special procedures of the UN are not legal procedures in a strict sense, they do elaborate on international standards. It indicates how, to a great extent these procedures rely on the standards and jurisprudence discussed above. Additionally, some practical guidance is given for improvements on the independence. Of the special procedures, in particular the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights, with a four-pronged mandate of investigatory, advisory, legislative and promotional,<sup>125</sup> has over the years conducted a number of country studies and issued reports on the situation of judicial independence.<sup>126</sup> The special rapporteur has highlighted and criticized a number of features relating to judicial independence depending on the challenges in the country in question.<sup>127</sup> The politicized judicial procedures in Italy concerning Prime

<sup>120</sup> See e.g. Myanmar, 1997, CRC/C/15/Add.69, para. 46; Mauritius, 1996, CRC/C/15/Add.64, para. 32; a slightly different phrase is used in e.g. Mongolia, 1996, CRC/C/15/Add.48, para. 29: “. . . respect for fundamental rights and legal safeguards in all aspects of the juvenile justice system and full independence and impartiality of the judiciary dealing with juveniles.”

<sup>121</sup> Colombia, 2000, CRC/C/15/Add.137, para. 19.

<sup>122</sup> Guatemala, 1996, CRC/C/15/Add.58, para. 24.

<sup>123</sup> Paraguay, 1997, CRC/C/15/Add.75, para. 5.

<sup>124</sup> 1998, CEDAW/C/1998/II/L.1/Add.7, para. 307.

<sup>125</sup> Dato' Param CUMARASWAMY, 1998, p. 15.

<sup>126</sup> [www.unhcr.ch/html/menu2/7/b/mijl.htm](http://www.unhcr.ch/html/menu2/7/b/mijl.htm).

<sup>127</sup> The Special Rapporteur has in his studies relied on and made reference to other United Nations human rights mechanisms, such as the treaty bodies and special procedures, see e.g. E/CN.4/2002/72/Add.1, 24 January 2002, para. 192 (the Human Rights Committee); E/CN.4/2000/61/Add.1, 6 June 2000, para. 169 (the Human Rights Committee, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women); E/CN.4/1998/39/Add.2, 30 March 1998, para. 180 *et seq* (the Human Rights Committee and special rapporteurs); A/51/538, 22 October 1996, paras. 95 *et seq*, The UN Secretary General's fact finding mission.

Minister Berlusconi have been criticized on many accounts for instance.<sup>128</sup> The bureaucratic management of the judges in Saudi Arabia, the lack of transparency, the irregular appointment procedures, and the lack of female judges was disapproved of by the Rapporteur.<sup>129</sup> Indonesia was asked to amend the Constitution to take judicial independence into greater account. Problems were also identified with the appointment and selection procedures, the salary scales, transparency, and the slow transfer of control of the judiciary from under the Ministry of Justice to the Supreme Court. The existence of judicial corruption and the need for a judicial council was also highlighted.<sup>130</sup>

In Guatemala the training, human rights sensitization of the judges, and security of tenure needed improvements.<sup>131</sup> Discipline and removal should be reconsidered as well as security of tenure of at least five years and if non-renewable it should be on a minimum of ten years. A code of ethics, legal education, allocation of budgetary allocations and resources also needed improvement.<sup>132</sup> Mexico was recommended to provide for security of tenure as in Guatemala. Judicial councils should be established, and a reasonable fixed percentage of the federal and state budgets allocated for the judiciary. It was recommended that education in international human rights standards should be improved and enforcement secured. A code of ethics should be developed, and judges should declare their assets to the Judicial Council, upon appointment.<sup>133</sup> The Slovak Republic ought to consider appointment and approval, and assure distinct and adequate premises for the Supreme Court, not associated with the Ministry of Justice or other government branches.<sup>134</sup> South Africa was recommended to let the judiciary self-regulate complaint mechanisms and improve training and education for the judges.<sup>135</sup>

Belarus was advised to have the Judicial Council decide on tenure after probation periods for new judges rather than the executive. Remuneration was another issue and the judges were also in need of sensitization on judicial independence.<sup>136</sup> The United Kingdom was asked to provide training on international human rights standards to its judges.<sup>137</sup> Belgium should improve the public confidence in the judiciary.<sup>138</sup> Colombia was criticized for the functioning of the military courts.<sup>139</sup> In relation to Peru, the Special Rapporteur

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<sup>128</sup> E/CN.4/2003/65/Add.4, 31 January 2003.

<sup>129</sup> E/CN.4/2003/65/Add.3, 14 January 2003, paras. 87 *et seq.*

<sup>130</sup> E/CN.4/2003/65/Add.2, 13 January 2003, paras. 108–113.

<sup>131</sup> E/CN.4/2002/72/Add.2, 21 December 2001, para. 92.

<sup>132</sup> E/CN.4/2000/61/Add.1, 6 June 2000, para. 169.

<sup>133</sup> E/CN.4/2002/72/Add.1, 24 January 2002, para. 192.

<sup>134</sup> E/CN.4/2001/65/Add.3, 25 January 2001, para. 72.

<sup>135</sup> E/CN.4/2001/65/Add.2, 25 January 2001, paras. 107, 112.

<sup>136</sup> E/CN.4/2001/65/Add.1, 8 February 2001, para. 121.

<sup>137</sup> E/CN.4/1998/39/Add.4, 5 March 1998, para. 98.

<sup>138</sup> E/CN.4/1998/39/Add.3, 16 February 1998.

<sup>139</sup> E/CN.4/1998/39/Add.2, 30 March 1998, paras. 185 *et seq.*

stressed the need for the judiciary to also be seen as independent, not only be independent. Peru was also criticized for the system of retaining and appointing judges as well as for provisional judges. Recertification of judges every seven years should be discontinued and remuneration and training should be improved.<sup>140</sup> The system of faceless judges, which will be discussed below, was also condemned.<sup>141</sup> Nigeria should reconsider their special tribunals and provide sufficient resources to the judiciary and assure implementation of court decisions.<sup>142</sup> Appointment and dismissal of judges has also been criticized.<sup>143</sup>

From the reports it is possible to identify some common issues that are of importance to the Rapporteur. Taken as a whole, tenure, appointment and dismissal are crucial areas. Other concerns were transparency, remuneration, constitutional guarantees, and support for implementation of court decisions. Threats from not only the executive and the legislative but also corporate giants and multinationals, organized crime, and powerful businessmen are deemed as problematic issues.<sup>144</sup> Training and sensitization on international human rights standards related to judicial independence is also stressed. In general the Rapporteur has also been calling for a greater monitoring of the UN Basic Principles on Judicial Independence. Special courts, such as military courts, are found problematic. That there should also be female judges in order to reflect the society was a major issue in relation to one country. Instituting judicial councils is advocated as is declaration of judges' assets to such councils to prevent corruption and increase transparency. Fixed percentage of the state budget is recommended. Codes of conduct, distinct premises, and the importance of appearance are other issues emphasized as central for the independence and impartiality.

Apart from the Special Rapporteur on judicial independence, other 'special procedures' have also dealt with judicial independence. The Working Group on Arbitrary Detention, in a decision on the situation in Djibouti, concluded that the fact that the majority of the judges on the Security Tribunal of the Republic of Djibouti were government employees was contrary to article 14 of the ICCPR.<sup>145</sup>

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<sup>140</sup> E/CN.4/1998/39/Add.1, 19 February 1998, paras. 6 and 7.

<sup>141</sup> E/CN.4/1997/32, 18 February 1997, para. 35 *et seq.*

<sup>142</sup> E/CN.4/1997/62/Add.1, 24 March 1997, paras. 74, 78.

<sup>143</sup> A/51/538, 22 October 1996, paras. 65 *et seq.*

<sup>144</sup> E/CN.4/1996/37, 1 March 1996, paras. 92–95, 246–247; see also E/CN.4/2003/65, 10 January 2003, para. 56.

<sup>145</sup> Djibouti, No 40/1993, E/CN.4/1994/27, paras. 104 and 125; see also Peter RÄDLER, 1998, pp. 741–742; generally on extra-ordinary courts, see also the resolution of the UN Commission on Human Rights, E/CN.4/Sub.2/2003/L.11, 13 August 2003.



## B. International Courts

As stated, international courts are different in many ways from national courts but they are included in this overview in so far as their references to international human rights law provide further insight. Judicial independence has not been dealt with in detail by the International Court of Justice (ICJ) or by its League of Nations predecessor, the Permanent Court of International Justice (PCIJ).<sup>146</sup> In, for example, the *Consistency of Danzig Legislative Decrees* case of 1935 in the PCIJ, rule of law was however pronounced a fundamental aspect in upholding human rights.<sup>147</sup>

### 1. International Criminal Courts

The two international ad hoc tribunals for former Yugoslavia and Rwanda were established by Security Council resolutions rather than by treaty but they rely on international human rights law as highlighted in their decisions below.

The International Criminal Tribunal for former Yugoslavia

In the *Čelebići* case the Bureau of the International Criminal Tribunal for former Yugoslavia (ICTY) decided on a ‘Motion on Judicial Independence’.<sup>148</sup> The motion demanded that one of the judges should cease to take part in the proceedings due to her having taken the oath of the office of Vice-President of the Republic of Costa Rica and as a member of the executive branch of the Government of Costa Rica she had ceased to possess the criteria required of an independent judge. The judge had however committed not to take office until the case was concluded, which was confirmed by the President of Costa Rica. The Bureau made reference to the ECHR and a series of seminal cases from the ECtHR, the Statute of the ICJ, as well as the Statute of the International Tribunal for the Law of the Sea and decided the issue on the meaning of ‘exercise’ as in article 16 (1) of the Statute of ICJ: “No member of the Court

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<sup>146</sup> On independence of international courts, see e.g. Dinah SHELTON, 1996, who discusses e.g. the questioned independence and impartiality of the Iranian arbitrators in the Iran-US Claims Tribunal, p. 27.

<sup>147</sup> *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, PCIJ Series A/B, No 65; see also Jonas GRIMHEDEN, 2001, p. 480.

<sup>148</sup> *Prosecutor v. Delalić, Mucić (Pavo), Delić, Landžo (Zenga) (Čelebići case)*, IT-96-21-T, Decision of the Bureau on Motion on Judicial Independence, 4 September 1998; the Bureau consists of the President, the Vice-President and the presiding judges of the two trial chambers.

may exercise any political or administrative function . . .”, in finding that the judge has not yet exercised her political function.<sup>149</sup>

#### The International Criminal Tribunal for Rwanda

The *Kanyabashi* case originated from the International Criminal Tribunal for Rwanda (ICTR) and dealt with jurisdiction.<sup>150</sup> Kanyabashi, the accused, had initially appeared before Trial Chamber II. Due not least to the arrival of new judges, the chambers were re-composed (to hear the Prosecutor’s request for leave to file an amended indictment), which led to an interlocutory appeal by Kanyabashi who had been handed over to Trial Chamber I where one of the judges was from the old Trial Chamber II. The President of the Court directed another motion to that Chamber concerning the appellant (a joinder motion from the prosecutor to combine the case with that of five other accused). Kanyabashi objected that Trial Chamber I was not independent and impartial, referring to a number of cases from the ECtHR.<sup>151</sup>

Trial Chamber I dismissed the objection (lack of jurisdiction and re-composition) and Kanyabashi appealed. The Appeals Chamber (a part of the ICTY) decided the case with two separate joint opinions (McDonald and Vohrah; Wang and Nieto-Navia) and one dissenting opinion (Shahabuddeen), each elaborating on the meaning of judicial independence.<sup>152</sup>

All three of the opinions referred to the motto that ‘justice must not only be done but be seen to be done’, perhaps in response to Kanyabashi’s brief which included this motto, and each opinion seemed to have applied this principle. McDonald and Vohrah, for instance talked about whether the Trial Chamber “as re-composed caused the appearance of a lack of independence and impartiality”.<sup>153</sup> Even though the Human Rights Committee has not yet fully acknowledged this objective element of impartiality, the opinion still referred to article 14 (1) of ICCPR in an elaboration on why the statutes of the ICTR and the ICTY did not specifically mention independence and impartiality. It argued that the concepts are inherent in the notions of fairness and due process as specified in the statutes.<sup>154</sup> McDonald and Vohrah also discussed the distinction between independence and impartiality quite succinctly:

<sup>149</sup> See e.g. André KLIP and Göran SLUITER (Eds.), 2001, pp. 343–348 and also pp. 357 *et seq* on i.a. Judge Mumba.

<sup>150</sup> ICTR-96-15-A, Appeals Chamber, 3 June 1999, Decision of the defence motion for interlocutory appeal on the jurisdiction of Trial Chamber I.

<sup>151</sup> The cases were: *Delcourt*, *Piersack*, *Sramek*, *Belilos*, see note 33 of McDonald’s and Vohrah’s Separate Opinion.

<sup>152</sup> By majority the Leave Request was referred to Trial Chamber II, Judge Shahabuddeen dissented on this, finding the appeal not admissible; unanimously, Trial Chamber I is competent to adjudicate the Joinder Motion.

<sup>153</sup> Joint and separate opinion by Judge MacDonald and Judge Vohrah.

<sup>154</sup> *Id.*, para. 36.

“Independence connotes freedom from external pressures and interference. Impartiality is characterized by objectivity in balancing the legitimate interests at play.”<sup>155</sup>

The opinion even applied the objective/subjective test of the ECtHR (paragraph 40) that will be discussed below, and went on to conclude:<sup>156</sup>

that President Kama’s administrative decision in the assignment of the Judges does not constitute a departure from the Rules, conforms with the independence and freedom from external influences which are necessary in the administration of justice, is justified in the present circumstances and does not support the Appellant’s contention that the re-composition of the Trial Chamber gives the appearance of a lack of independence and impartiality. (paragraph 45)

Judge Wang and Judge Nieto-Navia added to the importance of the objective element.<sup>157</sup>

Even an appearance of partiality or bias on the part of the Chambers would dangerously undermine the authority of the Tribunal, and render ineffective their efforts to fulfill the mandate of the Tribunal to dispense justice in accordance with the Statute and the Rules. (paragraph 26)

Judge Shahabuddeen, lastly, dissented in so far as the right to appeal on one of the motions. As to the lack of independence and impartiality however, he was in agreement with the majority and elaborated on the criteria for the subjectivity test.<sup>158</sup>

The issue is one of public confidence in the system of administering justice. But it is not the case that the issue is to be judged by the views of the hypersensitive and the uninformed. The test is whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and

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<sup>155</sup> *Id.*, para. 35.

<sup>156</sup> References were made (note 34) to a dozen well-known cases from ECtHR as well as a Canadian case: *R.D.S. v. The Queen*, Supreme Court of Canada, 1997.

<sup>157</sup> Joint separate and concurring opinion of judge Wang and Judge Nieto-Navia.

<sup>158</sup> Dissenting opinion of judge Shahabuddeen; the majority found the second ground for appeal by the Appellate, the re-composition of Trial Chamber I, was a legitimate claim and consequently Trial Chamber II was the only chamber competent to hear the Leave Request (for the amended indictment).

informed member of the public that the judge was not impartial. (Section V, p. 24)

it is not possible to appreciate how there could be an appearance of lack of independence and impartiality arising from the circumstance that the normal composition of Trial Chamber I was changed. It is artificial to say that a fair-minded member of the public who had taken reasonable steps to inform himself of the material facts would have had any reasonable suspicion that there could be a lack of independence and impartiality. (Section V, p. 25)

In another case, Mr. Akayesu appealed his verdict to the Appeals Chamber in The Hague on the grounds of inter alia the Court in Arusha was “an illegal, biased and partisan Court in its Statute and in the formation and conduct of the trial”.<sup>159</sup> He later refined the appeal but the Appeals Chamber found the claims too general and abstract (paragraph 92). The Chamber drew on the *Furundzija* case recalling that the onus is on the appellant to substantiate claims of partiality (paragraphs 91 and 86).<sup>160</sup>

Akayesu supported his claim on three counts: (1) remarks made by judges in public and private allegedly violating impartiality and independence, (2) the existence of “pressure and special arrangements” that challenged the independence of the court, and also (3) “defamatory and false” statements made by the Registrar (paragraph 90). Part of the claim was based on remarks made by Judge Kama, who after hearing statements made by witnesses who were alleged victims of sexual violence, supposedly “violated the presumption of innocence” by expressing sympathy for their suffering (paragraph 90, note 169). In an earlier Notice of Appeal, Akayesu had relied on the establishment of the Tribunal as a basis for appeal but after that issue had seemingly been settled in the *Tadic* case,<sup>161</sup> he instead choose to pursue solely the failure of the ICTR to respect the independence and impartiality (paragraph 89, note 168).

## 2. *Special National Courts*

The Special Court for Sierra Leone is a national court in a jurisdictional sense but its mandate has clearly been to follow international human rights standards. Under the Statute of the Special Court for Sierra Leone, the Appeals Chamber of the Special Court shall be guided by the case-law of the Appeals Chamber of

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<sup>159</sup> Appeal Chamber Judgment, ICTR-96-4-A, 1 June 2001, C, para. 85 *et seq*; see also ICTR/INFO-9-2-144, Arusha 7 October 1998.

<sup>160</sup> IT-95-17/1, “Lasva Valley”, 21 July 2000, Furundzija was denied appeal while he could not prove partiality of Judge Mumba.

<sup>161</sup> IT-94-1, see decision of 10 August 1995.

the ICTY and the ICTR (article 20 (3)).<sup>162</sup> A somewhat similar construction, predating the Special Court, existed for Bosnia and Herzegovina up until the end of 2003 where the Bosnia and Herzegovina Human Rights Chamber, as with the Special Court for Sierra Leone, had a number of international judges and where the case-law was developed on the basis of international standards.<sup>163</sup> The Human Rights Chamber functioned as the constitutional court for the country and relied mainly on the case-law of the ECtHR but also for example on that of the UN Human Rights Committee.

Also the Human Rights Chamber dealt with judicial independence. In the *Šehić* case the Chamber concluded by 6 votes to 1 that a court was politically influenced.<sup>164</sup> The *Đ. M.* case concerned tenure and the risk of political influence and a violation was found by 9 votes to 4.<sup>165</sup> In the latter case they also referred to the *Damjanović* case, which dealt with judicial independence in detail.<sup>166</sup> The Chamber referred to the case-law of the ECtHR and *Campbell and Fell v. UK*, listing the manner of appointment, duration of terms of office, existence of guarantees against outside pressure, and whether there is an appearance of independence as the criteria for judicial independence. In the view of the Chamber in *Damjanović*, the court, which was a military court, could not even qualify as a court due to the lack of appearance. While an appeal does not redress such a shortcoming as developed in the ECtHR's *De Cubber* case, the Chamber did not even vote on the independence of the court. The appointment and dismissal of judges of the military court was done by the Presidency on proposal from the Minister of Defense, and no minimum period was prescribed and no grounds or procedures specified for dismissal.

In the *Boudella et al* case of 2002 the Chamber had to deal with the handing over by the Federation of Bosnia and Herzegovina of four suspected war criminals to US forces.<sup>167</sup> The issue that arose concerned military courts and the application of the death penalty. Since the four men risked the death penalty by verdict of US courts, article 1 of Protocol 6 to the ECHR, led to the conclusion that the Federation was in breach. The vote was close with the President's vote being decisive in an otherwise seven-to-seven draw. The Chamber did not look into the possible violation of article 6 of the ECHR even though one dissenting

<sup>162</sup> See [www.sc-sl.org](http://www.sc-sl.org); [www.sierra-leone.org/specialcourtstatute.html](http://www.sierra-leone.org/specialcourtstatute.html); article 13 (1) stipulates both impartiality and independence for the judges of the Court (article 14 (1)).

<sup>163</sup> The Chamber was established under Annex 6 of the Dayton Agreement, [www.hrc.ba](http://www.hrc.ba); The international judges are to be replaced with local judges in 2004; see also Manfred NOWAK, 2001.

<sup>164</sup> CH/97/77, 5 November 1999.

<sup>165</sup> CH/98/756, 14 May 1999.

<sup>166</sup> CH/96/30, 5 September 1997, paras. 39–40 on judicial independence, referring to ECtHR cases (*Campbell and Fell v. UK* and *Holm v. Sweden*) dealing with a military courts and irremovability of judges.

<sup>167</sup> CH/02/8679, 11 October 2002, pp. 59 *et seq* on judicial independence.

opinion argued for that.<sup>168</sup> The Chamber held that the likely use of military commissions by the US to try the four suspects, and given the stronger potential for influence by the executive on these, as well as the limited procedural guarantees, increase the likelihood that the death penalty would be imposed.

### C. The European Court of Human Rights

The interpretation of the international standards on judicial independence by the European Court of Human Rights is the most elaborate of the regional human rights mechanisms.<sup>169</sup> The standards are also more developed than that of the UN Human Rights Committee, which is also reasonable considering the Court's 14-year seniority to the Committee.<sup>170</sup> The ECtHR draws on but also provides guidance to the considerations of the Human Rights Committee. Both bodies are based on the ideas expressed in the UDHR. The ECtHR has become a 'world court' in terms of being cited as an authoritative adjudicator on human rights issues: national courts worldwide draw on its jurisprudence,<sup>171</sup> as does for example the ad hoc criminal tribunals for former Yugoslavia and Rwanda discussed above, and other regional human rights courts.<sup>172</sup> The Council of Europe and the geographical jurisdiction of the ECtHR also extend as far as the border of China.

In the case-law of the ECtHR, courts can be independent without being impartial and vice-versa.<sup>173</sup> There is however a functional relationship between the two terms in which independence is considered a precondition for impartiality.<sup>174</sup> The absence of formal independence is not a sufficient ground for non-independence but rather the nature of the work.<sup>175</sup> Not only courts by

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<sup>168</sup> Dissent by Ms. Picard, p. 71, referring to the ECtHR case, *Soering v. UK*.

<sup>169</sup> Increasingly the standards, such as those on fair trial, are even used by legal persons, *Impartialité du Tribunal*, 2001; see e.g. *Morel v. France*, 6 June 2000 (the date in connection with a case is if no other information is given, the date of the judgment; cases are searchable through various commentaries and case locators but also through e.g. [www.coe.int/eng/judgments.htm](http://www.coe.int/eng/judgments.htm) and <http://sim.uu.nl/sim/dochome.nsf>).

<sup>170</sup> Raija HANSKI and Martin SCHEININ (Eds.), 2003, p. 148.

<sup>171</sup> Anne Marie SLAUGHTER, 2000, p. 1109–1110; see also Lauri LEHTIMAJA and Matti PELLONPÄÄ, 1999, p. 227.

<sup>172</sup> See e.g. *Guy Malary v. Haiti*, Report No. 78/02, 27 December 2002, para. 76.

<sup>173</sup> Leonard H. LEIGH, 1998, p. 653.

<sup>174</sup> Nihal JAYAWICKRAMA, 2002, p. 523, see *Bramelid and Malmström v. Sweden*, 12 December 1983 (European Commission).

<sup>175</sup> *Campbell and Fell v. UK*, 28 June 1994, para. 80; *Sramek v. Austria*, 22 October 1984, para. 36; *Bentham v. The Netherlands*, 23 October 1985, para. 40; *H. v. Belgium*, 30 November 1987, para. 37 *et seq*; *Demicoli v. Malta*, 27 August 1991, paras. 39 *et seq*.

name but commissions with compositions not necessarily thought of as tribunals have therefore been deemed as courts. If a decision by a court can be overturned by a body that does not comply with judicial independence, a fair trial will not be possible.<sup>176</sup> The requirement of judicial independence and impartiality also applies to judges, as well as lay judges and jurors.<sup>177</sup>

The factors relied on in determining judicial independence are, according to the Court, cumulative, where no single factor is adequate to determine independence.<sup>178</sup> The European Court of Human Rights relies on the old maxim of ‘justice must not only be done, but also seen to be done’, which brings independence and impartiality closer together and a distinction between the two becomes more difficult.<sup>179</sup> At the same time, the appearance of independence, which promotes public confidence in the judiciary is stressed; a feature that the UN Human Rights Committee so far has been less concerned with.

Inspired by the ECtHR, the EU’s European Court of Justice (ECJ), even though not a human rights court, has in a number of decisions dealt with the right to a fair trial and judicial independence. One example is the recognition of the requirement of “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.<sup>180</sup> The European Court of Justice has in its case-law integrated independence as one of the constitutive criteria for a court or tribunal.<sup>181</sup>

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<sup>176</sup> *Van de Hurk v. Netherlands*, 19 April 1994, para. 54; see also C. C. ENGERING and N. A. LIBORANG, 1999, p. 43.

<sup>177</sup> *Langborger v. Sweden*, 22 June 1989, para. 34.

<sup>178</sup> Leonard H. LEIGH, 1998, p. 654.

<sup>179</sup> *Delcourt v. Belgium*, 17 January 1970, para. 31; Peter RÄDLER, 1998, pp. 729–730.

<sup>180</sup> *Baustahlgewebe GmbH*, Case C-185/95, 17 December 1998 (Germany), paras. 20, 21; see also *Kremzow*, Case C-299-95, 29 May 1997 (Austria); judicial independence has specifically been dealt with mostly in relation to the definition of court; a judge combining the functions of public prosecutor and examining magistrate was for instance not deemed a court, *Pretore di Salò*, Case 14/86, 11 June 1987 (Italy); see also e.g. *Vaassen-Göbbels*, Case 61–65, Judgment of 30 June 1966 (The Netherlands); *Fratelli Pardina SpA*, Case 338/85, Judgment of 21 April 1988 (Italy); *Van der Wal*, joined cases C-174/98 and C-189/98, 11 January 2000 (The Netherlands); see also on judicial independence in the EU member states, *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, 2003, pp. 249–250.

<sup>181</sup> See *Dorsch Consult GmbH*, Case C-54/96, 17 September 1997 (Germany); *Victoria Film A/S*, Case C-134/97, 12 November 1998 (Sweden); and also the EFTA court, *Restamark*, Case E-1/94, 16 December 1994 (Finland); see also the cases in relation to the nature of the EU Commission and its independence, *Heintz van Landewyck SARL and others*, 209 to 215 and 218/78 of 29 October 1980; *SA Musique Diffusion française et al*, 100 to 103/80 of 7 June 1983.

The following discussion of the extensive case-law of the ECtHR highlights the various factors deemed by the Court to influence judicial independence.<sup>182</sup>

### *1. Independence*

The independence aspect of the ECtHR case-law has focused on freedom from executive interference. Appointment and tenure has in this regard been the most frequently used criteria to determine independence.<sup>183</sup> *Ringeisen v. Austria* in 1971 pronounced that an appointment for five years was sufficient to form an independent tribunal.<sup>184</sup> In *Le Compte, Van Leuven and De Meyre v. Belgium* in 1981, the manner of appointment in addition to the duration of term of office was said to be essential factors to determine judicial independence.<sup>185</sup> In one case, a police board was not considered independent enough to issue fines.<sup>186</sup> Other cases have pronounced that civil servants as adjudicators in itself does not put into question the independence of a court, given appropriate

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<sup>182</sup> In the case-law of the Court I also include the conclusions reached by its partial predecessor, the European Commission.

<sup>183</sup> See e.g. discussion in Peter RÄDLER, 1998, pp. 738–741; see also *Lauko v. Slovakia*, 2 September 1998, paras. 36–38, 64, where salary of the judges was an additional factor to appointment; in national case law, similar forms of influence have been dealt with, see e.g. the Canadian Supreme Court: *R. v. Lippé* ([1991] 2 S.C.R. 114) concerning part-time judges that were cleared from claims of dependence, given the list of safeguards in place to assure independence, Adel Omar SHERIF and Nathan J. BROWN, 2002, pp. 6–7; and also *R. v. Généreux* ([1992] 1 S.C.R. 259) that set the level of proof at perception of independence; see also *Law Society of Lesotho v. Prime Minister of Lesotho*, Court of Appeal of Lesotho, [1986] LRC (Const) 481; *Attorney General v. Per-Hendrik Nielsen*, Supreme Court of Denmark, 18 April 1994, Case No. II 395/1993, (1994), Nihal JAYAWICKRAMA, 2002, pp. 517–518; on remuneration, see also Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 458 R.C.S. 3; Constitutional Court of Hungary, 18 October 1994, Case No. 45/1994, *Magyar Kozlony*, No. 103/1994 (1994), 3 BULLETIN ON CONSTITUTIONAL CASE-LAW 240, where the Minister of Justice awarded or recommended honors to judges for their judicial activity and this was found restricting judicial independence; and Constitutional Court of Lithuania, 6 December 1995, Case No. 3/1995, *Valstybes zinios*, 101-2264 of 13 December 1995 (1995) 3 BULLETIN ON CONSTITUTIONAL CASE-LAW 323, where judges were paid premium in connection with administration of justice, Nihal JAYAWICKRAMA, 2002, p. 51.

<sup>184</sup> 16 July 1971, para. 95; see also *Stars v. Procurator Fiscal*, High Court of Judiciary of Scotland, 11 November 1999: [2000] 1 LRC 718, in a criminal case a temporary sheriff was appointed for one year with possibility to recall the appointment by the Lord Advocate, this was not deemed independent, Nihal JAYAWICKRAMA, 2002, p. 518.

<sup>185</sup> 23 June 1981, para. 57.

<sup>186</sup> *Belilos v. Switzerland*, 29 April 1988.



guarantees of preventing undue influence.<sup>187</sup> In *Bryan v. UK*, the appearance of independence was not complied with in that the Secretary of State had power to revoke the mandate to decide on the tribunal.<sup>188</sup> In *Piersack v. Belgium*, guarantees against outside pressure were added to the list of factors securing judicial independence.<sup>189</sup>

In *Beaumartin v. France*, the *Conseil d'Etat* asked for the opinion of the Minister for Foreign Affairs about whether they had jurisdiction on treaty law and for this reason, the court was ruled dependent.<sup>190</sup> In *Bentham v. The Netherlands*, a Regional Health Inspector was not independent enough to be considered for a tribunal because the lack of judicial review of the Inspectors' administrative decision led to a violation.<sup>191</sup> In *Demicoli v. Malta*, the Court found a lack of independence and impartiality in a case of alleged defamation of members of the Maltese House of Representatives in which members of the House sat in the judgment and found the applicant guilty.<sup>192</sup>

In *Langborger v. Sweden* a violation was found where the appointment of members to a housing and tenancy court was determined by an association with direct interest in the outcome of the court, which ran counter to the interests of the applicant.<sup>193</sup> In *Campbell and Fell v. UK*, however, no violation was found where a board appointed by the Home Secretary had disciplined prisoners.<sup>194</sup> The independence of the members of the board was found to be sufficiently strong. In both these cases, criteria for judicial independence were summarized as the manner of appointment, the term of office, guarantees against outside pressure, and the appearance of independence.<sup>195</sup>

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<sup>187</sup> *Ettl and others v. Austria; Erkner and Hofauer v. Austria*, and *Poiss v. Austria*, these 3 cases were dealt with in judgments of 23 April 1987; see also *British-American Tobacco Co. Ltd. v. The Netherlands*, 20 November 1995, paras. 78 *et seq*; *Sramek v. Germany*, 22 October 1984, paras. 41 *et seq*; see also a case from the UK, where temporary judges were sufficiently independent given that the executive had no interest in the outcome of the case, *Clancy v. Claird* (2000) UKHRR 509; Independence of the Judiciary 2000; see also *Jens Viktor Plabte v. The State*, that also concerned temporary judges, Norway, Case No 82 B/1997 No 108/1957, 19 December 1997.

<sup>188</sup> 22 November 1995; see also *Baková v. Slovakia*, 12 November 2002 where the court was under executive influence.

<sup>189</sup> 1 October 1982; paras. 27 *et seq*.

<sup>190</sup> 24 November 1994, paras. 15–17; see also *Stran Greek Refineries and Straties Andreadis v. Greece*, 9 December 1994, para. 50.

<sup>191</sup> 23 October 1985, para. 40.

<sup>192</sup> 27 August 1991.

<sup>193</sup> 22 June 1989; see also *Academic Trading Ltd & others v. Greece*, 4 April 2000, where the composition of the court was changed during proceedings but no violation was found.

<sup>194</sup> 28 June 1984.

<sup>195</sup> See also more recent cases, e.g. *Lavents v. Latvia*, 28 November 2002, listing the three criteria as well as discussing the objectivity test, see further below.

## Extra-Ordinary Courts

Turkish National Security Courts have been a major issue for the ECtHR.<sup>196</sup> Cases from these courts include: labor union rights, books and articles on the Kurdish political situation, a message read at student movement commemoration, and a journalist revealing police violence. These acts were politically sensitive in Turkey and deemed threatening to the state, or as terrorist acts. The ECtHR noted that one of the judges on a three-judge Turkish panel was a military judge, which was questionable while these judges were still servicemen belonging to the army and were thus subject to orders from the executive and subject to military discipline, and their appointment was done by administrative authorities and the army.<sup>197</sup> The fact that the applicant was civilian was essential in the context. District Court Martials in the United Kingdom have also been a frequent issue for the Strasbourg Court.<sup>198</sup>

In *Sutter v. Switzerland* however, a military court was deemed independent while the judges were not answerable to their superiors in their judicial functions.<sup>199</sup> Where members of a military court are sufficiently independent of the convening officer and if the organization of the trial offers adequate guarantees of impartiality, such as in *Castillo Algar v. Spain*,<sup>200</sup> and in *Gregory v. UK*,<sup>201</sup> military courts can also be sufficiently independent and impartial.

### 2. Impartiality and Public Confidence

Even though the strand of public confidence defined above could be related to both independence and impartiality, in the Strasbourg system, it has so far been related to impartiality aspects. The ECtHR has with its case-law developed a main distinction from the UN Human Rights Committee with the so-called objective impartiality.<sup>202</sup> Whether the situation actually tampers with

<sup>196</sup> See e.g. *Kizilyaprak v. Turkey*, 2 Oct 2003; *Uçar and others v. Turkey*, 27 November 2003.

<sup>197</sup> *Incal v. Turkey*, 9 June 1998, paras. 67 *et seq*; *Çiraklar v. Turkey*, 28 October 1998, paras. 39 *et seq*; judges on these courts are no longer servicemen.

<sup>198</sup> *Findlay v. UK*, 25 February 1997; *Morris v. UK*, 26 February 2002; *Coyne v. UK*, 24 September 1997; *Moore and Gordon v. UK*, joined with *Smith and Ford v. UK*, 29 September 1999; *Cable & others v. UK*, 18 February 1999; *Wilkinson and Allen v. UK*, 6 February 2001; *Grievs v. UK*, 16 December 2003; see also Ralph BEDDARDS, 1998.

<sup>199</sup> *Sutter v. Switzerland*, 1 March 1979, Application No. 8209/78 (Commission).

<sup>200</sup> 28 October 1998.

<sup>201</sup> 25 February 1997; see also *Cooper v. UK*, 16 December 2003.

<sup>202</sup> Hans DANELIUS, 1997, p. 152; P. van DIJK and G. J. H. HOOF, 1998, pp. 454–455; the reasoning based on objective impartiality has however been adopted by e.g. the ICTR in the *Kanyabashi* case discussed above; two United Nations experts, appointed by the Commission on Human Rights to draft a report on fair

impartiality is not at stake; it is what the objective viewer perceives that matters.<sup>203</sup> Subjective impartiality, also labeled factual impartiality, concerns situations of actual impartiality. Subjectively a judge or a court is considered impartial until proven otherwise, as developed in a series of cases from the ECtHR.<sup>204</sup> Objective impartiality on the other hand, is a matter of objectively justified reasons of doubts as to composition or organization of a court, or concerns of bias of a judge that suggests partiality. The concern must not be solely the feeling of an accused in relation to the court but must pass an objectivity test.<sup>205</sup> Also a series of judgments in this regard has been issued by the ECtHR.<sup>206</sup>

Cases drawing on the objective impartiality-test have often been concerned with previous engagement, so called interlocutory matters, with a party to the

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trial, did to some extent acknowledge objective impartiality and sketched on three factors for consideration in determining impartiality: whether the trial judge's position allows a crucial role in the proceedings; whether the judge may have a pre-formed opinion which would weigh heavily on the decision making; whether a judge would have to rule on an action taken in a prior capacity; Stanislav CHERNICHENKO and William TREAT, 1994, para. 26, objective impartiality was expressed as 'appearing open to doubt'; it seems logical that the Human Rights Committee eventually will follow the path of the ECtHR more closely and consider also objective impartiality.

<sup>203</sup> See e.g. Peter RÄDLER, 1998, pp. 732–733.

<sup>204</sup> *Piersack v. Belgium*, 1 October 1982; *De Cubber v. Belgium*, 26 October 1984; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992; *Padovani v. Italy*, 26 February 1993; *Saraiva de Carvalho v. Portugal*, 22 April 1994; see also *Pullar v. UK*, 10 June 1996.

<sup>205</sup> See e.g. *Kingsley v. UK*, 28 May 2002; a similar development as the objective impartiality has been made by the Canadian Supreme Court over the last 20 years, by issuing what possibly are the most well known cases on judicial independence. Starting in 1985 with the *Valente* case (*Valente v. The Queen*, [1985] 2 S.C.R. 673) *Valente* established three "essential conditions" for judicial independence, that of security of tenure – until retirement age, fixed term or for specific adjudicative task; financial security – salary and pension established by law and not subject to arbitrary interference; and institutional independence – assignment of judges etc; see Jean LÉCLAIR and Yves Marie MORISSETTE, 1998; *Valente* was followed by *The Queen v. Beauregard* ([1986] 2 S.C.R. 56) which expanded the collective independence of the judges, declaring them "completely separate in authority and function"; In the *Valente* and *Beauregard* cases the Court applied a 'reasonable person' test to determine the appropriate level of independence, see Ian GREENE, 1988, pp. 185–194; The test was also performed in *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick* [2002] 1 S.C.R. 405; and *Ell v. Alberta* [2003] x S.C.R. xxx, 2003 SCC 35; see similar application in e.g. Australia, Nigeria, and Bangladesh, Nihal JAYAWICKRAMA, 2002, p. 520.

<sup>206</sup> See the cases cited on subjective impartiality above as well as *Fey v. Austria*, 24 February 1993.

trial. Not always has such engagement lead to condemnations by the ECtHR.<sup>207</sup> *Hauschildt v. Denmark* clarified the extent of involvement in pre-trial proceedings that constitute violation of impartiality.<sup>208</sup> Involvement per se is not enough; it has to be substantial. It is the ‘scope and nature’ of the pre-trial involvement that determines impartiality.<sup>209</sup> For a judge to simply take standard precautionary measures in a pre-trial stage without qualifying the guilt of the accused to a higher level as in *Padovani v. Italy*, the Court finds no violation.<sup>210</sup>

In *Pfeifer and Plankl v. Austria*, a violation of the requirement of impartiality was determined when correspondence between two detainees awaiting trial was screened by the judge handling their case and the letters were also read by the adjudicating judge.<sup>211</sup> Similarly, a judge had been a prosecutor in earlier stages of the case in *Piersack v. Belgium*,<sup>212</sup> also in *De Cubber*<sup>213</sup> and in *Yaacoub*<sup>214</sup> where the Court found violations. In *Procola v. Luxembourg* the *Conseil d'Etat* had given an advisory opinion at an earlier stage on the provision that Procola was challenging.<sup>215</sup> Four out of the five members of the *Conseil* had participated in that decision. This according to the Court was

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<sup>207</sup> *Thorgeir Thorgeirson v. Iceland*, 25 June 1992; *Bulut v. Austria*, 22 February 1996; on prior involvement in the trial, the Supreme Court of Cyprus has deemed such acceptable if they just concern legal or constitutional matters, especially so if it is at the Supreme Court level, Decision of the Supreme Court of Cyprus, 1912, 29 November 1994, (1996) 1 BULLETIN ON CONSTITUTIONAL CASE-LAW 147, Nihal JAYAWICKRAMA, 2002, p. 522; see also *Berry v. Director of Public Prosecutions*, Privy Council on Appeal from the Court of Appeal of Jamaica, [1996] 3 LRC 697.

<sup>208</sup> 24 May 1989.

<sup>209</sup> *Nortier v. The Netherlands*, 24 August 1993, para. 33; *Saraiva de Carvalho v. Portugal*, 22 April 1994, para. 35; see also *Fey v. Austria*, 24 February 1993, para. 30, where it was phrased as “extent and nature”.

<sup>210</sup> 26 February 1993; see also in relation to same judge on appeal but without violation: *Fey v. Austria*, 24 February 1993; *Sainte-Marie v. France*, 16 December 1992; *Diennet v. France*, 26 September 1995; *Thomann v. Switzerland*, 10 June 1996; see however *Oberschlick v. Austria*, 23 May 1991; see also *Jón Kristinsson v. Iceland*, 1 March 1990 (settled because of changed law, see discussion related to Iceland below (Part II Conclusions), where the convicting judge previously had dealt with the case as deputy chief of police.

<sup>211</sup> 25 February 1992; see also *Perote Pellon v. Spain*, 25 July 2002, the court was in addition a military court.

<sup>212</sup> 1 October 1982.

<sup>213</sup> 26 October 1984.

<sup>214</sup> 29 April 1988.

<sup>215</sup> 28 September 1995; see however *Kleyn and others v. Netherlands*, 6 May 2003, where no violation was found.

enough to question the impartiality. The extent of prior involvement required for determining partiality is less strict in juvenile cases.<sup>216</sup>

In situations where the interests of the parties are represented in a tribunal, for example a disciplinary council, it is not a violation as long as the parties are equally represented.<sup>217</sup> Should the interest of none of the two sides of representations correspond to that of the applicant, the impartiality is questioned if there is a clear link, such as in *Langborger v. Sweden*,<sup>218</sup> while in *Pullar v. UK*,<sup>219</sup> the alleged partiality relevance was too weak. A similar issue is the use of lay judges or jury, where the risk for improper influence increases. In *Holm v. Sweden* the composition of a jury was at issue<sup>220</sup> where the majority of the jury consisted of members of the left-wing party that was the full and direct owner of a publishing company that had published a book containing the disputed passage that claimed Mr. Holm was a right-wing activist. The ECtHR found Sweden in violation. Racist remarks by jurors have also been a reoccurring matter where judges, according to the ECtHR, are required to assure that the jury is unbiased.<sup>221</sup> Politically charged questions or matters receiving great publicity, are especially sensitive issues for impartiality. Professional judges are however considered to be able to withstand such pressure under normal circumstances.<sup>222</sup>

Objective impartiality has also been at dispute in a number of other cases. In *Sramek v. Germany*, the appearance-requirement was highlighted where a member of the court was hierarchically subordinate to one of the parties to the suit and the court found that to be a risk to the impartiality of the court.<sup>223</sup> In

<sup>216</sup> *Nortier v. Netherlands*, 24 August 1993; on interlocutory matters, see e.g. also: *Saraiva De Carvalho v. Portugal*; *Thomann v. Switzerland*, 10 June 1996.

<sup>217</sup> P. van DIJK and G. J. H. HOOFF, 1998, pp. 456–457.

<sup>218</sup> 22 June 1989; The *Langborger* case led to a change in the composition of the Swedish Housing Court, *Bostadsdomstol*, and the Court was later even dismantled and merged with one of the appeal courts; a case with potentially the same effect is the Kellerman case which was handled domestically by the Labor Court, *Arbetsdomstolen*, (17/1998).

<sup>219</sup> 10 June 1996.

<sup>220</sup> 25 November 1993, Five jurors out of nine in the libel case were members of the Swedish Social Democratic Party; The Swedish government argued interestingly enough that the composition of the jury was acceptable in light of the Swedish legal system, legal traditions and political history; since 1812 Sweden has used a jury system for freedom of press cases; see also *Fey v. Austria*, 24 February 1993; *Gautrin & Others v. France*, 20 May 1998.

<sup>221</sup> *Remli v. France*, 23 April 1996; see also *Sander v. UK*, 9 May 2000; *Gregory v. UK*, 25 February 1997.

<sup>222</sup> P. van DIJK and G. J. H. HOOFF, 1998, p. 453; *Menten v. The Netherlands*, Application No. 9422/81 (Commission); see also *Sunday Times v. UK*, 26 April 1979.

<sup>223</sup> 22 October 1984; see also *Pescador Valero v. Spain*, 17 June 2003, where a judge had connections with one of the parties to the trial; and *Sigurdsson v. Iceland*, 10

*Buscemi v. Italy*, the judge in a child-care proceeding made statements in the press prior to trial that were detrimental to the applicant.<sup>224</sup> The ECtHR found this to be objectively justified as partiality. Membership of a judge in an association, such as the Freemasons, where a party to a trial was also a member, did not in itself lead to partiality.<sup>225</sup> In *Delcourt v. Belgium* in 1970, the issue was that of appearance of independence.<sup>226</sup> The *Procureur general* at the Court of Cassation is a supervisory-advisory function to assure the correct application of law by the judges so that even though the task of the office in other situations is to prosecute crime, the institution is in conformity with the requirements for an independent judiciary. A higher court is moreover not required, when remanding a case to a lower court, to send it to another court or differently composed bench.<sup>227</sup> In *Lavents v. Latvia*, the presiding judge of a trial against Lavents criticized the defense in the ongoing trial and gave preliminary thoughts on how the case would be concluded; the Court found this to be a breach of the impartiality.<sup>228</sup>

#### D. Other Regional Organizations

Other regional systems have also made substantial contributions to the understanding of judicial independence and impartiality.

##### 1. The Inter-American Court and Commission

The Inter-American Court of Human Rights (IACtHR) has dealt with rule of law and its essential components under state of emergency in their eighth advisory opinion. The judicial guarantees essential for the protection of non-derogable rights are not suspendable.<sup>229</sup> In a subsequent advisory opinion on request from Uruguay, the Court further elaborated on the essential contents: “When the Judicial Power lacks the necessary independence to render impartial

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April 2003, where a judge had interests in the disputed matter; and *Posokhov v. Russia*, 4 March 2003, with lay judges lacking formal appointment.

<sup>224</sup> 16 September 1999.

<sup>225</sup> *Salaman v. UK*, Application No. 43505/98, Admissibility decision of 15 June 2000; see also *Kiiskinen and Kovalainen v. Finland*, Application No. 26323/95, Admissibility decision of 3 June 1999.

<sup>226</sup> 17 January 1970, paras. 31 *et seq.*

<sup>227</sup> *Ringeisen v. Austria*, 16 July 1971, para. 97.

<sup>228</sup> 28 November 2002, since a violation of impartiality was found, the question of independence was not considered.

<sup>229</sup> *Habeas corpus in emergency situations*, Advisory Opinion OC-8/87, 30 January 1987, Series A No. 8; see e.g. Antônio August CANÇADO TRINDADE, 1997, p. 8 *et seq.*

decisions or the means to carry out its judgments”, the right to an independent judiciary lacks effectiveness (paragraph 24).<sup>230</sup>

The Court has also dealt with judicial independence in contentious cases. In Peru, three justices of the Constitutional Court were dismissed in 1997 without apparent legal grounds. Even though the judges were reinstated again in 2000 the Court still found Peru to be in violation of article 8 of the American Convention with its requirements of fair trial as well as the judicial protection provision in article 25.<sup>231</sup> In Panama, suspension of constitutional guarantees of judicial independence in the years of 1969–1987 was deemed a violation of the American Convention.<sup>232</sup> A temporary court and a judge appointed when the case had been assigned to the court were found to be a violation of the right to an independent and impartial judiciary.<sup>233</sup> As stated above special courts such as the ‘faceless’ tribunals in Peru have been found violative of judicial independence.<sup>234</sup> The distinction between objective and subjective impartiality is applied.<sup>235</sup>

The Inter-American Commission on Human Rights (IACHR) has also dealt with individual cases related to independence and impartiality. By way of example, an Argentinean case involved judges of the Supreme Court who recused themselves from a hearing.<sup>236</sup> The rules allowed for substitute judges from the appeal courts but since they are claimed to be under the disciplinary power of the justices of the Supreme Court, they would not appear independent and impartial. The Commission found it inadmissible however, since they had not made the claim in the domestic trial. Also, a case from Haiti established that juries may be biased.<sup>237</sup>

The IACHR has also commented on judicial independence in a number of countries.<sup>238</sup> Regarding El Salvador, the IACHR cautioned about the effects of a dependent and partial judiciary:

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<sup>230</sup> *Judicial guarantees in state of emergencies*, Advisory Opinion OC-9/87, 6 October 1987, Series A No. 9, on the language used in the Spanish version of article 8 of the American Convention on Human Rights (1969), corresponding to fair trial in the English version.

<sup>231</sup> *The Constitutional Court Case*, 31 January 2001 (*Aguirre Roca et al v. Peru*).

<sup>232</sup> Report No 28/94, 30 September 1994.

<sup>233</sup> *Baruch Ivcher Bronstein v. Peru*, Report No. 74/01, 6 February 2001, paras. 113–116.

<sup>234</sup> See e.g. *Castillo Petruzzi et al v. Peru*, Report No. 52/99, 30 May 1999, paras. 127 *et seq.*

<sup>235</sup> See e.g. *Guy Malary v. Haiti*, Report No. 78/02, 27 December 2002, paras. 74–76.

<sup>236</sup> *Ernesto Galante*, 3 August 2001, Report No. 70/01, paras. 34 and 72.

<sup>237</sup> *Guy Malary v. Haiti*, Report No. 78/02, 27 December 2002, para. 78; see also e.g. *William Andrews v. United States*, Report No. 57/96, 6 December 1996.

<sup>238</sup> See e.g. Nicaragua, *The Right to Justice and Due Process*, Annual Report of the Inter-American Commission on Human Rights 1993, OAE/Ser.L/V/II.85, doc. 9, rev., 11 February 1994.

If the citizenry does not have confidence in the administration of justice and if its impartiality and independence are not effectively guaranteed, the efforts at investigation now underway will be useless and the atrocities of the past will repeat themselves.<sup>239</sup>

Administrative tribunals subject to the Ministry of Justice, cannot, according to the Commission, be considered as judicial courts.<sup>240</sup> In Paraguay, the Commission found shortcomings with judicial independence in respect of dominance of the ruling political party with influence also on the judiciary, and generally for the lack of an effective and independent judicial system.<sup>241</sup> In the case of Peru, the judicial reforms initiated by the government were criticized for eroding judicial independence while allowing for harassment, transfer, removal and even incrimination of judges, and additional criticism was given for the growing jurisdiction of the Military courts.<sup>242</sup> Mexico was asked to provide the judicial branch with the necessary material and budgetary resources, and to institute reform so as to assure the stability of judges and to establish laws for disciplining of judges.<sup>243</sup> On Guatemala, the Commission recalled the standards set by the UN Special Rapporteur, stating that a five-year fixed term with possibility for re-election is not enough. The Rapporteur had suggested ten years in case of no provision for re-election.<sup>244</sup> Guatemala was also described as having a culture of intimidation where judges were threatened to the extent that it undermined their impartiality.<sup>245</sup>

Cuba has been criticized for not having separation of powers. Article 121 of the Cuban Constitution stipulates: “The Courts constitute a system of state organs structured with functional independence with respect to any other, and subordinated hierarchically to the National Assembly of People’s Power and to the Council of State.”<sup>246</sup> Especially, the courts’ subordination to the State

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<sup>239</sup> Annual Report of the Inter-American Commission, 1992-93, OEA/Ser.L/V/II.83 doc. 14, corr. 1, 12 March 1993, pp. 184–185.

<sup>240</sup> Annual Report of the Inter-American Commission, 1982-3, OEA/Ser.L/V/II.61, Doc 22 rev. 1, 18; see also Peter RÄDLER, 1998, p. 737, note 48.

<sup>241</sup> Annual Report of the Inter-American Commission, 1989-90, OEA/Ser.L/V/II.77 rev. 1, doc. 7, 17 May 1990, pp. 167–171.

<sup>242</sup> Country report, Peru 2000, OEA/Ser. L/V/II.106, Doc. 59 rev., 2 June 2000, paras. 169 *et seq.*, 209 *et seq.*; see also Annual Report, 2000, OEA/Ser.L/V/II.111, doc. 20 rev., 16 April 2001, Ch II, para. 33.

<sup>243</sup> Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Do. 7 rev., 1, 24 September 1998, para. 735.

<sup>244</sup> Fifth Report on the Situation of Human Rights in Guatemala, Ch IV, paras. 44 *et seq.*, IACHR, OEA/Ser.L/V/II.111, doc. 21 rev., 6 April 2001.

<sup>245</sup> Paras. 47 *et seq.*

<sup>246</sup> Annual Report of the IACHR 1999, OEA/Ser.L/V/II.106, Doc. 6 rev., 13 April 1999, Chapter IV, Cuba, paras. 40–41; see also Cuba report 2001, paras. 50–51, on



Council is problematic according to the Commission. The IACHR commented on the national security doctrine in the US, Guatemala, Argentina, and Colombia where the principle of judicial independence was undermined by giving the military authorities power over civilian.<sup>247</sup> The Commission has also criticized other special courts, such as the special criminal courts in Nicaragua<sup>248</sup> and military courts in Colombia and Chile.<sup>249</sup>

## 2. *The African Commission on Human and People's Rights*<sup>250</sup>

The African Commission on Human and People's Rights (ACHPR) has criticized for example Nigeria repeatedly for not providing an independent judiciary. A resolution condemned particularly the country for "circumscribing the independence of the judiciary and setting up military tribunals lacking independence and due process to try persons suspected of being opposed to the military regimes . . .".<sup>251</sup> In subsequent reports Nigeria has also received more detailed criticism, for example regarding the ouster clauses, clauses that limited the jurisdiction of the Court in certain cases and transferred them to special courts.<sup>252</sup> A specific and rather well known case on this issue was the *Communication of International Pen et al on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation/Nigeria* where the Commission found a violation

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the subordination to the political authority; article 62 of the Constitution: "None of the liberties citizens are recognized to have can be exercised against the provisions of the Constitution and the laws, or against the existence and ends of the socialist State, nor against the decision of the Cuban people to build socialism and communism. Violations of this principle are punishable."

<sup>247</sup> Annual Report 2001, OEA/Ser.L/V/II.114 doc. 5 rev 16 April 2002.

<sup>248</sup> *Report on the Situation of Human Rights in the Republic of Nicaragua*, OEA/Ser.L/V/II.53, doc 25, 30 June 1981, reproduced in part in Thomas BUERGENTHAL and Dinah SHELTON (Eds.), 1995, pp. 365 *et seq.*

<sup>249</sup> Inter-American Commission, Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.53 doc.22, 30 June 1981, p 222; Inter-American Commission, Report on the Situation of Human Rights in Chile, OEA/Ser.L/V/II.66 Doc.17, 1985, p. 286, para. 8; see however IACtHR, the *Genie Lacayo* case, 29 January 1997, which highlights also some positive aspects of military courts.

<sup>250</sup> For documentation, see e.g. Rachel MURRAY and Malcolm EVANS (Eds.), 2001.

<sup>251</sup> Eighth Annual Activity Report, 1994–1995, Adopted 22 March 1995, ACHPR/RPT/8<sup>th</sup>/Rev.1; see also *Civil Liberties Organization v. Nigeria*, 129/93; see also 224/98, also 218/98.

<sup>252</sup> Ninth Annual Activity Report, 1995–1996, Adopted 3 April 1996, Annex VII, Resolutions of the 19<sup>th</sup> Session, *Account of Internal Legislation of Nigeria and the Disposition of the Charter of African Human and People's Rights*, 18–19 December 1995, DOC. II/ES/ACHPR/4, Ouster Clauses, Decisions in Communications 129/94 and 101/93; see also *id.*, II/ES/ACHPR/4, special Tribunals, Decisions in Communications 60/91 and 87/93.

of 7 (1) (d).<sup>253</sup> In a case from The Gambia, a resolution was passed insisting on the need for judicial independence under all circumstances.<sup>254</sup> After a military coup in Niger the Commission found that the independence of the judiciary was circumscribed.<sup>255</sup> In the *Media Rights Agenda/Nigeria* case the Commission concluded that the judiciary was dependent because the judges were active military officers with little knowledge of law.<sup>256</sup>

## Conclusions

The UN Human Rights Committee has in the individual cases of independence mainly dealt with the need to distinguish clearly between the executive and the judiciary and in clear cases of political influence as regards a courts willingness to accept a case even though jurisdiction was at hand. Cases related to impartiality have chiefly dealt with pre-trial involvement of judges. If such involvement has been substantial, bias may be determined. A certain level of involvement was also required to find a court biased in relation to connections between parties to a case and the court, as well as the acts of the judge.

Extra-ordinary courts, questionable mainly on the grounds of their independence but to some extent also impartiality, have not fully been found in contravention of the independence and impartiality requirement. The Committee has in relation to ‘faceless’ courts stated that they must not only be independent and impartial in function but must also be seen to be so. Even though the Committee has not concluded that extra-ordinary courts by its very nature are inconsistent with the requirements of independence, it has however set quite high demands on what may be acceptable. The prevailing circumstances of the country in question, mainly political stability and level of transparency seem to be decisive. Military courts are considered acceptable if a number of safeguards are in place,<sup>257</sup> and civilians should only be tried by military courts in very exceptional cases.<sup>258</sup> Remuneration, tenure, oath of

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<sup>253</sup> Twelfth Annual Activity Report, 1998–1999, Adopted 5 May 1999, Annex V, Communications, 137/94, 139/94, 154/96 and 161/97, paras. 85–87.

<sup>254</sup> Eighth Annual Activity Report, 1994–1995, Adopted 22 March 1995, Annex VIII, Resolutions of the 17<sup>th</sup> Session, Resolution on Gambia.

<sup>255</sup> Twelfth Annual Activity Report, 1998–1999, Adopted 5 May 1999, Annex IV, Resolution on the Situation in Niger.

<sup>256</sup> Fourteenth Annual Activity Report, 2000–2001, Adopted 6 November 2000, Communication 224/98, paras. 59–62.

<sup>257</sup> Manfred NOWAK, 1993, p. 240.

<sup>258</sup> David WEISSBRODT, 2001, p. 141; procedures must also be clear on what cases should go to extra-ordinary courts, see *Kavanagh v. Ireland*, Communication No. 819/1998; see also Report on the Working Group of Arbitrary Detention, E/CN.4/1993/24 para. 34 on extra-ordinary courts.

impartiality, public trials, and possibilities for appeal to civil court are decisive criteria for these safeguards. A trend is possibly discernable in the direction of limiting special courts to more restricted applications.

In the dialogue with the governments, the Committee is quite consistent with their jurisprudence in their approach to independence. The initial questions to state parties and the subsequent recommendations in response to State Reports by the Committee are dominated by the issue of tenure, promotion, and transfer. Other issues that receive great attention are the influence of the executive through for example the appointment procedures, disciplining and dismissal. Extra-ordinary courts have been a frequent issue and a quite consistent approach has been developed, criticizing vague procedures for determining what cases fall within the jurisdiction of such courts, jurisdiction over civilians, and the lack of supervision by ordinary courts over the extra-ordinary courts. In response to countries with a legal system influenced by the Soviet model (issues that will also be discussed in relation to China in the third Part), the Committee has expressed criticism of the *procuratura* system, the potential political influence with the supremacy of the parliament, the lack of security of tenure, and criminal liability for ‘wrongfully’ decided cases.

In the dialogue with governments, the Committee has been going further than its jurisprudence in some respects, by calling for constitutional guarantees, judicial reform, establishment of judicial councils, training of judges and some references to the UN Basic Principles. Questioning the composition and the representativity of the judiciary with references to the proportion of women, minorities, and disabled has been done but only occasionally. The issues highlighted by the Committee in jurisprudence and dialogue are important but a more systematic approach that may stimulate the State Parties to produce more revealing reports that potentially would boost the credibility of the Committee is lacking.

The perception of independence and impartiality could have been taken further by the Committee in particular in its dialogue. As highlighted by the UN Committee against Torture,<sup>259</sup> criticizing additional areas of the judicial landscape should be considered such as the poor correspondence of the judiciary to the society in terms of gender balance and ethnicity of the judges, and as stipulated in the Universal Declaration on the Independence of Justice (article 13), the representativity, as an important component of the perception. Society should to some extent be appropriately reflected in the composition of the judiciary, considering for example: ethnicity, gender, age, background, and ‘place of origin’ of judges.<sup>260</sup> In this way the legitimacy will be enhanced and

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<sup>259</sup> See e.g. Saudi Arabia, 2002, CAT/C/CR/28/5, para. 8.

<sup>260</sup> See e.g. John M. WILLIAMS, 2001, pp. 186–187; see also Kathleen E. MAHONEY, 1996; see also Kathleen E. MAHONEY, 1999, especially on gender and composition of courts, pp. 89 *et seq.*

the appearance of independence will be strengthened. Society's perception of the judiciary is important,<sup>261</sup> related to this, transparency is not emphasized by the Human Rights Committee. The Committee against Torture has, as the Human Rights Committee, also criticized the *procuratura* system and parliamentary supremacy. Additionally, the Committee against Torture has been critical of joint crime fighting commissions set up with representatives of, for example, the procuratorate and the judiciary.

The other treaty bodies make references to the importance of judicial independence as a requirement for the effective enjoyment of the treaty provisions. Most references are quite general but in particular the Committee against Torture is more detailed in its queries and criticism and seems to draw on the work of the Human Rights Committee to a large extent. More specific references are also made to the need for training of the judiciary and the dissemination of the UN Basic Principles. Also the *procuratura* system has been criticized. The Committee on the Rights of the Child has a standard phrase where they refer to the need for judicial independence in their reports. This system provides for consistency and continuity but it also risks the credibility of the criticism in being overly standardized, disregarding the context.

The two ad hoc international criminal tribunals have applied the jurisprudence of the ECtHR as regards judicial independence, including the objective impartiality. The same is true for the Bosnia and Herzegovina Human Rights Chamber. The Sierra Leone Special Court will be relying on the case-law of the two ad hoc tribunals and consequently the cases from the Strasbourg court. The ECtHR itself has dealt with judicial independence in much of the same way as the UN Human Rights Committee. The independence aspects relate to executive influence and concerns over appointment, tenure, guarantees against outside pressure, and the appearance of independence. Impartiality has dealt mainly with previous engagement in the legal process by judges and the balance between substantial involvement that would objectively be seen as ground for partiality and non-substantial involvement. Jury composition and the role of lay judges have been other issues of concern. Extra-ordinary courts have been deemed permissible if there are sufficient safeguards in place to assure independence and if appeal to regular civil courts is possible, similar to the views of the Human Rights Committee.

The European Court of Human Rights considers judicial independence to hinge on issues related to (1) executive influence, (2) terms of office (appointment, tenure, et cetera), (3) guarantees from outside pressure, and (4) the appearance of independence and impartiality. The major difference between the ECtHR and the Committee is the more extensive reliance in Strasbourg on

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<sup>261</sup> See e.g. Anthony MASON, 1997 on criticism from media and public increasingly relevant; see also e.g. Frances KAHN ZEMANS, 1999 on the need to use media etc to improve credibility of the courts.

the appearance through the objective perspective on impartiality. The common core of the jurisprudence is however consistent in other regards. The ECtHR has dealt with perceived impartiality, while the Human Rights Committee has dealt with appearance in relation to independence and impartiality only in the case mentioned involving ‘faceless tribunals’. No further steps toward the ‘objectivity-test’ have however been taken by the Committee.

The other regional human rights mechanisms support these basic tenets of judicial independence. The Inter-American Commission on Human Rights has called for constitutional guarantees of judicial independence, and the need to prevent executive influence, and the importance of tenure and promotion in this regard. The Commission has also been critical of extra-ordinary tribunals on the same grounds as the UN mechanisms, the ECtHR, and also the African Commission on Human and People’s Rights. The European Court of Justice, even though not a human rights court has come to include independence as a required criterion even for the definition of court.

In short, the three strands of independence, impartiality, and public confidence, where the latter concerns both independence and impartiality and relates to the credibility and legitimacy of the judiciary in society, are applied fairly consistently in the jurisprudence analyzed above but more importantly they are all given support in the jurisprudence at various levels of detail. These three strands, the global minimum for judicial independence under international human rights law, will be used in the ensuing discussion on judicial independence in China.

JUDICIAL INDEPENDENCE

COMPARING COMPARISONS

ASSESSING CHINA'S JUDICIARY

## Comparing Comparisons

Professor Hiram Chodosh argues in his article entitled *Comparing Comparison: In Search for Methodology*, that the legal science is dominated by the oppositional or dichotomous treatment of features.<sup>1</sup> This dualism, he holds, provides very little explanatory power. Amartya Sen similarly argues that other cultures are defined as contrast to contemporary Western culture. Additionally, the self-perception in the Western world is often implicitly that contemporary institutions are age-old traditions of Western civilization, according to Sen. Other cultures are then interpreted so as to reinforce political convictions that the West is the main or even the sole source of rational and liberal ideas even with a monopoly on rights and justice. On this basis, Sen concludes that other cultures are defined by what differs and the divergence is taken to be more authentic and genuinely indigenous than aspects more similar to those in the West.<sup>2</sup>

Through such a selective emphasis on differences, other civilizations are redefined in alien terms such as “exotic and charming, or else bizarre and terrifying, or simply strange and engaging”.<sup>3</sup> With identity defined by contrast, the “divergence with the West becomes central”.<sup>4</sup> When Sen’s ideas are considered in the case of China, the question is, as Professor William Alford phrases it, to what degree do the “images of China’s legal history that have long dominated our thinking warrant retention”.<sup>5</sup>

[I]n China one encounters systems of justice so different from ours that a discourse inscribed with the particularities of Western development fails us almost completely. Observed through conventional Western lenses, processes through which Chinese justice is administered hardly qualify as ‘legal’: trials, lawyers—even courts or law as a semi-autonomous discipline—appear extrinsic and dispensable.<sup>6</sup>

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<sup>1</sup> Hiram E. CHODOSH, 1999, in particular, pp. 1117–1118.

<sup>2</sup> Amartya SEN, 2000 (a), p. 36; In the following I refer to broader categories of East and West, conforming with the common social science usage, even though more often than not I am with “East” intending China but also to some extent the so-called Confucian countries in Eastern Asia; and with “West”, I refer largely to the European and North American countries.

<sup>3</sup> Amartya SEN, 2000 (a), p. 36.

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

<sup>5</sup> William P. ALFORD, 1984, p. 1249.

<sup>6</sup> Mirjan R. DAMAŠKA, 1986, p. 2.

As elaborated upon in the Preface, China has been portrayed as the opposite of Europe and the larger Western world. Through this counter polarity a dichotomy or a binary opposition between the two has developed which is still prevalent. Accumulated stereotypes over the centuries have had severe impact on the understanding of contemporary cross-cultural issues, and contemporary writing on Chinese law often excessively discredits the system.<sup>7</sup> There needs to be a move beyond the polarization toward preventing and countering this dichotomy. At a minimum, what needs to be done is to avoid what has been called “elevated particularities”<sup>8</sup> that exaggerate existing peripheral differences between systems and make these the focal points in comparison and assessment.

The underlying problem for what I describe here using a rather broad-brushed comparison between cultures is highly related to and influential on the legal development, particularly in China. Significantly, the dichotomy has had detrimental effects on how the Chinese themselves view their own legal institutions. How a legal institution such as a judiciary, is perceived, imagined, or depicted, is fundamental for its successful (re)introduction in society. In this way, it is indeed perilous to view Chinese law through unfiltered Western eyes.<sup>9</sup>

Following up on the quotation from Professor Mirjan Damaška above on the Chinese legal system being so different from those in the West, he offers a response to the rhetorical question on how to cope with such a different system: To understand we need to at a minimum develop a conceptual framework to assist in “tracing similarities and differences in component parts”.<sup>10</sup> In this pursuit, as prescribed by Damaška and also as inspired by the writings relied upon above, on the impact of the images of legal history has had, I am applying what I would like to call an analogy-approach as an attempt to obtain deeper insights into the Chinese legal system. The intention of this approach is to bridge the seemingly vast divide between judicial systems in the Western world and that of China. To counter historical vestiges on law in China, it is required to stress the many similarities between the Chinese legal development and the equivalent process in international practice. The purpose is not to identify the exact corresponding institutions or processes. To do so would be impossible since there are also many differences. Rather, I see the approach I propose as a methodology for enhanced understanding between and perhaps also within cultures.

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<sup>7</sup> See Eileen P. SCULLY, 2001, p. 13 on the growing literature discrediting the Chinese legal system.

<sup>8</sup> Göran BEXELL, 2002, p. 13.

<sup>9</sup> See e.g. Kjell Å MODÉER, 2000, p. 390.

<sup>10</sup> Mirjan R. DAMAŠKA, 1986, p. 3.



Alford argues that if looking at “the presence or absence of the values and forms of [for example] due process”,<sup>11</sup> it may not be possible to understand the people on their own terms, which will make it more difficult to eventually understand their experience according to due process. Insufficient understanding reduces the opportunities to design proper policies and to obtain desired changes on the ground that further human rights. To again draw on Sen’s understandings, central is not the differences between the societies but what ability the members of one society have to appreciate and understand how others function.<sup>12</sup> When the viewer is able to see, Sen continues, that institutions and practices in other cultures are not foreign, it will be realized that they are not as culture-specific as first perceived.<sup>13</sup> It is therefore essential to try to understand the system before making calls of judgment. Alford acknowledges however that it will never be possible to see “the law of ancient or even that of modern China precisely as would someone living in either of those societies”.<sup>14</sup> But the effort to reach that level of understanding is important. The “faith in the possibility of understanding others”, and the process to understand is the best possible. Alford cautions however that we must neither “mistake our faith for a description of reality nor forget that we can never expect to attain the objective we seek”.<sup>15</sup>

Preconceived ideas based on local experiences or imprecise theories are bound to be seen as anything ranging from insensitivity to legal imperialism. This will in turn affect how other legal systems are perceived. This second Chapter of my discussion takes its cue from the first part on judicial independence and segues to the analysis of different perspectives of comparative law in Chapter III. I advocate an analogy-approach that is applied to ancient history of China with its early development of law, discourse on law and morality, and the various forms of safeguards in the legal proceedings to guarantee fairness presented in Chapter IV. The description is designed to pick up the many loose ends commonly left out or marginalized and tie them together to highlight the plausible alternative explanation in contrast to the predominant view. The intention is to normalize the view on Chinese law by countering the many dominant but flawed perceptions by demonstrating the existence of many features of judicial independence in the Chinese history.

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<sup>11</sup> William P. ALFORD, 1986, p. 950.

<sup>12</sup> Amartya SEN, 2000 (a), p. 35.

<sup>13</sup> *Id.*, p. 36.

<sup>14</sup> William P. ALFORD, 1986, p. 948.

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

# JUDICIAL INDEPENDENCE

I. INTERNATIONAL INSTRUMENTS

II. INTERNATIONAL JURISPRUDENCE

# COMPARING COMPARISONS

**III. COMPARATIVE LAW: COMPARING CHINA**

IV. FIAT LEX: LEGAL HISTORY IN CHINA

# ASSESSING CHINA'S JUDICIARY

V. FIAT FLUX: MODERN HISTORY

VI. THE CONTEMPORARY JUDICIARY

### ***III. Comparative Law: Comparing China***

Over the course of a lengthy tradition, comparative law has developed an elaborate etiquette of reciprocal differences between an ‘us’ and a ‘them’, a center and a periphery, an east and a west, a ‘common’ and a ‘civil’ law.<sup>1</sup>

– *David Kennedy*

how we compare ourselves to others produces both enabling conditions as well as obstacles to further communication.<sup>2</sup>

– *Teemu Ruskola*

Sharply divergent ideas on judicial independence in different parts of the world can, according to Damaška, be ascribed to the differences in what he has labeled policy-implementing and conflict-solving procedures. He acknowledges however that most countries constitute a mix of these two oppositions and his conclusion is that the focus on the oppositions is like stressing coffee and milk when cappuccino is the norm.<sup>3</sup>

Assessing the judiciary in China, in either a historical or a contemporary setting requires some form of comparison. International human rights law as a basis in this assessment requires venturing into comparative law to address the various issues related to comparison, especially in cross-cultural comparison and assessment. This Chapter is divided under two sections: comparative law, on how to reduce biased perceptions in assessment (A), and how the artificial dichotomy between China and the Western world has arisen (B). In the subsequent Chapter (IV), I will move to a practical application of the analogy-approach.

#### **A. Comparative Research**

In comparative law, the influential and oft read Günter Frankenberg claims that “[a]nalogies and the presumption of similarity have to be abandoned for a rigorous experience of distance and difference”.<sup>4</sup> Certainly, part of the understanding is based on comparison and fundamental in this process is finding distance and difference but at the same time this must be balanced with similarities and analogies. This is especially important when comparison is

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<sup>1</sup> David KENNEDY, 1997, p. 546.

<sup>2</sup> Teemu RUSKOLA, 2002, p. 188.

<sup>3</sup> Mirjan R. DAMAŠKA, 1986, pp. 12, 93, 241.

<sup>4</sup> Günter FRANKENBERG, 1985, p. 453.

done between rather different cultures. It is indeed commonplace to see the differences, while

comparison is central to all legal analysis, as it is central even to the very process of understanding. Comparison involves understanding one entity or domain in terms of an other entity or domain. The comparative enterprise is thus permeated by the other, the inevitably different.<sup>5</sup>

Seeing the defining counterpart as necessarily different is a detrimental oversimplification but easily occurs in comparative law or studies of other cultures.<sup>6</sup>

The pioneer comparative lawyer, John Henry Wigmore, often focused in his studies on the presumption of finding similarities.<sup>7</sup> At times criticized, Wigmore identified institutions in for example Japan that had been analogous to those in Europe and the US and found striking similarities.<sup>8</sup> Comparative law has swung back and forth like pendulum-extremes between positions as those of Frankenberg and Wigmore. Comparative law and inter-cultural assessments must seek a middle solution between these extremes. In the ideal situation both contrasting and making analogies is required in the pursuit of enhanced understanding and it is important to emphasize the commonly missing side of finding similarities.

Professor Wolfgang Friedmann argues in relation to international law that “[i]t is always tempting for the student of comparative religion, culture and history to extol or generalize cultural differences”.<sup>9</sup> Rather, it is quite reasonable to expect people, cultures and states to react in similar fashions. “The fact is that the necessities of state policy . . . prevail by far over the differences of history.”<sup>10</sup> Institutions are likely to develop in similar ways in different parts of the world. The approach of searching for similarities has been

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<sup>5</sup> Vivian GROSSWALD CURRAN, 1998, p. 45.

<sup>6</sup> As an example of this, see e.g. Stanley LUBMAN, 1999, pp. 13 *et seq.*

<sup>7</sup> See e.g. John H. WIGMORE, 1941; Annelise RILES, 2001 (b), p. 108, Wigmore was reading del Vecchio, p. 108, note 59.

<sup>8</sup> Annelise RILES, 2001 (b), p. 108; Wigmore could also be seen as a precursor for some of the post-modern thinking through e.g. allowing the reader/viewer to make conclusions based on all material available and the use of irony even though his approach also was very modernistic with its panoramic views etc.

<sup>9</sup> Wolfgang FRIEDMANN, 1964, p. 316; see also e.g. an early forerunner, an Italian legal scholar active in the early part of the last century who drew on work by philosophers from Plato, Aristotle, and Cicero to Leibniz in his argumentation for a universal legal origin M. Giorgio del VECCHIO, 1910; M. Giorgio del VECCHIO, 1953, pp. 25, 106, *leges innumerae, una justitia*.

<sup>10</sup> Wolfgang FRIEDMANN, 1964, p. 316.

labeled a “cross cultural consensus approach”,<sup>11</sup> a strategy aimed at “reappropriat[ing] the very cultural traditions relied upon by the relativist”.<sup>12</sup>

Professor Teemu Ruskola, a scholar of Chinese and comparative law cautions however the application of a functionalist approach:

At its worst, functionalism leads to a kind of epistemological imperialism: either we find in foreign legal cultures confirmation of the (projected) universality of our own legal categories, or, equally troublingly, we find ‘proof’ of the fact that other legal cultures lack some aspect or other of our law.<sup>13</sup>

Also countering the functionalist or the cross-cultural consensus approach, Professor Marina Svensson, a Sinologist and human rights scholar, finds the strive for cross-cultural equivalents to be “wrongheaded and constitut[ing] a dead end”, while contemporary realization of human rights plainly does not require identification of such equivalents.<sup>14</sup> While a functionalist approach aims at defining similar institutional arrangements, it risks being contextually insensitive without concern for the greater milieu in which an institution operates. At the same time, the counter argument as suggested by for example Svensson fails to recognize the many similarities in legal development and consequently does not address flawed dichotomies between legal cultures.

Searching for functional equivalents is however not necessarily more than a methodology. It may be the case that there are universal concepts that have taken on different names in different cultures and institutions that are very similar if not identical in function, even though the ascribed name may differ. That is not what matters most. Rather, more important is the process of searching for such equivalence or universality, as the methodology of understanding another legal system, but also in order to cope with one’s own subjectivity.<sup>15</sup> At its minimum, analogy is therefore a productive method. When something seemingly different is approached, the methodology applied in order to make sense of what is observed affects the outcome. Comparative method in

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<sup>11</sup> Robert D. SLOANE, 2001, pp. 564, 578.

<sup>12</sup> *Id.*, p. 579; see also Theodore L. BECKER, 1970, p. 7, drawing on Walter GOLDSCHMIDT, 1966, p. 28, advocating a teleological approach, searching for the purpose of an institution.

<sup>13</sup> Teemu RUSKOLA, 2002, p. 190.

<sup>14</sup> Marina SVENSSON, 2002, p. 11, see also pp. 34–35; she continues however with admittedly arguing that human rights were well received in early 20<sup>th</sup> century China just because the concept could build upon or relate to e.g. the Confucian concept of dignity; she still emphasizes the radically new shape that the concepts had taken. p. 12.

<sup>15</sup> On impossibility of objectivity, see e.g. Günter FRANKENBERG, 1985; William P. ALFORD, 1986, p. 948.

itself is said to emphasize the exclusiveness of one of the objects observed.<sup>16</sup> Comparing by contrast is certainly important but in its extreme it may lead to a distorted understanding of both the object of study and the point of reference – a stereotyped dichotomization.

As comparative law and comparison in general as tools for understanding other cultures tend to dichotomize the differences and even ignore or downscale similarities, the potentially distorted view that remains is critical. Barbara Stafford, an art-historian, elaborates on what she labels a theory of analogy:

Without a sophisticated theory of analogy, there is only the negative dialects of difference, ending in the unbreachable impasse of pretended assimilation or the self-enclosed insistence on absolute identity with no possibility for meaningful communication.<sup>17</sup>

Exclusive dichotomized comparison is not productive and can potentially be even counter-productive in understanding for instance the judiciary in China. Stafford elaborates stating that “[o]nly by making the past or the remote or the foreign proximate can we hope to make it intelligible to us”.<sup>18</sup>

In inter-cultural exchange, be it research, communication, or legal development assistance, there is a need to see beyond ones often biased personal experience in order to understand the other, the object of study or comparison. In this context there is a need for an enlarged scope of attention, one much more contextual. Alford, talks about the need for a reflective description in comparative law.<sup>19</sup> He also calls for consideration of the process in studying institutions but also to explore historical, philosophical, political, social and economic aspects and to “sharpen awareness of the obstacles in cross-cultural judgments”.<sup>20</sup>

As hinted by Alford’s question quoted in the beginning of this part: to what degree does the “images of China’s legal history that have long dominated our thinking warrant retention”,<sup>21</sup> common stereotypical understandings of foreign legal systems create artificial dichotomies between the systems. A methodology for comparison must be able to address and seek to redress such stereotypical binary forms. We must begin with first understanding the experience on their own terms, only then “can we begin to understand what, if

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<sup>16</sup> This has been labeled the “focusing hypothesis” by Amos TVERSKY, 1977, p. 333; I’m grateful to David Reidhav for pointing this out to me.

<sup>17</sup> Barbara Maria STAFFORD, 2001, p. 51.

<sup>18</sup> *Id.*, p. 51.

<sup>19</sup> William P. ALFORD, 1986, p. 947.

<sup>20</sup> William P. ALFORD, 1984, p. 1245.

<sup>21</sup> *Id.*, p. 1249.

anything, genuinely is universal".<sup>22</sup> But "[h]ow is one to study the points not of difference but of commonality, of universality even?"<sup>23</sup> This is the question to which my attempted answer is an analogous methodology. When seeming differences are reduced, international human rights law for one is less intrusive and more justifiable. So of course my "project"<sup>24</sup> also tends towards an international political agenda that might be unavoidable.<sup>25</sup> Fundamentally however, disregarding ones view on differences and similarities or contrast and analogy, the study of the experience of China is worthwhile for its own sake.

[T]he value of China as an object of study does not rest in any qualities of exotic uniqueness it may possess; nor, certainly, is it of value as the West's 'other' in some absolute sense. Rather, China is valuable as an alternative repository of human experience, a vast laboratory (with its own furnishings) for the exploration of universal human dilemmas.<sup>26</sup>

The seemingly positive view on China that I may be projecting is not intended to justify or legitimize the current state of affairs in China. On the contrary, I find the dichotomization between China and the Western world as detrimental to both for the observers understanding by inflating differences. In order to improve the many and severe issues within the judiciary in China, one must first come to terms with stereotyped preconceptions and biased polarizations both at home and abroad to be able to provide substantive, credible, and constructive criticism.<sup>27</sup>

## **B. Legal Orientalism**

'Legal orientalism'<sup>28</sup> refers fundamentally to a Euro-centric perspective on law. Observers of Chinese law in the Western world frequently exaggerate the particularities of Chinese law while focusing on the positive aspects of legal

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<sup>22</sup> William P. ALFORD, 1986, p. 956.

<sup>23</sup> Annelise RILES, 2000, p. 18.

<sup>24</sup> Project in the sense used by e.g. Annelise RILES, 2001 (c), p. 11, in relation to objectivity.

<sup>25</sup> On (political) motives in comparative law, see e.g. David KENNEDY, 2003; but also generally Annelise RILES (Ed.), 2001

<sup>26</sup> Paul A. COHEN and Merle GOLDMAN (Eds.), 1990, pp. 6–7.

<sup>27</sup> On the need for reciprocity of human rights considerations in e.g. development cooperation, see Katarina TOMAŠEVSKI, 1993, p. 156.

<sup>28</sup> The expression "legal orientalism" has been used by Veronica TAYLOR, 1997 and Teemu RUSKOLA, 2002 and draws on orientalism as defined by Said, discussed below.

systems in the ‘old world’. In an effort to explain the development of this apparent dichotomy, this section is divided into, firstly, the construction of the East, and secondly, an elaboration of the dichotomy between China, the East and the Western world and the effects on the contemporary views of law in China.

### *1. Constructing ‘the East’*

The great misunderstanding over Chinese rites sprang from our judging their practices in light of ours: for we carry the prejudices that spring from our contentious nature to the ends of the world.<sup>29</sup>

– *Voltaire*

All knowledge that is about human society, and not about the natural world, is historical knowledge, and therefore rests upon judgment and interpretation.<sup>30</sup>

– *Said*

Edward Said’s words are reminders of the subjective evaluations of society that we commonly make.<sup>31</sup> In Said’s seminal work, *Orientalism*,<sup>32</sup> he stressed the creation of the Orient with Western terminology.<sup>33</sup> “[T]he concept of the Orient was drawn into polemics, pushed toward the right or the left, the top or the bottom of the map, depending on the disposition and the stages of those who invoked it.”<sup>34</sup> Historically China has been portrayed in stark contrast to or at times as an ideal for Europe but in either case as counter-polar, which led to a faulty polarization evolving.<sup>35</sup> Political motives were often the reason behind the need for polarization.

In defining Eastern Asia as a representative of the East, Confucianism has habitually been the focus of attention. Accordingly, Confucian ideals of morality are held to trump law, to emphasize the collective over the individual, to hold the father above the son – generally the superior trumping the inferior is the theme reiterated in many diverse contexts. In the 1990s such arguments were used in relation to relevance and applicability of rights in Asia, in

<sup>29</sup> François M. A. VOLTAIRE, 1771, p. 36, quoted in Jonathan D. SPENCE, 1990, p. 133.

<sup>30</sup> Edward W. SAID, 1997, p. 162.

<sup>31</sup> For an interesting discussion on and presentation of history, see Paul A. COHEN, 1997, in particular pp. 3–4.

<sup>32</sup> Edward W. SAID, 1997.

<sup>33</sup> On *Orientalism*, see e.g. also Tobias HÜBINETTE, 2002.

<sup>34</sup> Raymond SCHWAB, 1984, p. 1; quoted in Stefan TANAKA, 1993, pp. 268–269.

<sup>35</sup> See e.g. Philip C. C. HUANG, 2001, p. 210, on late Qing Orientalism in China; and also Hans HÄGERDAL, 1996, p. 1.



particular then, Eastern Asia, where Confucianism was influential. Lionel Jensen provides a rebuttal to Confucian-based arguments in a book entitled *Manufacturing Confucianism: Chinese Traditions & Universal Civilization*.<sup>36</sup> Jensen argues that Confucianism to a great extent is a Western invention,<sup>37</sup>

it is a way of life that reflects how Westerners understand, or wish to understand, themselves. For four centuries and through varied circumstances it has figured prominently in the cultural consciousness of the West<sup>38</sup>

Jensen argues that in the West, the myth of Confucianism was born by 16<sup>th</sup> century Jesuits who shaped a Confucius resembling the well-known Roman God Janus, in their pursuit to explain China to the Western world.<sup>39</sup> The purpose for the often very positive, in particular at the peak of the *chinoiserie*, but not always accurate description of China in Europe by Jesuits, was the desire to portray China as a good potential market for soul conversion; deeply moral and monotheistic, not so different from the Judaeo-Christian tradition.<sup>40</sup>

China was by many seen also as a source for the enlightenment; *ex orient lux* and even *ex orient lex*.<sup>41</sup> Voltaire, Rousseau, Montesquieu, Comte, Quesnay, Fontenelle, Diderot, Leibniz, Wolff, Malebranche, Bayle and Defoe, all contributed to increasing the influence of Confucius.<sup>42</sup> When highly authoritative Chinese scholars in the early twentieth century rediscovered the European material on Confucius, they equated him with the Christian Messiah.<sup>43</sup> Another commentator on the phenomena labels this the triumph of the Orient, when the Western stereotypical characteristics of the East are spread to educated people in that particular region.<sup>44</sup> Jensen finds the reason for this

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<sup>36</sup> Lionel M. JENSEN, 1997.

<sup>37</sup> *Id.*, p. 5 and through out the book.

<sup>38</sup> *Id.*, p. 4.

<sup>39</sup> *Id.*, p. 7.

<sup>40</sup> Jonathan D. SPENCE, 1990, p. 132.

<sup>41</sup> Teemu RUSKOLA, 2002, p. 218.

<sup>42</sup> Lionel M. JENSEN, 1997, p. 8; see also Hans HÄGERDAL, 1996, p. 1, who also mentions Weber and the Swede Jan Myrdal, claiming that the depiction of China was at times negative and at times positive but always the counter polarity; also, William P. ALFORD, 1984, p. 1190, who adds Du Halde and Spinoza to the list; and Jonathan D. SPENCE, 1990, pp. 133–136, in particular on Voltaire but also Adam Smith and Hegel; see further e.g. Geoffrey MacCORMACK, 1996, p. xiii about Montesquieu's description in *L'ESPRIT DES LOIS* of a China based on the spirit of rites and without law; see also Ahmed A. WHITE, 2001, p. 42, on Weber.

<sup>43</sup> Lionel M. JENSEN, 1997, pp. 252–253; in modern times the state promoted Confucius as a symbol for the 'advanced' ethnic majority, p. 11.

<sup>44</sup> Hans HÄGERDAL, 1996, p. 276.

myth-creation in the desire to develop “the self image of *our* [the Western] modern”.<sup>45</sup> In conclusion, he states that

. . . Confucius assumed his present familiar features as the result of a prolonged, deliberate process of manufacture in which European intellectuals took a leading role. Our Confucius is a product fashioned over several centuries by many hands, ecclesiastical and lay, Western and Chinese.<sup>46</sup>

Similar accounts of history are provided by others; Rana Kabbani writes in Europe’s Myth of the Orient, about what she calls the “imperial fiction”.<sup>47</sup> The colonialist worldview forced stereotypes onto the colonized, to uphold an imperial myth of the Western supremacy.<sup>48</sup> Kabbani states that the portraits of the East more accurately describe Europe.<sup>49</sup> From another perspective but on the same note, Isabel Santaolalla argues that America similarly created a myth where they were civilizing the rest and in this process the East was exoticized.<sup>50</sup> In the second half of the nineteenth century the Chinese labor immigrants to the US created an image of the Asians as untrustworthy, dishonest, corrupt, evil and immoral and “[b]y examining the images we hold, say, of the Chinese and Indians, we can learn a great deal about Chinese and Indians, but mostly we learn about ourselves”.<sup>51</sup> With this exoticization the Orient developed into a negative counter-pole to the West.

The fictive opposition between the Orient and the Occident is especially clear in the field of law.<sup>52</sup> Professor Monateri argues that the Western legal tradition is of multi-cultural origin and the belief in Roman law as the source for Western legal culture to be a myth. In making Roman law, the source for the Western legal development, he argues, “[a] major strategy of this project is the exoticization of legal cultures different from the Western one. Babylonian, Egyptian, and Syrian law are exotic, whereas Roman law is not, even if it was based on slavery and a lot of magic”.<sup>53</sup> Even though Roman law had its origins in Africa and Asia, Rome was establishing law that was different from the past and the surroundings. In Monateri’s words, “Coptic, Ethiopian, or Chinese

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<sup>45</sup> Lionel M. JENSEN, 1997, p. 8.

<sup>46</sup> *Id.*, p. 5.

<sup>47</sup> Rana KABBANI, 1986.

<sup>48</sup> *Id.*, pp. 4–9.

<sup>49</sup> *Id.*, p. 85.

<sup>50</sup> Isabel C. SANTAOLALLA, 1998, p. 3–4 (as printed).

<sup>51</sup> Harold R. ISAACKS, 1980, quoted in Isabel C. SANTAOLALLA, 1998, p. 4 (as printed); see also Teemu RUSKOLA, 2002, p. 209, on the same note related specifically to China.

<sup>52</sup> Claimed by Jean Escarra, relied upon in Teemu RUSKOLA, 2002, p. 200.

<sup>53</sup> P. G. MONATERI, 2000, p. 525.

texts would have worked as well. The ‘recall to Rome’ does not reflect the quality of Roman products, but the strategy of legitimization that dominated in Europe”.<sup>54</sup>

Foreign powers in China disqualified the Chinese legal system as unjust and secured extraterritoriality for their citizens in all their actions, relying on their own established courts. These foreign jurisdictions added to the Euro-centric Orientalism by “discrediting traditional customs and elites as ‘backward,’ and sanctioning integration into the world market as ‘progress’ and ‘development’”.<sup>55</sup> Hegel claimed that China is timeless and static and that the Chinese lacked moral character, logic, and a real sense of law.<sup>56</sup> As the writer August Strindberg concluded over 100 years ago, “[t]he idea of the eternal non-development of the Chinese has arisen as a trick of the eye with the European . . . thus the European can not discern the progress in the Chinese development”.<sup>57</sup> China was seen as “inscrutable and thus insignificant”.<sup>58</sup> With communism evolving during the twentieth Century, it became a counter-pole to the Western market economy and with it the various political associates. Chinese justice was deemed opposite to that associated with the market economy of the Western world and this development further estranged the understanding of justice in China, not only the communist forms of administration of justice but also the view on Chinese legal history.

Comparative law is not only a way to address the issue of cross-cultural comparison and assessment; it is also one of the sources of the heightened alienization of the Chinese legal culture. In Western comparative law textbooks it is common, if not seemingly mandatory to have a section devoted to Confucian influence on legal thinking.<sup>59</sup> Traditional classification of the world’s legal systems lists common law and continental law as the two main categories and then one or more categories of other systems such as East Asian, Hindu, Chinese, and Muslim.<sup>60</sup> Consider for example the major comparative law textbook of Professors René David and John Brierley, *Major Legal Systems in the World Today*, where the authors have it that Far Eastern countries rejected the supremacy of law: “For the Chinese, law is an instrument

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<sup>54</sup> *Id.*, p. 515–516.

<sup>55</sup> Eileen P. SCULLY, 2001, p. 13.

<sup>56</sup> Teemu RUSKOLA, 2002, pp. 214–215, 219.

<sup>57</sup> August STRINDBERG, 1985, p. 177 (my translation).

<sup>58</sup> Lionel M. JENSEN, 1997, pp. 247–248.

<sup>59</sup> See e.g. Michael BOGDAN, 1994, pp. 210 *et seq* where he is also claiming a lack of private law, as is also commonly done (see further on this below) even though research convincingly shows the contrary; but note also Bogdan’s discussion of *praesumptio similitudinis*, assuming legal systems are rather similar, p. 97, and also the acknowledgment of *ubi societas, ubi ius* in Michael BOGDAN, 1985, p. 461.

<sup>60</sup> Randall PEERENBOOM, 2003 (a), p. 41; see also p. 39–40 on Orientalism.

of arbitrary action rather than the symbol of justice; it is a factor contributing to social disorder rather than to social order.”<sup>61</sup>

More specifically David and Brierley argue that the Chinese society is founded on a fundamentally different basis.

The traditional Chinese concept of the social order, which had developed until the nineteenth century apart from any foreign influence, is completely different from that of the West. The fundamental idea (distinct from any religious dogma) is that there is a cosmic order of things involving a reciprocal interaction between heaven, earth and men.<sup>62</sup>

The Chinese legal system is, they argue, based on conciliation and consensus where disputes must be “dissolved rather than resolved”.<sup>63</sup> In a footnote they draw on the oft-used quote from the seventeenth Century Emperor Kangxi “those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate”.<sup>64</sup> Amartya Sen teaches however that selective citations by Confucius and selective neglect of other Asian authors bring forth discipline and order rather than liberty and autonomy with “apparent plausibility” but this, he contends, is hard to sustain.<sup>65</sup>

In a more recent attempt, Professor Ugo Mattei is defining a tripartite taxonomy with three views on law: rule of law, rule of political law and the Oriental view on law.<sup>66</sup> Professor Randall Peerenboom criticizes Mattei’s attempt on the grounds that Mattei fails to bring the other legal systems into the mainstream. Peerenboom even questions the whole project of taxonomy suggesting it to be a possible way to “satisfy the fetish of publishers for first year comparative law textbooks”.<sup>67</sup> It is when we observe our own legal system that we often fail to see the impact of culture, Peerenboom holds. Mattei does not take us further than previous Orientalist schemas, creating other legal systems.<sup>68</sup> With Mattei’s taxonomy, Asian legal systems are treated as one “and

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<sup>61</sup> René DAVID and John E. C. BRIERLEY, 1985, p. 30; see also John H. WIGMORE, 1936, pp. 1141 *et seq.*, for an older version that however takes indigenous law into greater account.

<sup>62</sup> René DAVID and John E. C. BRIERLEY, 1985, p. 518.

<sup>63</sup> *Id.*, see also p. 30, where they also seem to contradict themselves in relation to Japan.

<sup>64</sup> *Id.*, p. 520; also quoted in T. R. JERNIGAN, 1905, p. 191, which in turn was quoted in James P. BRADY, 1982, p. 35.

<sup>65</sup> Amartya SEN, 2000 (a), p. 36.

<sup>66</sup> Ugo MATTEI, 1997; and see the criticism hereof by Randall PEERENBOOM, 2003 (a), p. 44.

<sup>67</sup> Randall PEERENBOOM, 2003 (a), pp. 47, 45, see however the corresponding footnote on p. 45 where he elaborates somewhat on the fetishism.

<sup>68</sup> Randall PEERENBOOM, 2003 (a), pp. 42, 49.

by emphasizing certain traditional aspects, the many major changes in Asian legal systems are overlooked”.<sup>69</sup> Peerenboom concludes that the underlying cause is the too narrowly defined rule of law with “contingent values and institutional arrangements of contemporary Western liberal democracies”.<sup>70</sup> This is also what Professor Donald Clarke discusses using his “Your Too Narrow” approach.<sup>71</sup>

More over, if a Western reader of a text on China is left with a feeling that the features described are something very particular, which may appear to be extraordinary, these authors seem to believe that the level of research is more advanced. Similarly, business is created on projecting a foreign market as impossible to penetrate unless you have the local ‘contacts’. Consider for example the often-included references to the concept of what is labeled *guanxi*, ‘contacts’ in China,<sup>72</sup> by many a seemingly untranslatable indigenous concept to the Chinese culture, readers may believe that this concept makes the whole understanding of law inappropriate in the Chinese culture. Guanxi could very well be translated into ‘contacts’ which is a universal feature that varies in influence but certainly play a role also in the most ‘developed’ of societies, also in the functioning of law. Professor Peerenboom even suggests that many academic careers have been built on such ascribed differences between East and West.<sup>73</sup>

An additional problem exists with the educational and practicing tradition in law, where common law lawyers find legal solutions exotic that continental colleagues would find quite natural; without a broader comparative perspective there is a tendency to portray China’s legal system as odd or alien. Furthermore, many non-Chinese specialists on law in China are more familiar with the Chinese system than with their own, which easily leads to a comparison between a detailed reality in China with an idealized one in their own legal system.<sup>74</sup>

Peerenboom states that by “[f]ocusing exclusively or predominantly on the negative obscures the considerable progress China has made in improving the legal system may lead others outside the field to misinterpret the significance of reforms”.<sup>75</sup> China’s legal system is different from many other countries but it is easy to exaggerate the differences, making it more alien and dysfunctional

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<sup>69</sup> *Id.*, p. 56.

<sup>70</sup> *Id.*, p. 57.

<sup>71</sup> Donald C. CLARKE, 2003 (c), pp. 114–115; note also his discussion on ideal versus actual Western legal order and cautioning about one’s own country corresponding to the ideal, pp. 93, 95 *et seq.*

<sup>72</sup> See as examples of this Pitman B. POTTER, 2001, p. 12; Mayfair Mei-hui YANG, 1994; but see also Peerenboom’s criticism of Clarke on Guanxi, Randall PEERENBOOM, 2003 (a), p. 79.

<sup>73</sup> Randall PEERENBOOM, 2000, p. 93.

<sup>74</sup> Randall PEERENBOOM, 2003 (a), p. 89.

<sup>75</sup> *Id.*, pp. 80–81.

than it actually is. There are also many outdated and excessively negative descriptions of Chinese justice in popular press as well as academic journals and not only by fringe commentators but mainstream authors too. Peerenboom holds that there is enough to criticize without exaggerating, such as the many human rights violations but it must be done in a balanced way. Positive steps must also be highlighted and difficult issues must be treated with required detail while it is not likely that a regime shift would provide a much faster solution to the many problems.<sup>76</sup> According to Peerenboom, an excessively negative view would likely lead to “despair and paralysis” for China which would be detrimental to the legal development and reform.<sup>77</sup>

Perceptions of Chinese law are still dominated by an unwillingness to give credit to positive developments. As will be discussed in the next part, through Party documents and constitutional change as well as numerous high-level reiterations, China has stated that it should be governed by the rule of law. The Chinese ‘official policy statement’ that has been used is a rather lengthy one, a so called *tifa*, which in its entirety seeks to explain the concept of rule of law. Still, academic debate in China and outside has centered around a small section of the phrase that is possible to interpret also as rule *by* law or a diluted version of rule of law such as running the country according to law.<sup>78</sup> In many academic forums at least a nominal commitment to the rule of law in China is still being discussed from a linguistic point of view. This is part of what Peerenboom refers to as Western commentators ignoring ordinary meaning of words and overriding linguistic conventions.<sup>79</sup> To gain deeper insight into the functioning of China’s legal system and the descriptions thereof requires an awareness of these many historical and contemporary constructs of the East.

## 2. Reciprocal Constructions

The polar binary of East versus West, Asia versus Europe obscures similar struggles in all societies.<sup>80</sup>

– *Edward Friedman*

As have been suggested above, there is also construction of the East in the East.<sup>81</sup> Professor of law Jan-Michiel Otto has stated that when studying China,

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<sup>76</sup> *Id.*, pp. 60, 64, 85–86, 74.

<sup>77</sup> *Id.*, p. 85.

<sup>78</sup> *Id.*, p. 67, *yifa zhiguo, jianshe shehuizhuyi fazhiguo*; see also Randall PEERENBOOM, 2004 (a), p. 113.

<sup>79</sup> Randall PEERENBOOM, 2003 (a), p. 89.

<sup>80</sup> Edward FRIEDMAN, 1999, p. 67, on Europe not being a solid democratic entity some years ago; see also Alhadi KHALAF, 1999.

stereotypical understandings are often used and some of these are also popular within China.<sup>82</sup> Professor Marina Svensson provides examples of how an influential Chinese early twentieth Century thinker supported arguments by quoting foreign commentators conclusions on the nature of the Chinese, and in this way reinforced the Western picture of China and Asia, in this case as unaware of freedom and human rights.<sup>83</sup>

Japan is often used as the role-model Confucian country. Stefan Tanaka discuss in book length how the history of Japan, and more broadly Asia, was to a certain degree invented and created.<sup>84</sup> Tanaka elaborates on how categories are constructed and at times changed as a function of human experience and imagination. As Japan was creating or recreating history in response to the increased encounters with the West, Tanaka argues convincingly, Japan sought and possibly succeeded in matching the West: Japan wanted to be on an equal level.<sup>85</sup> The strategy used was to emphasize uniqueness and diversity in approaches. Japan abandoned universal and strove towards some form of indigenization. An element in this development is part of the Orientalism that I have been discussing above. Tanaka relates to the work of Said and his findings of the Orient as an object of the past that Europe formed to measure its own development.<sup>86</sup> This formation shaped the view of the Orient in the West but also in the East. Japan defined itself accordingly and “. . . became captive to its own discourse”; Tanaka labels the result a “reciprocal myth”.<sup>87</sup> To again draw on Amartya Sen: some Asians have proudly responded that they are different and thus conferring identity by contrast.<sup>88</sup>

With an idealized view of the West and a romanticized perception of its own history intended to create characteristics separate from the West, Japan and East Asia reinforced differences.<sup>89</sup> Additionally, both the East and the West tried to “define the totality by which a larger world, one of difference, could be understood within their own present”.<sup>90</sup> This led to a popularization of certain

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<sup>81</sup> There is also potential for a reversed East-West dichotomy between Europe and Asia, see Jean Philippe MATHY, 1993; see also Avishai MARGALIT and Ian BURUMA, 2002.

<sup>82</sup> Jan Michiel OTTO, 2002, p. 27; see also Edward FRIEDMAN, 1999, pp. 56–57.

<sup>83</sup> Marina SVENSSON, 2002, p. 117.

<sup>84</sup> Stefan TANAKA, 1993, pp. 7–8.

<sup>85</sup> Karl BÜNGER, 1985, p. xx, on Western superiority over by way of example China, owing to factors such as technical development and the Opium War.

<sup>86</sup> Stefan TANAKA, 1993, pp. 271, 21–22; referring to Edward W. SAID, 1978, pp. 1–28, 201–284.

<sup>87</sup> Stefan TANAKA, 1993, p. 22; from the Meiji-era (1868–1912) onwards, the Japanese state is considered to have ‘constructed’ aspects of history and society in order to support the development of nationalism, Carol CLUCK, 1985.

<sup>88</sup> Amartya SEN, 2000 (a), p. 36.

<sup>89</sup> Stefan TANAKA, 1993, pp. 226–227 and Chapter 5.

<sup>90</sup> *Id.*, pp. 269–270.

types of ideals occurring in both camps – ideals that did not necessarily correspond to reality.<sup>91</sup>

With the Chinese official history recorders, after the proclamation of the People's Republic in 1949, the past was also described as bourgeois and negative in an attempt to project the new era as radically different and positive. In this way China added to the dichotomy by making the Chinese historical development overly negative. Contemporary influential writers uphold stereotypes, such as Francis Fukuyama who in *The End of History and the Last Man* describes the Japanese culture as collectivistic.<sup>92</sup> Similarly, the Japanese Professor INOUE Kyoko sees some of the differences in what a constitution should be doing, as arising from the collective Asians versus the individualistic Westerners.<sup>93</sup>

The dichotomy of East and West has its contemporary remnants in for example the discussions on “Asian values”<sup>94</sup> and “the clash of civilizations”.<sup>95</sup> Marina Svensson, states: “Both [of these discussions] are guilty of essentializing culture and of presenting the West and Asia . . . as two homogenous and sharply delineated cultures.”<sup>96</sup> The differences, according to Svensson, between East and West in relation to rights are to a large extent man made and with limited application. In this faulty polarization, both ‘camps’ are treated as monolithic entities, entities that in addition are constant over time. She writes that “[t]o simply juxtapose China and the West tends to exaggerate differences and overlook points of similarities”.<sup>97</sup> Svensson continues her reasoning, stating that these misconceptions serve “to prevent a meaningful dialogue and cross-cultural understanding”.<sup>98</sup>

Even though cultural differences in relation to, for example, the degree of judicial independence between countries in the East and those in the West have been excluded by researchers,<sup>99</sup> legal orientalism has been and is reinforced. China of today, as other East Asian countries, relies on what could be termed self-orientalism, in depicting their own history as for example lawless while the

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<sup>91</sup> *Id.*, pp. 274.

<sup>92</sup> Francis FUKUYAMA, 1992, p. 231.

<sup>93</sup> Kyoko INOUE, 1991, p. 268.

<sup>94</sup> See e.g. Tatsuo INOUE, 1999; Marina SVENSSON, 2000; Robert D. SLOANE, 2001, pp. 565, 578–579.

<sup>95</sup> Samuel P. HUNTINGTON, 1996.

<sup>96</sup> Marina SVENSSON, 2002, p. 10.

<sup>97</sup> *Id.*, p. 13.

<sup>98</sup> *Id.*

<sup>99</sup> See in particular J. Mark RAMSEYER and Eric B. RASMUSEN, 2003, p. 139; the claim is made for the case of Japan, often made into the archetype of the Confucian-type countries where law, litigation, and adjudication is said to be so different from other countries.



West is perceived as the opposite.<sup>100</sup> Creation of polarities and its sustainability and long-term effect must be taken into consideration in cross-cultural comparison and assessment. Historical stereotypes play a decisive role also in the contemporary view on a legal system.

## Conclusions

[T]he thing that we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.<sup>101</sup>

– *Foucault*

Foucault's challenge with the citation above and in the well-known passage following this, where he quotes an imaginary Chinese encyclopedia on how to rank animals, show the prevalent limits in seeing the Chinese legal order as a legal order, and the difficulties in understanding the courts as central institutions in the legal system rather than as "court[s] of all errors and no appeals".<sup>102</sup>

Research but also media reports on China tend to give a very plain view on legal developments or political status and development. This may be due to the tendency to assume that a legal system has to be familiar to the analyzer to be acceptable. A picture in black and white is easy to process but even a slightly different system is quickly seen as completely different. Professor William T. deBary teaches however that other cultures share similar conceptions of fundamental laws when viewed with an opened mind that is not restricted to the model and form of the Western world.<sup>103</sup>

A fundamental challenge therefore exists in assessing the judiciary in China. The general stereotypical dichotomization between China and Europe has reciprocally dominated and influenced the perception over the centuries. Tools in coming to terms with another legal system, such as those used in comparative legal analysis, often tend to highlight the differences, adding to the binary positions, and downplaying the many similarities. This occurs not least by classification rather than providing a basis for increased mutual understanding and factual detailed constructive criticism through greater

<sup>100</sup> Teemu RUSKOLA, 2002, pp. 197, 224, see also p. 222, on reciprocal development in the West

<sup>101</sup> Michel FOUCAULT, 1971, p. xv.

<sup>102</sup> Theodore L. BECKER, 1970, p. 304; this epithet was given to the highest court in the US state of New Jersey in the 1940s by the bar, in part due to its substantial number of lay judges.

<sup>103</sup> Wm. T deBARY, 1995, p. 7, see also exemplification at p. 9.

contextual considerations. If a tool is not able to cope with obstacles such as accumulation of stereotypes it will be pointless or even detrimental in cross-cultural assessment by ignoring or even reinforcing misconceptions. Applying an analogy method to the relevant issues of the legal history of China will discard some of the major misunderstandings about Chinese law. This is the aim of the following Chapter.

# JUDICIAL INDEPENDENCE

I. INTERNATIONAL INSTRUMENTS

II. INTERNATIONAL JURISPRUDENCE

# COMPARING COMPARISONS

III. COMPARATIVE LAW: COMPARING CHINA

IV. FIAT LEX: LEGAL HISTORY IN CHINA

# ASSESSING CHINA'S JUDICIARY

V. FIAT FLUX: MODERN HISTORY

VI. THE CONTEMPORARY JUDICIARY

#### ***IV. Fiat Lex: Legal History in China***

Too often, early China is judged a failure by standards that apply only to the modern Western system. For example, if a formal separation of powers defined by a written constitution, an independent judiciary, and a class of legal experts is deemed essential for a healthy legal system, then any ancient government will fall short of the modern ideal.<sup>1</sup>

Numerous legal institutions and views on law can be identified in Chinese history that have been rolled over to succeeding dynasties and that have had an impact on the contemporary legal system. Many of these developments also have striking similarities to the legal development in the Western world. Such features are important to highlight for understanding but also to clarify the potential of the present system.

To exclude China's history even if we had been concerned only with law in general, to use Damaška's expression, smacks of the dogmatism of the untraveled".<sup>2</sup> Today, many of our concepts of traditional Chinese law are additionally based on ethnocentric nineteenth Century Western reports during the pro-Western and anti-dynasty Chinese era.<sup>3</sup> This Chapter provides an *exposé* of the history of law in China that will lay bare features that often are overlooked in studies of law in China, and which are essential for a thorough understanding of the legal system and its development including the contemporary situation.

In the first of the following four sections, the focus is on the origin of law illustrating the long tradition of law and legality in China (A); in the second section (B) I discuss law versus morals and the contending schools of thought, linking these with the discussion on Confucianism entertained above. The third section (C) deals with the three issues of litigiousness, rule of law, and civil law. 'Confucian' countries, as discussed in the previous Chapter, are said to be non-litigious and for this reason existing obstacles to litigation must be given due consideration. The rule of law is held to be an imported concept to China in modern times. In the Chinese history an intricate system was however developed over the centuries akin to the rule of law. Chinese legal history is also claimed to have relied on criminal law only but there is also an often-neglected civil dimension. In the fourth section (D), I explore the various control mechanisms that were in place in Chinese history to restrain powers

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<sup>1</sup> W. E. BUTLER (Ed.), 1983, p. 12.

<sup>2</sup> Mirjan R. DAMAŠKA, 1986, p. 199, on categorizations of law that exclude the Chinese legal system.

<sup>3</sup> David C. BUXBAUM, 1971, p. 277.

and assure fair trial through legal procedures, to avoid bias, and the system for controlling implementation through an elaborate set of appeal possibilities.

In the following section I will trace the various dynasties in Chinese history since an overview of these periods may be useful when considering further analysis.<sup>4</sup>

## II. Chronology of Chinese Eras

Xia	21 <sup>st</sup> –16 <sup>th</sup> Century B.C.E.
Shang (Yin)	16 <sup>th</sup> –11 <sup>th</sup> Century B.C.E.
Zhou	11 <sup>th</sup> Century–221 B.C.E.
Easter turned Western Zhou	around 770 B.C.E.
Spring & Autumn Period	722–481 B.C.E.
Warring States	475–221 B.C.E.
Qin	221–207 B.C.E.
Han	206 B.C.E.–220 C.E.
Period of North-South disunion	220–589
Northern Wei	386–535
Sui	589–618
Tang	618–907
Song	960–1279
Northern	960–1125
Southern	1127–1279
Yuan (Mongolian)	1279–1368
Ming	1368–1644
Qing (Manchurian)	1644–1911
Republican China	1912–1949
The People's Republic of China	1949–present

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### A. The Origin of Law

The legal history of China has been written and re-written by many legal historians, both Chinese and non-Chinese.<sup>5</sup> My attempt here is not to compete with these efforts but merely to outline the general history and those historical

<sup>4</sup> Based on John K. FAIRBANK, 1992, p. 24.

<sup>5</sup> For overviews see e.g. Albert H. Y. CHEN, 1994, pp. 6–37; Yongping LIU, 1998; Chunying XIN, 1999; or for a more detailed passage, Derek BODDE and Clarence MORRIS, 1967.

developments in particular of relevance to the discussion on the courts and judicial independence. However, in doing so, I also challenge some of the basic understandings of law in China. One such fundamental historical claim being countered is lack of indigenous law in China.<sup>6</sup>

### 1. 1600 B.C.E.–220 C.E.

It is difficult if not impossible to say where the first legal system developed.<sup>7</sup> From Babylonia in what today is Southern Iraq, Sumerian private legal documents dated from 2900 B.C.E., and Assyrian laws are thought to exist from around 2350–2100 B.C.E..<sup>8</sup> In China there are indications of a legal system from the Xia Dynasty, (2100–1600 B.C.E.) but it likely originated from the era prior to Xia,<sup>9</sup> which was the age of the legendary sage-kings Yao, Shun, and Yu.<sup>10</sup>

In the subsequent Dynasty, Shang (1600–1100 B.C.E.), also known as Ying, the events are more verifiable. There were a number of quite large clans (*zu*) that each had separate laws.<sup>11</sup> There is no specific mentioning of legal institutions from Shang but given the nature of the available inscriptions, mentioning of such would not be expected.<sup>12</sup> As the Shang Dynasty was defeated by the Zhou (1100–403 B.C.E.), the laws of the Zhou-clan were mixed with that of the Shang.<sup>13</sup> Shang had been treating members of other clans extra-legally but then a more general application of the law took shape.<sup>14</sup> The mixture of clans in early Zhou spurred a feudal society with laws.<sup>15</sup> The oldest law mentioned in China is the *Fa Jing*, the Canon of Laws from 400 B.C.E. and the Commentaries of Zuo (*Zuo zhuan*) from 536 B.C.E. mention crime and

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<sup>6</sup> Highlighted by e.g. Teemu RUSKOLA, 2002, pp. 181–182, who also point to claims made that law is even lacking in China of today.

<sup>7</sup> See John H. WIGMORE, 1936, p. 5, with a comparative table of age and duration of legal systems in the world.

<sup>8</sup> See e.g. G. R. DRIVER and Jon C. MILES, 1935, pp XX, 1; C. H. W. JOHNS, 1904, p. 5; Reuven YARON, 1969, pp. 1–2.

<sup>9</sup> Huanyue GAO, 1995, p. 97.

<sup>10</sup> Sima QIAN, 1994, p. XXIV; also the Xia Dynasty is however more of a legendary construct.

<sup>11</sup> Yongping LIU, 1998, pp. 12, 29–31, 33 *et seq.*

<sup>12</sup> Herrlee Glessner CREEL, 1980, p. 29.

<sup>13</sup> Yongping LIU, 1998, p. 22, see also pp. 34 *et seq.*, 42; see also Herrlee Glessner CREEL, 1980, p. 29; it should be remembered that the territory under control of these clans were not necessarily to be seen as the ancient origins of present China but were often very small entities within the borders of present day China; Shang and Zhou were located in the lower Yellow River valley.

<sup>14</sup> Yongping LIU, 1998, p. 123.

<sup>15</sup> *Id.*, p. 34.

punishment.<sup>16</sup> It is however very likely that older codes have existed.<sup>17</sup> Recovered law with the actual text available is only available from the Qin Dynasty (221–207) with the Code of Qin (*Qin Lüe*).<sup>18</sup>

In this early law, there were traces of civil as well as criminal law.<sup>19</sup> Criminal law as we would categorize it today contained elements of law related to family, property, contract and succession.<sup>20</sup> I will in the next Chapter return to a discussion on the existence of civil law. The legal system was based on evidence as a fundamental factor, and torture seems to have been condemned: justice was essential and the system was aimed at avoiding miscarriages of justice.<sup>21</sup> There is no mentioning of imprisonment as a punishment but detention during investigation is described.<sup>22</sup> The word for lawful under the Zhou Dynasty was *dian*, (典)<sup>23</sup> a character that depicts a book lying on a table.<sup>24</sup>

As the Zhou Dynasty changed from what has become known as the Western Zhou to Eastern, around 770 B.C.E., the importance of the clans diminished and instead the family appears to have become the core unit. The clan-heads still had power to punish misdeeds however and were obliged in return to provide welfare to its members.<sup>25</sup> The importance of the clans in legal development was important in many ways.<sup>26</sup>

History has it that a Duke of Zhou realized that laws were needed so the Zhou code of law was developed.<sup>27</sup> This code was a mixture of rituals (*li*) and law.<sup>28</sup> *Li*, rituals or rites, is a central concept in the history of China; at this stage they were formally an appeal for ancestral blessings. The rites were also

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<sup>16</sup> *Id.*, pp. 20–21, 201.

<sup>17</sup> Herrlee Glessner CREEL, 1980, pp. 29, 35–36; see also e.g. Derek BODDE and Clarence MORRIS, 1967, p. 16.

<sup>18</sup> Yongping LIU, 1998, pp. 20–21, 52–53, see also p. 121; The Code had been developed already around 400 B.C.E. and was predominantly penal but administrative aspects were also detectable, pp. 53, 201, 212 *et seq.*

<sup>19</sup> *Id.*, p. 125.

<sup>20</sup> Geoffrey MacCORMACK, 1996, p. xiv; see also Herrlee Glessner CREEL, 1980, p. 34.

<sup>21</sup> Herrlee Glessner CREEL, 1980, pp. 31–32.

<sup>22</sup> *Id.*, p. 31.

<sup>23</sup> The character has later on taken on the meaning of pledge in the context of pawn, see e.g.: Ulrike GLÜCK, 1998; Philip C. C. HUANG, 2001, p. 22 and Chapter 5, pp. 71–98.

<sup>24</sup> Karlgren, THE BOOK OF DOCUMENTS, pp. 40, 65, cited in: Jerome A. COHEN et al (Eds.), 1980, p. 29, see also p. 36.

<sup>25</sup> Yongping LIU, 1998, p. 132.

<sup>26</sup> See e.g. Teemu RUSKOLA, 2000, where he argues that corporate law existed in imperial China and that the clans often functioned as large corporations, pp. 1602, 1605.

<sup>27</sup> Yongping LIU, 1998, p. 63.

<sup>28</sup> *Id.*, pp. 65–66.

used in relation to for example funerals, court visits and marriages, and applied to all walks of life.<sup>29</sup> These rites, a form of decorum, were possibly more importantly used to determine ranks because those of highest rank could perform certain rites or could be placed closer to the sight when those even higher ranked performed theirs.

These rites grew to something close to natural law in the Warring States period (475–221 B.C.E.), the last sub-era of the Zhou Dynasty.<sup>30</sup> Heaven was the provider of this natural law that could not be altered by man.<sup>31</sup> With time, a set of restrictions on the ruler developed.

The Mandate of Heaven that the Emperor possessed, provided for a competing clan to lawfully rise above the ruling one. If the imperial clan lost, the understanding was that the new clan had received the Mandate before the actual struggle commenced. A system with a ‘line of communication’ (*yanlu*), supplemented this through a complaints procedure by way of a moral obligation of the literati to report complaints from the constituents. At times there was also a mandate to prosecute the Emperor if grave mistakes were made.<sup>32</sup> Another feature, benevolence (*ren*), was required of the ruler toward the subjects.<sup>33</sup> Associated was also righteousness (*yi*), that was distinct from *li*, but yet contained rites, it was the system by which to rule.<sup>34</sup> It has been argued that prior to the nineteenth Century (C.E.) there was no direct correspondence to rights in China but nevertheless ideas and institutions that might have served the same purpose.<sup>35</sup> These systems formed part of what can be seen as natural law.

Law existed in addition to rites even though law has been written less of in Chinese history. The elite found moral supremacy to be more attractive and consequently emphasis, at least in describing history, came to be placed on rites.<sup>36</sup> In the Zhou Dynasty (11–2 B.C.E.) there are references to *fa* (罰) and *xing* (刑). *Fa* contained more punishment by the ruler while *xing* was a general term for punishment.<sup>37</sup> *Xing* remained in use and was maybe the best candidate to equal law in its contemporary meaning and this character for law, *fa* (法), was

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<sup>29</sup> *Id.*, pp. 68–71; Herrlee Glessner CREEL, 1980, pp. 38–40.

<sup>30</sup> *Id.*, p. 73, see also pp. 78–79.

<sup>31</sup> See e.g. Ludger KÜNHARDT, 1987, pp. 238, 242; Herrlee Glessner CREEL, 1980, p. 29.

<sup>32</sup> Ludger KÜNHARDT, 1987, pp. 244–245.

<sup>33</sup> Geoffrey MacCORMACK, 1996, pp. 131–137.

<sup>34</sup> Yongping LIU, 1998, p. 78; see also Liu Shipe’s TEXTBOOK ON ETHICS from 1905, translated and commented in Stephen C. ANGLE and Marina SVENSSON (Eds.), 2001, pp. 40–41.

<sup>35</sup> See Stephen C. ANGLE and Marina SVENSSON (Eds.), 2001, pp. 74 *et seq.*

<sup>36</sup> Brian E. McKNIGHT, 1992, e.g. pp. 2–3.

<sup>37</sup> Geoffrey MacCORMACK, 1985, pp. 336, 341.



at times used in place of *xing*.<sup>38</sup> *Fa* (法), entailed something more than *xing* with the reference to rites and benevolence, if a law lacked a certain quality such as some kind of legislative process, it did not qualify as *fa* (法).<sup>39</sup>

A common position is to dichotomize rites and law: *li* and *fa* (法), but this distinction, it has been argued, should not be overemphasized.<sup>40</sup> Rather, the rulers wanted to lead the people by being exemplary role models.

The Moral Law causes the people to be in complete accord with their ruler, so that they will follow him regardless of their lives, undismayed by any danger.

– Sunzi, *On the Art of War*, ca 4<sup>th</sup> Century C.E.<sup>41</sup>

If the leaders behaved correctly, it was the understanding that the citizens would do likewise. Law was in this sense something negative, while if the ruler had to rely on law he was not performing well enough.<sup>42</sup> That rites would be able to reach beyond the law was however utopian.<sup>43</sup>

## 2. 221 B.C.E.–1898 C.E.

As the Zhou Dynasty lost its Mandate of Heaven in 221 B.C.E., the Qin Dynasty (221–207 B.C.E.) took over with its law, as mentioned above the first recovered code in China. Qin is the era known for the Legalist school of thought, which will be dealt with in the next Sub-Section. The Duke of Qin is even known for having rendered a verdict against the King.<sup>44</sup> The Han Dynasty (206 B.C.E.–220 C.E.) replaced the Qin. It is likely that many laws from the Qin were adopted by the new Dynasty. Even though the Han Dynasty traditionally is said to be a Confucian era, with the heritage of the Qin legalism the influence of the legalist school of thought was considerable.<sup>45</sup> As the Han Dynasty came to a close it was replaced in terms of legal development by less noteworthy dynasties.

In the 6<sup>th</sup> Century however, the Tang Dynasty (618–907) replaced the Sui. The Great Tang Code drew on the laws of its predecessors and served as the

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<sup>38</sup> *Id.*, p. 347.

<sup>39</sup> *Id.*, pp. 342, 348–349; see also Benjamin I. SCHWARTZ, 1985, pp. 321–323.

<sup>40</sup> Brian E. McKNIGHT, 1992, p. 6.

<sup>41</sup> SUNZI, 1971, p. 2.

<sup>42</sup> Yongping LIU, 1998, p. 97.

<sup>43</sup> Herrlee Glessner CREEL, 1980, p. 38–40.

<sup>44</sup> *Id.*, p. 40.

<sup>45</sup> Yongping LIU, 1998, p. 263, 252.

core for all subsequent imperial dynasties as well as for the neighboring countries Japan, Korea, and Vietnam.<sup>46</sup>

All cases of criticizing the emperor where the circumstances are completely reprehensible are punished by decapitation.<sup>47</sup>

– *Article 122.1 a of the Tang Code*

At first glance this example of an article from the Tang Code may seem representative of a suppressive regime and it is possible that it at times has been used in that way. When the official Commentary and the Subcommentary is consulted however, the article appears in a different light. This Commentary first clarifies that those that discuss the deficiencies of government affairs involving the Emperor, for example criticizing a law, can send a petition. The Subcommentary provides further details saying that “completely reprehensible” requires that both the original circumstance and the principle on which it is criticized are completely reprehensible.<sup>48</sup>

The law continued to develop through the various dynasties and was influenced by external sources such as during the Mongol-lead Dynasty of Yuan (1279–1368) and the Manchu-lead Qing (1644–1911). The reputation of Chinese law grew and neighboring states were increasingly interested in the development.<sup>49</sup> Many of the main institutions characterizing a modern state existed in China before Europe, such as law, as opposed to custom.<sup>50</sup> Contrary to typical conception, this brief *exposé* of Chinese legal history highlights an early and continuous existence of law and its development. A number of other potential misconceptions on Chinese law remain and will be elaborated below.<sup>51</sup>

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<sup>46</sup> Wm. T deBARY, 1995, pp. 13–14; on the Tang Code, see e.g. Wallace JOHNSON, 1979; Wallace JOHNSON, 1997.

<sup>47</sup> Wallace JOHNSON, 1997, p. 92.

<sup>48</sup> *Id.*, p. 92.

<sup>49</sup> The Qing Code was e.g. copied for use in Annam, a precursor to present day Vietnam, and became known there as the Gia-Long Penal Code (1812), see Van Truong PHAN, 1922, p. 5, see also pp. 10–16 with interesting comments on the incoherence of the Chinese penal code at that stage; In the last of the imperial dynasties, the Qing (1644–1911), it is estimated that 30–40 per cent of the Tang Code was still in use, Thomas CHIU et al, 1991, p. 7.

<sup>50</sup> Karl BÜNGER, 1985, p. xv–xvi.

<sup>51</sup> For a good summary of stereotypical positions on law, see e.g. John K. FAIRBANK, 1992, pp. 183–186 on Qing law.

## B. Dispelling Confusion: *Confucianism v. Legalism*

Lead the people by laws and regulate them by penalties, and the people will try to keep out of jail, but will have no sense of shame. Lead the people by virtue and retrain them by rules of decorum, and the people will have a sense of shame, and moreover will become good.<sup>52</sup>

– Confucius

Confucius advocated an idealized statesmanship from the past where rites and morals should provide continuity and stability.<sup>53</sup> The model picture prescribes that the Confucian ruler led by example in correct and virtuous living and the legalists argued for a powerful, rigorous impartial application of the law.<sup>54</sup> The Confucian model with morality dominating over law, the ritual over legal systems and the domination of the familial over the impersonal model of society “has so deeply influenced our understanding of law in China that attempts to escape Western paradigms at times fall back on the Confucian grand theory”.<sup>55</sup>

In the previous Chapter, I discussed Confucianism and the stereotypes connected with the concept. Even contemporary commentators commonly emphasize the collectivistic nature of China and the use of moral rule, as opposed to law, as the fundamental aspects of Chinese history and society even of today.<sup>56</sup> Confucianism has even been described by one European lawyer practicing in China as one of the most efficient obstacles for China’s legal

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<sup>52</sup> THE ANALECTS, II:3, quoted in Wm. T deBARY, 1995, p. 34.

<sup>53</sup> Alf HENRIKSSON and Tru HWANH (Eds.), 1997, p. 147.

<sup>54</sup> Geoffrey MacCORMACK, 1985, p. 334; see also Wm. T deBARY, 1995, p. 21, on the discussion related to ZHU Xi (11<sup>th</sup> Century).

<sup>55</sup> Karen TURNER, 1992, p. 14; she also has a footnote to William P. ALFORD, 1986; see also Shigeo NAKAMURA, 2004, questioning the stereotype of Chinese law as a mere model without actual impact. Nakamura argues that from the early 20<sup>th</sup> Century Japanese comments on the Chinese legal system in this regard influenced European researchers who exaggerated further, and even mistranslated passages that further stressed the stereotypes before these faulty conclusions on Chinese law were again presented in Europe and Asia.

<sup>56</sup> In addition to the examples given in the preceeding Chapter, see e.g. Chunying XIN, 1999, p. 312; interestingly enough she is quoting an English language source by a non-Chinese in support of this claim; see also H. Patrick GLENN, 2000; Stanley LUBMAN, 1999, e.g. pp. 19 *et seq*; see also Daphne HUANG, 1998, pp. 186–187; Jacques deLISLE, 2001, p. 22, talking about a traditional Confucian disesteem for law; , Michael BOGDAN, 1985, p. 455; Cecilia HÅKANSSON, 1999, pp. 16 *et seq*.

development.<sup>57</sup> On the contrary, Confucianism did not simply advocate morality, there were also elements of law. A famous quote from Confucius reads: “As judge in disputes am I not better than anyone else. What is necessary is to discourage the people from legal disputes.”<sup>58</sup> And Mencius, Confucius’ disciple, said that “virtue alone is insufficient for ruling; the laws cannot carry themselves into practice”.<sup>59</sup> When asked about state governance, Confucius said: “If a ruler himself is upright, all will go well without orders. But if he himself is not upright, even though he gives order they will not be obeyed.”<sup>60</sup> The *Analects*, the Confucian classics, states that “[o]ur Master’s teaching is simply this: loyalty and reciprocity”.<sup>61</sup> Confucius is therefore more likely to have emphasized the rites and the moral as a way to provide role models in addition to law, not instead of law.

Alford calls for research into the legalization of Confucianism, not only the Confucianization of laws.<sup>62</sup> In the classic *Book of Changes* (*I Ching*) that contains the common roots for Confucianism and Taoism, justice is described as the means for restraining men from wrongdoing by regulation of good and by rectification of judgments.<sup>63</sup> In Chinese history, relatively small amounts were ever written on law in China while the historical records were kept by the literate elite, for whom morals were to be seen as the driving force of the society.<sup>64</sup> The domination of references to Confucianism, heavily promoted by the state, has obscured the discussions of other forms of government more focused on law and less kin-based conceptions of state. There is therefore a danger of over-simplification and over-generalization in describing China as monolithic and Confucian.<sup>65</sup> Confucianism is moreover a very elastic concept and can be interpreted in many ways.<sup>66</sup> Confucianism is also quite politicized so that to understand the position of Confucianism in history as well as the contemporary it is important to realize the underlying politics that determined what parts have been reinforced and reconfigured through various processes.<sup>67</sup> Later interpreters of Confucianism such as the Neo-Confucian HUANG Zongxi of the seventeenth Century argued for rule of law that would bind and provide for a counter power to match an arbitrary ruler.<sup>68</sup>

<sup>57</sup> Thomas LAGERQVIST, 1995, p. 304.

<sup>58</sup> Alf HENRIKSSON and Tru HWANH (Eds.), 1997, p. 80, (my translation).

<sup>59</sup> Quoted in Benjamin I. SCHWARTZ, 1985, pp. 322–323.

<sup>60</sup> THE ANALECTS, XIII:6, quoted in Wm. T deBARY, 1995, p. 34.

<sup>61</sup> THE ANALECTS IV:15, quoted in Wm. T deBARY, 1995, p. 27.

<sup>62</sup> William P. ALFORD, 2000, p. 49.

<sup>63</sup> THE I CHING OR BOOK OF CHANGES, 1967, p. 328.

<sup>64</sup> Brian E. McKNIGHT, 1992, pp. 2–3, and through out the book.

<sup>65</sup> Jianfu CHEN, 1999, p. 4; see also Yongping LIU, 1998, pp. 9–10.

<sup>66</sup> Chaihark HAHM, 2003, p. 254.

<sup>67</sup> *Id.*, p 258

<sup>68</sup> Wm. T deBARY, 1995, pp. 22–23, HUANG Zongxi was used in the late 19<sup>th</sup> Century to link China and the Western world, p. 32; Professor Joseph Chan has

The Legalists was the major contending school to Confucianism and the battle was in its essence concerned with whether society should be governed by unwritten rules of proper behavior or by written law.<sup>69</sup> During the sixth to third centuries B.C.E. the legalists dominated the discourse.<sup>70</sup> Confucianism has thereafter been taken as the leading school of thought with only minor influence from the Legalists.<sup>71</sup> According to recent research the Legalist school is understood to have been much more influential on the Confucianism than is frequently argued.<sup>72</sup> Influential Legalist statesmen elaborated on their school of thought, the reformist SHANG Yang for example, argued that good governance

consists in neither following the past nor trying to be fashionable, but in adapting measure to present conditions. In making laws consideration should be given to public opinion and general usage, and, in ruling a State, all measures should be devised to meet the demands and interests of time.<sup>73</sup>

Also the Legalist Han Feizi stated that the intelligent ruler would restrain his magistrates with laws and use measures to correct their errors.<sup>74</sup> There were also other schools shaping Chinese law apart from the Confucian and the Legalists.<sup>75</sup> With the Moist school for one, Master Mo<sup>76</sup> stressed that the strong were not to oppress the weak.<sup>77</sup>

In contradistinction to the Legalists' legal emphasis, Confucians did not emphasize law but seen as whole they were indeed relying on law.<sup>78</sup> The issue was not so much of law or morals, but a combination of the two. Confucians and the Legalists should rather be seen as carrot and stick and aspects of both were and are needed. Not even the Legalists believed that law alone would suffice.<sup>79</sup> Even the relatively harsh punishments ascribed in the Chinese system is said to be the result of Confucianism to the same extent as the Legalism.<sup>80</sup>

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elaborated on how Confucianism is compatible with universal human rights, Joseph CHAN, 1999.

<sup>69</sup> John W. HEAD, 2003, p. 11; see also the forthcoming HEAD, 2004.

<sup>70</sup> John W. HEAD, 2003, pp. 11–12.

<sup>71</sup> On the Legalists, see e.g. Benjamin I. SCHWARTZ, 1985, pp. 321 *et seq*; see also Bertil LUNDAHL, 1992, pp. 21 *et seq*; Edward L. FARMER, 1995, p. 17.

<sup>72</sup> Yongping LIU, 1998, pp. 325 *et seq*.

<sup>73</sup> Chu CHENG, 1947, p. 10.

<sup>74</sup> Karen TURNER, 1992, pp. 29–30.

<sup>75</sup> Yongping LIU, 1998, p. 320.

<sup>76</sup> Also transliterated as MO Tzu, MO Ti, MO Tsu, MO Zi; he lived between Confucius and Mencius in the later half of the 5<sup>th</sup> Century B.C.E.

<sup>77</sup> MO TZU: BASIC WRITINGS, 1963, p. 82.

<sup>78</sup> See e.g. Eric W. ORTS, 2001, p. 52.

<sup>79</sup> Karen TURNER, 1992, p. 21.

<sup>80</sup> Eric W. ORTS, 2001, p. 55.

The individual magistrates in imperial China, which will be dealt with in more detail further below, were mandated to adjudicate on the local level. There were typically two kinds of administrators in a court: those trained in drafting indictments and the scholars of Confucian classics. These two groups handed down verdicts differently in that the former relied on the law and the latter according to moral principles.<sup>81</sup> However, the Confucian principles might have been used to make the decisions more ‘advanced’ but without necessarily changing the outcome of the ruling; the principles are likely to have been used more for lacunas than for areas covered by law.<sup>82</sup> At times it was popular for judges to refer to Confucian classics in the verdicts but underlying these arguments was law.<sup>83</sup> As the Confucian literati started to dominate court affairs, the Confucian classics came to function as sources of solutions in difficult cases.<sup>84</sup> During the Sui and Tang dynasties, the legal codes were moreover increasingly Confucianized.<sup>85</sup> The extent to which Confucianism affected the imperial government is altogether a matter of dispute.<sup>86</sup>

Peerenboom questions the influence ascribed to Confucianism as regards the magistrates. Judges everywhere make moral considerations and most commonly the legal principles applied are consistent with the morals of the community. It is therefore impossible to prove that judges were relying on moral principles rather than law even though the judges were not making references to laws and were indeed formally trained in the classics of Confucianism, Peerenboom holds.<sup>87</sup> He continues stating that Confucianism was also more practical than its limited perception as a philosophy of a religious nature. The purpose was largely to buy allegiance of the elite through filial piety and subservience to authority.<sup>88</sup> Confucian values are plainly according to Peerenboom, the importance of the family, the emphasis on education and hard work, meritocratic advancement and a commitment to public service.<sup>89</sup> Values that do not seem exotic in the contemporary world and even commonly and loudly proffered values in for example party politics.

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<sup>81</sup> Yongping LIU, 1998, pp. 288–289.

<sup>82</sup> *Id.*, pp. 290–291.

<sup>83</sup> Huanyue GAO, 1996 (b), p. 94; referring to the Han Dynasty.

<sup>84</sup> Karen TURNER, 1992, p. 35.

<sup>85</sup> Huanyue GAO, 1996 (b), p. 96.

<sup>86</sup> Eric W. ORTS, 2001, p. 55.

<sup>87</sup> Randall PEERENBOOM, 2003 (a), pp. 50–51.

<sup>88</sup> *Id.*, pp. 51–52; he also holds that it is probably the case that religion only had a minimal impact on law in China.

<sup>89</sup> *Id.*, p. 54.

*Legitimized Inequalities?*

One specific perception of Confucianism is its inegalitarian nature. The Confucian school had three cardinal principles: the ruler over the subject, the father over the son, and the husband over the wife. The hierarchy of unequals that flows from these principles is according to Professor XIN Chunying, an example of the vertical nature of the Chinese legal development as opposed to the Western horizontal approach with equal status between individual and the state and with a constitution that regulates the relationship.<sup>90</sup> With the filial piety for instance and the unequal distribution of rights and duties that exist in such relationships, mainly rights of the father and duties of the son, the school of thought appears to be rather inegalitarian. There were also differences in the degree of punishments, for instance, severe punishment for a son killing his father but much less for the reverse crime.<sup>91</sup> This can, at least to some extent, be mitigated by the fact that in the Chinese history the laws were often used as guidelines only, not to be thoroughly implemented because of the perception of being far too brutal and strict.<sup>92</sup> Chan argues moreover that filial piety was second to the principle of benevolence, which would trump filial piety when unequal or unrealistic demands were placed on the child. Chan supports his argument by relying on authoritative translations of the Confucian classics.<sup>93</sup>

Confucianism is also said to treat the responsibility towards the family in a unique way. Since the Han Dynasty some 2,000 years ago, and in all consecutive dynasties Chinese law has treated concealment of relatives suspected for criminal offences less severely than of other suspects.<sup>94</sup>

Those who according to law are allowed mutual concealment, or are eighty years of age or more, ten years of age or less, or are incapacitated, cannot be called as witnesses.<sup>95</sup>

– *Article 474.2, The Tang Code*

This feature is also found in countries that have drawn on the Chinese tradition such as for example Korea. The Criminal Act of the Republic of Korea (South

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<sup>90</sup> *Id.*, p. 313.

<sup>91</sup> Derek BODDE and Clarence MORRIS, 1967, p. 37.

<sup>92</sup> Geoffrey MacCORMACK, 1996, pp. 48–49.

<sup>93</sup> Joseph CHAN, 1999, pp. 222–224.

<sup>94</sup> Yongping LIU, 1998, p. 97.

<sup>95</sup> Wallace JOHNSON, 1997, p. 544; Johnson in footnotes to the Article refers to Article 46 (in Wallace JOHNSON, 1979, p. 246) as to whom are legally allowed to mutual concealment and he also explains that by not being called as witness you could not be put under “judicial torture”; judicial torture was heavily regulated and would backlash on the accuser with the same means if the accused did not confess after the stipulated number and format of torture, see articles 476–478.

Korea) still contains the provisions to the same effect.<sup>96</sup> Even though not identical, European criminal statutes and practice show similar examples of less severe treatment for harboring or protection of fugitive family members.<sup>97</sup>

Another feature and one probably even more often used to show the inegalitarian nature of Confucianism is the dichotomy between the nobility and the common people where the commoners should be held in ignorance and be ruled by law, while the educated nobility should only be governed through morals and rites. Confucius did not talk in terms of upper and lower classes or about the division between rites and law but these references are believed ascribed to the Confucian apocrypha.<sup>98</sup> Conversely, Confucius claimed that the wealthy and powerful should exemplify moral conduct in order to enjoy the credibility of the people and thus be able to govern.<sup>99</sup> The words used for nobility and commoners (*junzi* and *xiaoren*) had actually meant those born into these groups but Confucius redefined them as an individual concept, and not inherited. In this way, the meaning of *junzi* came to change from nobility to something more like a gentleman, a good person, and *xiaoren* from commoner and plebian into a man lacking nobility in character.<sup>100</sup> A reading of a saying such as “the good person seeks to perfect the good qualities of others”<sup>101</sup> takes on a new meaning when the redefinition of Confucius is applied. Consider also the following quotation from the 4<sup>th</sup> Century B.C.E., on balancing law and discretion:

Laws cannot stand alone . . . for when they are implemented by  
the right person they survive but if neglected they disappear . . .  
Law is the basis of good government but the superior man [good

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<sup>96</sup> Chapter IX, article 151, section 2: “If a relative, head of the house, or a family living together with the said person commits the crime of the preceding paragraph [Section 1: harboring or aiding to escape of criminal] for the benefit of the criminal, he shall not be punishable.”; chapter IX, article 155, section 4: “If a crime such as destruction of evidence or harboring of witness is committed by a relative, head of the house, or a family living together with the said person for the benefit of the criminal, it shall not be punishable.”

<sup>97</sup> Under the Swedish system, in court, witnesses that are closely related to the accused are not to take the oath that would enable prosecution for perjury, since deliberate false testimony is not unexpected, *Rättegångsbalken* Ch. 36 §3 and 13, (*Brottsbalken* Ch. 15 §1); under German law the same provision exists (*Eidesverweigerungsrecht*, §63 StPO) and a relative can also refuse to testify where a relative is accused (*Zeugnisverweigerungsrecht*, §52 StPO).

<sup>98</sup> Herrlee Glessner CREEL, 1980, pp. 37–39; see also Geoffrey MacCORMACK, 1996, p. 113 on sumptuary laws.

<sup>99</sup> Herrlee Glessner CREEL, 1980, p. 38.

<sup>100</sup> *Id.*; see however the traditional interpretation of *junzi* in INSTITUTE OF LAW (Ed.), 2002, p. 44.

<sup>101</sup> *junzi chengren zhimei.*



person, a magistrate or a judge] is the basis of law. So when there is a superior man, the law even if sparse will cover any situation, but when there is no superior man, even if the laws are all-embracing, they will neither apply to all situations nor be flexible enough to respond to change.<sup>102</sup>

### C. Law and Litigation

It is often claimed that due to the Chinese culture and not the least due to the influence of the Confucianism, people do not want to resort to litigation, there has been no history of the rule of law, and the legal system is penal in nature. These three stereotypes will be addressed in the following.

#### 1. *Litigiousness*

A dominant prevailing school has it that Chinese prefer mediation and consensus to litigation.<sup>103</sup> The litigiousness ascribed to the Western world is counter-polar to the mediating East.<sup>104</sup> Professor LIU Hainian elaborates on the concept in the Chinese context but he refrains from making any claims that non-litigation is China-specific.<sup>105</sup> Some of Liu's colleagues at the Institute of Law of the Chinese Academy of Social Sciences, however, are developing the idea for publication that Confucianism was non-litigious and that this has influenced history and legal philosophy, even contemporarily.<sup>106</sup>

Recent scholarship calls into question the unwillingness to litigate in China. Professor Philip C.C. Huang has in his extensive research on in particular late imperial justice, been able to lay overt the civil aspects often omitted in much of the research.<sup>107</sup> Also Professor Kathryn Bernhardt has been influential in this regard.<sup>108</sup> By only looking at the codes, Huang holds that one can easily be misled to believe that the Chinese system was punitive, moralistic, and conciliatory. Contrarily, by looking at the case-law, it is clear that civil law and adjudication were strong, with a winner-take-all approach rather than

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<sup>102</sup> Xunzi, quoted by Karen TURNER, 1992, p. 19–20.

<sup>103</sup> Randall PEERENBOOM, 2003 (a), p. 53.

<sup>104</sup> Teemu RUSKOLA, 2002, p. 221.

<sup>105</sup> Hainian LIU, 2003.

<sup>106</sup> INSTITUTE OF LAW (Ed.), 2002, pp. 43–44; in support they are e.g. referring to an early twentieth Century court in Nanjing that had a scroll on one of the walls saying that the purpose of trial is to expect no litigation, p. 45.

<sup>107</sup> See e.g. Philip C. C. HUANG, 1996; Philip C. C. HUANG, 2001; see also Joseph CHAN, 1999, pp. 226–227.

<sup>108</sup> Kathryn BERNHARDT and Philip C. C. HUANG, 1994 (b), see e.g. p. 9.

conciliatory. This view moreover demonstrates that the system aimed not only at preserving harmony but also to effectively protect rights.<sup>109</sup>

As in other cultures, the litigation potential was higher than the courts were able and willing to handle so a number of procedural obstacles were put in place, many of which are very familiar to other societies of today.<sup>110</sup> While Chinese people were quite willing to engage in formal litigation, the civil dockets were always kept with a backlog, which served as a first obstacle to litigation.<sup>111</sup> Courts were also made to intimidate; they were “designed to impress upon people their own powerlessness”.<sup>112</sup> Ming and Qing (1368–1644, 1644–1911) even imposed fines on those who encouraged litigation and assisted in legal drafting.<sup>113</sup> The formal adjudication system was intended to revert minor disputes to the informal legal arenas of mediation by, for example, village elders.<sup>114</sup> This informal legal system was available also through the clans, villages and guilds, especially so when it came to contracts and property disputes.<sup>115</sup>

Huang demonstrates the ordinary and extensive ways in which the people used the courts and he also offers explanations as to why the negative picture of courts in China developed.<sup>116</sup> By drawing on magistrates’ accounts of their experiences; their monthly reports to their superiors; and annual county court registers, Huang provides a view of the Chinese courts that discards many old perceptions. Huang explains that a reason for many misleading conclusions has been the case-load of the courts.<sup>117</sup> There were as a mean about 150 new cases per year in a court in the second half of the Qing (the nineteenth Century) but not all of these were reported upwards in the hierarchy. Rather a few simple and straightforward cases were reported.<sup>118</sup> Huang notes that the litigation rate is then only about 1/40th of that in contemporary US but then again he notes, contemporary US courts also handle very trivial matters while China relies on other forms of complementary dispute settlement. Litigation costs were neither

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<sup>109</sup> Philip C. C. HUANG, 1994, pp. 179–180, 167 *et seq.*

<sup>110</sup> Martin M. SHAPIRO, 1981, p. 182.

<sup>111</sup> Melissa MACAULEY, 1998, pp. 14, 59, 61–69; see also e.g. Kathryn BERNHARDT and Philip C. C. HUANG, 1994 (a).

<sup>112</sup> Melissa MACAULEY, 1998, p. 339.

<sup>113</sup> Geoffrey MacCORMACK, 1990, p. 78, see also p. 82 on civil cases.

<sup>114</sup> Melissa MACAULEY, 1998, p. 3; see also James P. BRADY, 1982, pp. 38–39.

<sup>115</sup> Geoffrey MacCORMACK, 1990, p. 288; see also William C. JONES, 2003, p. on traditional law and supplementation of village elders and guild procedures in civil disputes.

<sup>116</sup> Philip C. C. HUANG, 1996, see in particular Chapter 7.

<sup>117</sup> *Id.*, pp. 173–175.

<sup>118</sup> *Id.*, pp. 175–178; one of the factors that have lead to the overemphasis on hard punishments is the many studies on appeal cases only, see Martin M. SHAPIRO, 1981, pp. 190–191.

abundantly high. Huang concludes that there is no doubt that formal law played a significant role in the lives of the majority of the people.<sup>119</sup>

The relatively low rates of litigation that are used to prove the non-litigiousness can be explained by rational choice or institutional arguments about litigation costs.<sup>120</sup> Korea is nowadays considered to be the most Confucianized country.<sup>121</sup> The alleged low rate of litigation in Korea or preference for informal dispute settlement can be traced to the influence on the legal development from Japan, a country that also had and maintains numerous litigation obstacles.<sup>122</sup> Japan in turn, is often ascribed to be a non-litigious society where the people would go to the extreme to stay clear from the courts. Increasingly research has shown that the Japanese would go to court as much as anyone else if it had not been for the procedural obstacles intended to divert referrals to courts.<sup>123</sup>

## 2. Rule of Law

A state can only be governed according to law. The law sets a standard for all. It is made to decide doubtful cases and to distinguish right from wrong. It is the very life of the people.<sup>124</sup>

– Chinese official, 6th Century B.C.E.

The rule of law is commonly not seen as part of the traditional Chinese legal culture. The clans and the families prevented the individualism that was needed for the development of rule of law in China, one author claims, and therefore China lacks a tradition in this respect.<sup>125</sup> A more nuanced approach suggests that a difference between Qing (1644–1911) China and Europe in the development at that period was the method of tax intake where China had a “tradition of limited administrative intrusion into local society”.<sup>126</sup> This, according to the latter source, is a reason for the Chinese judicial administration to have remained more “customary” as opposed to for example European counterparts.

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<sup>119</sup> Philip C. C. HUANG, 1996, pp. 180–181, 185; see also Melissa MACAULEY, 1998, pp. 5–6; David C. BUXBAUM, 1971, p. 270.

<sup>120</sup> Randall PEERENBOOM, 2003 (a), p. 50; on litigants choice, see also Philip C. C. HUANG, 1996, pp. 189 *et seq.*

<sup>121</sup> Chaihark HAHM, 2003, p. 257.

<sup>122</sup> *Id.*, p. 275, see also p. 279 on universal features rather than Confucian in this context.

<sup>123</sup> See e.g. J. Mark RAMSEYER, 1995, p. 135.

<sup>124</sup> CHENG Guan, quoted in Joseph D. H. LOWE, 1984, pp. 31–32.

<sup>125</sup> Qi ZHANG, 2002, pp. 20, 17, the author does however acknowledge to some extent some elements of rule of law.

<sup>126</sup> Melissa MACAULEY, 1998, pp. 10–11.

King Wu, who reined around 1100 B.C.E. in China, talked about just killings and just punishments and said that: “punishment should not be inflicted at the arbitrary whim of the ruler.”<sup>127</sup> Archaeological findings suggest that some fundamental parts of the rule of law preceded even the Legalists and were in existence already in the Warring States period (402–221 B.C.E.),<sup>128</sup> with scholars advocating rule of law.<sup>129</sup> A scholar living a couple of hundred years before the Warring States who was influential in the drafting of laws stated:<sup>130</sup>

A state can only be governed according to law. The law sets a standard for all. It is made to decide doubtful cases and to distinguish right from wrong. It is the very life of the people.

If a ruler governs a country without being learned in law and relying upon the text of laws, he will be heading for nowhere just as in the case of handwriting which is no sooner completed than rubbed away.

However skillful and excellent in craftsmanship one may be, one cannot dispense with a ruler and a compass in drawing squares and circles. Though the skilful artisan is capable of manufacturing rulers and compasses, yet he cannot draw squares and circles without them. Likewise, a sage king is capable of making good laws, but he cannot dispense with them while governing his country.<sup>131</sup>

Professor Karen Turner has studied elements of rule of law in the Qin and the Han dynasties (221 B.C.E.–220 C.E.). She stresses that the new materials available from archeological sites have altered the perceptions of the rule of law in early dynastic China and she argues that her interpretation challenges the “pervasive notion that law in China referred only to the coercive force of the state”.<sup>132</sup> Indeed they were authoritarian governments but they were not lawless or arbitrary in their use of power.<sup>133</sup>

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<sup>127</sup> Geoffrey MacCORMACK, 1985, pp. 337, 339–340, King Wu also outlawed wine-drinking, p. 340; reasonableness in punishment was an issue already for Emperor Wendi of the Han Dynasty, who in 167 B.C.E. is said to have abolished corporal punishment that could not heal (e.g. tattooing, taking of limbs) and successors further limited brutal punishment; Huanyue GAO, 1996 (a), p. 87; in rougher periods later on, some of the abolished forms of punishment were reintroduced however, p. 88.

<sup>128</sup> Eric W. ORTS, 2001, p. 55.

<sup>129</sup> Joseph D. H. LOWE, 1984, pp. 34–38.

<sup>130</sup> *Id.*, pp. 31–32.

<sup>131</sup> Chu CHENG, 1947, p. 8.

<sup>132</sup> Karen TURNER, 1992, p. 13.

<sup>133</sup> *Id.*, p. 2.

The material excavated (*Mwangdui* and *Shuihudi*) in the middle 1970s was not seriously analyzed until after the Cultural Revolution in the early 1980s.<sup>134</sup> The new material shows that legal thinking was not limited to the early Legalist period. There was a commonly recognized fund of principles including the subordination of the rulers to the law was discussed in the early Chinese history as well as a number of detailed issues related to the rule of law:

clear laws, consistent punishment, official accountability, fixed practices for making and changing the laws, and for formulating strict procedures for investigating and deciding proper sentences for behavior defined as criminal.<sup>135</sup>

Controversy over the legitimacy of official law has been a common phenomena and Turner draws a number of parallels between thinkers in China and ancient Europe in this regard.<sup>136</sup> In ruling the country and in law-making, the *dao* ('the way') was essential, it served as a "timeless, universal, impartial standard and the law that it generated as a reliable guide for the hard decisions that fall to any ruler . . .".<sup>137</sup> Turner is paralleling this with the Stoic school, for example Cicero.<sup>138</sup> The *dao* cautioned rulers who were issuing punishments that if they were inappropriate it would bring calamity upon the ruler himself.<sup>139</sup> But at times Chinese thinkers "seem to have been even more aware than their Greek and Roman counterparts of the implications of unbridled human intervention in government".<sup>140</sup> The issue in the early Han (206 B.C.E.–220 C.E.) period was not whether to use laws in governing the country but rather how to maintain clarity and consistency so that rule of law could be achieved and personal influence be minimized.<sup>141</sup>

In conclusion Turner finds that in the 3<sup>rd</sup> and 2<sup>nd</sup> Century B.C.E., Chinese thinkers articulated some fundamental components of the rule of law: that the ruler should abide by the law, that laws are more universal and general than commands, that law should be measured against transcendent norms, that laws should be clear, based on natural principles, publicly announced and should not be changed by history nor man.<sup>142</sup> These components, developed over 2,000 years ago, correspond to many of the requirements of the rule of law. Attempts

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<sup>134</sup> *Id.*, p. 8; in the later years of the Cultural Revolution, deschiffing the texts was commenced by e.g. Professor Liu Hainian, discussion with Liu 16 December 2003.

<sup>135</sup> Karen TURNER, 1992, p. 15.

<sup>136</sup> *Id.*, e.g. p. 17.

<sup>137</sup> *Id.*, pp. 23–24, as expressed in Jingfa.

<sup>138</sup> *Id.*, p. 25.

<sup>139</sup> *Id.*, p. 28, see also the statements by Emperor Wen at p. 28, and the Han philosopher Ji Yi at p. 29, to the same effect.

<sup>140</sup> *Id.*, p. 15.

<sup>141</sup> *Id.*, p. 21.

<sup>142</sup> *Id.*, p. 26.

at definitions of the rule of law, such as Peerenboom's discussion of 'thin' and 'thick' theories of rule of law generally and in the Chinese context is a good reference. The elements according to Peerenboom for a 'thin' theory, emphasizing the formal aspects of the rule of law rather than a broader view including also political aspects, is constituted of the following elements: procedural law-making, transparency, general applicability, clarity, prospectivity, consistency, stability, fairness in application, enforcement of the laws, and reasonably accepted laws.<sup>143</sup> As Turner argued, many of these components were in place early in the Chinese history. As will be elaborated upon in the next section, additional components of the rule of law developed during the course of the centuries in China. Based on a 'thin' theory of rule of law, most of these components can be inferred in the historical development in China.

### 3. *Civil Law*

It is often claimed that China's legal history involves only penal law and criminal sanctions.<sup>144</sup> XIN writes about the non-distinction between civil and criminal law in the Chinese legal history and describes the focus on punishment. She goes on to elaborate on the character for law in the Chinese language that early on meant punishment.<sup>145</sup> Recent scholarship has argued that the distinctions between the characters used for law; *fa* (法) and *xing*, law and punishment, should not be overemphasized.<sup>146</sup> Similarly, arguments are also made that there was no distinction between civil and criminal law until the twentieth Century.<sup>147</sup> It is even claimed that China completely lacked civil law.<sup>148</sup>

Marriage, land, and debts however were common matters of dispute and settlement, as early as in the Warring States period (475–221 B.C.E.), personal behavior, property, debts, weddings, and inheritance were disputed issues.<sup>149</sup> The Qing Code contained numerous civil law provisions, as did also the laws of previous dynasties.<sup>150</sup> Professor David Buxbaum provided further elaborations on the existence of civil law in the nineteenth Century China, with

<sup>143</sup> Randall PEERENBOOM, 2002, pp. 65, 3.

<sup>144</sup> See e.g. Teemu RUSKOLA, 2002, p. 182; and also Philip C. C. HUANG, 1996, p. 76; and as an example of the emphasis on penal law, the highly influential Derek BODDE and Clarence MORRIS, 1967; see also Phillip M. CHEN, 1973, p. 11.

<sup>145</sup> Chunying XIN, 1999, p. 313.

<sup>146</sup> Brian E. McKNIGHT, 1992, p. 6; see also the discussion on *fa* and *xing* above.

<sup>147</sup> See e.g. Jianfu CHEN, 1999, pp. 20–21; on the existence of administrative law in the Chinese history, see e.g. Karin BUHMANN, 2001

<sup>148</sup> As suggested by Huanyue GAO, 1997 (d), p. 90.

<sup>149</sup> *Id.*, p. 90.

<sup>150</sup> Philip C. C. HUANG, 1996, pp. 21 *et seq.*

some 20 per cent of the reported cases being concerned with civil matters, 30 per cent with criminal and 50 per cent administrative.<sup>151</sup> Buxbaum also refutes the claims by Cohen that civil cases were handled as criminal, and only when the case was purely concerned with civil matters was it handled as a civil case. Another contradiction involves the claim that one of the litigants was always punished; this was not so in civil cases or minor criminal cases.<sup>152</sup>

## D. Judicial Independence

The Chinese imperial history demonstrates that rulers aimed at assuring fair trials; judicial independence and separation of powers was part of the scheme to realize these aspirations. Throughout China's history there have been intricate systems of separation of powers with mutual supervision mandates but also with special supervisory institutions, highly elaborate systems of appeals, and even judicial independence.<sup>153</sup> A credible adjudication system is dependent on control mechanisms of various kinds to check and counter balance the adjudicative power, and additionally, legal procedures including the possibility to appeal support such a system, as does qualified unbiased judges. In the following the discussion will center on legal institutions and process aimed at providing credible adjudication such as restraining powers, the qualifications and position of the magistrate, and procedures, including possibilities of appeal.<sup>154</sup>

### 1. Restraining Powers and Independence

Commentators claim that there was no separation of powers and no independence of the judiciary in China.<sup>155</sup> On the local magistrate's level, which I will return to below, there was an absence of strict separation of powers, but the judicial system as a whole had a number of features akin to

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<sup>151</sup> David C. BUXBAUM, 1971, p. 264.

<sup>152</sup> *Id.*, pp. 267–268.

<sup>153</sup> See e.g. William P. ALFORD, 1984, p. 1193; note also that in the Roman system, separation of powers was accomplished through concurrent powers of several magistrates, Max WEBER, 1954, p. 94.

<sup>154</sup> See generally on such checks William P. ALFORD, 1984, pp. 1127–1128; and pp. 1129 *et seq* on how these actually worked.

<sup>155</sup> See e.g. Derek BODDE and Clarence MORRIS, 1967, p. 113; Larry SMEETS, 1992; Marie Seong-Hak KIM, 1996, p. 19; Xin REN, 1997, pp. 54–55; Shoudong ZHANG, 2002, p. 75; William C. JONES, 2003, p. 9; Chongyi FAN (Ed.), 2003, p. 460; or no separate judicial function: Huanyue GAO, 1997 (a), p. 99; Geoffrey MacCORMACK, 1990, p. 72; Yongping LIU, 1998, p. 257; Fen WANG and Zhengju CHENG (Eds.), 2002, pp. 20 *et seq*.

separation of powers.<sup>156</sup> In early China however, as in classical West, there were no indications of separation of powers between adjudicative and executive functions.<sup>157</sup> As the Chinese society moved from clan gatherings aimed at revenge, to disinterested tribunals,<sup>158</sup> and as the dynasties developed the legal system with separation of powers and an independent judicial institution took shape.

In Europe, Sophocles but also Locke and to some extent even Rousseau viewed heaven as the last appellate level.<sup>159</sup> In China, heaven was also seen as the ultimate arbitrator and provider of justice. Similar to the Kings in Europe, the Emperor of China was the supreme judicial authority.<sup>160</sup> From the Zhou Dynasty (1100–221 B.C.E.) there are records of having official judges opposed to the ruler himself; such judges are believed to have been in charge of the conquered people of Shang, not the people of Zhou.<sup>161</sup> From this period there are no indications of professional judges but that they were nonetheless of a higher social status than others and were thus able to adjudicate accordingly.<sup>162</sup> In Qin (221–207), only the magistrate and his deputy had the right to order arrests and interrogations of suspects as well as to sit on trials, and probably only the judge was able to pronounce guilt.<sup>163</sup> Under the ruler they managed the ever-growing administration required for the expanding territory as China evolved over the centuries. The way in which the administration was organized and controlled shifted between dynasties but to a large extent it was fairly consistent. Already in the Han Dynasty (around 200 B.C.E.) an elaborate inspection system developed where higher levels of the administration checked the lower through regular visits and assessments.<sup>164</sup>

The standard structure through out the Chinese dynasties was an administration with a number of boards (*bu*), ministries or agencies. These boards were designed to mutually supervise each other with a partially overlapping mandate.<sup>165</sup> From the 14<sup>th</sup> Century (during the early Ming) and onwards, but also at some earlier stages such as during Tang, there were six

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<sup>156</sup> Still the non-separation at the lowest level is often used to describe the whole system, see e.g. Daniel C. K. CHOW, 2003, pp. 50–53.

<sup>157</sup> Karen TURNER, 1992, pp. 8, 33–34.

<sup>158</sup> John H. WIGMORE, 1941, pp. 733–736; Noteworthy is in this context also the etymological origin of tribunal that Wigmore highlights: tribe.

<sup>159</sup> M. Giorgio del VECCHIO, 1953, pp. 158, 164–165.

<sup>160</sup> Yongping LIU, 1998, p. 296.

<sup>161</sup> *Id.*, pp. 122–123.

<sup>162</sup> *Id.*, p. 127.

<sup>163</sup> *Id.*, pp. 210–211.

<sup>164</sup> The institutions were known as *tingwei* and *luqiu* respectively; Shoudong ZHANG, 2002, p. 78.

<sup>165</sup> Wm. T deBARY, 1995, pp. 17–18; see also Derek BODDE and Clarence MORRIS, 1967, p. 120.



such boards: personnel/civil (*li*), revenue/population (*hu*), rites (*li*), war (*bing*), works/engineering (*gong*) and punishment/justice (*xing*).<sup>166</sup> A few of the boards need some clarification. The Board of Rites was in charge of supervising the examination system used for entering the bureaucracy but also for festivals and government sponsored schools. The Board of Works dealt with ‘public works’: construction and irrigation but also salt since it was a critical commodity. The Board of Punishment was the branch mainly in charge of adjudication.<sup>167</sup> The Commandant of Justice – or the minister of the Board of Punishment – held a strong position and was mandated to create legal precedence. In rare cases the Commandant could even over-rule the Emperor’s position on legal issues. One such Commandant stated that his position was that of balancing the empire: “To allow even one deviation in the laws would cause them to no longer be taken seriously.”<sup>168</sup>

A seventh board was later added, called the Censorate.<sup>169</sup> The purpose of the Censorate was to investigate wrongdoing and corruption in the other boards as well as by the Emperor.<sup>170</sup> The Censorate supervision took three forms: they were obliged to investigate and report wrongdoing, to perform an annual review through circuit (*dao*) intendants (*daotai*), and to make an independent scrutiny of the system as a whole.<sup>171</sup> In today’s debate, some argue that the Censorate would to some extent have the function of a constitutional review institution.<sup>172</sup> Intendants were appointed, with the mandate to oversee the correct implementation of law and assure good criminal investigations through reviewing decisions, suggest promotions and demotions, and even to adjudicate certain kinds of cases.<sup>173</sup>

In the Song (960–1279) and Ming (1368–1644) dynasties, administration was increasingly centralized and in early Ming a system (*lijia*) was put in place that was intended to strengthen the central power but which also gave power to the people in enabling them to by-pass the local bureaucracy and seek redress at a higher level.<sup>174</sup> The Song also saw a further specialization of the various

<sup>166</sup> Derek BODDE and Clarence MORRIS, 1967, p. 122; June TEUFEL DREYER, 1996, p. 30; the six were said to correspond to heaven and earth and the four seasons, Huanyue GAO, 1997 (b), p. 98.

<sup>167</sup> For details, see e.g. Derek BODDE and Clarence MORRIS, 1967, pp. 122–131.

<sup>168</sup> Karen TURNER, 1992, pp. 33–34.

<sup>169</sup> Used in Tang and Ming and subsequent dynasties, named *Duchayuan*, sometimes referred to as *Yushitai*; Meiji Japan borrowed the institution of the Censorate from China in 1869, Paul Heng-chao CH’EN, 1981, p. 53.

<sup>170</sup> June TEUFEL DREYER, 1996, p. 30; Derek BODDE and Clarence MORRIS, 1967, p. 121.

<sup>171</sup> William P. ALFORD, 1984, p. 1128.

<sup>172</sup> Qi ZHANG, 2002, p. 23.

<sup>173</sup> Huanyue GAO, 1997 (a), p. 100; there were also e.g. coroners with similar tasks; Brian E. McKNIGHT, 1992, p. 234.

<sup>174</sup> John R. WATT, 1972, pp. 107 *et seq.*, 114–115.

tasks within the administration of justice.<sup>175</sup> These several types of Intendants with differing functions such as military, fiscal and judicial had overlapping jurisdiction as a system of checks and balances.<sup>176</sup> The Song Dynasty moreover recognized in particular the necessity of law and the judicial officials became the most important in the system of intendants.<sup>177</sup> During Song the circuit system with inspectors was also firmly established and increased to 15 from the 13 of the Han, and later to 23 circuits.<sup>178</sup> The circuits later developed into provinces.<sup>179</sup>

With the Yuan Dynasty (1279–1368), the supervision system was further refined. Yuan was the first foreign-dominated regime in China with the Mongols having invaded the country under Khubilai Khan.<sup>180</sup> With the clear mixtures of legal traditions that now occurred, elaborate systems of dispute settlement developed that could cope with the conflicting legal principles and a corresponding choice-of-law system was applied when foreigners were involved.<sup>181</sup> Legal education and popular dissemination of law improved and legal professionalism was strengthened.<sup>182</sup> A more effective system of checks and balances developed and the delegation of judicial powers was made clearer than in the previous dynasties.<sup>183</sup> Throughout the Yuan Dynasty a three-tier system of administration was used: the prefecture; the intermediate or provincial; and the central or imperial level. In the subsequent dynasties, the Ming and Qing, an additional, fourth level was developed, adding districts below the prefectures.<sup>184</sup> Ming (1368–1644) also had four levels of courts: district (*xian*), sub-prefectural/departments (*ting/zhou*), prefectural (*fu*) and at the top was the Board of Punishments.<sup>185</sup> Each province typically had a Governor (*xunfu*) and sometimes a Governor-General (*zongdu*) that was in charge of two provinces.<sup>186</sup>

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<sup>175</sup> Ichisada MIYAZAKI, 1980, p. 61.

<sup>176</sup> Brian E. McKNIGHT, 1992, p. 232.

<sup>177</sup> *Id.*, pp. 21, 233.

<sup>178</sup> Brian E. McKNIGHT, 1992, pp. 230–231; see also Derek BODDE and Clarence MORRIS, 1967, p. 121.

<sup>179</sup> Brian E. McKNIGHT and James T. C. LIU (Eds.), 1999, p. 17; the Prefecture (*zhou* or *fu*) originated from commanderies in new areas from third Century B.C.E., Brian E. McKNIGHT, 1992, p. 230.

<sup>180</sup> The grandson of Chinggis Khan, John K. FAIRBANK, 1992, pp. 119–121.

<sup>181</sup> Paul Heng-chao CH'EN, 1979, pp. 69, 80–88.

<sup>182</sup> *Id.*, pp. 69–70, 88–98.

<sup>183</sup> *Id.*, pp. 74, 79.

<sup>184</sup> Geoffrey MacCORMACK, 1990, pp. 75–76; Derek BODDE and Clarence MORRIS, 1967, p. 114: there were some 1,300 districts, 150 departments, 180 prefectures and 18 provinces.

<sup>185</sup> Geoffrey MacCORMACK, 1990, p. 76.

<sup>186</sup> Derek BODDE and Clarence MORRIS, 1967, p. 114.

For the last of the imperial dynasties, Qing (1644–1911), detailed accounts of the system are available.<sup>187</sup> Each province out of the roughly 22, was typically run by a Governor. Two to three provinces were often grouped together under a Governor-General. Each province had a Judicial Commissioner ((*tixing*) *ancha shi*), trained in law.<sup>188</sup> The Judicial Commissioners were among the three to four most powerful persons in the province, subordinate to the Governor-General, but the Commissioner's first responsibility however was still to the Board of Punishments in the capital, leaving him with great autonomy.<sup>189</sup> In purely civil disputes however, the cases were handed over from a Judicial Commissioner to the Financial Commissioner (*bucheng si*) that operated under the Board of Revenue.<sup>190</sup>

Provinces were subdivided into Prefectures and these were in turn divided into divisions or counties. Correspondingly, under the Provincial Judge there was what was called Residing Intendant under which fell the Prefect and below that the district or county magistrate.<sup>191</sup> During Qing there were about 1,300 local districts and each magistrate rarely had less than 200,000 inhabitants within the jurisdiction.<sup>192</sup> The district-level was typically as far down as the bureaucracy reached.<sup>193</sup> Magistrates (*zhi*) could be based at, in addition to the county level (*xian*: *zhixian*), the (sub-) prefecture level (*fu/zhou*: *zhifu/zhizhou*).<sup>194</sup>

## 2. The Magistrate Judge

The district magistrates are the ones most commonly discussed when it comes to the Chinese traditional administration.<sup>195</sup> They embodied all roles of the state

<sup>187</sup> See e.g. T'ung tsu CHÜ, 1962.

<sup>188</sup> Geoffrey MacCORMACK, 1990, p. 79.

<sup>189</sup> Derek BODDE and Clarence MORRIS, 1967, p. 115; Martin M. SHAPIRO, 1981, pp. 173–174.

<sup>190</sup> Derek BODDE and Clarence MORRIS, 1967, p. 119.

<sup>191</sup> T'ung tsu CHÜ, 1962, p. 5; So-called Circuit Intendants (*tao*) could be either an Inspectant or a Resident Intendant. The Provincial Judge supervised the administration of justice and the postal service, p. 6.

<sup>192</sup> Martin M. SHAPIRO, 1981, pp. 171–172.

<sup>193</sup> June TEUFEL DREYER, 1996, p. 30.

<sup>194</sup> T'ung tsu CHÜ, 1962, p. 14, Magistrates were also called *jinmin zhiguan*, official close to the people or *difangguan*, local official.

<sup>195</sup> The tale of the cruel and unmerciful district magistrate is however said to be an illusion, Thomas B. STEPHENS, 1992, pp. 40 and 41–47; a similar system with a similar reputation are the *Kadis* (*al-Qadi*), the adjudicators in the traditional Muslim society; Originally the *Kadis* were legal secretaries to the governors but developed to be independent and at times there were also so-called *Mazâlim* courts controlling the *Kadis*, Martin M. SHAPIRO, 1981, pp. 205–207; under the Caliph in the traditional Muslim world there were governors and under these served the *Kadis*,

on their level: administrative decision maker, judicial adjudicator, and implementer.<sup>196</sup> The magistrates' duties were to maintain order, collect taxes, and administer justice.<sup>197</sup> Law was the area of the magistrates' tasks most closely monitored by the superiors.<sup>198</sup> Not only ethnic Han-Chinese were magistrates but also Manchus and Mongols in later dynasties.<sup>199</sup> Many commentators use these magistrates as proof of the non-separation of powers and the non-existence in imperial China of judicial independence.<sup>200</sup> An ascribed relatively low esteem of the magistrates is moreover in part due to the misconception that they were mere administrators.<sup>201</sup> The magistrates were conversely quite professional adjudicators, some trained in or experienced in law and commonly with legal experts at their side.

Already by 350 B.C.E. a system of prefectures with magistrates was set to run the administration under the ruler and charged with all affairs within the prefecture.<sup>202</sup> Each prefecture at that time contained some 10,000 households.<sup>203</sup> As early as during the Qin Dynasty (around 200 B.C.E.) the magistrate could prosecute and convict even in severe cases such as murder. The magistrate dealt with all the steps from investigation to trial and enforcement.<sup>204</sup> The magistrates are held to have had extremely wide powers and discretion. When closely observed however, there were a number of checks, mainly from above, that aimed at overseeing correct implementation and adjudication of the magistrates.<sup>205</sup>

Song (960–1279) magistrates had the authority to make final judgments in cases where punishment was less than 100 blows with the heavy rod. For penal servitude and more severe punishments their decisions were provisional only.<sup>206</sup> At the next level, the prefectural administrators had the jurisdiction to decide on penal servitude and less severe punishments while the circuit intendant had to decide on heavier punishments.<sup>207</sup>

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Adel Omar SHERIF and Nathan J. BROWN, 2002, pp. 1, 4–5; see also A. R. B. AMERASINGHE, 2000, p. 25, in relation to the judiciary in Muslim Spain.

<sup>196</sup> See e.g. Derek BODDE and Clarence MORRIS, 1967, pp. 113 *et seq*; see also William P. ALFORD, 1984, p. 1192; Ichisada MIYAZAKI, 1980, p. 59.

<sup>197</sup> T'ung tsu CHÜ, 1962, p. 16.

<sup>198</sup> Martin M. SHAPIRO, 1981, pp. 173–174.

<sup>199</sup> T'ung tsu CHÜ, 1962, p. 21; see also Derek BODDE and Clarence MORRIS, 1967, p. 124.

<sup>200</sup> See e.g. Geoffrey MacCORMACK, 1990, p. 72; Yongping LIU, 1998, p. 257.

<sup>201</sup> Philip C. C. HUANG, 1996, p. 76.

<sup>202</sup> Yongping LIU, 1998, p. 189.

<sup>203</sup> *Id.*, p. 189.

<sup>204</sup> Jiahong HE, 1995, pp. 122–123.

<sup>205</sup> William P. ALFORD, 1984, pp. 1193, 1227 *et seq*; see also Karen TURNER, 1992, p. 32.

<sup>206</sup> Brian E. McKNIGHT, 1992, p. 234.

<sup>207</sup> *Id.*, p. 235; see also Geoffrey MacCORMACK, 1990, pp. 74–75.

In Qing (1644–1911) the magistrates were similarly authorized to pronounce sentences in civil and minor criminal cases where punishment was maximum beating or the application of the cangue.<sup>208</sup> If the magistrate refused to accept a case, appeal to the higher level was possible. Penal servitude cases had to be reported collectively every season to the Board of Punishment, and exile, banishment, and penal servitude for homicide was retried by the now provincial judge (formally circuit intendant), and the cases had to be reported individually to the Board. Death penalty cases were retried by the Governor-General and Governor and when immediate execution was called for they tried the case together with the Provincial Judge.<sup>209</sup> Qing magistrates were required to cite statutes and cases in their decisions.<sup>210</sup> Contrary to common misconceptions, the speed of handling cases was remarkably high and there was no presumption of guilt.<sup>211</sup>

To the extent that magistrates were empowered to settle disputes, it is often claimed that the magistrates largely mediated. On the contrary, mediation was, as in most societies, the first method in minor disputes and also at an informal level before reaching the magistrates, and if mediation failed, litigation ensued.<sup>212</sup> The Chinese magistrates were very much adjudicators: 70–90 per cent of the cases during Qing were solved through adjudication and only in some five per cent of the cases did the magistrate act as a mediator.<sup>213</sup>

Over the centuries magistrates were increasingly required to know the law so both they and their clerks had to pass yearly exams and there were even punishments for failure.<sup>214</sup> Some magistrates had also first served as legal secretaries and all possessed strong basic education.<sup>215</sup> The magistrates had varying degrees of legal knowledge but if they had a lesser level, their clerks who specialized in law, would do more of the law-related work.<sup>216</sup> Such specialized clerks were commonly hired locally and stayed for a longer period

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<sup>208</sup> Heavy wooden collar enclosing neck and arms.

<sup>209</sup> T'ung tsu CHÜ, 1962, pp. 116–117.

<sup>210</sup> R. Randle EDWARDS, 2003, p. 183.

<sup>211</sup> David C. BUXBAUM, 1971, pp. 269–270, countering Bodde and Morris, see Derek BODDE and Clarence MORRIS, 1967.

<sup>212</sup> David C. BUXBAUM, 1971, p. 267; and Philip C. C. HUANG, 1996, p. 17.

<sup>213</sup> Philip C. C. HUANG, 1996, p. 78, see also pp. 76–109, in particular p. 104, and also pp. 111 *et seq* on mediation before final adjudication.

<sup>214</sup> Geoffrey MacCORMACK, 1990, p. 79; there were however possibilities for non-governmental employees to be exempted from punishment.

<sup>215</sup> Martin M. SHAPIRO, 1981, p. 175; at times it was however possible to buy positions.

<sup>216</sup> T'ung tsu CHÜ, 1962, p. 118; see also Geoffrey MacCORMACK, 1990, p. 79; Song (960–1279) magistrates for instance, were contrary to the common perception of Chinese judges quite knowledgeable about the law, Brian E. McKNIGHT and James T. C. LIU (Eds.), 1999, p. 15, see also pp. 61 *et seq* on the work of the magistrates and other officials with the level of detail in administration.

of time than the magistrate. In particular during the latter dynasties of Ming and Qing, these clerks were influential since the prospective magistrates no longer studied law to pass the imperial examination but only literature and philosophy.<sup>217</sup>

Knowledge, impartiality, and professionalism were highly revered qualities for judges. The preface of a thirteenth Century Manual for prevention of injustice, which was an invaluable guide for hundreds of years, begins “with a blast against prefects and county magistrates who delegated the investigation of capital offenses to ignorant inexperienced subordinates, instead of conducting the proceedings themselves”<sup>218</sup> A Magistrates handbook from around 1750 expressed similar concerns in more detail:

When hearing a case, [the magistrate] must clear his mind, so that it is blank and without preconceptions . . . If he interrogates carefully and pays close attention to details, he will naturally come to see the [true] facts [*qing*]. But if he . . . harbors preconceptions about who is right and wrong, and follows first impressions to dominate his thinking, makes judgments hastily and is impressed with his own intelligence, then he is likely to err.<sup>219</sup>

The justice system was a search for truth, a strive towards impartiality and the use of evidence to determine guilt.<sup>220</sup> Increasingly the emperors and officials saw law as fundamental in governing and maintaining social order.<sup>221</sup> The judges relied on broad cultural norms and local custom but first and foremost they based their verdicts on the written law or generally accepted Confucian norms, however with infrequent references to statutes or sub-statutes.<sup>222</sup> Underlying principles of high esteem for the judges give proof of deep considerations such as in the words of a late nineteenth Century magistrate: “who’s right and who’s wrong, let’s wait until everyone is gathered at court and determine by cross-examination.”<sup>223</sup>

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<sup>217</sup> Martin M. SHAPIRO, 1981, pp. 172–173; see also Geoffrey MacCORMACK, 1990, pp. 79–80; Derek BODDE and Clarence MORRIS, 1967, p. 113; and Ichisada MIYAZAKI, 1980, pp. 19–20 for a vivid picture of the work of the court staff; clerks were often relying on fees and ‘gifts’ rather than on a regular salary, Geoffrey MacCORMACK, 1990, p. 80.

<sup>218</sup> Sidney SHAPIRO, 1990, p. 33.

<sup>219</sup> Philip C. C. HUANG, 1996, pp. 208–209.

<sup>220</sup> Geoffrey MacCORMACK, 1985, p. 349.

<sup>221</sup> Melissa MACAULEY, 1998, pp. 95–96; see also Philip C. C. HUANG, 1996, p. 94.

<sup>222</sup> Mark A. ALLEE, 1994, pp. 124–125.

<sup>223</sup> As quoted in Philip C. C. HUANG, 1996, p. 116.

In the Qing Dynasty, confessions were considered important and torture to extract confessions were at times used.<sup>224</sup> Certain classes were however excluded from torture, such as the young, old, disabled, and privileged classes. The use of torture was moreover regulated to be kept within clearly defined limits and confessions during torture always had to be supplemented by evidence and such a confession could always be retracted.<sup>225</sup> Even though there were a number of problems also related to lack of efficiency, restricted jurisdiction of the magistrates, and vast territorial jurisdiction, Buxbaum concludes that Qing China had an altogether quite advanced system of rules and procedures. Contrary to other commonly held views, its magistrates were better versed in law and the system included a distinction between legal and administrative functions of the magistrates.<sup>226</sup> During the Qing there were examples of arbitrary ruling but also great concern for equal treatment.<sup>227</sup> There were elements of what could be seen as equity in common law (*renqing*) as well as to a relatively minor extent, face-saving concessions to the losing party.<sup>228</sup> Especially after the verdict when determining the punishment, mitigating aspects were taken into consideration, such as relations and feelings.<sup>229</sup> Again, a system where factors mitigating the crime may be considered in determining the punishment is not foreign to judicial procedures elsewhere.

### 3. Impartiality

King Muh of the 9<sup>th</sup> Century B.C.E. instructed his judges with the following words:

We rulers of the people are responsible to Heaven for our injustice. Be impartial, particularly in regard to unsubstantiated charges; and in regulating the people the proper method is to hear criminal cases before . . . witnesses.<sup>230</sup>

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<sup>224</sup> Philip C. C. HUANG, 1996, p. 77.

<sup>225</sup> Alison W. CONNER, 1998, pp. 181–186; When one co-offender was at large but the others were not, the person at large could be presumed guilty; note also the elaborate review system in place to oversee the correct implementation of the rules, pp. 188–189, and see also further below on appeals.

<sup>226</sup> David C. BUXBAUM, 1971, pp. 272–274.

<sup>227</sup> Philip C. C. HUANG, 1996, pp. 86, 95.

<sup>228</sup> *Id.*, p. 61–62, 100–101.

<sup>229</sup> *Id.*, p. 208.

<sup>230</sup> John C. H. WU, 1933, p. 211; for another version of the quotation, see John H. WIGMORE, 1941, pp. 263–264.

‘The *Dao*’ moreover stated that the magistrates should not be concerned with “partisan interest but with public welfare”.<sup>231</sup>

Through out the dynasties the imperial central authorities required impartial magistrates which promoted an elaborate system aimed at preventing bias. Impartiality was needed in order to ensure magistrates loyal to the centre, but also for the sake of assuring unbiased decision making that would not erode the credibility of the system and the legitimacy of the regime. Most prominent in the scheme to assure impartiality, in addition to the supervision schemes discussed above, were the ‘rules of avoidance’ or recusal system, commonly referred to in Chinese as *huibi*. The system originates from the Han Dynasty some 2,000 years ago.<sup>232</sup>

Under the rules of the avoidance system, to prevent conflict of interest and corruption, magistrates commonly served a maximum of a three year-period in locations always away from their home province.<sup>233</sup> They were not allowed to serve in their native province or even in the neighboring province within 250 kilometers of their hometown, and the system also prevented clan members or maternal relatives from serving in the same province. Magistrates were therefore prevented to hold office in the same province as their grandfather, grandson, father, son, uncles, or brothers; as well as paternal first cousins, or maternal relatives. A magistrate was also unable to serve if the governor-general, governor, provincial treasurer, provincial judge or an intendant with the whole province under his jurisdiction was a relative.<sup>234</sup> The system developed over the centuries to include other forms of precautions.

The Qing Dynasty (1644–1911) used rules of avoidance of two overarching types: in relation to job assignment and in litigation. In relation to job-assignment there were two components: geographic and societal. Geographic limitations were mentioned above, with restrictions on areas to which officials could be assigned and the societal limitations refer to relatives, also discussed above, as well as ‘guild’ limitations. The latter restricted job assignment from the same area if a former teacher-student relationship existed, be it an actual teacher or some informal teachers status; employer-employee relations; or in cases of having studied together. Rules of avoidance in litigation were stipulated already in the Six-Codes of the Tang Dynasty, with apparent bias in cases of paternal and maternal relatives, and even other societal relations such as teacher-student, and other case-related interests.<sup>235</sup>

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<sup>231</sup> *Id.*, p. 30.

<sup>232</sup> Xiaomin SHEN, 2001; see also Martin M. SHAPIRO, 1981, pp. 176–177.

<sup>233</sup> James P. BRADY, 1982, p. 35.

<sup>234</sup> T’ung tsu CHÜ, 1962, pp. 21–22.

<sup>235</sup> Xiaomin SHEN, 2001, pp. 27–28; Provisions to the same effect are still in use and include *huiji*, place of origin of the judge and *huiqin*, cases involving relatives; see also Baoping MAO (Ed.), 1995, pp. 74–80; Derek BODDE and Clarence MORRIS, 1967, p. 118.



In 1915, after the collapse of the imperial Dynasty, the Ministry of Justice reintroduced rules of avoidance for lawyers that prevented a lawyer from serving in the same region for three years after having left a position as a judge, prosecutor, or similar. The measure was revoked in 1916 but again reintroduced in 1918 and remained in force until 1927, when it again was withdrawn on popular demand.<sup>236</sup> For judicial officers the rule of avoidance was maintained in the Republican era in an effort to maintain impartial justice.<sup>237</sup>

From Tang (618–907) through Qing (1644–1911) there was also liability for wrong decisions by judges.<sup>238</sup> If a judge sentenced or acquitted a defendant wrongfully, the same punishment was given to the judge as was meted out, or should have been meted out, or the difference between the given and that which ought to have been given to the defendant.<sup>239</sup> There was also a lesser scale of punishment applied when the wrongful verdict was not given deliberately, for example when there were no bribes involved.<sup>240</sup> In Ming (1368–1644) and Qing, the clerk responsible for the case was punished and his superior got one degree less of punishment, and his superior in turn got one degree less, et cetera, while in Tang only the person directly responsible was punished.<sup>241</sup>

#### 4. Appeals and other Legal Procedures

When both parties have appeared fully prepared, the court assessors . . . listen to the pleading. When by this means they have ascertained and verified guilt, they attribute . . . punishment.<sup>242</sup>

This text, probably from the Zhou Dynasty over 3,000 years ago gives us one of the earliest pictures of a court scene.<sup>243</sup> In modern terminology we may phrase the references above in terms of ‘equality of arms’ and ‘presumption of innocence’. Similarly, there were early fundamental considerations aimed at, for example, consistency. Even in the Tang Code, uncertainty of facts limited penalties to fines only; this would be the situation when for example there was no witness or when there was only a witness but no other proof.<sup>244</sup> There were

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<sup>236</sup> Xiaoqun XU, 1997, p. 82.

<sup>237</sup> *Id.*, p. 82.

<sup>238</sup> Geoffrey MacCORMACK, 1990, p. 91; there was also liability for failure to carry out duty or incorrect such.

<sup>239</sup> *Id.*, p. 92; penal servitude could however be transformed into blows (based on a table) with a stick.

<sup>240</sup> *Id.*, p. 93.

<sup>241</sup> *Id.*

<sup>242</sup> Bernhard KARLGREN, DOCUMENTS, pp. 74–78, the passage quoted in full: Yongping LIU, 1998, p. 120.

<sup>243</sup> Yongping LIU, 1998, p. 120.

<sup>244</sup> Geoffrey MacCORMACK, 1990, p. 89.

also procedures stipulating time limits, ways of writing the verdicts, what facts to include, et cetera.<sup>245</sup> There were also regulations on how inspecting intendants were to be treated by local authorities in order to limit the potential influence from these authorities when the intendant was roving the prefectures and districts.<sup>246</sup> Miscarriages of justice and delayed justice were to some extent even understood as causing natural disasters: disturbing the “harmonious blend of natural forces”.<sup>247</sup>

Most intricate of the legal procedures was the appeal process. In the hierarchy of government bureaucracy that existed in imperial China described above, a system for appeals against decisions made by the magistrates and their superiors developed.<sup>248</sup> Already from Han (206 B.C.E.–220 C.E.) onwards, there were signs of reconsideration of a matter by the same court, no appeal was then possible to a higher court.<sup>249</sup> Local magistrates were at that time usually able to execute judgments without higher approval.<sup>250</sup> The appeal system developed into reconsideration also of higher authorities. Starting during the Sui Dynasty (589–618) onwards, in relation to for example the death penalty, approval from the highest judicial authority was required as well as consent by the Emperor.<sup>251</sup> The lower courts were only final in minor cases with a maximum penalty of beating and there was a full reinvestigation at the appeal level.<sup>252</sup> Appeal became possible all the way to the Emperor by any person and a case rejected at one level could be taken to the next higher level.<sup>253</sup> A time limit existed for each level but this was not strictly followed.<sup>254</sup>

The death penalty was of special attention.<sup>255</sup> The Tang Code (article 497) stipulated heavy punishments to officials who applied the death penalty without higher approval. There was a requirement for three memorials to be submitted to the throne and approved and after this a three-day pondering.<sup>256</sup> The system was relaxed in the Song Dynasty (960–1279) with possibilities for the intermediate level to approve a death penalty sentence if the defendant had admitted the crime but Yuan (1279–1368) reverted to the previous stricter requirement.<sup>257</sup> The appeal system in death penalty cases could be bypassed by

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<sup>245</sup> Brian E. McKNIGHT, 1992, p. 235.

<sup>246</sup> *Id.*, p. 238.

<sup>247</sup> Brian E. McKNIGHT, 1981, p. 113; see also Geoffrey MacCORMACK, 1990, pp. 294–295, and also 293–294.

<sup>248</sup> John H. WIGMORE, 1936, pp. 178–179, and exemplified through p. 187.

<sup>249</sup> Geoffrey MacCORMACK, 1990, p. 87.

<sup>250</sup> *Id.*, p. 74

<sup>251</sup> *Id.*, p. 73.

<sup>252</sup> *Id.*; see also Derek BODDE and Clarence MORRIS, 1967, p. 113.

<sup>253</sup> Geoffrey MacCORMACK, 1990, pp. 115, 118.

<sup>254</sup> *Id.*, p. 117.

<sup>255</sup> See e.g. *Id.*, p. 91 *et seq.*; Alison W. CONNER, 1998, pp. 188–189.

<sup>256</sup> Geoffrey MacCORMACK, 1990, p. 75; see also Wallace JOHNSON, 1997.

<sup>257</sup> Geoffrey MacCORMACK, 1990, p. 75.

going to the Censorate immediately, or exceptionally from Tang onwards, by petitioning the Emperor.<sup>258</sup>

In the Qing in particular, death penalty cases were confirmed through a special procedure.<sup>259</sup> A Court of Revision (*dali si*) that had been influential prior to the Board of Punishments came to deal mainly with death penalty cases.<sup>260</sup> Review of death penalties was then approved by the Emperor after having been deliberated upon by what was called the Three High Courts (*sanfa si*): members from the Court of Revision, the Board of Punishments and the Censorate.<sup>261</sup> The review was careful and did not amount to an automatic approval; there were many reversals.<sup>262</sup> Only ten per cent of death sentences in late Qing were actually executed.<sup>263</sup> Similarly, cases concerning punishment of officials required scrutiny by the Emperor as did cases that were concluded on the basis of legal analogy.<sup>264</sup> Death penalty cases were sent individually to the capital for approval while the others were reported collectively.<sup>265</sup>

When a case had been approved at the top of the hierarchy, it was sent back down through the various levels together with the convicted offender who was 'traveling' with the case and execution of punishment took place at the originating level of the case.<sup>266</sup>

## Conclusions

This Chapter tackled some fundamental understandings of law in China. The recapitulation of the legal history focused on the origin of law, law versus moral, aspects of control in the legal system and in particular the courts in China. China has likely had written laws since 4,000 years ago, making it among the oldest systems in the world. The oldest recovered law dates back over 2,000 years and subsequent legal developments demonstrate proof of an increasingly advanced system of laws. Rites, or *li*, developed into something similar to natural law. *Li* was the basis for rule by morals. Even though many

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<sup>258</sup> *Id.*, pp. 87–88; Paul Heng-chao CH'EN, 1979, p. 79; through a 'Petitioner's Drum' or 'Petitioner's Stone'.

<sup>259</sup> Derek BODDE and Clarence MORRIS, 1967, pp. 131–134, and also through p. 143.

<sup>260</sup> *Id.*, pp. 132–133.

<sup>261</sup> *Id.*, pp. 116, 132; The Three High Courts were located in the Western parts of the capital. In the cosmological system with five elements, West was metal, metal cuts and did thus symbolize the punitive functions of the judicial system, p. 123.

<sup>262</sup> *Id.*, p. 173.

<sup>263</sup> Alison W. CONNER, 1998, p. 187.

<sup>264</sup> *Id.*, p. 117.

<sup>265</sup> Derek BODDE and Clarence MORRIS, 1967, pp. 115–116.

<sup>266</sup> *Id.*, p. 120.

descriptions of the Chinese legal system describe morality during most dynasties as dominating over law, and Confucianism over the school of the Legalists, law was far from irrelevant.

Even if Confucianism was the trait of the time, law and legal procedures were not absent. There was a legal core in Confucianism but certainly also ritual aspects of law. Law was de-emphasized by historical recorders while moral rule was held in higher esteem rhetorically. As is the case universally, law alone is not enough; implementation requires reasonable enabling laws, credible institutions and most often virtuous leaders. The inegalitarian nature of Confucianism is moreover considered to have been exaggerated; the philosophy advocated the very opposite and that morally advanced persons should lead by being good role models. Law developed early in the Chinese history and continued playing an important role through out the dynasties.

Judicial independence is not an exclusive European or Western development but has also been the aim in China. Mutual supervision; balancing of powers between various bodies; scrutiny by separate supervisory institutions; as well as at the higher levels of the state structure, specialist judges trained in law that were relatively independent from the corresponding level of government. Numerous efforts additionally to assure impartiality and fair trial with multiple appeal possibilities and legal procedural safeguards created an advanced system of administration of justice in the course of the imperial China. A development that in itself can be classified as rule of law, with civil and criminal as well as administrative cases being argued before the courts was seen. Differences in culture suggesting a mediating, non-litigious China in contrast to the non-Confucian societies can be discarded.

The task of the judicial authorities was to conduct a scrupulous investigation of the facts and the law to determine whether those conditions had been met and, if so, whether the correct sentence had been imposed. The emperor might vary the sentence proposed by the Board [The Board of Punishments, the highest judicial tribunal], but, except perhaps in certain political cases that directly threatened the stability of the regime, he did so in accordance with well-established principles by which the gravity of the offense and the appropriate punishment were to be determined.<sup>267</sup>

The magistrate judge, the lowest level of administrative representation, embodied in contrast to its superiors however many of the separate tasks of administration of justice. The same mixed tasks were actually also prevalent in Tokugawa (1603–1868) Japan and the Roman praetors were also in charge of judging and administrating.<sup>268</sup> In more recent history, the small European

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<sup>267</sup> Geoffrey MacCORMACK, 1996, p. 212.

<sup>268</sup> Martin M. SHAPIRO, 1981, p. 21.

country of Iceland had until the early 1990s a system with magistrates outside the capital that held both judicial and administrative authority.<sup>269</sup>

The examples given above on law and legal procedure in China originate from mainly English language literature, which in most cases is readily available. Research on the chosen aspects is however only rarely developed, in part because of the prejudged attitude, polarization, and attention to differences such as Confucianism, moral, non-legal, penal, non-separation, dependence, et cetera. Again, the purpose is not so much to show the universal strains of justice or law but rather for the sake of providing a methodology aimed at countering faulty understandings. Recovery of ideas from the Chinese history, as Professor Eric Orts argues, may even occur that influence the discussion on the rule of law in Western societies. He claims one must remain open to possible cross-fertilization between cultures as a way to avoid conflicts.<sup>270</sup>

The Chinese history amply proves consideration and institutionalization of measures to safeguard independence, impartiality, and even appearance of independence and impartiality. It has been argued that the “legal modernization” of China and Taiwan may owe “as much or more [of its success] to the strength of the traditional institutions as to any contribution made by Western law”.<sup>271</sup> With this, the groundwork has been laid for a more coherent understanding also of the contemporary legal system in China, which is the topic for the concluding part.

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<sup>269</sup> Act No. 92/1989, Iceland Core Document 24 June 1993, HRI/CORE/1/Add.26, paras. 38–41, 44; see also Stefán M. STÉFANSSON and Ragnar AÐALSTEINSSON, 1996 on Icelandic Supreme Court cases leading up to the reform; see also related ECtHR cases: *Thorgeir Thorgeirson v. Iceland*, 25 June 1992; *Jón Kristinsson v. Iceland*, 1 March 1990; with a revised law being introduced in 1989 the adjudicative powers were transferred to new district courts with judges performing strictly judicial functions only as recently as 1 July 1992.

<sup>270</sup> Eric W. ORTS, 2001, p. 115.

<sup>271</sup> Rosser H. Brockman, *Commercial Contract Law in Late Nineteenth-Century Taiwan*, in Jerome A. COHEN et al (Eds.), 1980, p. 130; quoted in Teemu RUSKOLA, 2000, p. 1718.

JUDICIAL INDEPENDENCE

COMPARING COMPARISONS

ASSESSING CHINA'S JUDICIARY

## Assessing China's Judiciary

An assessment requires consideration of the greater context surrounding the object of assessment.<sup>1</sup> This includes the various obstacles of historical, structural, and procedural nature that may exist, in this case related to judicial independence. The development in the last 100 years of modern Chinese history has lacked stability in general as well as in relation to the judiciary. The present system is based on structures from in particular the modern history with its many structural and procedural obstacles to judicial independence. It was reported that the President of the Chinese Supreme Court recently commissioned a study on the obstacles to the courts' present functioning but too many problems were discovered and the study was aborted.<sup>2</sup>

This last part out of the three, assessing the judiciary in China, is divided into two Chapters (V and VI). The content in Chapter V covers the modern history of the judiciary in China, where for the first time China and the Western world overtly meet through the 'Westernization' of the Chinese legal system, but also the Sinofication of Marxist concepts related to the judiciary. Efforts have been made towards the establishment of an independent judiciary but also some clearly against, which at times has made the judiciary a tool for government policy implementation. This Chapter illustrates the many failed efforts to establish an independent judiciary after the end of imperial China and during the first thirty years of Communist rule. Chapter VI explores the contemporary Chinese Judiciary, its structure and functioning, with emphasis on assessing the various potential restraints on the judiciary and the potential success of reform efforts.

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<sup>1</sup> See e.g. Donald C. CLARKE, 2003 (b), pp. 180-181, on the importance of a broad approach to be able to ask the right questions.

<sup>2</sup> Peerenboom 2003 (b), p. 24; the Ford Foundation is also sponsoring a study on interference with the courts in China, headed by Professor Li Buyun.

# JUDICIAL INDEPENDENCE

I. INTERNATIONAL INSTRUMENTS

II. INTERNATIONAL JURISPRUDENCE

# COMPARING COMPARISONS

III. COMPARATIVE LAW: COMPARING CHINA

IV. FIAT LEX: LEGAL HISTORY IN CHINA

# ASSESSING CHINA'S JUDICIARY

V. FIAT FLUX: MODERN HISTORY

VI. THE CONTEMPORARY JUDICIARY



## ***V. Fiat Flux: Modern History***

This Chapter considers the last century of Chinese legal development with domestic advances and foreign influx related to judicial independence. The main purpose is to take the development of the Chinese judiciary from the imperial era to the modern by showing the great state of flux of the legal system in order to understand the present situation.

The first Section (A) deals with the end of the imperial era: late nineteenth and early twentieth Century. The second section (B) discusses the legal development of the Chinese Soviets<sup>1</sup> before the proclamation of the People's Republic and the continued destiny of law in China up until the late 1970s. Finally, section (C) is devoted to the reconstruction of the legal system after the end of the Cultural Revolution, with what is commonly referred to as 'opening up and reform'.

### **A. The Imperial Era Concluded<sup>2</sup>**

At the turn of the nineteenth Century, Western ideas and Western legal systems became influential in what was to be the last years of imperial China.<sup>3</sup> Foreign laws were translated into Chinese starting in the later part of the nineteenth Century. The Emperor was recommended to learn from Peter the Great of Russia but also from the Japanese Meiji Reform.<sup>4</sup> During the Imperial decline and particularly towards the end, uprisings such as the Boxer rebellion,<sup>5</sup> and concessions to foreign powers, stressed the urge that reform keep up with the pace of development to avoid being suppressed.<sup>6</sup>

A major incentive for the willingness to adopt a Western style judicial system was that of extraterritorial jurisdiction. In the nineteenth Century, foreign powers had achieved their own legal jurisdictions within the Chinese borders. In the commercial treaties of 1902 and 1903, Great Britain, the United States and Japan had promised to surrender their extraterritorial

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<sup>1</sup> The Chinese Soviets were areas run by the Chinese Communist Party in a collective way as the soviets were in the USSR, see e.g. W. E. BUTLER (Ed.), 1983.

<sup>2</sup> An overview of the main legal events of the century are provided in Jinfan ZHANG (Ed.), 2001.

<sup>3</sup> Min ZHANG and Huiling JIANG, 1998, p. 133; Xiaoqun XU, 1997, p. 77.

<sup>4</sup> Wm T. deBARY (Ed.), 1960, pp. 71–73; see also Huanyue GAO (c), 1997.

<sup>5</sup> The mainly anti-foreign-movement of the turn of the Century, see e.g. John K. FAIRBANK and Kwang Ching LIU (Eds.), 1980, pp. 115–130; and also Paul A. COHEN, 1997.

<sup>6</sup> See e.g. Jianfu CHEN, 1999, pp. 17–18.

presence given the Chinese governments desire to reform the judicial system.<sup>7</sup> By making the judicial system conform to that of the West, China would be able to do away with the humiliating foreign jurisdictions in their country. Extraterritoriality was not ultimately discontinued until 1943.<sup>8</sup>

Officially the process of modernizing the legal system took two roads: revision and drafting new codes.<sup>9</sup> Drafting of new codes commenced in 1902 on the basis of Japanese codes, which in turn was basically copied German law, but before the enactment of the drafts, the Dynasty fell.<sup>10</sup> The 'revision road' on the other hand fared better. The old Qing code was liberalized step-by-step, removing for example cruel punishments in line with modern requirements and the revision was promulgated in 1910.<sup>11</sup> Even after the fall of the Qing, almost two decades into the Republican era, parts of the revised codes were retained as official law.<sup>12</sup> On procedural issues the draft codes were however used even though no enactment had taken place; the procedures specified for example separation between administration and adjudication and required a professional judiciary.<sup>13</sup>

In the last few hundred years of the imperial era an increased development of more specialized jurists had been seen and arguments were made for a more independent profession.<sup>14</sup> Judicial independence was seen as a major task in breaking with the traditional political order: moving from the, especially at the local level, traditional mixture of administration and adjudication to a clearer separation of powers. Separation of powers and judicial independence was met with positive response from all camps. The separation between traditional moral codes and the legal ones was however criticized. In late 1906, the Board of Punishments was changed into the Ministry of Law (*fabu*) and was limited to judicial administration, not actual adjudication.<sup>15</sup> The Qing thus had commenced the reform of the court system, and based on a Japanese law for courts, they drew up regulations on administration of justice within the courts.<sup>16</sup>

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<sup>7</sup> Xiaoqun XU, 1997, p. 78, see also p. 83.

<sup>8</sup> Jonathan D. SPENCE, 1990, p. 474.

<sup>9</sup> Philip C. C. HUANG, 2001, p. 15; see also Jianfu CHEN, 1999, pp. 18 *et seq.*

<sup>10</sup> Philip C. C. HUANG, 2001, pp. 15–16; see also Jinwen XIA and Ce QIN, 2000, p. 562.

<sup>11</sup> Philip C. C. HUANG, 2001, pp. 17, 15.

<sup>12</sup> *Id.*, p. 15, as it relates civil law; see also Jianfu CHEN, 1999, pp. 21, 23.

<sup>13</sup> Philip C. C. HUANG, 2001, p. 31.

<sup>14</sup> Albert H. Y. CHEN, 1994, p. 13.

<sup>15</sup> Xiaoqun XU, 1997, p. 79; on late Qing and judicial independence see also Chongyi FAN (Ed.), 2003, pp. 462 *et seq.*

<sup>16</sup> Jinwen XIA and Ce QIN, 2000, p. 561, The Japanese *caipan suogou chengfa* was copied and a *fayuan bianzhi fa* and *geji shenpanting shiban zhangcheng* were drawn up.

This move has been described as a historical turning point for the Chinese judiciary in subscribing to the principle of judicial independence.<sup>17</sup>

In the first years of the Republic, in the early 1910s, the work on a new court system was continued with the intention to establish a system separate from the administration, but it was only implemented to a very limited extent due to lack of funds.<sup>18</sup> Of the great number of courts that were intended to be established in the last years of Qing, in 1912 there was a total of only 345.<sup>19</sup> The law of late Qing as well as the judicial system with a provisional constitution was reissued provisionally by the Republican Government, but the laws were again to be revised and reissued repeatedly.<sup>20</sup> The Provisional Constitution of the Republic of China provided for separation of powers and judicial independence.<sup>21</sup> The law codification commission from the Qing, responsible for the new laws, was also maintained up until 1927 and headed by legal scholars trained abroad.<sup>22</sup> With the exception of two of the fourteen Ministers of Justice serving between 1912 and 1927, all had received their legal training in Japan, the US, the UK, and Germany.<sup>23</sup>

In the new system, judges were required to go through legal education and pass national exams.<sup>24</sup> The impact of these changes was however limited. In the province of Hainan it was reported that ten per cent of the judges were exempted and an additional 60 per cent ignored the requirement, so less than a third were in compliance.<sup>25</sup> Other statistics are also available from the first years of the Republic showing an alarming increase in the number of “homicide and causing injury”, as well as theft and robbery at the Supreme Court.<sup>26</sup> Originally there were courts at the magistrates’ county level but they had been abolished already in 1914.<sup>27</sup> The magistrates were left in place as a

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<sup>17</sup> *Id.*, pp. 561–562.

<sup>18</sup> Philip C. C. HUANG, 2001, p. 40.

<sup>19</sup> Xiaoqun XU, 1997, p. 79.

<sup>20</sup> Jinwen XIA and Ce QIN, 2000, p. 562; see e.g. the version of 1916 with specifics on independence, education, relationship with prosecutors etc: The Law of the Organization of the Judiciary of the.

<sup>21</sup> Xiaoqun XU, 1997, p. 80.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, pp. 83–84.

<sup>24</sup> James P. BRADY, 1982, p. 49.

<sup>25</sup> *Id.*, p. 49, citing an unpublished source from 1971: O. Y. K. Wou, THE DISTRICT MAGISTRATE PROFESSIONAL IN THE EARLY REPUBLICAN PERIOD.

<sup>26</sup> TABLES OF COMPARATIVE STATISTICS RELATING TO CIVIL AND CRIMINAL CASES IN THE SUPREME COURT FROM YEAR I TO YEAR X OF THE REPUBLIC OF CHINA, 1925, p. 15: Table XIII. A Comparison of the Numbers of Criminal Cases Disposed of on Second Appeal by the Supreme Court; The conclusions from such statistics can of course also indicate improved functions of the court or a need for revision of case law.

<sup>27</sup> Xiaoqun XU, 1997, pp. 94–95.

lowest level in the hierarchy of the judiciary that at the next higher level was occupied by judges in courts. In 1914–1915 judges and magistrates were prohibited from being members of political parties as a move toward further strengthening their independence but there were also other repeated official calls for judicial independence.<sup>28</sup> Judges were also prevented from serving as lawyers in the same area as they had been working for three years after leaving office.<sup>29</sup>

When the government founded on the Nationalist Party (*Guomindang* or GMD, also transliterated as *Kuomintang* or KMT) managed to restore order in the war torn country, little remained of the previous reform efforts. A separate court system was again foreseen.<sup>30</sup> The Provisional Constitution was discarded and a new one was adopted in 1923.<sup>31</sup> Again in 1928 a quasi-constitution was promulgated creating five departments of government including the judiciary.<sup>32</sup> The ‘five-powers’ structure was the creation of Dr. Sun Yat-sen and the GMD.<sup>33</sup> Apart from the three branches, legislative, executive, and adjudicative, two traditional Chinese powers were added: the civil service examination and the Censorate.<sup>34</sup> This idea sprung from an improved version of the separation of the three powers.

The plan was that during the six years from 1927–1933, the system was to be completed resulting with local courts in all counties. The outcome proved disappointing in that only half of the counties had courts by the end of the period.<sup>35</sup> In the counties that did set up a separate court, the local variations on how the plan was complied with were very diverse.<sup>36</sup> At the pinnacle of the court hierarchy, a Supreme Court was re-established in 1929 that included civil and criminal divisions and life tenure for the judges.<sup>37</sup> Below the Supreme

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<sup>28</sup> *Id.*, pp. 81, 83.

<sup>29</sup> *Id.*, p. 82; This was not a new concept in the Chinese history however: rules of avoidance had been used extensively through out the centuries as discussed above.

<sup>30</sup> James P. BRADY, 1982, p. 51; see also Jianfu CHEN, 1999, pp. 23–24.

<sup>31</sup> John H. WIGMORE, 1936, p. 194.

<sup>32</sup> Pingping SI, 1989, p. 15; James P. BRADY, 1982, p. 51; article 33 spelled out that the highest judicial organ was the Judicial Yuan; in 1931 the Constitution was again revised, John H. WIGMORE, 1936, p. 194.

<sup>33</sup> Wm T. deBARY (Ed.), 1960, pp. 112–113; see also Jianfu CHEN, 1999, pp. 24 *et seq.*

<sup>34</sup> The Constitution was also known as the Five Power Constitution: suffrage, right to remove from office, right to make new initiatives, referendum to do away with old laws, and democracy; Wm T. deBARY (Ed.), 1960, pp. 112–113; see also Huanyue GAO, 1997 (b), p. 101.

<sup>35</sup> Philip C. C. HUANG, 2001, pp. 40–41; see also Roy M. LOCKENOUR, 1930, pp. 255–257.

<sup>36</sup> Philip C. C. HUANG, 2001, pp. 41 *et seq.*

<sup>37</sup> Roy M. LOCKENOUR, 1930, p. 254; see also John H. WIGMORE, 1936, p. 195–197.

Court there were High Courts in each of the provinces and below those were district courts in each county.<sup>38</sup> Efforts were made to give examinations for the magistrates in order to reduce the difference between the magistrate level and the lower courts but this was only done sporadically and largely failed.<sup>39</sup> The lower courts had a very limited mandate; dealing only with smaller crimes and disputes.<sup>40</sup> In all in the late 1920s, there were at most only a few hundred modern courts for a population of 400 million.<sup>41</sup> Plans for the following years called for some 1,500 new courts.<sup>42</sup> Centralization of court funding was introduced already in the late Qing and was maintained in large part up until the GMD government was established in Nanjing in 1928.<sup>43</sup>

These courts were also supplemented with Guild-courts and Chamber of Commerce Courts that were better functioning and which grew in importance.<sup>44</sup> The aspirations of the GMD to establish independent courts was not solely based on the intentions of having independent adjudication, but also to centralize the control of the court system under the capital in Nanjing.<sup>45</sup> The powers of Party leader and head of government, JIANG Jieshi (CHIANG Kai-shek), were also to be limited by the separation of the ‘five powers’.<sup>46</sup>

After the so-called first ‘United Front’ of 1923–1927, when the government seat was Nanjing from 1928–1937, a period of cooperation existed between nationalist and communists to fight the disintegrating period of Warlordism. During this period GMD officials started advocating a “partyization” of the judiciary.<sup>47</sup> This meant in brief that as part of the reestablished efforts for a modern judiciary, the Party doctrine should also be a source for the judges to rely on in their adjudication.<sup>48</sup> The prohibition of judges from joining political parties also came to an end.<sup>49</sup> Indeed, prominent leaders of GMD criticized the “partyization” of the judiciary for being Communist and Marxist.<sup>50</sup>

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<sup>38</sup> Roy M. LOCKENOUR, 1930, p. 254; Originally the design was made for district courts in each Prefecture; generally, see also LE DROIT CHINOI: CONCEPTION ET EVOLUTION; INSTITUTIONS LEGISLATIVE ET JUDICAIRES; SCIENCE ET ENSEIGNEMENT, 1936.

<sup>39</sup> Xiaoqun XU, 1997, pp. 97–99.

<sup>40</sup> Roy M. LOCKENOUR, 1930, p. 255.

<sup>41</sup> *Id.*, p. 255; Xiaoqun XU, 1997, p. 102.

<sup>42</sup> *Id.*, p. 102.

<sup>43</sup> Xiaoqun XU, 1997, p. 100.

<sup>44</sup> Roy M. LOCKENOUR, 1930, p. 258.

<sup>45</sup> Philip C. C. HUANG, 2001, p. 43.

<sup>46</sup> Xiaoqun XU, 1997, p. 93.

<sup>47</sup> *Id.*, p. 85; see also pp. 90–92, on the justification arguments.

<sup>48</sup> *Id.*, pp. 85–86.

<sup>49</sup> *Id.*, p. 86.

<sup>50</sup> *Id.*, p. 87.

[J]udicial independence is the basis for . . . all matters, from maintaining public order and good social custom to securing individual's rights and obligations<sup>51</sup>

At the same time, others called judicial independence “the biggest evil” in providing cover for “fiefs” and the “cultivation of private factions”.<sup>52</sup> The Nanjing era also saw the first female judge in Chinese history; she was appointed as president of the Shanghai district court.<sup>53</sup> Throughout the Republican era from late Qing, all successive governments failed in establishing independent courts.<sup>54</sup> The abuse at the magistrate level was, according to one county magistrate, worse in the 1910s and 1920s than during Qing.<sup>55</sup> The contemporary appreciation of GMD legal developments in this era is however unjustly low, in part due to the present political nature of the GMD.<sup>56</sup>

#### *The Shanghai Mixed Court*

Part of the reason for the emphasis on judicial independence was, as stated, due to the desire to end extraterritoriality. By establishing a sound legal system that could match the foreign courts established in China, it was considered that China could regain its sovereignty.<sup>57</sup> In what was known as the French Concession and the International Settlement, outside the old Chinese walled city of Shanghai, various forms of extra-territoriality was for instance sought. There was a British jurisdiction with courts deciding on disputes and crimes when mainly British citizens were involved.<sup>58</sup> There were also similar arrangements for Americans, Germans, French, and Japanese, and in the last half of the nineteenth Century 18 countries had acquired extraterritorial privileges in China.<sup>59</sup> The Consular court of the US in Shanghai was criticized for being misused and in the early twentieth Century was even replaced with a US District Court for China that remained until 1942.<sup>60</sup>

A separate court system with ‘mixed courts’ had been established earlier in the international communities as a compromise between Chinese judicial sovereignty and extraterritoriality. Already in 1864, a mixed court was

<sup>51</sup> From the Manifesto of the National Judicial Conference of 1935; quoted in *Id.*, p. 93.

<sup>52</sup> Xiaoqun XU, 1997, p. 89.

<sup>53</sup> Her name was ZHENG Yuxiu; Xiaoqun XU, 1997, p. 87.

<sup>54</sup> *Id.*, p. 94.

<sup>55</sup> *Id.*, p. 96.

<sup>56</sup> Jianfu CHEN, 1999, pp. 29–30.

<sup>57</sup> Xiaoqun XU, 1997, p. 83.

<sup>58</sup> See e.g. the detailed rules for the British courts in Shanghai in W. B. KENNETT, 1918.

<sup>59</sup> Eileen P. SCULLY, 2001, p. 6.

<sup>60</sup> *Id.*, pp. 6, 105 *et seq.*

established in Shanghai.<sup>61</sup> Similar mixed courts were also set up in Amoy (present Xiamen) and Hangzhou.<sup>62</sup> A Chinese Magistrate sat together with a Western assessor forming this mixed court.<sup>63</sup> As the Qing regime collapsed in 1911 and until 1926, the mixed court was totally controlled by non-Chinese.<sup>64</sup> This domination ended after social unrest with subsequent rulings by the Court that made the Court appear to the Chinese as a foreign tool of suppression, which led Chinese authorities to demand full control over the Court.<sup>65</sup> This resulted in the appointment of judges by the provincial government.<sup>66</sup>

The reason for extraterritorial and mixed courts was the West's failure to establish trust in the Chinese legal system. These courts were established partially as a response to what was conceived by non-Chinese as unfair judgments by the Chinese courts, heightened by non-Chinese being sentenced in high profile cases such as the 'Terranova incident' and the 'Lin Wei-hi case'.<sup>67</sup> The efforts by China to modernize, or rather Westernize, their judicial system were to a large extent due to its desire to regain the lost sovereignty of the extraterritorial and mixed courts. On a similar note, at the end of the nineteenth Century, Chinese intellectuals were arguing for stronger human rights as a requirement for a stronger nation and thus national salvation.<sup>68</sup>

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<sup>61</sup> Thomas B. STEPHENS, 1992, pp. vii, 44, 113; see also Eileen P. SCULLY, 2001, p. 13–15.

<sup>62</sup> Eileen P. SCULLY, 2001, p. 6.

<sup>63</sup> Thomas B. STEPHENS, 1992, p. xi.

<sup>64</sup> *Id.*, pp. vii, 44, 113.

<sup>65</sup> Anatol M. KOTENEV, 1927, p. 171.

<sup>66</sup> *Id.*, 182; see also Xiaoqun XU, 1997, p. 87.

<sup>67</sup> Eileen P. SCULLY, 2001, pp. 36–38, 40–41 respectively; The latter case was settled in Canton by a Court of Criminal and Admiralty Jurisdiction in 1833, especially established by the British Parliament, p. 41; see however William P. ALFORD, 2000, pp. 50–52, on the prejudiced view on law in China, which in actuality was not always more brutal than in e.g. Britain, and the Chinese were not all that poorly legally versed.

<sup>68</sup> Marina SVENSSON, 2002, pp. 114–116.

## B. Formation of the People's Republic<sup>69</sup>

The judicial functionaries were to be divested of that sham independence which had but served to mask their abject subservience to all succeeding governments to which, in turn, they had taken, and broken, the oaths of allegiance. Like the rest of public servants, magistrates and judges were to be elective, responsible and revocable.<sup>70</sup>

– *Karl Marx, 1871*

The orthodox Marxism-Leninism view prescribes that the law and consequently the adjudication according to law should be done in the interest of the proletariat dictatorship and thus the Party.<sup>71</sup> The ultimate goal was to do away with state itself as well as the law.<sup>72</sup> Separation of powers was a rejected concept in Marxist-Leninism, which had as the main three tasks to secure national security, develop production to boost the economy, and to educate the people.<sup>73</sup> The Maoist form of Communism created a fundamental opposition between friends and enemies that came to permeate all institutions. This distinction was applied to all issues shaping them into good or bad in order to keep the revolution alive. The politics of the time was based on the existence of this clear opposition, without which the politics itself could not exist.<sup>74</sup> Such politics dictated some concepts such as judicial independence to be principles of the enemy and thus tainted them as a pariah.

In the 'liberated areas', areas controlled by the Chinese Communist Party (CCP), the development of a new legal system in began in 1927.<sup>75</sup> Starting in 1931, Chinese Soviet republics were being founded that laid the groundwork for practices such as the 'mass line' of the people in determining cases, people's assessors and administrative detention.<sup>76</sup> The first Soviet governments

<sup>69</sup> For the period from the Bolshevik revolution in Russia of 1917 to the proclamation of the People's Republic of China, see Edgar TOMSON and Jyun hsyong SU, 1972, pp. 19 *et seq.*, for a general account of the legal development in China.

<sup>70</sup> Address of the General Council of the International Working Men's Association on the Civil War in France, 1871, by Karl Marx; Karl MARX, 1970, p. 68.

<sup>71</sup> See e.g. Albert H. Y. CHEN, 1994, p. 117; and René DAVID and John E. C. BRIERLEY, 1985, p. 169.

<sup>72</sup> René DAVID and John E. C. BRIERLEY, 1985, p. 155.

<sup>73</sup> *Id.*, pp. 216, 191; see also Mirjan R. DAMAŠKA, 1986, p. 202; it is however argued that the Marxist influence on the Chinese legal system should not be over-exaggerated, Yongping LIU, 1998, pp. 9–10.

<sup>74</sup> Michael Dutton, presentation at ACE, Lund University, 10 October 2003; and forthcoming (2004). monograph at Duke University Press.

<sup>75</sup> Philip BAKER, 1996, p. 11; see also e.g. Jiahong HE, 1995, pp. 124 *et seq.*

<sup>76</sup> Philip BAKER, 1996, p. 11.



in China were established in Jiangxi (1931–1934) at the end of the first ‘United Front’ in 1927.<sup>77</sup> A first constitutional document was issued by the CCP in late 1931 and revised in 1934, which was largely copied from the Russian Constitution of 1918.<sup>78</sup> In this period, people’s courts were established based on the model of the revolutionary courts used in Russia between 1917 and 1921.<sup>79</sup>

There was also influence from the preexisting system, mainly then the legal system of the GMD. The introduction of semi-professional justice was not at first meant to replace the popular justice. These courts were first introduced in the red-held areas and sorted under a Supreme Court of Chinese Workers and Peasants, and from 1934 organized under a national Department of Justice. The professional and the popular systems continued to exist in parallel, with a significant popular component influencing the more professional courts with dominance of ideology over scientific or objective judicial standards.<sup>80</sup>

In late 1931 the Central Executive Committee of the Chinese Soviet Republic issued a Directive concerning the court system.<sup>81</sup> In early 1932 the Central Executive Committee published a Provisional Statute on the Organization of Military Tribunals of the Chinese Soviet Republic.<sup>82</sup> The four-tier system that was established for military personnel formed the basis when the civilian copy was designed. The CCP issued Provisional Rules on the Organization of Judicial Sections and Court Procedure in June 1932.<sup>83</sup> According to these Provisional Rules the courts in the Chinese Soviet Republic were to receive all civil and criminal matters apart from cases related to military servicemen or workers at military institutions (articles 2 and 3) and different sections for criminal and civil cases were set up (article 11). A hierarchy of courts under the Provisional Supreme Court was prescribed with corresponding levels of government set to guide the courts (articles 4 and 5). A

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<sup>77</sup> Jianfu CHEN, 1999, p. 32; Later on a Soviet was also established in well-known Yan’an.

<sup>78</sup> *Id.*, p. 32–33.

<sup>79</sup> Ivo LAPENNA, 1983, pp. 71–72; Lapenna also notes that a difference between the Russian and Chinese courts was that the latter also had the right to execute, with reference to article 4 of Decree of 8 April 1934 (see below), which seemingly ought to be article 3 and 4; see also article 29 of Provisional Rules on the Organization of Judicial Sections and Court Procedure in of 9 June 1932, noteworthy is that death penalty cases required a mandatory rehearing at the next superior court disregarding if an appeal has been made, as well as actual approval or disapproval of executions from the provincial level court, and also that the minimum time for appeal must have passed before the execution (articles 26, 27 and 31); a model for courts that was also to some extent used in Yugoslavia in 1941–45, pp. 72, 75.

<sup>80</sup> James P. BRADY, 1982, pp. 69–71.

<sup>81</sup> Directive No. 6, 16 December 1931.

<sup>82</sup> Statute of 1 February 1932, published in W. E. BUTLER (Ed.), 1983, pp. 191–194.

<sup>83</sup> Rules of 9 June 1932, published in W. E. BUTLER (Ed.), 1983, pp. 185–188; 41 articles divided under 6 chapters.

Judicial Procedure Act was also introduced in 1934.<sup>84</sup>

When it came to the actual examination of cases, a Central People's Commissariat of Justice was also to provide guidance to the Supreme Court and appoint and replace heads and staff of the courts (article 6). In simple cases a bench with one judge was sufficient but usually the judge chaired the hearings and two assessors were additionally required (article 13). The basic rule called for public trials and public announcement of verdicts (article 16). Rules of avoidance were also in place regulating possibilities of bias owing to family or personal ties between judges and the parties to a trial (article 19). The assessors were to be elected from members of trade unions, unions of poor peasants, and other mass organizations (article 14). Circuit (ambulating or roving) sessions could also be established for adjudication on the spot and important cases could be submitted for hearing at meetings with the broad masses (article 12).

Apart from the rather provisional nature of the rules, most of the structure and procedures seem familiar. The latter examples of the functioning related to assessors may seem different but have their contemporary similarities in the jury system, as well as with lay judges in many jurisdictions through out the world and also in present China.<sup>85</sup> Special were the roving court hearings and mass meetings at least in so far as the political terminology that was applied.

The Provisional Rules were supplemented in April 1934 through the publishing of Decree of the Central Executive Committee of the Chinese Soviet Republic.<sup>86</sup> This Decree was mainly aimed at countering counter-revolutionaries and thus strengthened the power of the courts in quick adjudication and execution of judgments. Speed was deemed essential so power was also given to political security organs and Red Army Forces to enable urgent measures under special situations to bypass the courts (article 4). Generally appeal possibilities were maintained (articles 5 and 6) but limited to only one appeal in the four-tier system. However, "in new and frontier areas, in areas of an enemy offence, and in critical situations, criminals in counter-revolutionary cases and criminals from the local magnates and landlords should be deprived of the right to appeal."<sup>87</sup> This Decree also repealed previous directives, rules and statutes related to the court proceedings (article 8) mentioned above.

As the second 'United Front' (1937-45) between the GMD and the CCP began in the late 1930s, largely brought about by the threat from Japan, GMD legislation was as a rule applied also in Communist controlled areas and the Nationalist Supreme Court was at least in theory at the top of the hierarchy.<sup>88</sup>

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<sup>84</sup> James P. BRADY, 1982, p. 72.

<sup>85</sup> See e.g. Wm T. deBARY (Ed.), 1960.

<sup>86</sup> Decret of 8 April 1934; published in W. E. BUTLER (Ed.), 1983, pp. 189–190.

<sup>87</sup> Article 5, para. 2 of the 1934 Decree.

<sup>88</sup> Jianfu CHEN, 1999, p. 33; McALVEAY, 1961, p. 3.

When the Japanese were defeated in the Second World War however, the tension between the GMD and the CCP grew stronger, and with it a more independent legal development. After the civil war broke out between the two in 1945, the GMD government adopted in the following year a constitution reintroducing the principles of Sun Yat-sen.<sup>89</sup>

In the 1940s the Communists explored the institution of mediation as a supplement to the courts. It was reported that during the first half of the 1940s civil cases resolved through mediation rose from less than 20 per cent to almost 50 per cent.<sup>90</sup> In general the direction of the Communist legal system was toward the development of the mass line in justice.<sup>91</sup> In 1946, a new constitutional document was drafted also by the CCP and in early 1949 the six codes of the GMD was formerly abolished along with a prohibition for the courts to rely on European, American or Japanese Law.<sup>92</sup> The courts were only to rely upon Communist Party documents until new laws were in place.<sup>93</sup> In 1948 provisional rules for the courts were being drafted but were only promulgated in 1951.<sup>94</sup> The formula for supervision was two pronged: vertically by higher courts and horizontally by corresponding levels of government.<sup>95</sup>

Justice in the red areas was subject to the most intense political influence in cases of clear opposition to the nationalists, such as in the early Jiangxi days and during the civil war in the latter half of the 1940s, while a more moderate approach was maintained during the ‘united front’ periods.<sup>96</sup>

### *1. The People’s Republic of China: Post 1949*<sup>97</sup>

As the Peoples Republic was officially proclaimed in 1949, the Common Program of the Party adopted by the Chinese People’s Political Consultative Conference, the broader advisory parliament, established in article 17 a people’s judicial system.<sup>98</sup> The first three to four years of the People’s Republic, passed without a formal constitution; instead the new government

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<sup>89</sup> Dingjian CAI, 1999 (a), p. 387.

<sup>90</sup> James P. BRADY, 1982, p. 68.

<sup>91</sup> *Id.*, p. 69.

<sup>92</sup> Jianfu CHEN, 1999, pp. 34–35.

<sup>93</sup> *Id.*, p. 35.

<sup>94</sup> McALVEAY, 1961, p. 9.

<sup>95</sup> *erchong zhidao*, *Id.*, p. 9.

<sup>96</sup> Jerome A. COHEN, 1969, p. 976.

<sup>97</sup> For the period after 1949, see generally Edgar TOMSON and Jyun hsyong SU, 1972, p. 33 on the legal development.

<sup>98</sup> Article 17 of the Program, Shao chuan LENG, 1967, p. 27; see also Philip BAKER, 1996, p. 12.

consolidated their power through, in addition to the Common Program, political campaigns.<sup>99</sup> An Organic Law of the Government was also in place.<sup>100</sup>

The Organic Law provided for a court hierarchy with a Supreme People's Court at the very top.<sup>101</sup> Already in 1946 it had been decided that the courts, police, and procuratorate should divide the jurisdictions in a conventional way but to draw on the Russian Procuratura-model with the prosecutors also formally supervising the judges and police.<sup>102</sup> Russia had lay-assessors at the lowest level only, which was the extent of the participation of the masses. In China, the mass line was more influential.<sup>103</sup> The People's Assessors, as they were called, participated in all non-minor cases at the first instance and at least in theory they had equal rights with the judge, but also the same obligations in respect to for example withdrawal when biased.<sup>104</sup> Legal doctrine, as with judicial independence, was repudiated and no such reference was made in the Provisional Organic Regulations of the People's Court of 1951.<sup>105</sup> Until 1954 there were therefore no stipulations on judicial independence and courts were organized under the local governments as opposed to the later organization under the congresses.<sup>106</sup>

In the summer of 1950, the first All-China Conference of Judicial Workers was convened in an effort to establish a national court system where the Minister of Justice proposed for example a five-year training for judges.<sup>107</sup> In the following year a provisional regulation established people's courts with three levels: county, provincial, and capital. Branch offices of the Supreme Court were also set up in each of the six administrative units that the military had divided the country into.<sup>108</sup> The courts were to be under the supervision of the people and checked by government organs at the corresponding level in the hierarchy.<sup>109</sup> The new system was however not ready to cope with the huge backlog of cases that had built up from the first years of the People's Republic. For this reason, a Judicial Reform Movement was initiated in 1952 that replaced at least 80 per cent of the some 6,000 judges that had been inherited

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<sup>99</sup> Dingjian CAI, 1999 (a), p. 388; see also Guobin ZHU, 1997, p. 33; Chunying XIN, 1999, p. 356.

<sup>100</sup> Jianfu CHEN, 1999, p. 36; Hikota KOGUCHI, 1987, p. 196.

<sup>101</sup> Articles 26 and 27; Shao chuan LENG, 1967, p. 27.

<sup>102</sup> James P. BRADY, 1982, p. 120.

<sup>103</sup> James P. BRADY, 1982, pp. 119–120.

<sup>104</sup> Shao chuan LENG, 1967, pp. 87, 89.

<sup>105</sup> Jianfu CHEN, 1999, p. 37; Hikota KOGUCHI, 1987, p. 196; Phillip M. CHEN, 1973, p. 169.

<sup>106</sup> Hungdah CHIU, 1982, pp. 8–9.

<sup>107</sup> *Id.*, p. 91.

<sup>108</sup> Laszlo LADANY and Luise MARIE (Eds.), 1992, p. 64; see also Shao chuan LENG, 1967, p. 28; a reform proposal in the contemporary debate in China has been made in line with these branch offices, see subsequent discussion on reform.

<sup>109</sup> Shao chuan LENG, 1967, p. 29.

from the Nationalist judiciary, and instilled the necessity of mixing law with politics.<sup>110</sup> In Shanghai 80 out of 104 of the judges had been from the GMD government period.<sup>111</sup> In 1949 there were around 60,000 trained in law in China.<sup>112</sup>

The Reform also reintroduced mass line adjudication as well as emphasizing conciliation and arbitration.<sup>113</sup> The People's Conciliation Commissions, organized under the courts, required consent by the parties and had no power of enforcement.<sup>114</sup> It was reported that some 70 per cent of the cases in Eastern China were solved through conciliation.<sup>115</sup> In the province of Sichuan 40,000 disputes were settled in nine months during 1953.<sup>116</sup> The reform movement also led to efforts to improve the court system and the qualifications of the judicial personnel.<sup>117</sup> Moreover, committees were appointed to criticize the court system and the staff of the court was called upon to perform self-criticism.<sup>118</sup> Principles that were attacked at this time included separation of law and politics, independence of the judiciary and the equality of the people before the law.<sup>119</sup> The President of the Supreme People's Court as well as the head of the Public Security and the Prosecutor General, all pledged their support to the merger between politics and law and condemned a "legal system based on 'judicial independence' or on written legal codes".<sup>120</sup>

In the 1951–1952 campaign to redistribute land, which mainly consisted of confiscating land from the major landowners and redistributing it to poor farmers, also to some extent was mixed with the campaign to suppress counter-revolutionaries, had extraordinary courts with mass line participation as well as some with regular judges. There were also peasant associations that gathered in large 'accusation meetings' with immediate sentencing based on common sense rather than law.<sup>121</sup> With the war in Korea in the early 1950s the mass line was reduced through recruiting the most active participants from the mass

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<sup>110</sup> The number of judges that were not from the Nationalist judiciary prior to 1952 was approximately 24,000. Jerome A. COHEN, 1969, p. 978; Phillip M. CHEN, 1973, p. 169; Laszlo LADANY and Luise MARIE (Eds.), 1992, pp. 64–65; see also René DAVID and John E. C. BRIERLEY, 1985, p. 525, note 16.

<sup>111</sup> Phillip M. CHEN, 1973, p. 169.

<sup>112</sup> Shao chuan LENG, 1967, p. 42; see also Laszlo LADANY and Luise MARIE (Eds.), 1992, p. 65.

<sup>113</sup> Shao chuan LENG, 1967, pp. 33, 39; see also James P. BRADY, 1982, pp. 106 *et seq.*

<sup>114</sup> Phillip M. CHEN, 1973, p. 172.

<sup>115</sup> Shao chuan LENG, 1967, p. 43.

<sup>116</sup> Phillip M. CHEN, 1973, p. 173.

<sup>117</sup> Shao chuan LENG, 1967, p. 39.

<sup>118</sup> *Id.*, p. 41.

<sup>119</sup> *Id.*, p. 42.

<sup>120</sup> James P. BRADY, 1982, p. 92.

<sup>121</sup> *Id.*, pp. 82–83, see also p. 80, about the land reform.

movements to positions at the people's courts after a few months of training.<sup>122</sup> The main focus was soon placed on counter-revolutionary crimes. Three types of courts were used in this endeavor:<sup>123</sup> Military Courts (*junshi fayuan*), organized under the Military Control Commission with judges chosen by the Army and the Party leadership. These trials could have an audience but the judgments were made by the judges. People's tribunals (*renmin fating*) started in 1951, with great public participation and elected lay-judges, mainly to handle the early Soviet Union years-style purges in the various campaigns. People's courts (*renmin fayuan*)<sup>124</sup>, were established in all cities but with much less severe sentences and they were only allotted a few cases since the judges were mainly from the GMD-era.

With the end of the main "anti-campaigns" around 1952, the system of People's tribunals was discontinued but then resurrected briefly in 1954–1955, and again more permanently in 1957.<sup>125</sup> Through the years that followed however, China saw a series of constitutions that to a large extent reflected the attitude towards law of the current leading faction of the CCP.<sup>126</sup> The presentation in that follows here is therefore divided under the headings of these chronological constitutional orders.<sup>127</sup>

The impact of the Soviet influence on the Chinese judiciary cannot be overlooked. The mass-line with extensive popular participation and the procuratura system with a formal supervisory mandate over the courts, in addition to the common prosecutorial functions, served as the fundamentals for the Chinese model. Additionally, in response to the bourgeois style justice, the Soviet ideals were often exaggerated in order to create a genuinely different model. The Chinese and Soviet experiments with administration of justice, testifies, according to Damaška, "to this difficulty in translating the poetry of ideology into the prose of procedural form".<sup>128</sup> The People's Republic failed to establish a well functioning system that could effectively replace the judiciary.

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<sup>122</sup> *Id.*, pp. 84, 90.

<sup>123</sup> *Id.*, pp. 90–91, 105; Shao chuan LENG, 1967, pp. 27, 35; Laszlo LADANY and Luise MARIE (Eds.), 1992, p. 62; see also Martin M. SHAPIRO, 1981, pp. 61–63.

<sup>124</sup> For details see in particular Shao chuan LENG, 1967, p. 81.

<sup>125</sup> James P. BRADY, 1982, p. 98.

<sup>126</sup> For a brief overview, see e.g. *Zhongguo faguan guanli zhidu gaige yanjiu* [Research on the Reform of Judges' Management System in China], 1999, p. 20.

<sup>127</sup> For a collection of the constitutions and the various drafts, see e.g. Jihong MO, 1999; see generally e.g. Chunying XIN, 1999, pp. 354 *et seq.*

<sup>128</sup> Mirjan R. DAMAŠKA, 1986, p. 241.

## 2. *The First Constitution, 1954*<sup>129</sup>

What has been termed the ‘golden period’ in the People’s Republic, started with the Constitution of 1954.<sup>130</sup> The legal system was being rebuilt with heavy exchange with and strong influence from the Soviet Union and the Constitution itself very much drew on the 1936 Constitution of Stalin and the USSR.<sup>131</sup> The Preamble of the Constitution set the tone with reflections of concrete problems the country was facing, such as the relationships with the US and Korea. All power was, with the Constitution, formally transferred to the people through the National People’s Congress as the highest organ of state power (articles 2 and 21).<sup>132</sup> At the same time the Constitution remained insistent on issues such as depriving landlords of political rights (article 19).

The Constitution resolved a number of issues such as reducing the potential for organizational influence on prosecutors and judges (articles 73 and 78) and eliminated at least the constitutional basis for People’s tribunals.<sup>133</sup> Even though the Constitution dealt with courts and tribunals and the independence of the judiciary, it did not spell out independence from the Party.<sup>134</sup> James P. Brady argues however that the Constitution (article 78) placed the courts above the Party and that in practice the Party influenced sensitive cases. The majority of the non-political cases were increasingly decided on a legal basis, which meant that they moved closer to the Soviet model.<sup>135</sup>

An organizational law on the courts was adopted in September 1954, which in article 4 provided the identical provision to article 78 of the Constitution: “In administering justice the people’s courts are independent, subject only to the law.”<sup>136</sup> The difference from the Soviet model was that in Russia independence related to the individual judges, not the courts.<sup>137</sup> Article 112 of the USSR Constitution of 1936 stipulated, “Judges are independent and subject only to the law”.<sup>138</sup> As to the difference between the formulations in the constitutions

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<sup>129</sup> On the Constitution in general, see e.g.: Henri ISAIA, 1978, p. 50; Chunying XIN, 1999, pp. 355 *et seq*; see also Jerome A. COHEN, 1969, p. 979.

<sup>130</sup> The Constitution in a German version Edgar TOMSON and Jyun hsyong SU, 1972, p. 375.

<sup>131</sup> Jianfu CHEN, 1999, p. 38, 65; Shao chuan LENG, 1967, p. 46, see also pp. 77 *et seq*.

<sup>132</sup> See Edgar TOMSON and Jyun hsyong SU, 1972, p. 156, for a chart over the administration.

<sup>133</sup> James P. BRADY, 1982, p. 120; Jerome A. COHEN, 1968, p. 425.

<sup>134</sup> Henri ISAIA, 1978, p. 50; Hikota KOGUCHI, 1987, p. 196; Shao chuan LENG, 1967, p. 48.

<sup>135</sup> James P. BRADY, 1982, p. 121.

<sup>136</sup> Shao chuan LENG, 1967, pp. 46–48.

<sup>137</sup> *Id.*, pp. 98–99; see also Jerome A. COHEN, 1968, p. 483.

<sup>138</sup> For a version of the Russian Constitution, see e.g. [www.departments.bucknell.edu/russian/const/36cons03.html#chap09](http://www.departments.bucknell.edu/russian/const/36cons03.html#chap09).

of USSR and China, Cohen suggests it may be that the Chinese were, as is often the case in many countries, “papering over an unresolved political dispute with ambiguous language”.<sup>139</sup> The organizational law also established adjudication committees (article 10), an in-house organ giving the senior judges a decisive authority in important cases.<sup>140</sup>

Article 17 of the Constitution required all organs, including the courts, to rely on the masses of the people, and the Party was the voice of the masses. Articles published in the press argued mainly for this position of the Party but there was at least one article advocating non-interference with the judiciary for the sake of, among other reasons, predictability and human rights.<sup>141</sup> In the first few years after the 1954 Constitution the Party influenced the judiciary through its policies rather than in individual cases.<sup>142</sup> Cohen argued that while judicial independence must rely on political consensus rather than fiat, they had to wait until the understanding for the institution manifested before they could introduce judicial independence.<sup>143</sup>

Instead of the local people’s governments, the people’s congresses were placed in charge of appointing judges and also of terminating their four-year terms in advance if a violation of the law had occurred or if a neglect of duty could be established.<sup>144</sup> Courts were to decide but the Standing Committee of the National People’s Congress was authorized to overturn the Supreme People’s Court.<sup>145</sup>

The Party still urged that political ideology should be included in the formulation of verdicts as a way of popular education. Police and mediation teams still handled a significant number of cases. Advocates expressed need for judicial independence to secure predictability in adjudication and thus social stability. In 1956–1957, judges were beginning to receive short-term training.<sup>146</sup> There were in addition to the special military courts, also railway transportation courts as well as water transportation (Maritime) courts. The latter two were in place only from 1953 until 1957 at which time the cases were moved to the regular courts.<sup>147</sup>

Below the lowest level of courts were people’s conciliation committees as in pre-1949 communist controlled parts of China, which settled disputes and

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<sup>139</sup> Jerome A. COHEN, 1969, p. 981.

<sup>140</sup> Jerome A. COHEN, 1968, p. 487.

<sup>141</sup> Jerome A. COHEN, 1969, pp. 982–983.

<sup>142</sup> *Id.*, p. 985.

<sup>143</sup> *Id.*, p. 1005.

<sup>144</sup> James P. BRADY, 1982, p. 121; Shao chuan LENG, 1967, p. 48; see also Jerome A. COHEN, 1969, p. 979.

<sup>145</sup> Jerome A. COHEN, 1969, p. 981.

<sup>146</sup> James P. BRADY, 1982, p. 121.

<sup>147</sup> Shao chuan LENG, 1967, p. 80; Jerome A. COHEN, 1968, p. 428; When the legal system was reestablished in the late 1970s the specialized courts reemerged.



decided minor criminal cases.<sup>148</sup> In the mid-1950s there were some 160,000 such committees that individuals could opt to rely on to settle disputes.<sup>149</sup> In the southern China province of Hainan in 1958 there were over 8,000 mediation teams and only 139 people's courts.<sup>150</sup> China also had lay tribunals, known as comrades adjudication committees introduced in 1953 that, at times with judges, provided legal advice and dealt with anti-social behavior in factories and mines.<sup>151</sup> In 1953 all courts also got an office that received letters and visits complaining of various minor problems. These People's Reception Offices, settled minor disputes, prepared petitions and agreements and worked with public information.<sup>152</sup> At the same time decisions by judges of the people's courts were more often overturned upon appeal than not.<sup>153</sup>

With the 1954 reform, the procuratorate was enabled to perform their function but were still much weaker than the police and the courts.<sup>154</sup> The mass-line participation in adjudication was transformed into the Russian style people's assessors and up until 1957 the Soviet model with a more permanent judicial structure was increasingly followed.<sup>155</sup> Assessors were selected by mass-organizations for ten days of court duty, where they would serve in pairs along with one judge, all having equal voting rights.<sup>156</sup> Soon a conflict evolved between judges and assessors however.<sup>157</sup> A peak of legal development was reached as the campaign on letting 'hundred schools contend' was launched with advanced legislation being tested on for example procedural matters.<sup>158</sup> Previous legal reforms were criticized, as was the quality of the judges: a mid-level court in Shanghai was said to have wrongfully adjudicated one third of their cases.<sup>159</sup> A group of liberal jurists argued for judicial independence at this time and the initiative was even supported by one of the Chief Justices of the Supreme People's Court.<sup>160</sup>

Mass line justice became increasingly dominant in this "great leap of justice".<sup>161</sup> The professional justice became more class conscious, decentralized

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<sup>148</sup> Shao chuan LENG, 1967, p. 91 and see also chart on p. 79; see also James P. BRADY, 1982, pp. 126, 165–166.

<sup>149</sup> Shao chuan LENG, 1967, pp. 91–92.

<sup>150</sup> James P. BRADY, 1982, p. 166.

<sup>151</sup> Shao chuan LENG, 1967, p. 93; Martin M. SHAPIRO, 1981, p. 61–63; René DAVID and John E. C. BRIERLEY, 1985, p. 260; Phillip M. CHEN, 1973, p. 176.

<sup>152</sup> Shao chuan LENG, 1967, p. 94, *xinfang*.

<sup>153</sup> *Id.*, p. 97, the statistics originated from the province of Sichuan.

<sup>154</sup> James P. BRADY, 1982, p. 122.

<sup>155</sup> *Id.*, pp. 124–125; Shao chuan LENG, 1967, p. 45.

<sup>156</sup> James P. BRADY, 1982, p. 125.

<sup>157</sup> *Id.*, p. 125.

<sup>158</sup> Shao chuan LENG, 1967, p. 54.

<sup>159</sup> *Id.*, pp. 58–59.

<sup>160</sup> *Id.*, p. 61.

<sup>161</sup> James P. BRADY, 1982, p. 162.

and community-oriented and was used mainly for legal education in highlighting cases.<sup>162</sup> With the Anti-rights movement of 1957 and the Great Leap Forward in the following year, the golden period of legal development came to an end.<sup>163</sup> The positive development that commenced with the 1954 Constitution was reversed with reduced professionalism and increased Party control.<sup>164</sup> The relations with the Soviet Union also became frostier with an increased desire for China to find its own way, a more flexible way, also when it came to the judiciary.<sup>165</sup> Principles such as judicial independence were highly criticized.<sup>166</sup> Even laws, a non-Chinese eyewitness states, are seen as bourgeois “not so much by their content – which could have been modified – but by their very nature as *legislative texts offering support to the individual in the face of power*”.<sup>167</sup> To defend oneself in court was understood as an attack against the government. Many judges did not have any form of higher education and often lacked legal training; a crash course in ideology was simply provided.<sup>168</sup> There was also hesitance about appeals because of the risk of getting a heavier sentence.<sup>169</sup>

After 1957 the principle of judicial independence was surrendered completely and the dominating influence was the mass-line based on MAO Zedong’s theory of contradictions.<sup>170</sup> Mao talked about the “correct handling of contradictions” as the basis for legal thinking, where he separated disputes (contradictions) among the people from those between the enemy and us, with the enemy being those resisting the socialist revolution.<sup>171</sup> Lawyers were highly criticized and even suppressed. The Ministry of Justice was abolished in 1959 and judges were sent to participate in production.<sup>172</sup> In the Southern province of Fujian, the President of the High Court reported in 1959 that the masses were so pleased with the trial procedure that they sang a song about how the courts toured the countryside and the judges even carried manure.<sup>173</sup> Investigation, mediation, and sentencing were made on the spot, or at the scene of the crime or the dispute to a great extent: In Liaoning it was reported that 80 per cent of the cases in 1959 were solved in this way.<sup>174</sup>

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<sup>162</sup> *Id.*, pp 164–165.

<sup>163</sup> Jianfu CHEN, 1999, p. 39; see also James P. BRADY, 1982, pp. 159 *et seq.*, 145.

<sup>164</sup> Jerome A. COHEN, 1969, p. 989.

<sup>165</sup> Shao chuan LENG, 1967, p. 45.

<sup>166</sup> Philip BAKER, 1996, p. 19.

<sup>167</sup> André BONNICHON, 1959, pp. 4–5, 14.

<sup>168</sup> *Id.*

<sup>169</sup> Shao chuan LENG, 1967, pp. 152–153.

<sup>170</sup> *Id.*, pp. 101, 147 *et seq.*

<sup>171</sup> *Id.*, pp. 154–155.

<sup>172</sup> *Id.*, pp. 46, 66.

<sup>173</sup> Jerome A. COHEN, 1968, p. 423.

<sup>174</sup> Shao chuan LENG, 1967, p. 65.

The pendulum swung back again in the early 1960s when the Great Leap proved devastating.<sup>175</sup> There was a renewed interest in foreign legal systems but not all of it purely positive: Kelsen's pure theory of law was by described by one commentator as a bourgeois trick and Kelsen's view on international law as an American imperialist tool.<sup>176</sup> In 1962, LIU Shaoqi, then head of state, argued for non-interference of the Party in the judiciary and for the necessity of judicial independence.<sup>177</sup> This period of continued legal development was even shorter; in 1963 a political movement started that was later replaced by the Cultural Revolution of 1966–1976.<sup>178</sup> The era of the Cultural Revolution was detrimental to law as the whole legal system including legal institutions and legal education was dismantled.<sup>179</sup> In a sixteen point Communiqué by the Central Committee, administration of what was left of the justice system was handed over to the people and the Red Guards who provided popular justice. There were voices proposing limiting popular justice to criticism, not actual handling, but the dominant position was critical of judges for not supporting the leftist mass movement. In Beijing, the Red Guards took the courts by storm and judges were removed and some were even executed.<sup>180</sup>

The Supreme Court was even occupied for about five years by the People's Liberation Army.<sup>181</sup> The legal processes as well as the educational aspects of justice were abandoned.<sup>182</sup> The revolution cooled down in 1967–1968 but political education campaigns continued with studies of Mao's writings.<sup>183</sup> Many courts remained closed and focus was placed on mediation in mass organizations.<sup>184</sup> Faculties of law even stayed closed longer than other departments at the universities.<sup>185</sup> A number of cases from the Cultural Revolution were later revisited and reversed, as were those of earlier campaigns.<sup>186</sup>

The Party was searching for an optimal institutional arrangement that would maximize advantages and minimize disadvantages, which after 1957 led to an extreme on the spectrum of political-judicial accommodations.<sup>187</sup> The 1954 Constitution needed twelve articles to deal with the courts; in the 1975

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<sup>175</sup> Jianfu CHEN, 1999, p. 39.

<sup>176</sup> Shao chuan LENG, 1967, p. 74.

<sup>177</sup> Shigui TAN, 2001, p. 82.

<sup>178</sup> Jianfu CHEN, 1999, p. 40; see also James P. BRADY, 1982, p. 192.

<sup>179</sup> See e.g. Shao chuan LENG, 1967, pp. 63 *et seq.*

<sup>180</sup> James P. BRADY, 1982, pp. 194–195, 200.

<sup>181</sup> 1968–1973, Susan FINDER, 1993, p. 147.

<sup>182</sup> James P. BRADY, 1982, p. 203.

<sup>183</sup> *Id.*, pp. 205, 210.

<sup>184</sup> *Id.*, p. 219.

<sup>185</sup> *Id.*, p. 218.

<sup>186</sup> See e.g. Susan TREVASKES, 2002.

<sup>187</sup> Jerome A. COHEN, 1969, p. 1002.

Constitution only one article was needed.<sup>188</sup> Cohen concludes: “One should therefore not consign judicial independence to the dustbin of Chinese history because of the abortive experience of the 1950’s.”<sup>189</sup>

### 3. *The Second Constitution, 1975*<sup>190</sup>

The Second Constitution of 1975 was mainly a propaganda document, brief in length and basically a ‘Maoification’ of the previously Soviet-style constitution.<sup>191</sup> The Constitution downplayed law and emphasized continued revolution through class-struggle and the dictatorship of the proletariat.<sup>192</sup> Mass-line justice was continued with the bureaucratic form of justice taking the back seat to that of the popular justice.<sup>193</sup> The Party was in the foreground and the state organs were de-emphasized; according to the Constitution (article 16) the National People’s Congress was the highest organ under the Party.<sup>194</sup> This time around, Professor CHEN Jianfu argues, it was the Constitution of the People’s Republic that most corresponded to the revolutionary reality.<sup>195</sup> But the end of the heydays of Maoism was near and the Constitution was soon to be replaced.

### 4. *China and International Law*

International law, in a traditional sense regulating relations between states, existed in China already during the earliest unifying dynasties through extensive interactions with non-Han peoples, in particular over the inner-Asian frontier. In this environment, there was an evolution in international relations with rules for diplomacy, treaty making, use of force, absorption and division of states, rights of neutrals, et cetera.<sup>196</sup> In the continued international relations, China subscribed to the principle of honoring agreements also with the same response to agreements under duress.<sup>197</sup> International law as an interstate regulator is not new to China.

China’s official position on international law in the early years of the People’s Republic followed closely that of the USSR where international law in the same way as national law was to serve state policy, but China came to

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<sup>188</sup> Henri ISAIA, 1978, p. 50.

<sup>189</sup> Jerome A. COHEN, 1969, p. 1006.

<sup>190</sup> For a general overview, see Edgar TOMSON and Jyun hsyong SU, 1972, pp. 228 *et seq.*; and Chunying XIN, 1999, pp. 356 *et seq.*

<sup>191</sup> Jianfu CHEN, 1999, p. 66.

<sup>192</sup> Chunying XIN, 1999, p. 357.

<sup>193</sup> James P. BRADY, 1982, p. 219.

<sup>194</sup> Chunying XIN, 1999, p. 358.

<sup>195</sup> Jianfu CHEN, 1999, p. 66.

<sup>196</sup> Jacques deLISLE, 2000, p. 275.

<sup>197</sup> Wolfgang FRIEDMANN, 1964, p. 312, see also pp. 311 *et seq.*

develop a more pragmatic approach.<sup>198</sup> China was humiliated with what is referred to as the unequal treaties that had been negotiated under duress, where China had to give up large concessions to the Western powers in the nineteenth century.<sup>199</sup> Additionally, when the League of Nations did not assist China when Japan occupied the Northeastern parts of the country (Manchuria) in the first half of the twentieth century, the international community and international law lost credibility in China.<sup>200</sup>

As was the case in the USSR, international law and national law again became equally binding in theory: international law as spelled out in for example a treaty was to have the same legal effect in the country as ordinary law.<sup>201</sup> In practice nevertheless, the status of international law was and is still rather unclear.<sup>202</sup> In the aftermath of World War II, the Military Tribunal of the Chinese Supreme People's Court invoked "international law standards and humanitarian principles" in sentencing Japanese war criminals.<sup>203</sup> China and the Communist Party also sent a delegation to participate in the negotiations for the United Nations in San Francisco in 1945.<sup>204</sup>

During the Cultural Revolution in the late 1960s and early 1970s, China rejected international law, but has since rapidly worked its way back to the international arena as an increasingly important and responsible actor.<sup>205</sup> After 22 years, Taiwan was replaced in the UN by the Beijing regime in 1971.<sup>206</sup> With the reforms initiated in the late 1970s, China is also increasingly committed to international law, with the ever-growing need for interaction, not the least for the sake of maintaining economic development.<sup>207</sup> China is also increasingly making its voice heard in debates over humanitarian intervention and international human rights law. Certainly this is also coupled with a growing concern in the international community over the good faith of the commitments made by China.<sup>208</sup>

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<sup>198</sup> Shao LENG and Hungdah CHIU (Eds.), 1972, pp. 1, 17–18.

<sup>199</sup> See e.g. Robert HEUSER, 2002, p. 143.

<sup>200</sup> *Id.*, p. 147.

<sup>201</sup> Shao LENG and Hungdah CHIU (Eds.), 1972, p. 12.

<sup>202</sup> Jerome A. COHEN (Ed.), 1972, p. 5; Hungdah CHIU, 1988, p. 20.

<sup>203</sup> Shao LENG and Hungdah CHIU (Eds.), 1972, p. 12.

<sup>204</sup> See e.g. Marina SVENSSON, 2000, pp. 200 *et seq.*

<sup>205</sup> See e.g. Jacques deLISLE, 2000, pp. 272–273; generally on China and the UN, see: Ann KENT, 1999; Ann KENT, 1993; see also Rosemary FOOT, 2000; C. Ronald KEITH and Zhiqiu LIN, 2001; Xinsheng LIU, 1997.

<sup>206</sup> See e.g. Edward WU, 2002, p. 348.

<sup>207</sup> Hungdah CHIU, 1988, pp. 2–3.

<sup>208</sup> Jacques deLISLE, 2000, pp. 274, 267.

### C. Reconstructing the Legal System

With the death of Mao in 1976, the courts were restored to formal authority.<sup>209</sup> The Gang of Four was under arrest until the new criminal code came into force in January 1981 and their trial became the showpiece of the new justice system.<sup>210</sup> The trial was more concerned with ideology than crime but it served as a breaking point for the development of a professionalization of the legal system with new laws protecting the integrity of the judicial organization.<sup>211</sup> After the failures of the Great Leap Forward and the atrocious Cultural Revolution, China was ready to return to a more stable system. In 1978 China was able to draft a constitution that managed to end some of the mistakes of the past but it lacked a clear mandate for the future.<sup>212</sup>

#### 1. *The Third Constitution, 1978*<sup>213</sup>

The purer Soviet-style constitution of pre-1975 was largely restored, closely resembling the 1954 Constitution. Some shortcomings had been addressed but with a number of the more extraordinary features from the 1975 Constitution still remaining.<sup>214</sup> For being a constitution, the text was overly politicized and extremely abstract and the Communist Party was fully integrated into the state.<sup>215</sup> The Constitution was to be revised repeatedly in the years to come and was to be replaced completely already after four years.<sup>216</sup> After 1978 the Party-influence mainly became limited to ‘important cases’ through the Party committees within the courts.<sup>217</sup>

In September 1979, an Instruction of the Central Committee of the Chinese Communist Party Concerning the Full Implementation of the Criminal Law and the Law of Criminal Procedure was published that formally abolished Party interference in individual cases.<sup>218</sup> In practice the interference did not stop and some judges were even quite hesitant to judge independently.<sup>219</sup> The system of examination and approval of cases in court was replaced with the president or

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<sup>209</sup> James P. BRADY, 1982, p. 233.

<sup>210</sup> *Id.*, 24.

<sup>211</sup> *Id.*, pp. 26, 236, 237–238.

<sup>212</sup> Jianfu CHEN, 1999, p. 67.

<sup>213</sup> For a detailed discussion on the 1978 Constitution, see e.g. Henri ISAIA, 1978; see also Chunying XIN, 1999, p. 360.

<sup>214</sup> Jianfu CHEN, 1999, p. 66; see also Henri ISAIA, 1978, p. 50.

<sup>215</sup> Guobin ZHU, 1997, p. 34.

<sup>216</sup> Jianfu CHEN, 1999, p. 67; Chunying XIN, 1999, p. 360.

<sup>217</sup> Hikota KOGUCHI, 1987, p. 197.

<sup>218</sup> Jianwei ZHANG, 2000, p. 152; CHIU, Hungdah, *Chinese Law and Justice: Trends over Three Decades*, 1982, p. 20; see also Hikota KOGUCHI, 1987, pp. 199–200.

<sup>219</sup> Hikota KOGUCHI, 1987, p. 200.

chief judicial officer having the mandate to approve verdicts. This system has however been criticized for causing the courts to first decide and then try the case (*xianpan houshen*).<sup>220</sup>

A German scholar who visited China in the fall of 1978 saw that the legal system and the rights were increasingly gaining attention. He had the opportunity to ask DENG Xiaoping, the then Chairman of the Military Affairs Commission, why equality before the law and judicial independence was not included in the Constitution.<sup>221</sup> Deng answered with the greatest confidence that these principles of course applied. The reason behind this position is believed to have been that at the time of drafting the Constitution the various factions within the Party could not agree. After the adoption however, the reformists gained control, which was reflected in the judiciary where demands for independence were heard from many levels.<sup>222</sup> As the demand for legally trained persons grew in the late 1970s, those trained under the GMD-period were largely the persons available for service, which led to an increase of influence from Taiwan that had built its legal system on the GMD-model. With the heavy Japanese influence on the Taiwanese legal system, the People's Republic also inherited the connection with Japan. China's Communist Party remained highly influential over the legal system.<sup>223</sup>

## 2. *The Fourth Constitution, 1982*<sup>224</sup>

The Constitution of 1982 corresponds to the watershed moment in the late 1970s when Deng led the 'Two Hands' policy of economic development and strengthening of law which changed the focus from mass political movements to socialist modernization based on law.<sup>225</sup> The work on the new constitution gained momentum in 1980 and one contentious issue was whether to include provisions for separation of powers or to rely on a People's Congress System.<sup>226</sup> In the debate it was also discussed if the Constitution was the highest authority in the country.<sup>227</sup> The latter system came to prevail with a centralized system formally under the National People's Congress. The new

<sup>220</sup> *Id.*, p. 203.

<sup>221</sup> Gerd KAMINSKI, 1979, p. 109.

<sup>222</sup> *Id.*

<sup>223</sup> D. A. LOEBER (Ed.), 1986, p. 433, see also pp. 423–432 on the relationship between the Party and the state.

<sup>224</sup> For a detailed description of the Constitution, see Jianfu CHEN, 1999, pp. 67–96; Chunying XIN, 1999, pp. 363 *et seq*; for a more general description of the legal development in the 1980s and 1990s, see e.g. Carlos Wing-hung LO, 1995; Timothy GELATT, 1989.

<sup>225</sup> Jianfu CHEN, 1999, p. 67, see also pp. 40 *et seq*; see also Hikota KOGUCHI, 1987, p. 195.

<sup>226</sup> Jianfu CHEN, 1999, p. 68.

<sup>227</sup> Chunying XIN, 1999, p. 345.

Constitution again corresponded in large parts to the 1954 Constitution, but for example differed from the previous Chapter II articles dealing with rights and duties which were enlarged from the previous scope. Other changes were the development of the terms “socialist democracy” and “socialist legality”.<sup>228</sup> The Communist Party was to fall within the ambit of the Constitution, which was specified in the ‘Party Constitution’ adopted in the same year.<sup>229</sup>

The Maoist era had relied on an extreme version of Party dominance over the judiciary, practiced by both the Communist Party and GMD in the Republican period.<sup>230</sup> Neither the 1975 nor the 1978 constitutions had provisions for judicial independence.<sup>231</sup> With the new Constitution of 1982, judicial independence was addressed but as in 1954, according to the wording it was the whole judiciary that had independence, not the individual judges.<sup>232</sup>

With the opening up that commenced in the late 1970s, the reforms, not least of the legal system, soon gained momentum. Law making became important: first rough versions of general areas of law and increasingly more specialized areas, and in a rather refined manner. A Judges Law was drafted starting in the early 1990s, which was adopted in 1995. In associated areas a procuratorate law and a police law were adopted in the same year, and a lawyer’s law in the following year, as well as amendments to the Criminal Procedural law. An Organization (Organic) Law of the People’s Court<sup>233</sup> was adopted already in 1979 and was revised in 1983.<sup>234</sup> In 1986 the Communist Party Central Committee issued a new instruction giving emphasis to the 1979 instruction on judicial independence.<sup>235</sup> The Constitution stipulates judicial independence in article 126 and the corresponding article is found in the Organization Law of the Courts (article 4), as introduced by the 1983 revision; in the Civil Procedural Law of 1991 (article 6); and the Judges Law of 1995 (article 1).<sup>236</sup> With the revision of the Criminal Procedural Law in 1996, judicial independence was also listed as a basic principle (article 5).<sup>237</sup>

In harmony with the further liberalization, calls for judicial independence increased. For instance an academic article on the topic was published in May 1989 criticizing the courts as the “rubber stamp” of the Party organization at

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<sup>228</sup> Guobin ZHU, 1997, pp. 34–35.

<sup>229</sup> *Id.*, p. 35.

<sup>230</sup> Xiaoqun XU, 1997, p. 104, see also p. 86, note 45 in particular; see also Donald D. BARRY (Ed.), 1979, pp. 67–79.

<sup>231</sup> Hikota KOGUCHI, 1987, p. 197.

<sup>232</sup> *Id.*, p. 205.

<sup>233</sup> The law is commonly referred to as “Organic” rather than organizational but I use the more explanatory word “Organizational”.

<sup>234</sup> The laws are available in their English translations in e.g. Ronald C. BROWN, 1997, pp. 149 *et seq.*

<sup>235</sup> Jianwei ZHANG, 2000, p. 153.

<sup>236</sup> Yuwen LI, 2001, p. 74.

<sup>237</sup> Chunying XIN, 1999, p. 681; on the revised CPL, see e.g. Jonathan HECHT, 1996.



every level.<sup>238</sup> As so many other issues, judicial independence was put on the backburner a few weeks later as the events unraveled around Tiananmen Square. A book published in 1991 in China on its judicial system stated that separation of powers as conceived by Montesquieu and corresponding judicial independence can never become reality.<sup>239</sup>

### 3. *Further Constitutional Reforms*

The 1982 Constitution is still in place today. Its amendments have largely been concerned with adjusting the Constitution to reflect practice. In connection with the Party congresses, the Constitution has therefore been amended: 1988 after the 13<sup>th</sup> (in 1987), 1992 before the 14<sup>th</sup> (in 1992) and 1999 after the 15<sup>th</sup> Party Congress (in 1997). A fourth amendment was proposed at the 16<sup>th</sup> Party Congress (in 2002), partially as a result of the new leadership being elected in the spring 2003, and after the 16<sup>th</sup> Party Central Committee's Third Plenum, in the fall of 2003.<sup>240</sup>

In 1988 the amendment mainly related to private economy and land use.<sup>241</sup> In 1993 further reforms were made dealing with the economy, state management, and people's congresses.<sup>242</sup> In 1999, as will be discussed later, the amendment related to the rule of law. The latest amendments to the Constitution, made by the second annual session of the National People's Congress in the spring of 2004, attracted great attention at the preparatory stage. WU Bangguo, head of the National People's Congress had been given the task of chairing a high-level committee that would formulate draft amendments to the Constitution in preparation for the spring Congress 2004.<sup>243</sup> The Chairman of the Committee stated that amendments would be limited to the essentials to ensure continuity. The main focus was therefore placed on including the legacy of JIANG Zemin, the 'three representations', the advanced productive forces, the advanced culture, and the advanced interests of the broad masses, into the preamble and to strengthen the protection of private ownership of land, supplementing the previous right to usage only.<sup>244</sup> Already in late

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<sup>238</sup> Pingping SI, 1989, p. 15.

<sup>239</sup> ZHONGGUO SIFA ZHIDU [China's Judicial System], WU Lei (Ed.), 1991, quoted in Chris X. LIN, 2003, p. 293.

<sup>240</sup> *Constitutional amendments likely to be limited to the 'essential'*, SOUTH CHINA MORNING POST, 24 June 2003.

<sup>241</sup> Chunying XIN, 1999, pp. 395–398.

<sup>242</sup> *Id.*, pp. 399–405.

<sup>243</sup> *China Sets Up Committee to Oversee Constitutional Reform*, AGENCE FRANCE PRESSE, 23 June 2003.

<sup>244</sup> *Constitutional Amendments Likely to be Limited to the 'Essential'*, SOUTH CHINA MORNING POST, 24 June 2003; The draft amendments covering the preamble and twelve articles also included a national social security institution, The Draft was

October 2003 after the 16<sup>th</sup> Congress of the Communist Party it was also announced that the revised Constitution would contain references human rights.<sup>245</sup> Article 33 of the Constitution was then in the spring of 2004 supplemented with the phrase that “the state shall respect and protect human rights”<sup>246</sup>.

President and Party Secretary-General HU Jintao has moreover reinvigorated the importance of the Constitution after becoming President, marking the 20<sup>th</sup> anniversary of the 1982 Constitution, by stating: “To carry out the basic strategy of governing the country by law, the primary task is to implement the Constitution . . .”<sup>247</sup> He further stated that the Constitution should be a legal weapon to safeguard citizens’ rights and for this purpose education on the Constitution must be provided, especially at Party and cadre schools. No organization or individual is privileged to stand above the Constitution and other laws, and he continued:

To implement the Constitution in an all-round way, it is necessary to adhere to the Party leadership and commit the Party organizations at various levels and every Party member to being the pacesetter in observing the Constitution and acting in strict compliance with the cardinal law.<sup>248</sup>

The Party Constitution also committed to the Constitution of the state through a revision in 2002.<sup>249</sup> The Constitution of the state cannot be directly invoked even though there has been a development in the last years towards making some of the rights listed therein justiciable.<sup>250</sup> With the introduction of a human

passed by the Standing Committee of the NPC on 27 December 2003, RENMIN RIBAO [People’s Daily] (internet version), 29 December 2003:

[http://english.peopledaily.com.cn/200312/29/eng20031229\\_131440.shtml#](http://english.peopledaily.com.cn/200312/29/eng20031229_131440.shtml#).

<sup>245</sup> SOUTH CHINA MORNING POST, 31 October 2003.

<sup>246</sup> The details of the Constitutional changes as adopted by the NPC were published in CHINA DAILY, 15 March 2003, the first article (33) of Chapter Two dealing with Fundamental Rights was supplemented with the phrase.

<sup>247</sup> *Hu Jintao: Honor Constitution’s Guarantee for Citizens’ Rights*, HUMAN RIGHTS (CSHRS) No. 3, May 2003, p. 2.

<sup>248</sup> *Id.*, p. 3.

<sup>249</sup> Chris X. LIN, 2003, pp. 268, 261.

<sup>250</sup> See *Qi Yuling v. Chen Xiaoqi* of 13 August 2001 dealing with education and the right to one’s own identity where the court relied in part on the Constitution; Wei ZHOU, 2003, p. 12; GUO, Guosong, *Maoming shangxue shijian yinfa xianfa sijahua diyian* [An Incident of Assuming Another’s Name to Enroll in School Lead the Development of the First Case of Justiciability of Constitutional Law], NANFANG ZHOUMO [SOUTHERN WEEKLY], 17 Aug 2001; Qi ZHANG, 2002, pp. 24–25, SPC issued authorization to cite Constitution to protect rights; see also *The Path of Constitutional Government Begins with Respect for the Constitution*, Foreign

rights provision into the Constitution and Hu's expressed pledge to the same, commitment to international human rights law is a logical further development.

#### 4. *China and International Human Rights Law*

Nowadays it is commonly stated that international law in China is directly applicable, at least in so far as commercial aspects are concerned.<sup>251</sup> Internationally, China has claimed also in relation to international human rights law that:

any convention acceded to by China become binding as soon as it entered into force. Furthermore, in the event of a discrepancy between provisions of an international instrument and domestic law, the latter was brought into line with the former. Where subtle differences remained, international instruments took precedence over domestic law.<sup>252</sup>

China is reiterating in its reports to the UN human rights machinery that treaty law becomes domestic law on ratification without any further transformation.<sup>253</sup> Also, according to the President of the Supreme People's Court of China in the annual report to the National People's Congress, the judiciary in China submits to international law:

The people's courts have . . . seriously honoured international conventions, treaties and agreements to which China is a signatory party<sup>254</sup>

The Supreme People's Court has also applied treaties when responding to questions from Shanghai High People's Court but international human rights law has so far not been cited.<sup>255</sup> Courts are not drawing on international human rights law, at least not outrightly.

Even though China has not yet ratified the ICCPR it did sign the Covenant in 1998 and has ratified the other main human rights conventions with few

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Broadcast Information System, 13 March 2003, also available at NANFANG DAILY [www.nanfangdaily.com.cn/zm/20030313](http://www.nanfangdaily.com.cn/zm/20030313).

<sup>251</sup> Zhaojie LI, 1995, pp. 194 *et seq*; see also generally Xiaoqing ZHU and Lie HUANG (Eds.), 2000.

<sup>252</sup> Statement as reported, from the Chinese delegation, in dialogue with the UN Committee against Torture when scrutinizing state report under the Convention against Torture, CAT/C/SR.50 and 51, 27 April 1990, para. 487.

<sup>253</sup> HRI/CORE/1/Add.21/Rev.2, 11 June 2001, paras. 51–53.

<sup>254</sup> *China: Apparent Full Text of Supreme Court Work Report*, delivered 11 March 2003 by XIAO Yang, BBC, 11 Mar. 2003, p. 4, as printed.

<sup>255</sup> Zhaojie LI, 1995, p. 211; Donald C. CLARKE, 2003 (a), p. 101.

reservations.<sup>256</sup> At the same time China has stayed clear of the optional individual complaint mechanisms as well as intrusive supervision mandates, such as that of the Committee against Torture via article 22 of the Convention Against Torture. China ratified the Convention on the Elimination of All Forms of Discrimination against Women in 1980; acceded to the Convention on the Elimination of All Forms of Racial Discrimination in 1981; ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1988; and ratified the Convention on the Rights of the Child in 1992. The two optional protocols to the Rights of the Child Convention were also signed, in 2001 and 2000 respectively. China also signed the International Covenant on Economic Social and Cultural Rights (ICESCR) in 1997 and ratified it in 2001.

Until ratification of the ICCPR, China is according to the Vienna Convention on the Law of Treaties of 1969 (article 18) bound to not take actions counter to the object and purpose of the Convention. Upon ratification of the ICESCR, China made only one reservation, making an interpretative declaration, reasonably amounting to a de facto reservation on the applicability of article 8 (1) (a), on the right to form trade unions. The reservation suggests applicability of the provision only insofar as it is in conformity with the Constitution, the Trade Union Law, and the Labor Law of China.

The Human Rights Committee in its General Comment Number 24 from 1994 argues for a mandate of the Committee to pronounce on the unacceptability of reservations to ensure objective determination with the object and purpose of the Convention as a whole (paragraph 18).<sup>257</sup> The Committee also commented on the nature of reservations and said that for the sake of specificity and transparency, reservations must be detailed without broad references to national legislation, rather a reservation must specify the detailed extent under which the provision does not apply (paragraph 19). The General Comment is concerned only with the ICCPR but the basis for the opinion is also relevant in relation to the ICESCR. The interpretative declaration by China was also formally objected to by The Netherlands, Norway and Sweden.<sup>258</sup>

The provision on judicial independence is stipulated in the ICCPR but China's experience from their reservation to the ICESCR is likely to be

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<sup>256</sup> The then China, now the Republic of China, Taiwan, signed the two covenants along with the First Optional Protocol of ICCPR in 1967 but that is now deemed void, see e.g. the 2002 Human Rights Policy White Paper of the Republic of China (Taiwan), available at [www.gio.gov.tw/taiwan-website/5-gp/2002hr/](http://www.gio.gov.tw/taiwan-website/5-gp/2002hr/); Taiwan was also representing China before the UN in the negotiations of the two Covenants.

<sup>257</sup> Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994.

<sup>258</sup> Objections made on 23 April, 23 April, and 2 April 2002 respectively, information available [www.Bayefsky.com](http://www.Bayefsky.com).

reflected in their foreseeable reservations to the ICCPR. In light of the position in General Comment 24 of the Human Rights Committee, a general reservation to article 14 on fair trial would not be acceptable.<sup>259</sup> China is likely to keep the reservations to a minimum, certainly less than the reservations, declarations, and understandings of the US, and make them as specific as possible. China is also gaining experience through direct inter-action with the Human Rights Committee in the continued applicability of the ICCPR in the territories of Hong Kong and Macao, now that they are returned to China.<sup>260</sup> When China eventually ratifies the ICCPR, they are not likely, in light of their previous *modus operandi*, to agree in the near future to the individual complaints mechanism under the First Optional Protocol to the ICCPR.

As discussed in the first part above, independence of the judiciary is moreover among the principles of international human rights law that has been recognized as carrying special weight. Even without a Chinese ratification of the ICCPR, the principle applies as part of the Universal Declaration of Human Rights (article 10). As mentioned, the UN Special Rapporteur on judicial independence even concluded that judicial independence and impartiality is part of customary law, even though his position may be disputed. The possibilities of supervisory mechanisms are however not in place without ratification of the ICCPR.

Professor XU Xianming, President of the China University of Political Science and Law and member of the Law Committee (*falü weiyuanhui*) of the NPC, writes on China's human rights commitment that the first generation of leaders of the People's Republic saw human rights as bourgeois and not relevant. The second generation of leaders tried to distinguish between "our" from "their" human rights, while the third and current leadership for the first time recognized the universal nature of human rights.<sup>261</sup> Still, China has proven quite rejectionist toward the work of the UN Commission on Human Rights and has been reluctant to admit UN special procedures, such as special rapporteurs, into the country.

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<sup>259</sup> General Comment 24, para. 8.

<sup>260</sup> Notifications to this effect sent to the UN Secretary-General before the handover by the British and the Portuguese governments in 1997 and 1999 respectively and after the handover in both cases by the Chinese government.

<sup>261</sup> XU Xianming, *Fazhi de zhen dishi renquan* [Human Rights are the Essence of Rule of Law], published at [www.chinacourt.org](http://www.chinacourt.org) 16 September 2002, quoted in Chris X. LIN, 2003, pp. 265–266.

## Conclusions

The end of the imperial era was marked by reform of the old system and introduction of new institutions. With the increasing foreign interest in China in particular regarding trade, demands were placed on China to allow for extra-territoriality and it was even the case that foreign legal jurisdictions were developed in Chinese treaty ports, which developed into entirely separate legal systems from the Chinese. As China was struggling to regain its sovereignty by in part, modernizing its judiciary to foreign standards, the country experienced major upheavals caused by civil war and foreign military attacks, including occupation in the Republican era. The period was dominated by rejecting the traditional legal system in favor of embracing the European models, which also had the effect of disregarding much of the traditional developments.

In the Soviet style system that the Chinese communists were establishing, an alternative legal system was developed based to a large extent on the model of the Soviet Union. When the People's Republic of China was proclaimed in 1949, this system was introduced on a nation-wide scale. The following 30 years were dominated by politics rather than law in which an initial constitutional order that had been established soon gave way to political dictates. Judicial independence was not even to be considered for most of this period. With the adoption of the present Constitution in 1982, legal reform and redevelopment was under way with reinstatement of legal institutions and adoption of new and modern laws. Subsequent constitutional amendments have introduced among other things, the rule of law, and fundamental provisions on the protection of human rights were introduced during the spring session of the 2004 NPC session. Judicial independence has also come back on the agenda and this development will be further discussed in the next Chapter.

In theory, international law is applicable when domestic law is in conflict with treaty-commitments. In practice this has proven to be true in cases of civil disputes. In other types of disputes there are no such clear references. So far there have not been overt references about the influence of international human rights law on domestic law by courts other than rhetorically. China's introduction of a general human rights guarantee in its Constitution and the pending ratification of the ICCPR may be the first steps beyond theory when it comes to establishing the superiority of international human rights law over to Chinese law.

# JUDICIAL INDEPENDENCE

I. INTERNATIONAL INSTRUMENTS

II. INTERNATIONAL JURISPRUDENCE

# COMPARING COMPARISONS

III. COMPARATIVE LAW: COMPARING CHINA

IV. FIAT LEX: LEGAL HISTORY IN CHINA

# ASSESSING CHINA'S JUDICIARY

V. FIAT FLUX: MODERN HISTORY

VI. THE CONTEMPORARY JUDICIARY

## VI. *The Contemporary Judiciary*<sup>1</sup>

Of only two things is he reasonably sure: one, that no occidental mind can exactly fathom either the ‘how’ or the ‘why’ of the Chinese courts, or for that matter, any other institution or practice . . . and two, that the practice of administering justice in China no more follows the theory thereof than the practice of operating a bicycle carries out the theory of internal combustion engines.

Accordingly, let us first look at the Chinese court system as it is supposed to be, and then take a glance at it as it really is.<sup>2</sup>

– *Lockenour, 1930*

As advised, but to prove Lockenour wrong, I will first try to fathom the structural issues in theory, then contemplate the operation of the courts. This Chapter concludes the historical *exposé* with an analysis of the contemporary system of the judiciary in China. Divided into three Sections, I first present the court hierarchy and the legal framework (A), then the structural constraints on the independence of the judiciary (B), followed by the recent years’ legal reform with its potential and obstacles, such as reform in a very large and non-homogeneous country (C).

The purpose is to provide an overview of the structural and procedural framework of the courts in China with emphasis on concrete obstacles to the realization of judicial independence. The observations are based on the status of the judiciary in general but in particular from a public law and criminal law point of view, as seen through the human rights approach.<sup>3</sup> The framework developed in the first part of this study, in chapters I and II, consists of three strands or clusters of criteria. Independence, the first strand, is composed of collective and individual insulation from influence where the former concerned structural and resource matters. Individual insulation entailed occupational protection from influences such as tenure, internal structure with protection from influence from superiors, and the rights of judges, for example, association and expression. The second strand of impartiality is concerned with recusal when faced with bias, and non-conflicting assignments for the judges. The last strand, focused on public confidence, deals with transparency of the judicial process and representativity of the judiciary in relation to for example the ethnic composition of the people.

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<sup>1</sup> Parts of the following text is drawing on Jonas GRIMHEDEN, 2002.

<sup>2</sup> Roy M. LOCKENOUR, 1930, p. 253.

<sup>3</sup> Clarke cautions that it is also important before an assessment to map the function and purpose of, in this case the Chinese courts, to see if the assessment model is at all relevant, Donald C. CLARKE, 2003 (b), p. 181.



Since the late 1990s, the issue of judicial independence has increasingly received attention and for the last few years it has been one of the central issues in the discussions on legal reform in China. The Chinese authorities have however officially maintained that judicial independence is a principle of their legal system and that there is no interference or pressure, particularly as regards appointment of judges.<sup>4</sup> Terminology coined by the then Secretary-General and President JIANG Zemin in 1996, called for “a country based on the rule of law, establishing a country based on a socialist legal system”.<sup>5</sup> Chinese commentators termed the statement as a spring-day for law.<sup>6</sup> In the following year at the 15<sup>th</sup> Chinese Communist Party Congress,<sup>7</sup> Jiang announced what has become the breaking point for the debate on rule of law: China was to be governed by the rule of law and have an independent judiciary.<sup>8</sup> The initiative was followed-up by the Communist Party with concrete proposals on the language for the Constitution.<sup>9</sup>

The rule of law initiative by the Communist Party was then followed in suit by the Second session of the Ninth National People’s Congress in 1999 that introduced the concept in the Constitution.<sup>10</sup> In the Party’s Campaign ‘*san jiang*’, the Three Emphases, rule of law was said to also form a part.<sup>11</sup> Jiang moreover was ascribed the authorship of the ‘*san gong*’, the Three Fair: (*gongping*, *gongzheng* and *gongkai*) impartial, fair and open judicial process.<sup>12</sup> The Supreme People’s Court (SPC) in the end of 1999 furthermore adopted a Five-Year Reform Platform (FYRP) where these issues were further elaborated.<sup>13</sup> This Platform will be dealt with in detail below.

Jiang particularly emphasized judicial independence and rule of law as a measure to counter corruption in general, but also rule of law for its own sake.<sup>14</sup> Corruption was, and continues to be, high on the agenda for the whole leadership. The then Premiere, ZHU Rongji, added that corruption within the

<sup>4</sup> Louise, JOINET, 1993, para. 66.

<sup>5</sup> *yifa zhiguo, jianshe shehui zhuyi fazhiguo*; Randall PEERENBOOM, 2002, p. 6.

<sup>6</sup> Guozhi LI and Xiaohua ZHUANG, 1998, p. 26.

<sup>7</sup> Shigui TAN, 1999, p. 12.

<sup>8</sup> The phrase “*yifa zhiguo*” has caused a great debate as to whether it refers to “rule of law” or “rule by law”, the intention ought to be that it means “rule of law”.

<sup>9</sup> Jihong MO, 1999, p. 1.

<sup>10</sup> Article 5, para. 1, as amended; see: Shumin ZHAO, 2000, p. 22; Jihong MO, 1999, pp. 4 *et seq*; Jie CHENG, 2003, pp. 17–18; Shigui TAN, 2001, p. 102.

<sup>11</sup> Shumin ZHAO, 2000, p. 22; The ‘Three Emphases’ are: theoretical study, political awareness, and good conduct.

<sup>12</sup> Shijie SONG, 1999, p. 20.

<sup>13</sup> ZUIGAO RENMIN FAYUAN YANJIUSHI [Research office of the Supreme People’s Court] (Ed.), 2000; see also Wusheng ZHANG and Zeyong WU, 2000 (a), p. 55; a further five-year reform plan is also foreseen in 2004.

<sup>14</sup> See e.g. Qianfan ZHANG, 2003, p. 101, while noting that the independence was to be qualified later on to not include separation of powers.

judiciary is the worst form of corruption, and if the judiciary is not impartial, the country will not remain a united country in the future.<sup>15</sup> In order to maintain legitimacy of the government in an ever modern and globalized world that lacks charismatic leaders like Deng and Mao, nationalism and economic growth are essential as is the rule of law.<sup>16</sup>

This progress in rhetoric, campaigns, and constitutional amendment caused repercussions with a surge in the debate on rule of law and judicial independence. Articles dealing with judicial independence were being published in academic and professional journals as well as regular newspapers, although rare examples of articles also can be found earlier on.<sup>17</sup> The academic discourse preceding the official launch of the rule of law is also considered to have been influenced by for example lectures given by Professor Wang Jianfu of the Law Institute of the Chinese Academy of Social Sciences on the rule of law to President Jiang in early 1996.<sup>18</sup> An overview of the scholarly and practitioner's debate on judicial reform and judicial independence show the importance of the remark made by Jiang, even though the introduction of the new policy certainly corresponded fairly well with the demand of the time.

As the debate in China developed, Chinese scholars and practitioners frequently referred to reasons for the need to establish an independent judiciary in order to prevent corruption. The argument went however far beyond what Jiang had initiated. Corruption became the main foundation on which to argue for judicial independence, in particular in non-governmental circles.<sup>19</sup> Arguments in favor of judicial independence were additionally made on the basis of, in particular, combating local protectionism, improving efficiency, fairness, human rights, strengthening rule of law, and the common practice in most countries.<sup>20</sup> But also other aspects were highlighted such as those required by the market economy, WTO membership, reform of the political system,

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<sup>15</sup> PEOPLE'S TRIBUNE, 1998:8, pp. 42–43.

<sup>16</sup> Randall PEERENBOOM, 2003 (a), p. 53.

<sup>17</sup> See e.g. Ruihua CHEN, 1996, p. 9.

<sup>18</sup> Qi ZHANG, 2002, p. 16; Randall PEERENBOOM, 2002, p. 59; also Professor LIU Hainian of the Chinese Academy of Social Sciences advocated adoption of rule of law already in 1978 and the first human rights delegation from China took place in 1991 (to Canada and the US), discussion with Liu, 16 December 2003.

<sup>19</sup> E.g. Rikai HE, 1999, pp. 2, 5; *Renda "gean jiandu" wenti tantao* [Inquiry into the Parliaments Individual Case Supervision] 2000; Ping XU et al, 2000, p. 42; Bixin JIANG, 2000, p. 43.

<sup>20</sup> See e.g. Rikai HE, 1999, p. 2; Chunming GUO and Zhigang LIU, 2000, p. 158; Wusheng ZHANG and Zeyong WU, 2000 (a), pp. 62–63; Shijie SONG, 1999, p. 24; Desen ZHANG and Youyong ZHOU, 1999, pp. 25–26; Yanjin YI, 2000, p. 740; a democratic legal order was argued for in e.g. Tiechuan HAO and Dingsheng FU, 1999, p. 5; Jianwei ZHANG, 2000, p. 153; Yanyou YANG, 2000, p. 740; 105 countries supposedly had provisions in their constitutions guaranteeing judicial independence, see: Hongbin GAO, 2000, p. 31.

United Nations instruments, and signature of the International Covenant on Civil and Political Rights, and those prescribed by international professional organizations, balance of powers, social stability and public order.<sup>21</sup> Increasingly the WTO-requirements are also used as a basis for advocating increased independence. What are the preconditions of the judiciary to adapt to the call for independence?

### A. Court Hierarchy and Legal Framework

The state structure in China is based on the supreme power originating from the parliament, the National People's Congress (NPC). Given the dominance of the Chinese Communist Party, the Party's influence on the NPC is extensive.<sup>22</sup> The bulk of the day-to-day political work of the NPC is done by its Standing Committee, while the 3,000-plus-member Congress is in session only for a few weeks every spring.

Under the NPC, the State Council (*guowuyuan*) is the Government under which the various ministries are organized. Also under the NPC, at the same nominal level as the State Council, the Supreme People's Procuratorate<sup>23</sup> (SPP) and the Supreme People's Court (SPC) are positioned.<sup>24</sup> Even though the level is formally the same, the important administrative rank of the leaders of the SPP and the SPC are one half-level lower (deputy level, *fuzhi*) than for example the Premier (i.e. vice-premier) and the head of the NPC. Similarly, a President of a high people's court, the highest court of a province, has the rank equal to a vice-governor of a province.<sup>25</sup> The President of SPC is then in turn ranked one level higher than the ministers, for example the Minister of Justice. The courts in China are organized under the SPC with local courts and specialized courts. Local level courts can be divided into three levels: basic, intermediate and higher.<sup>26</sup>

<sup>21</sup> See e.g. Rikai HE, 1999, pp. 4–5; Xiangjun KONG, 2001, p. 12; Congyi PAN, 1998, p. 84; Jianwei ZHANG, 2000, pp. 146, 153; for professional and NGO declarations on judicial independence; see: Wusheng ZHANG and Zeyong WU, 2000 (b), p. 51; Ruihua CHEN, 1996, p. 9; Hanhua ZHOU, 1999, p. 7.

<sup>22</sup> For the role of the Party in the legal system, see e.g. Randall PEERENBOOM, 2002, p. 211.

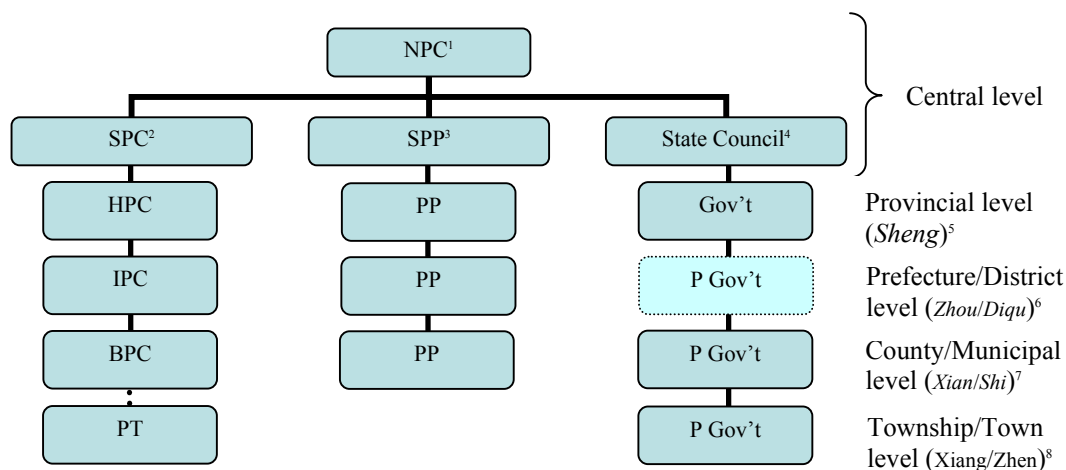
<sup>23</sup> In the last few years efforts have been made by the office itself to introduce another English translation of *Zuigao renmin jianchayuan*: Supreme People's Prosecution Service (SPPS), but the old translation lingers so I also remain with the accustomed version.

<sup>24</sup> See e.g. Hualing FU, 2002; the official webpage of the SPC, [www.court.gov.cn](http://www.court.gov.cn) uses "The Supreme Court of PRC" in the English translation.

<sup>25</sup> *Id.*, p. 6.

<sup>26</sup> *People's Courts, Special People's Courts, People's Republic of China*, 2002; see also e.g. Ronald C. BROWN, 1997, pp. 35–40; Susan FINDER, 1993, pp. 160–163.

### III. State Structure



*Sources:* Various interviews with Chinese officials; discussions in particular with Dr. Joakim Enwall; The Chinese Constitution.

1. National People's Congress, *Quanguo renmin daibiao dahui*.

2. Supreme People's Court, *Zuigao renmin fayuan*, under which three additional levels of local courts are organized, the High [*Gaoji*], Intermediate [*Zhongji*], and Basic [*Jiceng*] People's Courts; under the BPC there are People's Tribunals [*Renmin fating*], formally a division of the BPC and not an additional level in the hierarchy; the level of the court in the state hierarchy affects the position of the court and the court leaders, in addition to the levels described in this chart, e.g. a prefectural level city can be at vice provincial level (*fushengji*, e.g. Shenzhen and Changchun) and the status of the court leaders are consequently upgraded half a level.

3. The Supreme People's Procuratorate (Prosecuting Service), *Zuigao renmin jianchayuan*, under which three additional levels are organized as with SPC; the local level procuratorates are called after the name of the level followed by People's Procuratorate (*renmin jianchayuan*), e.g. Shanghai City People's Procuratorate (*Shanghai shi renmin jianchayuan*); if there is no corresponding level of congress, the procuratorate at that level are formally a branch of the next higher level procuratorate.

4. The State Council, the central Government, *Guowuyuan*, with local people's governments (*difang renmin zhengfu*); at the prefectural level there is only a local government if it is a city at prefectural level (prefectural level cities are divided into districts); there is an additional village level below Township, *Cun*, which does not form part of the official hierarchy; at the village level there are the Village Administration (*Cun weiyuanhui*) (almost 100,000) and neighborhood committees (*Jumin weiyuanhui*). At each corresponding level there is also a people's local congress, which is the law-making and supervising organ; at the prefectural level there is only people's congress if it is a city at prefectural level (prefectural level cities are divided into districts).

5. The Provincial level includes: provinces; Autonomous Regions (*Zizhiqu*)(Guangxi, Inner Mongolia, Ningxia, Tibet, Xinjiang); Municipalities directly under the Central Government (*Zhixiashi*)(Beijing, Chongqing, Shanghai, and Tianjin; the subdivisions of these are at one level higher than ordinary cities so that e.g. a district is at prefectural level; and Special Administrative Regions (Hong Kong and Macau).

6. Over 300 entities, out of which almost 200 are cities; the level was added in the 1950s and does not have congress or government but a representative office of the provincial government (*diqu xingshu*); At his level there are also autonomous prefectures which in Mongol-dominated areas are called Districts (*meng*) (*Ajmag*); Districts in Municipalities directly under the Central Government (*qu*); and District-level cities (*dijishi*).

7. Over 2,500 counties and municipalities; at this level there are also autonomous counties, which in Mongol-dominated areas are called Banners (*Qi*) (*Sum*); and County-level cities (*Xianjishi*).

8. Over 50,000 townships and towns; there are also Ethnic Townships (*Minzuxiang*) with autonomy.

### 1. *The Supreme People's Court*

The President of SPC, the Chief Justice, heads the SPC and the Chinese Judiciary.<sup>27</sup> In addition to the Chief Justice there are nine justices<sup>28</sup> of which one is Executive Vice President and most others are vice-presidents. In recent years the courts in China have tried to recruit experienced academicians as well as non-Party members to senior posts; one of the justices of the SPC is a former professor of law and member of one of the eight recognized 'democratic parties' in China.<sup>29</sup> The SPC has a total of 80 judges and 120 assistant judges.<sup>30</sup>

The SPC has four main distinctive functions: interpretation of law, adjudication, legislative work, and administration of the judiciary.<sup>31</sup> Interpretation (*jieshi*) of law has a rather unclear scope while many interpretations by the SPC seemingly exceed the legal authority, especially in criminal law, and even exceeds the original law to the extent that at times it exasperates the National People's Congress.<sup>32</sup> To secure implementation the SPC may co-issue an interpretation with administrative organs in charge of the substance-area.<sup>33</sup> Interpretations are based on a specific authorization granted

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<sup>27</sup> At present the Chief Justice is XIAO Yang; his CV (see e.g. *Chenbao*, Xinjiang, 17 March 2003), a short version is also available at [www.court.gov.cn](http://www.court.gov.cn). A brief summary of his background is interesting with various positions before becoming a judge; born in Guangdong (Canton) in 1938; has a degree from the law department of China Renmin University and taught law in Xinjiang Autonomous Province for some time in the early 1960s, after which he returned to his home province and worked within the police; after some years with a local government information agency he held various positions within the Party until in the early eighties, when he took up a post as Deputy Chief Prosecutor of Guangdong Province; in the second half of the 1980s he served as the Chief Prosecutor of the Province; 1990–1993 served as deputy Prosecutor General of the Supreme People's Procuratorate in Beijing; 1993–1998 Minister of Justice and since 1998 President of the Supreme People's Court; through out, he also held as is common, corresponding senior positions within the Party and he is a member of the Central Party Committee.

<sup>28</sup> Referred to as 'SPC judges' (*zuigao renmin fayuan faguan*), typically of 'second rank great judges' (*dierji dafaguan*), see below on the ranking system.

<sup>29</sup> In 1991, the SPC President stated that they had commenced a policy that would include members of the other parties and non-Party figures as people's assessors, more recently, the policy seems to extend to judgeships, Albert H. Y. CHEN, 1994, p. 111; see also James C. F. WANG, 1999.

<sup>30</sup> Daniel C. K. CHOW, 2003, p. 205.

<sup>31</sup> Susan FINDER, 1993, pp. 164–222.

<sup>32</sup> Jerome COHEN, 2001, p. 7; NPC has the legislative mandate, and adopts important basic laws while the Standing Committee of the NPC adopts laws in general, for details, see e.g. [www.china.org.cn/english/features/legislative/75857.htm](http://www.china.org.cn/english/features/legislative/75857.htm).

<sup>33</sup> Susan FINDER, 1993, pp. 185, 189; Susan FINDER, 2002, p. 4; see also Randall PEERENBOOM, 2002, p. 304; Wei LI, 1997, p. 87 *et seq*; for an example of joint issuance, see 2001, p. 116, joint issue of an interpretation of the Criminal Procedural

the SPC, the Supreme People's Procuratorate as well as others, by the Standing Committee of the National People's Congress in 1981.<sup>34</sup> Still, the SPC has no authorization to invalidate laws, only to interpret and provide details on existing national legislation.<sup>35</sup> Interpreting law also consists of the SPC responding to concrete and abstract questions of law and procedures from lower courts by way of preliminary rulings. Upon request they provide 'advisory opinions', non-binding responses (*han, fuhan, dafu*) in concrete cases and 'official replies' (*pifu*) to theoretical issues.<sup>36</sup> Opinions (*yijian*) and similar documents moreover explain general issues.<sup>37</sup> SPC opinions to lower courts on issues such as economic development are not intended to set aside the law but merely to provide a policy that can guide when the law is unclear.<sup>38</sup> The SPC also publishes model cases for lower court reference.<sup>39</sup>

As for the adjudication, the SPC rarely hears cases because they only have original jurisdiction in limited instances and many appeal proceedings are facilitated through written submissions where no oral hearing takes place. The appellate cases that reach the SPC annually are few but increasing and are mainly economic cases involving large sums. In fact, not until 1993 did the SPC have a courtroom.<sup>40</sup> The legislative work of the SPC consists of submitting draft legislation on for example the Judges Law.<sup>41</sup> There are also instances where the SPC is only one contributor to the drafting process that may be led by for example the Legislative Affairs Commission of the NPC, or the SPC may comment on regulations prepared by the State Council.<sup>42</sup> The SPC is also concerned with issuing procedural rules for the courts but also with regulating

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Law (*guanyu xingshi susongfa shishizhong ruogan wenti de guiding*, 18 Jan 1998) by SPC, SPP, Ministry of Public Security, Ministry of State Security, Ministry of Justice, and the Legislative Affairs Commission (*fazhi gongzuo weiyuanhui*) of the Standing Committee of the National People's Congress. The interpretation also contains an interesting example of a complete reversal in the interpretation of the meaning of the Criminal Procedural law (articles 30 and 31) related to withdrawal when there is a risk of bias (*huibi*) (to be decided by the court President or not).

<sup>34</sup> Susan FINDER, 1993, p. 164.

<sup>35</sup> *Id.*, p. 166.

<sup>36</sup> *Id.*, p. 172.

<sup>37</sup> Wei LI, 1997, pp. 97–98.

<sup>38</sup> Randall PEERENBOOM, 2002, p. 304.

<sup>39</sup> Wei LI, 1997, p. 98–99.

<sup>40</sup> Susan FINDER, 2002, p. 4; Susan FINDER, 1993, p. 191; need for leave of appeal from the SPC is required, Wei LI, 1997, p. 110; the SPC took on a criminal case on its own initiative in late 2003 (20 December), the verdict was published in RENMIN RIBAO [People's Daily], 23 December 2003, [www.peopledaily.com.cn/GB/shehui/1060/2261132.html](http://www.peopledaily.com.cn/GB/shehui/1060/2261132.html).

<sup>41</sup> Susan FINDER, 2002, p. 4.

<sup>42</sup> Susan FINDER, 1993, p. 211.

issues where legislation is absent. There is no actual legal basis for the SPC to issue rules and regulations of this kind but time has permitted the practice.<sup>43</sup>

The SPC also administers the whole of the judiciary in terms of providing high-level training and conferences. Through the judicial supervision scheme, the SPC, as can all courts, send teams to lower courts to do investigative work.<sup>44</sup> The SPC itself has nine divisions, three offices and a department for equipment management (*sifa xingzheng zhuangbei guanli ju*). The nine divisions consist of a Case-filing Division (*li'anting*), two Criminal Divisions (*xingshi shenpan di yi/er ting*), four Civil Divisions (*minshi shenpan di yi-si ting*), an Administrative Division (*xingzheng shenpanting*) and a Judicial Supervision Division (*shenpan jian duting*). The three offices are Enforcement (*zhixing gongzuo bangongshi*), Research (*yanjiushi*) and the General Office (*bangongting*).<sup>45</sup> The divisions of lower courts generally reflect that of the SPC.

Some parts of the SPC division may need some clarification. The Case-filing Division deals with jurisdictional issues, pre-screens cases on appeal or petition for retrial, after which it hands over cases to the relevant other divisions. The Division is also responsible for legal aid in the court system. The various civil and criminal divisions have separate mandates; for example, the First Criminal Division deals with crimes endangering state security, human rights, and death penalty cases among other issues, and the Fourth Civil Division deals with maritime and foreign related matters including those related to Hong Kong, Macao, and Taiwan.<sup>46</sup>

The Judicial Supervision Division is concerned with cases of previously decided judgments, either originating from the SPC or any of the lower courts, that are scheduled for retrial, excluding intellectual property rights and maritime issues that are handled by the Third and the Fourth civil division respectively. The Enforcement Office is in charge of implementing the decisions of the Court but also in mediating enforcement disputes between lower-level jurisdictions. The Research Office deals with basic research and statistical affairs but also supports the Adjudicative Committee (the composition and role of this Committee is elaborated upon below) of the Court, and it participates in drafting judicial opinions. The General Office has a broad mandate for administration and external affairs as well as compiling a Gazette.

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<sup>43</sup> *Id.*, pp. 212–213; no mentioning is made either in the Legislation Law of 2000, see also the Legislation Law, article 12, which grants among others, the SPC, the right to introduce bills to the NPC, article 43 on the possibility for the SPC to request legislative interpretations from the SC of the NPC, article 90 can ask the SC of the NPC to make legislative review.

<sup>44</sup> Susan FINDER, 1993, p. 202.

<sup>45</sup> For details see e.g. *Supreme People's Court, People's Republic of China, 2002*; see also [www.court.gov.cn](http://www.court.gov.cn).

<sup>46</sup> *Supreme People's Court, People's Republic of China, 2002*.

## 2. Local People's Courts

Apart from the Supreme Court, there are 31 high courts, almost 400 intermediate courts and over 3,000 basic courts, also referred to in English as primary or grass-root level courts.<sup>47</sup> In addition, an estimated 10,000 people's tribunals exist that are subordinate branches of the basic courts, but which do not constitute an additional layer.<sup>48</sup> A decision by a people's tribunal would therefore be appealed directly to the Intermediate level.<sup>49</sup> There are no limitations on how many people's tribunals can be established.<sup>50</sup> The tribunals, mainly located in the countryside, are independent from the township government and typically handle about 50 per cent of all first instance cases.<sup>51</sup> People's tribunals established within municipal districts and economically well-developed areas are being abolished.<sup>52</sup> When the Organization Law is revised, which is likely in the near future, the role of the tribunals will be settled more permanently.

One high people's court (HPC) exists in each province (22 in number), and in the autonomous regions (Guangxi, Inner Mongolia, Ningxia, Tibet and Xinjiang), as well as the directly governed municipalities (Beijing, Chongqing, Shanghai and Tianjin); in all 31 localities. They serve as appellate courts, and as trial courts in special cases assigned to them by the Intermediate level court or in cases with significant impact on society.<sup>53</sup> An Intermediate People's Court (IPC) is set up in prefectures of the provinces and autonomous prefectures, as well as in districts of directly governed cities, and in municipalities at the prefectural level. Typically IPCs are found in cities with a population greater than one million where they serve as appellate courts in general, but as trial courts in death penalty cases, political cases, cases of greater economic interest, and in cases concerning foreign persons or affairs.<sup>54</sup> Intermediate courts also serve as trial courts for alleged trademark and copyright infringements and

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<sup>47</sup> Yuwen LI, 2002, p. 55, 390 IPCs while INSTITUTE OF LAW (Ed.), 2001, p. 21: sets the number at 309, a possible typo; in all there were reportedly 3,568 courts in China, Vincent C. YANG, 2002, p. 21.

<sup>48</sup> Donald C. CLARKE, 2003 (b), p. 180, specifies the number of PTs to 12,000 by the end of 1999 according to the LAW YEARBOOK [falü nianjian] 2000 (p. 135) and according to the FYRP the number is to be reduced further; Randall PEERENBOOM, 2002, p. 283; INSTITUTE OF LAW (Ed.), 2002, pp. 10: 17, 411 tribunals is the exact figure given; Yuwen LI, 2002, p. 55, gives the number as 30,000 tribunals.

<sup>49</sup> Donald C. CLARKE, 1996, p. 7.

<sup>50</sup> Randall PEERENBOOM, 2002, p. 283.

<sup>51</sup> INSTITUTE OF LAW (Ed.), 2002, p. 10.

<sup>52</sup> Susan FINDER, 2002, p. 8.

<sup>53</sup> Albert MELONE and Xiaolin WANG, 1999, p. 144.

<sup>54</sup> *Id.*



some 50 of the IPCs are also authorized to handle patent infringement cases.<sup>55</sup> Beijing and Shanghai each have two intermediate courts.<sup>56</sup> The Basic People's Courts (BPC) are set up in counties and county-level cities.<sup>57</sup> The main structure of these local courts resembles that of the SPC with consideration given to local circumstances and position in the hierarchy.

By way of example, Shanghai has one High Court, two Intermediate Courts (*zhongji/diqu fayuan*) and twenty Basic Courts (*qu/xian fayuan*). Of the Basic Courts, 15 are district courts, located in the urban areas, and 5 are county courts in rural areas. Additionally there are two intermediate level special courts: one is a maritime and the other is a railroad transportation court. Under the jurisdiction of the railroad transportation court fall also five basic railroad transportation courts, four located outside of Shanghai: Nanjing, Bangbu, Hangzhou and Fuzhou.<sup>58</sup> There are also military courts under the jurisdiction of the Shanghai Higher People's Court but their existence is classified. As the Supreme People's Court falls under the National People's Congress, the various local courts formally fall under the corresponding level of people's congress and to which they are responsible.

According to most sources, in 1979 there were approximately 60,000 court officials and by 1998, 280,000, close to five times as many.<sup>59</sup> Of these officials, at least some 170,000 are judges.<sup>60</sup> The present figure for court officials is also often estimated at around 280,000, but demands have been placed on the judiciary to cut the number by ten per cent.<sup>61</sup> Interestingly however, the SPC President in 2002, reports the figures as 210,000 judges and an additional 100,000 non-judges.<sup>62</sup> From 1980 to 2000, the total caseload increased more than six times.<sup>63</sup>

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<sup>55</sup> *Intellectual Property Disputes on the Rise*, PEOPLE'S DAILY, 18 December 2003.

<sup>56</sup> Susan FINDER, 2002, p. 7.

<sup>57</sup> People's Courts, Special People's Courts, People's Republic of China, 2002; article 18 of the organizational law; see also SPC Opinion on Strengthening the Construction of Courts at the Basic Level, 13 August 2000, available at [www.cecc.gov](http://www.cecc.gov).

<sup>58</sup> Brief Introduction of Judiciary System in China and Courts in Shanghai, 2000, p. 4; see also [www.hshfy.sh.cn](http://www.hshfy.sh.cn).

<sup>59</sup> Yongquan ZHANG, 2000, p. 93.

<sup>60</sup> Figures from 1995 estimated the number to be 170,000, INSTITUTE OF LAW (Ed.), 2001, p. 21; see however the discussion by Clarke on the number of judges in Donald C. CLARKE, 2003 (b), pp. 173 *et seq.*

<sup>61</sup> Shigui TAN, 2001, p. 56; Qianfan ZHANG, 2003, p. 91; The SPC will decide on a quota for the total number of judges for courts based on population, economic growth, and number of legal disputes within the jurisdiction, *Numbers of Chinese Judges to be Cut Back*, PEOPLE'S DAILY, 8 July 2002.

<sup>62</sup> *Numbers of Chinese Judges to be Cut Back*, PEOPLE'S DAILY, 8 July 2002, but the intended number could have been 180,000.

<sup>63</sup> Wusheng ZHANG and Zeyong WU, 2000 (a), p. 56.

Of the total court personnel in China, some 22.5 per cent are female, including 21.6 per cent of the judges (about 44,000). About 40 per cent of the judges at the Basic People's Courts are women. Throughout the whole system, 2.5 per cent of court presidents or vice-presidents, and an additional 20 per cent of mid-level managers are female.<sup>64</sup> Of the 31 presidents of the High People's Courts and the PLA Military Court, as of early 2003, there were three females (in Anhui, Ningxia and Chongqing). At least it can be noted that in the Xinjiang and Tibet autonomous regions the presidents were of local ethnic minority.<sup>65</sup> In Xinjiang the following imprecise figures were provided in early 2003: in the High People's Court one fifth of the judges were women and slightly less than 50 per cent were of minority ethnicity; in the Kashgar Prefecture Intermediate People's Court, one third were women and over 50 per cent of minority; and in the Kashgar City Basic People's Court 45 per cent were women and again slightly over 50 per cent were of minority origin.<sup>66</sup> The number of court leaders of minority origin is however said to be increasing in the areas with dense minority populations.<sup>67</sup>

In the 1982 Constitution, people's assessors (lay-judges representing community influence) were removed from the text but they remain in the Organizational Law of the Courts (article 10) for first instance cases.<sup>68</sup> People's assessors need however to be economically compensated which is why most courts reportedly avoid retaining assessors. The system of selecting assessors varies between localities and the formally required approval of the people's congress has become less stringent.<sup>69</sup> The assessor-institution is however used to recruit experts in for example intellectual property rights cases.<sup>70</sup> Arguments have been made to abolish assessors all together.<sup>71</sup>

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<sup>64</sup> ZHONGGUO FUNÜBAO [China Womens' Bulletin], 12 September 2003; the number of members of the Women's Judge's Association is however according to researcher Qi WANG, about 10 per cent of the total number of judges, personal communication, 15 December 2003; in 1991 the number of women judges were reportedly 5,600, which would amount to some 3 per cent of the total number of judges Chinese Human Rights Reader, 1991, [www.chinesehumanrightsreader.org/governments/91wp/91hr-wp.html](http://www.chinesehumanrightsreader.org/governments/91wp/91hr-wp.html).

<sup>65</sup> People's Courts, Special People's Courts, People's Republic of China, 2002.

<sup>66</sup> Interviews with judges at the three levels of courts in Urümqi and Kashgar, 14–19 March 2003.

<sup>67</sup> ZHONGGUO FUNÜBAO [China Womens' Bulletin], 12 September 2003.

<sup>68</sup> See e.g. Huiling JIANG, 1996.

<sup>69</sup> Yuwen LI, 2002, p. 66–67.

<sup>70</sup> *Report on the Work of the Shanghai Higher People's Court*, 21 February 1997, SHANGHAI JIEFANG RIBAO [SHANGHAI LIBERATION DAILY], 4 Mar. 1997; see also INSTITUTE OF LAW (Ed.), 2002, p. 9.

<sup>71</sup> Yanjin YI, 2000, pp. 751–752.

### 3. *Specialized Courts*

Based on the model of the Soviet Union, the administration of justice in China has some quite special independent divisions.<sup>72</sup> For instance, the Ministry of Public Security encompasses a special branch of railroad police and the procuratorate have railroad prosecutors. When it comes to the courts there are, as mentioned, similar divisions. In addition to the separate system of military courts, there used to be separate systems of management for maritime courts, railway courts, The maritime courts (*haishi fayuan*) and the railway (*tielu fayuan*) courts are now managed within the general court system, as opposed to falling under for example the ministry of communication as maritime courts did until 1999.<sup>73</sup> In the Five Year Reform Platform (article 43) of the SPC, which will be dealt with below in more detail, the special arrangement for administration of specialized courts by administrative organs also stated that the special courts were to be administratively managed as the regular courts.<sup>74</sup>

The specialized courts at present consist of transportation courts, military courts, maritime courts, and railroad courts.<sup>75</sup>

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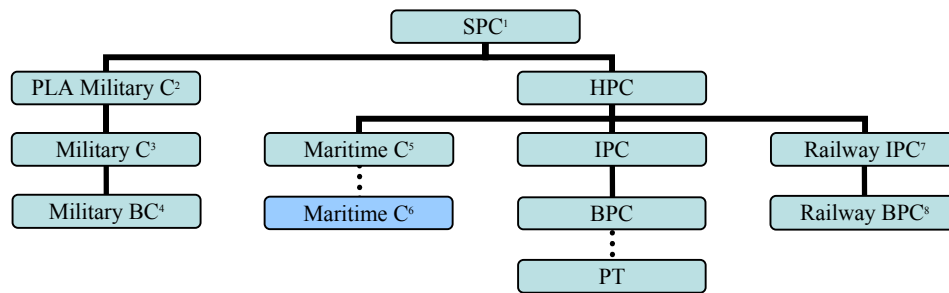
<sup>72</sup> See Democratic People's Republic of Korea, CCPR/C/SR.1946, 30 October 2001, para. 18 for a similar set up with special courts in North Korea; see also Todd FOGLESONG, 2001, on Russia, p. 73.

<sup>73</sup> *Maritime courts shift to nations judicial system*, CHINA DAILY, 1 July 1999.

<sup>74</sup> Susan FINDER, 2002, pp. 8–9.

<sup>75</sup> *People's Courts, Special People's Courts*, People's Republic of China, 2002; Susan FINDER, 1993, pp. 160–163; authors have suggest that the special forestry courts are still in place and even that there have been special traffic courts, agricultural courts, and oilfield courts; INSTITUTE OF LAW (Ed.), 2001, p. 10, on agricultural and oilfield courts; see also Albert MELONE and Xiaolin WANG, 1999, p. 144; Baoping MAO (Ed.), 1995, p. 179, on forestry courts; see however, INSTITUTE OF LAW (Ed.), 2002, p. 23, the only special courts are the maritime; the traffic court was actually a division of the SPC that was the appeals chamber for cases from the maritime and railroad courts but in 2001 it was transformed to a regular division (No. 4 Civil Division) of SPC, Correspondence with Shanghai HPC Judge, 21 September 2003.

#### IV. The People's Courts



Sources: e.g. Ronald BROWN, 1997, p. 38.

1. Supreme People's Court, *Zuigao renmin fayuan*, under which three additional levels of local courts are organized, the High [*Gaoji*], Intermediate [*Zhongji*], and Basic [*Jiceng*] People's Courts; under the BPC there are People's Tribunals [*Renmin fating*], formally a division of the BPC and not an additional level in the hierarchy.

2. People's Liberation Army Military Court, *Renmin jiefangjun junshi fayuan*.

3. Military Courts of greater military areas, different arms and services, *Junshi fayuan geda junju, gejun bingzhong*.

4. Military Affairs Basic Court, *Junshi jiceng fayuan*.

5. Maritime People's Court, *Haishi renmin fayuan*.

6. Maritime People's Court, Dispatched court, *Paichu fayuan*.

7. Railway Transportation Intermediate People's Court, *Tielu yunshu zhongji renmin fayuan*.

8. Railway Transportation Basic People's court, *Tielu yunshu jiceng fayuan*.

The military courts are set up by the People's Liberation Army (PLA) for crimes committed by military personnel, economic cases, and cases falling within their mandate based on law or as designated by the SPC. There is a separate law on military court organization and there is also a five-year reform plan, especially for the military courts.<sup>76</sup> The number and location of the military courts is a military secret and there are no good sources on how they function, but the variations on procedure are likely great.<sup>77</sup> A somewhat dated figure suggests that there may be a total of 54 military courts.<sup>78</sup> The military courts exist at three levels corresponding to the military's levels of hierarchy.<sup>79</sup>

<sup>76</sup> The reform plan was being drafted in the fall of 1999 according to Susan FINDER, 2002, pp. 8–9.

<sup>77</sup> Randall PEERENBOOM, 2002, p. 303.

<sup>78</sup> Albert H. Y. CHEN, 1994, p. 108.

<sup>79</sup> INSTITUTE OF LAW (Ed.), 2001, p. 10.

The Standing Committee of the National People's Congress has the power to appoint and remove the President of the Military Affairs Court.<sup>80</sup> In the autonomous province of Xinjiang there is also a system of Production and Construction Corps (*Xinjiang jianshe bingtuan*) courts at every level (three), which is more independent from the regular court system.<sup>81</sup> The highest level of this kind of court in Xinjiang (*bingtuan gaoji fayuan*) is a chamber of the Xinjiang High People's Court.<sup>82</sup>

Today there are maritime courts in some of the major port cities: Guangzhou, Shanghai, Qingdao, Tianjin, Dalian, Wuhan, Haikou, Xiamen, Ningbo and Beihai.<sup>83</sup> There are about 300 judges in these courts.<sup>84</sup> The maritime courts are at the intermediate level and appeals are made to the regular high people's court in the area. Some courts at this level also have branch offices.<sup>85</sup> There are also special legal procedures for maritime cases.<sup>86</sup>

The railroad court system is two-tiered, after which the High People's Court is the appropriate appeal level. The railroad courts are located on the Basic and Higher court levels. The number of railroad courts is 71, with 57 of these being at the basic level and 14 at the intermediate level.<sup>87</sup>

In addition to the specialized courts already discussed, as of the last few years, special court divisions have also been established for children,<sup>88</sup> real-estate,<sup>89</sup> and bankruptcy.<sup>90</sup> Experiments are also underway with small claims courts, such as for consumer disputes in the provinces of Heilongjiang and Hunan.<sup>91</sup>

#### 4. Legal Framework on Judicial Independence

The Constitution of the People's Republic of China specifies the position and

<sup>80</sup> INSTITUTE OF LAW (Ed.), 2002, p. 15.

<sup>81</sup> The Corps is a large loose network under military control, engaged in economic development, mainly agriculture but also labor reform camps: James D. SEYMOUR and Richard ANDERSON, 1998, pp. 44 *et seq.*

<sup>82</sup> Based on personal interviews with judges, prosecutors, and lawyers in Xinjiang, March 2003; see also *Zhonghua renmin gongheguo faguan zhiye daode jiben zhunze* [PRC Judges' get Fundamental Principles], WWW.LAW-LIB.COM, 18 October 2002.

<sup>83</sup> The first six were established by NPC in 1984 and SPC created the following two in 1999 and in Ningbo in 1992 and Beihai in 1997; Jinxian ZHANG, 1997, pp. 2–4.

<sup>84</sup> *Maritime Courts Shift to Nations Judicial System*, CHINA DAILY, 1 July 1999.

<sup>85</sup> See e.g. <http://qdhs.chinacourt.org/pcf/yt/php> for the Qingdao dispatched court in Yantai.

<sup>86</sup> INSTITUTE OF LAW (Ed.), 2002, p. 23.

<sup>87</sup> [www.chinacourt.org](http://www.chinacourt.org); Albert H. Y. CHEN, 1994, p. 108, records 73 courts.

<sup>88</sup> Weidong ZHANG and Menghua TIAN, 2003.

<sup>89</sup> Randall PEERENBOOM, 2002, p. 284.

<sup>90</sup> Ariel Lu YE, 2001.

<sup>91</sup> INSTITUTE OF LAW (Ed.), 2002, p. 12.

role of the courts. Article 3 of the Constitution states in part that: “All administrative, judicial and procuratorial organs of the state are created by the people’s congresses to which they are responsible and by which they are supervised.” Section VII of the Constitution deals with the courts and the procuratorate: article 24, paragraph 2, allows the President of the Supreme People’s Court to serve, at the most, two consecutive 5-year terms. The first sentence of article 125 provides for public trials and article 126 for judicial independence, emphasizing the non-interference by any administrative organ, public organization or individual.<sup>92</sup> The Communist Party does not squarely fall within this definition and it has been a hotly debated subject. As mentioned, the Communist Party has also issued directives that the Party must leave the judiciary independent, and recently, President Hu Jintao, has stressed that the Party must follow the Constitution. These issues will be discussed further below.

The Organizational (Organic) Law of the People’s Courts of the PRC was adopted in 1979 and revised in 1983. It deals with the general structure and organization of the courts as well as the requirements to become judge and appointments to the senior positions.<sup>93</sup> Regarding judicial independence, the 1979 version stipulated in article 4 that: “The people’s courts shall administer justice independently, subject only to the law”. With the 1983 revision however, this provision was amended and brought in line with the wording of the 1982 Constitution: “The people’s courts shall *exercise* justice independently, in accordance with the *provisions* of the law, *and shall not be subject to interference by any administrative organ, public organization or individual.*”<sup>94</sup> (emphasis added) The Criminal Procedural Law as revised in 1996 refers in article 5 to both the procuratorate and the courts using the same formulation on independence.

The Judges Law of 1995, for example, calls for the establishment of committees to handle examination and evaluation (article 46); the right of the judges to hold political opinions (article 9); it establishes a salary system separate from the administrative (article 34); but the Law also makes removal of judges possible in cases of making or spreading remarks detrimental to the future of the Chinese state (article 30).<sup>95</sup> Article 1 corresponds to the unrevised Organizational Law, in stipulating that the purpose of the law is to “ensure that the people’s courts independently exercise judicial authority according to

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<sup>92</sup> On article 126 of the Constitution, see e.g. Hui ZHAI, 2003, pp. 62 *et seq.*

<sup>93</sup> Available in English in Ronald C. BROWN, 1997, pp. 150 *et seq.*

<sup>94</sup> *yifa shenpan anjian bushou xingzheng jiguan, shehui tuanti he geren de ganshe*; translation available at [www.ChinaLaw114.com](http://www.ChinaLaw114.com).

<sup>95</sup> The Judges Law was adopted by the Standing Committee of the Eighth National People’s Congress in 1995 and entered into force on July 1 that year; A research group was set up by the SPC already in 1986 to look into the issue of a Judges Law, Weirong CHENG, 2003, p. 245.

law”.<sup>96</sup> Article 8 (2), the most explicit pronouncement of judicial independence, recites the language of the revised Organizational Law and the Constitution.<sup>97</sup> Commentators in China are in agreement on the lack of individual independence of judges in China, which should be guaranteed in accordance with the text of the law, while the courts as an entity are granted independence.<sup>98</sup>

Both the Judges Law and the law on the procuratorate of 1995 were amended in June 2001 along with a revision of the Lawyers Law later the same year; the changes entered into force 1 January 2002.<sup>99</sup> The revisions mainly concerned the Unified Judicial Exam (article 51 of the Judges Law). The revision also included changes that emphasized justice (article 1), judges professional ethics (article 7 (5)), qualifications to become a judge (article 9 (6)), appointment procedures (articles 12, 14, and article 13 (9) on “other circumstances” for removal was deleted), and rules of avoidance related to post-judicial trial lawyer employment, or situations of a family member of a judge practicing as a trial lawyer in a case before that judge (article 17).

In October of the same year the law on judges was amended and the SPC also issued a code of conduct for the judges, The Code of Judicial Ethics for Judges of the People’s Republic of China, which largely emphasized the impartiality of the judges.<sup>100</sup> Already the preamble of the Code stressed the importance of impartial adjudication. The entire first chapter of the Code (twelve articles) deals with the importance of independence and impartiality, and by stressing these aspects in particular in relation to the individual judge. The Code even instructs the judges not to reveal by statement or attitude the position of the court before a verdict is announced (article 11). Colleagues are also required to report on violations of the Code (article 17).<sup>101</sup> With the introduction of the Code, the SPC is also boosting the individual aspects of independence and impartiality. The Code emphasizes the importance of quality and impartiality before efficiency (chapter I in relation to chapter II) but at the same time highlights the need for a firm political position (preamble and article 34). The Code even deals with ‘cleanliness’ and the dress code of judges

<sup>96</sup> The original reads: *baozhang renmin fayuan yifa duli xingshi shenpanquan*.

<sup>97</sup> Original text available at [www.legaldaily.com.cn](http://www.legaldaily.com.cn) published 5 July 2001; see also article 45, dealing with the enforcement of article 8.

<sup>98</sup> Wusheng ZHANG and Zeyong WU, 2000 (a), pp. 58, 61; Xinyang YU, 2001, p. 33; Chunming GUO and Zhigang LIU, 2000, p. 158; Chunming GUO and Zhigang LIU, 2000, pp. 155, 158.

<sup>99</sup> Keyuan ZOU, 2002, p. 1051; see also SPC Circular on Enforcing the Judges Law, 1 July 2001, available at [www.cecc.gov](http://www.cecc.gov).

<sup>100</sup> Issued and effective 18 October 2001, the code is available at e.g. [www.accci.com.au/code](http://www.accci.com.au/code) and at [www.cecc.gov](http://www.cecc.gov); *Zhonghua renmin gongheguo faguan zhiye daode jiben zhunze* [PRC Judges get Fundamental Principles], [WWW.LAW-LIB.COM](http://WWW.LAW-LIB.COM), 18 October 2002; Yuwen LI, 2003, p. 28–29.

<sup>101</sup> See also Yuwen LI, 2003, pp. 31 *et seq.*

(article 33). Judges are also for example to report on their private finances to the court (article 29), and their extra-judicial activities are regulated (chapter VI).

In 2004 the SPC jointly with the Ministry of Justice issued a code intended to regulate the relationship between judges and lawyers in order to ensure fair trial.<sup>102</sup> This Joint Code reiterates much of the Code for the judges but it also specifies additional recusal rules for judges and lawyers, and it prohibits out of court discussions between judges and lawyers as well as between judges and parties appearing before their courts.

From the adoption of the organizational law in the late 1970s through the Judges Law in 1995 and its 2001 revision, and the Code of Judicial Ethics, a clear development can be discerned. The judiciary is gradually separating itself from the administration. Indicative is the usage starting in 1995 of ‘judge’ (*faguan*) as opposed to ‘adjudicator’ (*shenpanyuan*), which had been used in the organizational law. Stricter separation from the administration directly relates to independence and the judiciary’s credibility in society. The modified formulation on independence in the new Code mirrors revisions to the revised Organizational Law, the Judges Law and the Constitution. The old wording was to “exercise justice independently, in accordance with the provisions of the law, and shall not be subject to interference by any administrative organ, public organization or individual”.<sup>103</sup> In the Code, article 2 reads:

A judge should perform his duties in accordance with the Constitution and other laws and on the principle of judicial independence. A judge should perform his duties with no interference from administrative departments, social organizations or individuals and *no influence other than the influence from the laws*.<sup>104</sup> (emphasis added)

A gradual move is made in the text that still avoids specifically mentioning the Party but more clearly stipulates greater independence of the judiciary. There are speculations that the Judges Law will have to be revised again within the near future.<sup>105</sup> More out of date is however the Organizational Law.<sup>106</sup> A revised Organizational Law would likely codify the wording of the Code. The Party is however not mentioned in the Constitution so a revised stipulation may

<sup>102</sup> Issued 19 March 2004, effective immediately, published in RENMIN FAYUAN BAO [People’s Courts News]; see also *New Code of Conduct on Judicial Corruption*, SOUTH CHINA MORNING POST, 20 March 2004,.

<sup>103</sup> The Organizational Law, article 4, the Judges Law article 8 (2), and the Constitution article 126.

<sup>104</sup> Translation used available at e.g. [www.accci.com.au/code](http://www.accci.com.au/code).

<sup>105</sup> Qianfan ZHANG, 2003, p 89

<sup>106</sup> On needed changes to the Organizational Law, see e.g. Jianping FENG and Lianqing FENG, 2003, arguing for a clearer stipulation of protection from influence.



opt for broader wording such as in the unrevised Organizational Law, rather than a seemingly exhaustive but non-complete list that excludes mentioning the Party.

## **B. Constraints on the Independence**

The following provides an overview of the numerous challenges for the judiciary in China and presents a discussion on the many proposals on how to resolve these problems. Considering the three strands of independence, impartiality, and public confidence in the judiciary, some of the Sub-sections (1–4, 6) below are mainly concerned with independence of the courts, one Sub-section (5) is focused on public confidence, and the last Sub-section (7) with both aspects of impartiality and public confidence.

In the preceding analysis of the legal framework of the Chinese judiciary, the relationship between the Party and the people's congresses seems to be essential for an understanding of the function of the judiciary and crucial to a discussion on judicial independence. This analysis of the constraints on the independence commences with these two actors.

### *1. The Chinese Communist Party*

Historically the political influence on the judiciary in China was extensive up until 1979 but strong political influence still lingers.<sup>107</sup> The present Constitution of 1982, even though after a series of amendments, remains ambiguous on the role of the Party. Even though the preamble makes references to the Party, the substantive part only defines the state organs and does not mention the Party at all. The supremacy of the NPC is arguably constitutionally superior to the Chinese Communist Party (CCP) but arguments for Party-supremacy are usually seen as deriving from the four cardinal preambular principles of the Constitution: (1) socialism, (2) the dictatorship of the proletariat, (3) the Party leadership, and (4) Marxism-Leninism-Mao Zedong thought.<sup>108</sup>

The mandatory annual reporting of the courts to the corresponding level of congresses typically lists the court as being “under the leadership of the . . . CCP . . .”<sup>109</sup> The courts also make commitments to adhere to the Party's basic

<sup>107</sup> For the general structure of the State with emphasis on the role of the Party, see e.g. James C. F. WANG, 1999, pp. 71 *et seq*; Daniel C. K. CHOW, 2003, pp. 115 *et seq*; June TEUFEL DREYER, 1996, pp. 88–89.

<sup>108</sup> Philip BAKER, 1996, p. 13.

<sup>109</sup> *Report on the Work of the Shanghai High People's Court*, 21 February 1997, SHANGHAI JIEFANG RIBAO [SHANGHAI LIBERATION DAILY], 4 Mar. 1997; the corresponding report from the *Report on the Work of the Shanghai Municipal People's Procuratorate* was also published in the same issue.

line and basic principles.<sup>110</sup> The wording in the report of the SPC from late March 2003, reads similarly:

Since the First Session of the Ninth [NPC], the [SPC], under the leadership of the party Central Committee and the supervision of the NPC and its Standing Committee, has persistently taken Deng Xiaoping Theory and the important thinking of the ‘three representations’ . . . on the importance of the communist party in modernizing the nation<sup>111</sup>

In the same first substantive paragraph however, there is also a confession to the new credo of practicing “hard the principle of ‘impartiality and efficiency,’ the theme of the work of the law courts”.<sup>112</sup> XIAO Yang, the President of the SPC, told a Conference of High People’s Courts Presidents in China after having declared allegiance to the CCP, that the country would not adopt so-called judicial independence of Western countries based on separation of powers.<sup>113</sup> Professor Anthony Dicks finds the problem of having the Communist Party de facto not falling within the jurisdiction of the court system in China as fundamental to the understanding of the legal system.<sup>114</sup> Some scholars argue that the Party’s only reason for allowing judicial independence reform is that since the Party does not consider itself bound by the requirements of judicial independence, it does not foresee an affect on its power.<sup>115</sup>

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<sup>110</sup> *Report on the Work of the Shanghai High People’s Court*, 21 February 1997, SHANGHAI JIEFANG RIBAO [SHANGHAI LIBERATION DAILY], 4 Mar. 1997.

<sup>111</sup> *China: Apparent Full Text of Supreme Court Work Report*, delivered 11 March 2003 by XIAO Yang, BBC, 29 March 2003.

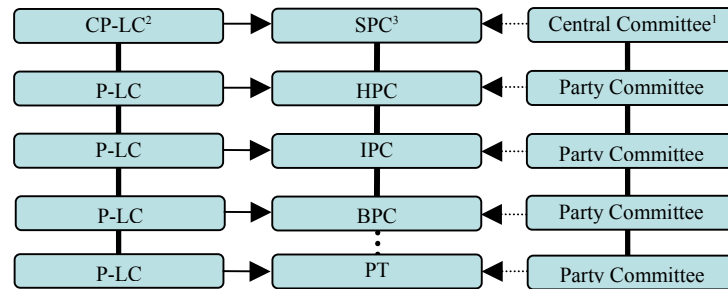
<sup>112</sup> *Id.*

<sup>113</sup> Susan FINDER, 2002, p. 10.

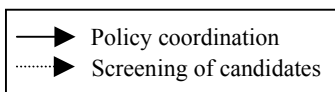
<sup>114</sup> Anthony R. DICKS, 1996, p. 95.

<sup>115</sup> Yuwen LI, 2001, p. 74; some also see the Party as the actual guarantor of judicial independence, Min ZHANG and Huiling JIANG, 1998, pp. 308 *et seq.*

## V The Communist Party and the Judiciary



Sources: e.g. Randal PEERENBOOM, 2002, p. 302.



1. The Central Committee of the Communist Part (*Gongchandang zhongyang weiyuanhui/Zhonggong zhongyang*), the Organizational Department (*zuzhi bu*) of the Central Committee screens candidates before appointment by the Standing Committee of the NPC; similar departments exist in each of the lower Party committee with corresponding influence.

2. Central Political-Legal Committee (*Zhongyang zhengfa weiyuanhui*), the SPC President is a member.

3. Each court has a Party Group (*Dangzu*).

On the organizational level, at the echelon, the most obvious and frequent contact-point of the SPC with the Party is through the Central Political-Legal Committee (*zhongyang zhengfa weiyuanhui*), which coordinates the administration of justice and sets nation-wide standards as well as leads political-legal committees (*zhengfa weiyuanhui*) at the various levels of government.<sup>116</sup> Already before the foundation of the republic, this system was used in areas controlled by the communist forces.<sup>117</sup>

The Central Political-Legal Committee fall under the Central Committee of the Party, and its members include the heads of the SPC, SPP, Ministry of

<sup>116</sup> Susan FINDER, 1993, p. 149; see also Philip BAKER, 1996, pp. 13–17; Lin LI, 1999, pp. 623–4.

<sup>117</sup> Qianfan ZHANG, 2003, p. 99.

Public Security, and Ministry of State Security, Ministry of Justice as well as a representative of the political department of the People's Liberation Army (PLA).<sup>118</sup> Usually the Committee is only involved in law and order but in 1999 they also took a decisive interest in the judges' generally low educational level, and problems with enforcement of verdicts.<sup>119</sup> The President of SPC also used to be the head of the Committee, marking the de facto importance placed on the courts.<sup>120</sup>

The political-legal committees at the local level similarly coordinate the activities within administration of justice, including the courts.<sup>121</sup> These committees answer to the Party committees (*dang weiyuanhui* or *dangwei*) at that level and the next higher level.<sup>122</sup> Political-legal committees at the local level generally include: the deputy Party Secretary in charge of political-legal issues, heads of local courts, and representatives of the procuratorate, public security, state security, judicial affairs, civil affairs, and occasionally also the nationalities and religious affairs, and the supervision bureau. It is the President or the Vice-President of a court that interacts with the corresponding level committee.<sup>123</sup>

The local political-legal committees' influence is evidenced through implementing higher Party organizations' directives or discussing difficult court cases, such as those related to Strike Hard campaigns, *Falun gong*, or crimes involving local cadres. Whether the position taken by the committee is transferred as an order to the court President or if it is just submitted for consideration varies between different localities.<sup>124</sup> In 1991 there were also public order management committees established at every level, affiliated with the political-legal committees in order to unite the courts, the Party and government departments in coordinated action.<sup>125</sup> The role and impact of these committees is uncertain.

The nomenklatura system, like in the Soviet Union, requires the Party to approve all-important appointments.<sup>126</sup> The Organizational Department (*zuzhi bu*) of the Central Party Committee that deals with ideology, education, policy, and more narrow personnel issues, screens candidates to top judicial positions

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<sup>118</sup> Susan FINDER, 1993, p. 150; the Central Committee is a 200 member body formally under the CCP National Congress; the Committee's is lead by the Politburo with some 24 members which in turn is guided by the Politburo Standing Committee with around 9 members.

<sup>119</sup> Susan FINDER, 2002, p. 11.

<sup>120</sup> Susan FINDER, 1993, p. 224; the head of the Committee since 2002 is LUO Gan the Minister of Public Security.

<sup>121</sup> Jerome COHEN, 2001, p. 5.

<sup>122</sup> Randall PEERENBOOM, 2002, p. 302.

<sup>123</sup> Susan FINDER, 2002, p. 11.

<sup>124</sup> *Id.*, p. 12.

<sup>125</sup> *Id.*, p. 17.

<sup>126</sup> Randall PEERENBOOM, 2002, pp. 14, 305–306; Yuwen LI, 2001, p. 83.

before the Standing Committee of the NPC actually appoints the judges.<sup>127</sup> The Party can through its influence reassign a judge from one court to another.<sup>128</sup> The function is the same at the local level with the corresponding level of the Party organizational department. The involvement of the Party in the appointment process is running counter to the procedures established in the Judges Law.<sup>129</sup>

Like all state organs, courts have an internal Party group (in the courts referred to as *dangzu*) of which the court president or vice-president is the Party secretary. The Party group within the court is administratively subordinate to the Party committee at the corresponding level of government and in turn the Central Committee of the Party.<sup>130</sup> The Standing Committee of the Party group is the most influential organ. The Party group includes most of the high-ranking officials within the court and gets involved in important cases taking not only applicable law and the case at hand into consideration but also broader societal aspects.<sup>131</sup> Much of the Party work organized through various structures in the courts, is of limited importance in restricting the independence: these structures (Party Institutional Unit, *jiguan danwei*; and Party Cells, *dangzhibu*) handle Party membership, arrange political study sessions, and transmit Party policy.<sup>132</sup> Only some six per cent of the court leaders in China (about 200) are non-Party members.<sup>133</sup> Given that over 90 per cent of the judges in the country are Party members, the impact ought not to be insignificant.<sup>134</sup> Membership however may simply indicate that it is good career move to be a member of the Party, and not more. In concrete cases the Party influence is considered likely to be minimal with courts only seeking advice in sensitive cases, rather than the Party taking the initiative.<sup>135</sup>

The Statute of the CCP stipulates that the Party has to function within the realm of the Constitution and the laws.<sup>136</sup> As discussed above, this has also been reiterated by Party leaders. Still, the degree of Party influence on the

<sup>127</sup> Lixian LIU and Zhijun ZHANG, 2000, p. 36; see also Randall PEERENBOOM, 2002, pp. 280, 302; Susan FINDER, 2002, pp. 10–11.

<sup>128</sup> Albert MELONE and Xiaolin WANG, 1999, p. 147.

<sup>129</sup> Randall PEERENBOOM, 2002, 214.

<sup>130</sup> Susan FINDER, 2002, p. 10.

<sup>131</sup> Randall PEERENBOOM, 2002, p. 303.

<sup>132</sup> *Id.*, pp. 284, 302; Susan FINDER, 2002, pp. 11–12.

<sup>133</sup> ZHONGGUO FUNÜBAO [China Womens' Bulletin], 12 September 2003; the percentage calculation is done on the total number of courts, excluding branch courts (PTs).

<sup>134</sup> The figure according to Jerome A. COHEN, 2001, p. 5; the same figure is given in Stanley LUBMAN and Leila CHOUKROUNE, 2004, p. 125; in 1985 the figure was reportedly slightly higher, at 95 per cent, Albert MELONE and Xiaolin WANG, 1999, p. 147.

<sup>135</sup> Susan FINDER, 1993, pp. 151, 175.

<sup>136</sup> Shigui TAN, 2001, pp. 81–82, 98.

judiciary is considered substantial by many.<sup>137</sup> It is argued that there is a risk of the Party “replacing the law”.<sup>138</sup> In 1994 the local Party Committee ordered a President of a county court removed because the President refused to follow the decision of the Committee in a specific case. In 2001 the ruling was however changed to correspond to the ejected President’s original intent.<sup>139</sup> In this one reported case, the Committee seems to have been concerned with local protectionism, which will be discussed below, rather than Party politics.

The Party is also influential through the Party regulations for members, which in addition to the SPC and State Council handbooks, deal with disciplinary matters.<sup>140</sup> Court leaders may also be required to attend training sessions at the Communist Party schools at national or local levels.<sup>141</sup> Judges moreover pledge support to the cardinal principles of the Party in their professional oath.<sup>142</sup> The judges are believed to be influenced by Party policy documents and speeches of leaders.<sup>143</sup> Overall, there is a customary interaction between Party and state officials.<sup>144</sup> The scope of the influence of the Communist Party is impossible to discern but in particular, the system for appointment and dismissal is affected.<sup>145</sup>

The courts are however considered increasingly less politicized.<sup>146</sup> The Party has lost much of its power in the last years, not the least in the countryside, and has been forced to give up power to institutions such as the judiciary.<sup>147</sup> With the escalating load of civil cases and the regularity of the criminal cases, the Party is by necessity also taking a lesser interest in individual cases.<sup>148</sup> Peerenboom argues that the Party in general has no other interests than fairness

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<sup>137</sup> See e.g. Wusheng ZHANG and Zeyong WU, 2000 (b), p. 49; Bing TAN and Zhisheng WANG, 2001, p. 141.

<sup>138</sup> *yi dang dai fa*, Chunming GUO and Zhigang LIU, 2000, p. 157.

<sup>139</sup> Yuwen LI, 2003, p. 31.

<sup>140</sup> Susan FINDER, 1993, p. 158.

<sup>141</sup> Susan FINDER, 2002, p. 12.

<sup>142</sup> Albert MELONE and Xiaolin WANG, 1999, p. 147.

<sup>143</sup> Shigui TAN, 2001, p. 39.

<sup>144</sup> Susan FINDER, 2002, p. 17.

<sup>145</sup> *Shifou ying zai xianzheng tizhi nei jinxing* [Whether or not to Advance the System of Constitutional Government], 2000, p. 52; see also William P. ALFORD, 2000, p. 18.

<sup>146</sup> Keyuan ZOU, 2002, p. 1049; Yuwen LI, 2001, p. 91.

<sup>147</sup> Randall PEERENBOOM, 2002, pp. 188–189, 204, 215; A small but telling example is decision by the Ministry of Justice and the SPC to not allow graduates from Party schools to sit for the Judicial Exam, *Dangxiao shibushi gaodeng yuanxiao? Biyesheng zhiyi “dangxiao wenping”* [Aren’t Party Schools Higher Educational Institutions? Graduate Students Question “Party School Ranking?”], SOHU.COM, 19 August 2003.

<sup>148</sup> Susan FINDER, 1993, pp. 151, 146.

in the adjudication for which reason direct Party influence is rare.<sup>149</sup> Actually, the local government influence on the courts seem to be much more frequent than that of the Party and in this situation the Party interference may serve in some cases to counter local protectionism.<sup>150</sup> Possibly, as the case exemplified above, the Party may serve local interests rather than following the central policy. However, consideration must also be given to the actual influence of the courts, even though the formal structures suggest the influence is great, the actual influence may be nominal.<sup>151</sup> Still, government and parliamentary bodies are influenced by the Party through promotional and other incentives and in this way the influence persists to some extent.

Disregarding the level of Party influence, criticism is voiced against the present system, also by Chinese scholars. The most fundamental aspect is critique of the political system as a whole, such as by Professor ZHANG Qianfan of Nanjing University.<sup>152</sup> More moderate opinions, such as those expressed through a research group led by researchers at Tsinghua University in Beijing who argue for Party influence to be regulated by law, especially regarding influence on the local Party committees.<sup>153</sup> The local Party leadership issues concerns many but the reporting obligation of courts to Party and administrative leadership is also important, as will be discussed further below.<sup>154</sup> Yet, the judicial reform under way does not clearly address the relationship between the judiciary and the Party, or the relationship with the people's congresses.<sup>155</sup> Fundamental too is the inherent confusion between the Party and the NPC about the relative powers.<sup>156</sup>

## 2. *The People's Congresses*

The constitutionally supreme organ of the state, the NPC, and its local level corresponding entities, is another major structural constraint on the judiciary.<sup>157</sup> The NPC has played a subsidiary role in the history of legal progress in China.

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<sup>149</sup> Randall PEERENBOOM, 2002, pp. 14, 10–11, 7, 216.

<sup>150</sup> *Id.*, pp. 307–308.

<sup>151</sup> See e.g. Randall PEERENBOOM, 2003 (a), p. 69, in relation to party cells in law firms that are unlikely to ever be established and if they are the of very limited importance.

<sup>152</sup> Qianfan ZHANG, 2003, p. 99.

<sup>153</sup> Xiabing HU and Renqiang FENG, 2000, p. 62: preventing the law being replaced with words and the law suppressed with privileges (*yiyan daifa, yiquan yafa*); see also e.g. Zhuru CHENG, 2001, pp. 100 *et seq.*, and 307 *et seq.* on separating the Party and the administration.

<sup>154</sup> Lixian LIU and Zhijun ZHANG, 2000, pp. 35–38.

<sup>155</sup> Keyuan ZOU, 2002, p. 1061.

<sup>156</sup> Weifang HE and Fuhua WEI, 2003, p. 57.

<sup>157</sup> See Perry KELLER, 1994 for a thorough description of the people's congresses and their legislative work; see also Young Nam CHO, 2003 for a general overview.

Starting in the 1990s however, the role has become increasingly important. When in 1998 the then Prime Minister, LI Peng, stepped down and instead became Chairman of the Congress, he for example stated that a revision was called for when it came to the widespread problem of judicial officials not complying with the laws and he demanded open trials.<sup>158</sup> The NPC is taking on a larger role in the Chinese political and legal arena. With the new Legislation Law of 2000, the Standing Committee of the NPC formally got the position of constitutional court according to Cohen.<sup>159</sup> A politically composed and one-party dominated body placed as the ultimate court above the courts is clearly problematic.

According to article 128 of the Constitution and article 17 of the Organizational Law of the Courts, the SPC is responsible to and reports to NPC. Article 67 (6) of the Constitution provides for the supervisory role of the Standing Committee of NPC over the judiciary.<sup>160</sup> The local people's courts answer in a similar way to the corresponding level of people's congresses. The organizational law of the local people's congresses and local people's governments, supplements the Constitution on how the supervision is implemented and the SPC moreover issued guidelines in 1998 on the forms of supervision:<sup>161</sup>

- Annual reports to the corresponding level of congress;
- Congress deputies (a quorum) can make inquiries to the court and the court must respond in writing or by way of a meeting;
- Congress may inquire into rulings and if the decisions prove wrong they will have to be corrected through the so-called case adjudication supervision procedures.

#### Annual Reports

The main feature of this supervision consists in reporting to the corresponding level of people's congress. Only in later years have the people's congresses started to bring the supervision into action.<sup>162</sup> The annual report of the Standing

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<sup>158</sup> *Li Peng pushes for juries and open trials*, SOUTH CHINA MORNING POST, 17 September 1998.

<sup>159</sup> Jerome COHEN, 2001, p. 7; see the Legislation Law, articles 90 and 91 for legislative review, and 42 and 43 for legislative interpretation.

<sup>160</sup> See Susan FINDER, 1993, p. 152, in particular note 26 with the reference to article 30 of the Rules of Procedure of the National People's Congress (*yishi guize*) stipulating annual reporting at the NPC-session; see also Xiabing HU and Renqiang FENG, 2000, pp. 478 *et seq.*

<sup>161</sup> Susan FINDER, 2002, pp. 13–14.

<sup>162</sup> Margaret Y. K. WOO, 2000, p. 181; Susan FINDER, 2002, p. 12, exemplifying with foreign investors having lobbied for improved supervision; see also Mo DI, 1995.



Committee of the National People's Congress to the NPC further explains the relationship with the courts. Under the heading of "Standing Committee of NPC Strengthening step-by-step construction of its own organs" (*changweihui zishen jianshe zhubu jiaqiang*), in the most recent of the reports, the third of the five points made recommends, "improving correct handling of NPC relations with government, court and procuratorate." The detailed text reads in part:

Our country's organs are an organic unity. Governments, courts and procuratorates at all levels stem from the people's congresses [*renda*], are responsible to and are supervised by the people's congresses.

Between the people's congresses and these three organs [referred to as 'one government two yuan', *yifu liangyuan*, where yuan is the word used as part of both the courts and procuratorate: *fayuan* and *jianchayuan*] the division of labor is not identical, nor are the responsibilities, but the goals and the mission are identical: all of them are under the leadership of the Party, jointly establishing socialism with Chinese characteristics. The people's congresses are according to the stipulations in law, to carry out supervision of the 'one government two yuan' with the purpose of supervising the legality of administration, fair justice and assuring the ever better performance of all work of the 'one government two yuan', thus guaranteeing the genuine application of people's endowed rights for the purpose of the foreseen benefits of the people. This kind of supervision is a necessary restriction of 'one government two yuan' and is also supporting and furthering the work of 'one government two yuan'.<sup>163</sup>

For the reporting to be well received or possibly understood by the NPC, vice presidents of the Supreme Court are doing cumbersome lobbying beforehand in the provinces.<sup>164</sup> In 1997, only 69 per cent of the NPC delegates voted in favor of the SPC annual report (to put this in context, most reports would get close to a complete approval). This was a spark for reform within the judiciary.<sup>165</sup> As a first case ever, in 2001, the report of the Shenyang Intermediate People's Court in the Eastern province of Liaoning, was even rejected due to corrupt judges and poor performance of the court and the report had to be revised and could

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<sup>163</sup> Quanguo Renmin Daibiao dahui Changwu Weiyuanhui Gongzuo Baogao [Working Report of the Standing Committee of the National People's Congress], RENMIN RIBAO [People's Daily], 22 March 2003, p. 2, (my translation).

<sup>164</sup> Interview with SPC judge, 13 March 2002.

<sup>165</sup> Randall PEERENBOOM, 2002, p. 309.

only be passed six months later.<sup>166</sup> The President of the court was soon thereafter also dismissed by the Standing Committee of the provincial-level congress.<sup>167</sup> Reportedly, in the city of Dalian, the local people's congress even actually reviews the performance of individual judges and votes on their qualifications.<sup>168</sup> Whether this latter initiative conforms to the provisions on supervision is yet to be tested. In Shanghai for instance, the local People's Congress issued in 1999, regulations regarding the supervision of judicial institutions.<sup>169</sup>

### Individual Case Supervision

People's congresses started formally in 1998 in some provinces to scrutinize individual cases that were brought to their attention.<sup>170</sup> In 1999, the NPC tried to pass detailed regulations on individual case supervision (*gean jiandu*) but the initiative was blocked. A renewed effort was made in 2000, which also failed. Instead there are now regional laws on this form of supervision.<sup>171</sup> The national draft law provides for supervision when mistakes have been made in judgments or when procedural time limits have been seriously overstepped, or in cases involving violations of law, such as torture, by court staff or prosecutors. The draft law is based on a few principles for supervision that indicate problems experienced: supervision can only be considered after the court decision has been made; only collectively by delegates; and people's congresses may not interfere or try to adjudicate a case.<sup>172</sup> The system has in the absence of adequate regulations been misused and is a source for much criticism.<sup>173</sup>

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<sup>166</sup> Keyuan ZOU, 2002, p. 1059; see also *Congress rejects court's report*, CHINA DAILY, 16 February 2001; Zhengti xingxiang piandi faguan mianlin xinren weiji [The General Image is Low; Credibility Crisis of Judges], ZHONGGUO XINWEN ZHOUKAN [China News Weekly], 29 November 2001, as reported by <http://news.sohu.com/28/74/news147307428.shtml>, stating that of the 474 deputies, only 218, less than 50 per cent, approved the report.

<sup>167</sup> Jie CHENG, 2003, p. 21; Qi ZHANG, 2002, p. 22.

<sup>168</sup> Qianfan ZHANG, 2003.

<sup>169</sup> Susan FINDER, 2002, p. 14.

<sup>170</sup> At least Jiangsu and Yunnan provincial people's congresses adopted laws to this effect in 1997, see: CHEN Hongling in 2000, p. 4.

<sup>171</sup> Randall PEERENBOOM, 2002, p. 310; see also INSTITUTE OF LAW (Ed.), 2002, p. 29.

<sup>172</sup> Keyuan ZOU, 2002, pp. 1059–1060.

<sup>173</sup> See e.g. Qianfan ZHANG, 2003, p. 92; Lixian LIU and Zhijun ZHANG, 2000, pp. 43–45; Xiabing HU and Renqiang FENG, 2000, p. 61, who criticizes the system for also being used by Party and government organs: *danwei banan*; Xinyang YU, 2001, p. 33; see also Hainian LIU, 1999, p. 563.

Arguments are made in China, both in favor of and against, individual case supervision.<sup>174</sup> It is argued that the powers of the courts would have to be strengthened in order to maintain the balance and to make the system compatible with judicial independence.<sup>175</sup> One judge has proposed that in large and serious cases, the congresses should instead establish investigative commissions.<sup>176</sup> Another judge criticizes the lack of constitutional and legal basis for the system as it is functioning now.<sup>177</sup> One author claims that extra procedural supervision to protect legal issues is like “climb[ing] trees to catch fish”.<sup>178</sup> The system designed to prevent, for example, local protectionism, risks being the source of the very same; delegates to the congresses choose cases to supervise, and may potentially influence based on local concerns.<sup>179</sup> Commentators express their concern over the detailed function asking whether NPC supervising the process in the courts or the results; the overall situation or individual cases; or the law or the work of the courts?<sup>180</sup>

If a party to a case desires to speed up the court process, the people’s congress members can be lobbied to raise the issue with the court in question, which will typically lead to results.<sup>181</sup> A high court in Jilin overturned convictions from 1989 against four autoworkers. The four had demonstrated in support of the Tiananmen student protests and was convicted of “carrying out counter-revolutionary propaganda and incitement”. A month before release, one of the four had sent an appeal to the chairman of the NPC requesting reassessment. The Jilin Province High Court thereafter announced that charges had been dropped owing to lack of proof corresponding to the crime that was allegedly committed and the sentences were reduced accordingly.<sup>182</sup> As long as the corrections are seemingly positive, as in this case, it is difficult to object to the results, but the fact that the regular appeal procedures fail to resolve these issues, is striking.

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<sup>174</sup> See e.g. Pengcheng XIE, 1999, arguing for, and Chunming GUO and Zhigang LIU, 2000, p. 156; Liming WANG, 2002, pp. 11 *et seq*; and Wen GAN, 1999, p. 27, arguing against.

<sup>175</sup> QI Jianjian in *Renda “gean jiandu” wenti tantao* [Inquiry into the Parliaments ‘Individual Case Supervision’], 2000, pp. 6–7.

<sup>176</sup> HU Jianfeng and SU Meifang in 2000.

<sup>177</sup> Pengcheng XIE, 1999, pp. 33–34.

<sup>178</sup> *yuanmu qiuyu*, in: SHEN Qingzhong in *Renda “gean jiandu” wenti tantao* [Inquiry into the Parliaments Individual Case Supervision] 2000, p. 7.

<sup>179</sup> Yanjin YI, 2000, p. 746; see also Randall PEERENBOOM, 2004 (b) for a detailed analysis, stressing the pros and cons of the system.

<sup>180</sup> *Shifou ying zai xianzheng tizhi nei jinxing* [Whether or not to Advance the System of Constitutional Government], 2000, pp. 52–53.

<sup>181</sup> Interview with SPC judge, 13 March 2002.

<sup>182</sup> CHINESE NEWS DIGEST, 31 May 1997.

### Other Forms of Supervision

As mentioned above, the people's congresses also influence the judiciary through appointment and dismissal of judges. The Organizational Law of the Courts grants the corresponding level of people's congress the power to appoint and dismiss court presidents and vice-presidents; the standing committee is responsible for the lower judges (article 35).<sup>183</sup> Court presidents are appointed for the same term of the people's congress, which is five years, and the other judges indefinitely (article 36). Promotions such as from clerk to judge and judge to vice-president also require the approval of the corresponding standing committee (article 35). The Organizational Law of the Courts moreover provides that judges can be removed at any time and without clearly specified reasons.<sup>184</sup> If a court President is to be removed between two sessions of the congress that initially made the appointment, the standing committee of that congress has to get approval from the standing committee of the higher-level congress, through the higher level court (article 36, paragraph 2). The court or a government unit typically does the actual selection of judges.<sup>185</sup> There are problems with appointments being made on the basis of friendship and kinship.<sup>186</sup>

Many in China advocate reform of the appointment system for judges.<sup>187</sup> One proposal that has been made is that the NPC and its Standing Committee should actually appoint judges without interference.<sup>188</sup> Other suggestions are to consider professors of law and lawyers for judgeships,<sup>189</sup> or to only draw on judges from lower courts to fill vacancies in higher courts.<sup>190</sup> Some of these suggestions are becoming reality in the reforms under way as will be discussed more in detail below.

The Chinese People's Political Consultative Congress (CPPCC), a parallel structure to the National People's Congress includes, in addition to CCP members, the other eight 'democratic parties'.<sup>191</sup> Of the 2,200 some members,

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<sup>183</sup> See also the Judge Law, article 11: Susan FINDER, 2002, p. 14, note 11; while there are no corresponding level to intermediate people's courts established in municipalities directly governed by the Central government or in prefectures of provinces or municipalities directly governed by the Central government, the next higher level, provincial and municipal respectively, is in charge (article 35, 2<sup>nd</sup> sentence; see also Shigui TAN, 2001, p. 99.

<sup>184</sup> Susan FINDER, 2002, p. 15.

<sup>185</sup> Albert MELONE and Xiaolin WANG, 1999, p. 144.

<sup>186</sup> Qianfan ZHANG, 2003, p. 78.

<sup>187</sup> Junju MA and Dezong NIE, 1998, pp. 32–35; Bing TAN and Zhisheng WANG, 2001, p. 141; Weifang HE, 2000, p. 643; Rikai HE, 1999, pp. 6–7.

<sup>188</sup> Wusheng ZHANG and Zeyong WU, 2000 (b), p. 48.

<sup>189</sup> Chunming GUO and Zhigang LIU, 2000, p. 156.

<sup>190</sup> Hongbin GAO, 2000, p. 33.

<sup>191</sup> See e.g. [www.china.org.cn/engsih/chuangye/55437.htm](http://www.china.org.cn/engsih/chuangye/55437.htm).

40 per cent are members of the Communist Party.<sup>192</sup> In contrast, the NPC have around 70 per cent Communist Party members and 15 per cent from the eight other parties.<sup>193</sup> As a consultative body and under the prevailing conditions, the CPPCC has very little impact on state affairs. There is also number of non-Party members in the NPC but these constitute a quiet minority.

A last issue related to the people's congresses is the responsibility of the corresponding level of people's congresses to allocate funding to the courts. This is one of the major dilemmas in countering local protectionism but also for judicial independence.<sup>194</sup> This matter will be discussed more in relation to the local government given the decisive impact these have on the congresses in this regard. The scope and structure of the various forms of control mechanisms that people's congresses presently possess certainly risks restricting the independence of the Chinese judiciary. Some argue that the supervision is needed at the present state of development because of the relatively low level of education of the judges and other obstacles to an improved system.<sup>195</sup> In a recent case from the central province of Henan, a judge was suspended from her job for reviewing the legality of a local regulation in a civil dispute in light of national law, where the judge sided with one of the parties claiming that the national law should be applied and declared the local regulation invalid.<sup>196</sup>

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<sup>192</sup> [http://news.xinhuanet.com/english/2003-02/28/content\\_751100.htm](http://news.xinhuanet.com/english/2003-02/28/content_751100.htm); where it is also stated that the number of females had risen by more than 1% from the previous composition to almost 17%, and almost 12% of ethnic minority origin.

<sup>193</sup> The proportion of CCP members has steadily increased over the last 20 years and is likely to be well above 70%; some 22% were women and 15% of ethnic minority origin, [www.cctv.com/lm/980/-1/82406.html](http://www.cctv.com/lm/980/-1/82406.html).

<sup>194</sup> E.g. Junju MA and Dezong NIE, 1998, pp. 24, 32–35; Chunming GUO and Zhigang LIU, 2000, p. 158; Wusheng ZHANG and Zeyong WU, 2000 (b), p. 48.

<sup>195</sup> Yuwen LI, 2001, p. 96.

<sup>196</sup> According to the procedures, the judge should have submitted such an issue to the SPC who would send it to the Standing Committee of the NPC for final judgment, *Judges Sows Seed of Lawmaking Dispute*, CHINA DAILY, 24 November 2003; *Faguan pan difangxing fagui wuxiao; weifa haishi hufa* [Judge Decided Local Regulation Invalid; Violating or Protecting Law], NANFANG ZHOUMO [Southern Weekly], 20 November 2003, the judge of Luoyang IPC was a thirty-year holding a masters degree in law; it was later reported that the judge was reinstated while it had been concluded that she had not made any mistake but the appeal decision on the matter is still pending, *Henan Li Huijuan shijian zaiqi bolan* [The Case of Judge Li from Henan again Causes Great Waves], ZHONGGUO QINGNIANBAO [China Youth Daily] 6 February 2004; see also Chris X. LIN, 2003, pp. 275–280 on the debate of courts' right to strike down statutes.

### 3. Central and Local Governments

Members, relatives and friends of political elites, companies with local or provincial government owners or powerful bureaucratic patrons, and those offering bribes and favors have enjoyed such systematic advantages in the legal system that Chinese and foreign participants and observers alike often have come to see a resort to law or courts as an act of naiveté, desperation or opportunism, and top leaders have felt compelled to launch repeated campaigns against corruption and local protectionism, and to improve the implementation of laws and performance of ‘law work’.<sup>197</sup>

Even though the people’s congresses are the supreme organs, the Ministry of Finance at the central level and the local governments’ financial departments at the local level, decide on the budget allocation to the courts.<sup>198</sup> This horizontal dependency places the local courts in a very difficult situation. The governments, in addition to the budget, also control court activities such as allocation of housing or other benefits to judges, car usage, and as discussed, promotions, transfers, and dismissal of judges through the administrative system. A court can also find the government less cooperative in enforcing a judgment should it not be cooperative.<sup>199</sup> Local governments also influence the courts to get the upper hand in competition of various kinds, such as in business deals.<sup>200</sup>

Such local protectionism is a multifaceted problem. Professor CAI Dingjian defines six major aspects of this form of corruption in which courts in China engage.<sup>201</sup>

- Competing for jurisdiction over cases for profit
- Refusing to or only reluctantly filing cases to assist local parties
- Treating economic crimes as disputes to protect illegal gains of local parties
- Misuse of coercive measures to be the first to control assets in dispute
- Misinterpreting law and distorting facts in favor of local parties
- Preventing non-local enforcement of verdicts

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<sup>197</sup> Jacques deLISLE, 2001, p. 9.

<sup>198</sup> Yuwen LI, 2001, p. 84; see also more generally: Xiabing HU and Renqiang FENG, 2000, pp. 63–64; Donald C. CLARKE, 1996, pp. 41 *et seq.*

<sup>199</sup> Weidong ZHANG and Menghua TIAN, 2003, p. 82; Yuwen LI, 2001, p. 85.

<sup>200</sup> *Caipan wenshu: sifa gongzheng de zaiti* [Adjudication Case-file: The Carrier of Judicial Fairness], 1999, p. 6.

<sup>201</sup> Dingjian CAI, 1999 (b), pp. 149–150.

With the increased liberalization in the early 1980s, the central power more clearly came to realize the competing local powers. The local interests grew even stronger as reforms were deepened and the leverage of the central government decreased.<sup>202</sup> In the late 1980s pilot studies were done on how to address local protectionism including having high people's courts select judges for the intermediate and basic level courts.<sup>203</sup> This model was not used on a larger scale. In part as a measure to prevent local protectionism, the SPC is increasingly also trying to differentiate between the judiciary and the administrative organs.

In 1989 the Administrative Litigation Law (ALL) gave increased power to the courts against government through the possibility of accepting cases against government organs.<sup>204</sup> The annual increase in the number of these types cases is reported to be ten per cent.<sup>205</sup> The dependency on the local government has however kept the rate of administrative litigation cases at relatively low levels, with a very high level of voluntary withdrawal of complaint (*chesu*).<sup>206</sup> A recent news article suggests that the reason for the decline in ALL-cases is the lack of confidence in the system given the close relationship between courts and local governments and the unequal position between the plaintiffs and the administrative organ.<sup>207</sup> Through a new Judicial Interpretation from August 2002, a government being charged in an administrative litigation case has the burden of proof to show its innocence within ten days.<sup>208</sup> In recent years, reform proposals by the SPC have consisted of separation between administrative and jurisdictional areas.<sup>209</sup>

The generally very limited budget allocated to the courts, especially in the remote areas, has made the courts in particular sensitive to even small changes in the budget.<sup>210</sup> Until early 2002, the courts could keep the litigation fees they collected, which was an important contribution to the total budget.<sup>211</sup> It is still

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<sup>202</sup> Randall PEERENBOOM, 2002, p. 312.

<sup>203</sup> Susan FINDER, 1993, pp. 218–219.

<sup>204</sup> *Id.*, p. 223.

<sup>205</sup> Chris X. LIN, 2003, p. 281, citing YUAN Shohong, *Zingzheng susong wu da nanti* [Five Difficult issues in Administrative Litigation], FAZHI RIBAO [Legal Daily], 28 August 2002, in 2001, the plaintiff prevailed in 40% of the cases; The increase of filed cases as of November 2003 compared to the previous year was 6%; a major part of the increase was however related to “urban construction” and “land resources” while cases related to public security decreased, Xinhua, 16 December 2003, [www.peopledaily.com.cn/GB/shehui/1060/2246561.html](http://www.peopledaily.com.cn/GB/shehui/1060/2246561.html).

<sup>206</sup> Qianfan ZHANG, 2003, p. 82.

<sup>207</sup> Zhongguo qingnianbao [China Youth Daily], 21 October 2003, as reported by Xinhua: [http://news.xinhuanet.com/legal/2003-10/17/content\\_1127652.htm](http://news.xinhuanet.com/legal/2003-10/17/content_1127652.htm).

<sup>208</sup> Jie CHENG, 2003, p. 23.

<sup>209</sup> Shigui TAN, 2001, p. 100.

<sup>210</sup> Qianfan ZHANG, 2003, p. 80.

<sup>211</sup> Yuwen LI, 2001, p. 85.

possible to make budget allocations to courts dependent on the amount of fees collected.<sup>212</sup> It was estimated that 30 per cent of the salary and welfare costs of the staff of the courts came from ‘creative sources’ such as businesses undertakings unrelated to the work of the court as well as collection of litigation fees.<sup>213</sup> The judicial organs were however instructed in 1998 to give up commercial enterprises and the revenue from fees is now meant to go into the state budget, not directly to the courts.<sup>214</sup> Still, courts are reportedly given goals to attract a certain amount of investments to local areas.<sup>215</sup>

According to Chinese commentators, the problem with local protectionism requires consideration of four aspects: (1) the Party leadership, especially at the local level; (2) the relationship with the local administration and joint decision between the SPC and the Ministry of Finance to determine the budget for the courts; (3) elimination of the reporting obligation of the courts to the Party and administrative leadership; and (4) regulating the inter-level contacts and the role of the adjudicative committees (these committees will be discussed further below).<sup>216</sup> Many Chinese scholars also suggest that a major component of the problem is the financing, and that the solution would be central funding, at least in part with an independent budget for the courts stipulated in law.<sup>217</sup> Many similarly advocate a recentralization of the courts with a stronger central-vertical organization to break with the horizontal influence at the local level. Starting in 1999 some local courts were provided with central funding as test cases.<sup>218</sup>

In the reform efforts there is however a contradiction in that the Party goals are at odds with each other. The Party still considers that sensitive questions need not necessarily be solved in a fair manner.<sup>219</sup> Some argue nevertheless, that local protectionism at times assures that laws and the Constitution are set aside for good reasons.<sup>220</sup>

Another problematic area in the Chinese judiciary is the enforcement of judgments; figures suggest that 30–50 per cent of the enforcement fails.<sup>221</sup> The

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<sup>212</sup> Donald C. CLARKE, 2003 (b), p. 187, note 63.

<sup>213</sup> Pengcheng XIE, 1999, p. 35.

<sup>214</sup> *Id.*, pp. 34–35; Susan FINDER, 2002, p. 22.

<sup>215</sup> *Faguan buneng chengshou zhizhong* [Judges Cannot Shoulder the Unbearable Burden], XINHUA WANG, 25 September 2003.

<sup>216</sup> Lixian LIU and Zhijun ZHANG, 2000, pp. 36–40.

<sup>217</sup> Pengcheng XIE, 1999, pp 34–35; Bing TAN and Zhisheng WANG, 2001, p. 141; Xianjin JIANG and Jun ZHENG, 2000, p. 46.

<sup>218</sup> Discussion with YANG Runshi, head of the Research department of the SPC, Beijing, 2 April 2003; Qianfan ZHANG, 2003, p. 90.

<sup>219</sup> Randall PEERENBOOM, 2002, p. 14.

<sup>220</sup> *Caipan wenshu: sifa gongzheng de zaiti* [Adjudication Case-file: The Carrier of Judicial Fairness], 1999, p. 6.

<sup>221</sup> INSTITUTE OF LAW (Ed.), 2002, p. 12; Yuwen LI, 2002, pp. 67–69; Randall PEERENBOOM, 2002, p. 287; in state compensation cases, the enforcement is even



importance of the enforcement is apparent for the status of the courts, which consequently negatively affects its independence. The independence also suffers from the local influence on enforcement. One judge from an IPC in the Eastern province of Shandong reports that in 70 per cent of cases concerning implementation, one of the parties to the dispute has notes from local Party of government leaders attached. In one case even both parties had such messages.<sup>222</sup> Even though there is no requirement to have an enforcement division or a decision execution chamber (*zhixing ting*), many courts still have one.<sup>223</sup> Enforcement divisions have in practice a lower status than the courts in general: the staff has the lowest level of education and unqualified judges are transferred to such non-adjudicative positions.<sup>224</sup> The court police (*fajing*) secure order in the courts and also assisting in the enforcement of judgments.<sup>225</sup> Court police however are assigned through the personnel department of the local government, which makes them more susceptible to local pressure, and also they do not garner the same respect as regular police.<sup>226</sup> In 2000 the SPC issued a regulation granting the HPCs stronger powers in enforcement of verdicts from lower courts, allowing the HPC to demand jurisdiction of lower courts' verdicts either to itself or an IPC under its jurisdiction.<sup>227</sup>

A mechanism has supposedly been instituted to ensure that judges are not sanctioned in any way due to local or departmental protectionism or through legal procedures of any such disciplinary measure.<sup>228</sup>

#### 4. *Restrained Jurisdiction*

The fragmented jurisdiction of the courts is a restraint on the independence with the mandate and the duties of the courts being quite unclear.<sup>229</sup> The division of tasks between the organs of administration of justice, in particular the relationship with the procuratorate, is complicated where the Constitution is

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as low as 10% in some areas where government organs refuse to comply, FAZHI RIBAO [Legal Daily] 14 November 2003, [www.chineselawyer.com.cn/article/2003-11-14/10442.html](http://www.chineselawyer.com.cn/article/2003-11-14/10442.html).

<sup>222</sup> XINHUA WANG, 18 December 2003; the judge concludes that in the Jinan city IPC, the administrative interference is “extremely extensive”.

<sup>223</sup> Donald C. CLARKE, 1996, p. 12.

<sup>224</sup> Randall PEERENBOOM, 2002, p. 287; Donald C. CLARKE, 1996, p. 13; Susan FINDER, 2002, p. 22.

<sup>225</sup> Organizational Law of the Courts, article 41, para. 3, requires the establishment of court police.

<sup>226</sup> Donald C. CLARKE, 1996, p. 15.

<sup>227</sup> Randall PEERENBOOM, 2002, p. 326.

<sup>228</sup> *Numbers of Chinese Judges to be Cut Back*, PEOPLE'S DAILY, 8 July 2002

<sup>229</sup> Ping XU et al, 2000, p. 42.

vague as to what form of supervision the procuratorate is supposed to maintain over the courts.<sup>230</sup>

The *prokuratura* was established in the Soviet Union in the 1920s but was based on an institution found in Peter the Great's Constitution of 1722.<sup>231</sup> The intention of the institution was to serve as the eyes and ears of the ruler.<sup>232</sup> In addition to the conventional task of public prosecution, the *prokuratura*, also called the procuratorate or the procuracy (*jianchayuan*), has a supervisory function over the legal institutions, such as the police, prisons, and the courts. This supervisory function was the originally intended main function of the institution in Russia.<sup>233</sup> The procuratorate in China is also mandated with actually investigating crimes suspected to have been committed by state functionaries.<sup>234</sup> Investigation of crimes is therefore done not only by the police, but also by the procuratorate as well as state security police, depending on the nature of the crime. Previously the courts were also involved in taking evidence but this has been removed from the task of the courts, leaving it to the parties to the trial through the procedural reforms in the 1990s.<sup>235</sup> In the supervisory system that the procuratorate has over the legal institutions, courts are supervised through regular appeals but also through a so-called protest system (*kangsu zhidu*).<sup>236</sup> In 1996 the Shanghai Municipal People's Procuratorate, in supervising trials in criminal cases, lodged 16 appeals and 8 such protests.<sup>237</sup>

Suggestions have been made to reduce the confusion by limiting and coordinating the investigatory organs.<sup>238</sup> Also the Party has its own investigatory branch, the Discipline Inspection Committee (DIC), which is concerned with high-ranking officials and at times resorts to for example detaining suspects.<sup>239</sup> The DIC is among the most important organs in China,

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<sup>230</sup> Yanjin YI, 2000, pp. 756, 760; Chunming GUO and Zhigang LIU, 2000, p. 155; see also Weifang HE, 2000, p. 644.

<sup>231</sup> René DAVID and John E. C. BRIERLEY, 1985, p. 216.

<sup>232</sup> Mirjan R. DAMAŠKA, 1986, p. 188; The *promotor fidei* of the Roman Catholic Church was the origin of the institution and after having been transformed to the royal *Fiskalat* of Prussia, it went via Sweden and the *Justitiekansler* to Russia; also the French *Procureur du roi* was an influential source for the *Fiskalat*, Hartmuth HORSTKOTTE, 1998, p. 67.

<sup>233</sup> Youri SKURATOV, 1998, p. 12.

<sup>234</sup> See e.g. Hualing FU, 2002, pp. 2 *et seq.*

<sup>235</sup> Yuwen LI, 2002, p. 70.

<sup>236</sup> Articles 185 and 186 of the Criminal Procedural Law; Yuwen LI, 2001, p. 81; on the usage of the term protest, see Hartmuth HORSTKOTTE, 1998, p. 66.

<sup>237</sup> *Report on the Work of the Shanghai Municipal People's Procuratorate*, 21 February 1997, SHANGHAI JIEFANG RIBAO [SHANGHAI LIBERATION DAILY], 4 Mar. 1997.

<sup>238</sup> Shigui TAN, 2000, p. 119; see also Congyi PAN, 1998, p. 86; and Wusheng ZHANG and Zeyong WU, 2000 (a), p. 56 on the role of the courts.

<sup>239</sup> See e.g. Keyuan ZOU, 2002, p. 1048.

commonly referred to as the ‘big five’ (*wuda banzi*): The Party Committee, the Government, the NPC, the Chinese People’s Political Consultative Congress, and the DIC.<sup>240</sup>

One remaining problem with corruption in the country is the discredited the anti-corruption bureau of the procuratorate and speculation is that this branch will be absorbed by a separate larger and stronger anti-corruption body. In this way the procuratorate focuses more and more on the regular prosecutorial work of their mandate.<sup>241</sup> Between the courts and the procuratorate there is also a power struggle where for example mutually inconsistent interpretations of laws are made.<sup>242</sup> Some judges and scholars in China argue that given the different tasks and interests of the various judicial organs, these must be well separated and better balanced.<sup>243</sup>

### 5. Transparency

Beginning in the late 1990s the media began to take on the role of public watchdog and is increasingly seen as a potential supervisor of the judicial system.<sup>244</sup> Public trials became the rule so as to increase the public’s confidence in the legal system but also as a means to provide legal education.<sup>245</sup> Starting in 1998, courts were requested to allow scrutiny by the public.<sup>246</sup> In response, Beijing Number 1 IPC announced that everyone above 18 with identification documents could audit trials and soon thereafter, the Central TV Station (CCTV) transmitted from a trial at that Court.<sup>247</sup> In 1999 the SPC issued instructions on the strict application of the public trial system.<sup>248</sup> Already in the spring of 1994, a television station in the city of Nanjing was the first to

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<sup>240</sup> INSTITUTE OF LAW (Ed.), 2002, p. 35.

<sup>241</sup> Hualing FU, 2002, pp. 16–17.

<sup>242</sup> Randall PEERENBOOM, 2002, p. 313; see also Mark FINDLAY, 1999, p. 287.

<sup>243</sup> Pengcheng XIE, 1999, p. 35; Desen ZHANG and Youyong ZHOU, 1999, p. 26; CHEN Guangzhong in Ping XU et al, 2000, p. 44.

<sup>244</sup> Xiabing HU and Renqiang FENG, 2000, pp. 490 *et seq.*

<sup>245</sup> The communist model of trials were commonly seen mainly as an educative process; see Shuangjin HUANG, 1999.

<sup>246</sup> CHINA NEWS DIGEST, 12 June 1998, reported by AFP as quoted from the CHINA DAILY, 11 June 1998; also reported in FAR EASTERN ECONOMIC REVIEW, 30 April 1998, p. 16; previously so-called open trials had been available for the public by way of ticketing, that is, the court had within its power to choose when to have participants and to some extent also which participants. But starting in 1998, access was granted upon presenting identification.

<sup>247</sup> A recording of the transmission (partial) is on file with the author; the case concerned a copyright infringement and it was broadcasted with expert commentators, REUTERS, 7 August 1998, *China to Broadcast First Nationwide Live Trial*; Wuyi XING, 1998, p. 71.

<sup>248</sup> Yuwen LI, 2002, p. 70.

broadcast trials.<sup>249</sup> The IPCs in Shanghai have according to reports, 100 per cent of public trials in first and second instance cases, and in about 40 per cent in administrative cases and second instance criminal cases.<sup>250</sup>

Courts are also becoming more transparent through publishing cases in the Gazette and other printed publications such as case compilations and the People's Court Daily as well as on the Internet.<sup>251</sup> The SPC also established a reporting center for the public to be able to complain against illegal activities of judges in high and intermediate people's courts, as well as a hotline for the media.<sup>252</sup> The unclear role of the media has however been criticized in China.<sup>253</sup> Reporters have even been charged for reporting on some cases.<sup>254</sup> The solution to the confusion is suggested to be 'really' open trials including media scrutiny but also that society, government leaders and Party officials truly supporting this system of openness, not just in theory.<sup>255</sup>

There are also various forms of social pressure inherent in legal systems that are not unique to China. Judges may be unwilling to have greater individual independence because with the independence comes greater responsibility and social pressure, be it from neighbors, friends, companies, or the dominant ideology. In particular, this kind of social pressure may be influential in a one-Party state where there is a long history of state dominance and limited individual powers. It is believed that in the USSR, the pervasive ideology may have been the reason for the conformity of the judges to the system rather than any structural-systemic variations.<sup>256</sup> The analogy to a master-servant relationship is one way to explain much of the influence that is impossible to detect but that exists to varying degrees everywhere. Even though there may be no influence on a given issue or in general, judges still know what is expected of them just as an experienced and loyal servant does not always need instructions to know what to do.<sup>257</sup>

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<sup>249</sup> INSTITUTE OF LAW (Ed.), 2002, p. 7.

<sup>250</sup> Yuwen LI, 2002, p. 65.

<sup>251</sup> Zhengqun ZHAO, 10 Mar. 2003, pp. 78–79; see also Qianfan ZHANG, 2003, p. 89; [www.court.gov.cn](http://www.court.gov.cn).

<sup>252</sup> INSTITUTE OF LAW (Ed.), 2002, pp. 3, 8; in the second half of 2003, the Supreme People's Procuratorate also introduced an experimental system of appointed citizen case supervisors to oversee the case handling of the procurators, GUANGMING RIBAO [Daily], 26 December 2003.

<sup>253</sup> Ping XU et al, 2000, p. 42; Shigui TAN, 1999, p. 19.

<sup>254</sup> Aijun LIN and Dongmei LIU, 2001.

<sup>255</sup> Desen ZHANG and Youyong ZHOU, 1999, p. 28.

<sup>256</sup> Theodore L. BECKER, 1970, p. 147; see also Albert MELONE and Xiaolin WANG, 1999, p. 148, on the unnecessary of so called 'telephone justice' in China, where politicians would simply call up a judge and instruct how the case should be settled.

<sup>257</sup> J. Mark RAMSEYER and Eric B. RASMUSEN, 2003, pp. 17–18, 156, 160; this is similar to the 'invisible hand' argument which shows how bureaucrats follow the

## 6. Supervision within the Judiciary

### Superior Courts

The ways that courts at different levels in the Chinese hierarchy interact with each other is typically very administrative in nature,<sup>258</sup> which restricts the independence of the judges.<sup>259</sup> For an effective appeal, insulation between the levels in the court system hierarchy is needed, and through appeals, higher courts are to be able to control the adjudication of the lower courts. The Chinese judiciary is built on a more persistent system of superior courts monitoring inferior courts.<sup>260</sup> In addition to the regular appeal (*shangsu*) possibilities in the Chinese court system, there are also possibilities for higher courts to review cases on their own initiative or to order retrial (*chongshen*) in the lower court.<sup>261</sup> Lower courts may also ask higher courts for instructions (*qingshi* or *shenpan huibao*) on how to resolve an issue, even though there is no legal responsibility to respond to the request.<sup>262</sup> These formal requests and also informal discussions taking place are problematic but they are reportedly decreasing in frequency.<sup>263</sup> Through the Party organizations in the courts, higher courts are also, as discussed above, involved in appointment of judges in lower courts.<sup>264</sup> Higher courts have moreover without legal authority been issuing directives to lower courts on, for example, enforcement in specific cases.<sup>265</sup>

A reversal on appeal is considered a mistake or error of judgment, especially if it is a decision by the adjudicative committee. Instead of reversing

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wish of the politicians even when they are left independent Randall L. CALVERT et al, 1987, e.g. pp. 501, 516; see also Lewis A. KORNHAUSER, 2002, p. 50, courts and in particular supreme courts consider the views of political branches; see also Edward L. RUBIN, 2002, p. 69; see also J. A. G. GRIFFITH, 1985, pp. 295–296; Torstein ECKHOFF, 1965, p. 43; Stephen B. BURBANK et al, 2002, p. 5.

<sup>258</sup> Xiabing HU and Renqiang FENG, 2000, p. 55.

<sup>259</sup> Chunming GUO and Zhigang LIU, 2000, p. 158; Weidong CHEN and Zhengjun WANG, 2000, p. 140.

<sup>260</sup> Susan FINDER, 2002, p. 35; see also Yanjin YI, 2000, p. 742; Constitution, article 127.

<sup>261</sup> Yuwen LI, 2001, p. 81.

<sup>262</sup> Shigui TAN, 2001, p. 89; Susan FINDER, 2002, p. 34; see also Donald C. CLARKE, 2003 (b), p. 178, who also discuss individual monetary and other incentives for the responsible judges in some courts in order to assure that cases were not sent back for retrial.

<sup>263</sup> Randall PEERENBOOM, 2002, p. 314.

<sup>264</sup> Susan FINDER, 2002, p. 34.

<sup>265</sup> *Id.*, p. 35.

higher courts on appeal, cases will therefore be remanded for retrial.<sup>266</sup> Retrial cases are increasing in number; between 1997 and 1998, civil and economic cases increased 10–20 per cent, and in 25 per cent of the cases there was a retrial, while only some 6 per cent of the cases were appealed.<sup>267</sup> The court that first adjudicated the case typically handles retrials where a special chamber of the court is in charge. Among judges this chamber has a relatively low status. Many judges therefore prefer to refer a case to the adjudicative committee in the first place to stay clear of personal responsibility.<sup>268</sup> The ‘misjudgment liability system’, which will be discussed below, adds to this preference to rely on the adjudicative committee.

### Supervision within the Courts

Courts in China bare many similarities with a regular government agency in terms of how they are managed and judges are often seen as regular bureaucrats.<sup>269</sup> Susan Finder highlights the fact that even the Constitution refers to the highest “judicial organ”, rather than “court”, which also reinforces its administrative character.<sup>270</sup> By falling into the hierarchy of the regular state organs, the status of the courts is determined in a negative way. The effectiveness in for example enforcement by the courts is thus seriously reduced.<sup>271</sup> The average judge handles just above 20 cases per year, which is very low in international comparison.<sup>272</sup> A number of reform measures have been initiated to address this issue that will be discussed further below.<sup>273</sup> However, the courts in China do have a special position in society and increasingly so; they are not equivalent to an administrative unit as is sometimes held, but are gaining status as separate adjudicative institutions.<sup>274</sup>

While the external independence of the Chinese judiciary may seem relatively extensive, the internal independence within a court is heavily circumscribed.<sup>275</sup> The so-called democratic centralism applied in China,

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<sup>266</sup> *Id.*

<sup>267</sup> Li 2001, p. 82.

<sup>268</sup> *Id.*, p. 83.

<sup>269</sup> See e.g. Xiabing HU and Renqiang FENG, 2000, pp. 54–55.

<sup>270</sup> Susan FINDER, 1993, p. 148.

<sup>271</sup> See e.g. INSTITUTE OF LAW (Ed.), 2002, pp. 33–34.

<sup>272</sup> Yongquan ZHANG, 2000, p. 92; the figures for China are probably based on the total number of court staff however, the number of cases per judge would rather be around 30, which still must be considered low.

<sup>273</sup> See e.g. Yuwen LI, 2002, pp. 73–74.

<sup>274</sup> See e.g. Donald C. CLARKE, 1996, p. 79, stating that the courts are as powerful as the post office, and the criticism thereof by Randall PEERENBOOM, 2003 (a), p. 79; see also Randall PEERENBOOM, 2002, p. 281.

<sup>275</sup> Randall PEERENBOOM, 2002, p. 299.

prescribes hierarchical submission to superiors within an organization.<sup>276</sup> This system effects the courtroom adjudication with influence on the outcome in a given case from superiors not present at the hearing. In the civil and criminal procedural laws there is also an internal supervision system where, if a definite error in judgment by the court is found, the court president may submit the case to the adjudicative committee who decides on whether to retry the case.<sup>277</sup> A chief judge of a chamber is also very influential through the administrative powers of allocating housing, organizing panels, and reviewing all decisions.<sup>278</sup>

Until recently all cases had to be approved (*shenpi*) by the head of the chamber or the court.<sup>279</sup> The FYRP for the Chinese judiciary, issued by the SPC in 1999, which will be discussed in detail below, calls for an end to the power of chief judges to change decisions and requires them to rotate posts on a regular basis.<sup>280</sup> Still, in some courts, overturning a lower court requires approval of the court president.<sup>281</sup> The court leaders are not able to change a verdict but if judges decide contrary to the opinion of the leaders, the working conditions of that judge may be negatively affected. Chief Judges are also allocating the cases in most courts.<sup>282</sup>

The judges are burdened with extensive administrative work and also have to spend time on legal educative tasks (*pufa jiaoyu*) of various kinds.<sup>283</sup> Proposals are made to minimize the administrative duties for judges.<sup>284</sup> In the Tianjin Special Economic Zone a system was introduced with a very limited number of 'presiding judges' focusing on adjudication with a reasonably sized staff and assistants; this is seen as an easier scheme to supervise and it is also easier to find qualified judges for these fewer positions.<sup>285</sup> This scheme will also be elaborated upon further in relation to the FYRP. At the same time, the ratio of judges to other staff has been raised from 59 to 72 per cent at the SPC and similar change is expected at the local levels.<sup>286</sup> The total number of judges is much higher in China than in other countries according to somewhat dated research of Professor HE Weifang, so to make the judiciary more efficient, he believes that the total number of judges should be limited to some 20,000 for

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<sup>276</sup> Yuwen LI, 2001, p. 75.

<sup>277</sup> *Id.*, p. 81.

<sup>278</sup> Susan FINDER, 2002, p. 28.

<sup>279</sup> Shigui TAN, 2001, pp. 87–88.

<sup>280</sup> Susan FINDER, 2002, p. 29 and see also p. 22, FYRP articles 20 and 35.

<sup>281</sup> *Id.*, p. 23.

<sup>282</sup> Communication with Shanghai HPC judge, 19 January 2004.

<sup>283</sup> Qianfan ZHANG, 2003, p. 77; see also Keyuan ZOU, 2002, p. 1054.

<sup>284</sup> Wusheng ZHANG and Zeyong WU, 2000 (b), p. 53; Xianjin JIANG and Jun ZHENG, 2000, p. 47.

<sup>285</sup> Wusheng ZHANG and Zeyong WU, 2000 (a), p. 55; other authors argue that the normal situation with from a third up to half of the total personnel not being adjudicators is inefficient, Weidong CHEN and Zhengjun WANG, 2000, p. 139.

<sup>286</sup> Shigui TAN, 2001, p. 56; Qianfan ZHANG, 2003, p. 91.

all of China, with a substantive number of support staff. In this way the standards of the judges could be improved.<sup>287</sup>

In an effort to reduce corruption in the judiciary, a scheme of ‘three separations’ (*li-shen-jian: sange fenli*) has been instituted, where the filing of a case and the actual trial should be handled by different judges at different divisions of a court; the enforcement must not be handled by the same division as the trial-judges; and thirdly that the supervision of the trial should be done by another division and other judges than the trial-judges. Another effort toward the same end is to remove the ‘three together’, referring to the practice of judges accepting offers by litigants to travel, eat, and stay, with the litigants, and at the litigants’ expense, in order for the judge to see the disputed issue first hand. This has occurred where court budgets are too limited to allow for any such expenses.<sup>288</sup> A further source of complication is the internal structure of the courts where the court police and the enforcement have partially overlapping jurisdictions.<sup>289</sup>

### Ranking

With the bureaucratic model of managing the judiciary, the methods used for Party and state organs includes a ranking system (*jibie*), which determines status in relation to other Party and government institutions as well as within an organization.<sup>290</sup> Judicial salaries are currently set locally in the same way as for government employees, according to rank. The amount varies depending on the region, and fringe benefits such as size of apartment, availability of official cars, et cetera, varies according to rank.<sup>291</sup>

With the Judges Law, the judiciary established a separate ranking system (article 18) but maintained some of the equivalents to the general bureaucratic management ranking.<sup>292</sup> The judges are ranked according to twelve ranks within four different levels, with the first level and rank (*shouxi dafaguan*) reserved for the President of the SPC. The second level of the four (*dafaguan*) contains ranks two and three (*yiji dafaguan* and *erji dafaguan* respectively). A president of a significant high people’s court would typically be at the third

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<sup>287</sup> Weifang HE, 1995, p. 5, 10; see also Shigui TAN, 2001, pp. 95–96.

<sup>288</sup> Qianfan ZHANG, 2003, pp. 90–91; see also e.g. Desen ZHANG and Youyong ZHOU, 1999, p. 28.

<sup>289</sup> Wusheng ZHANG and Zeyong WU, 2000 (a), p. 57.

<sup>290</sup> *Id.*, pp. 15–16; see also WANG, Qi; The system of ranking also extends into the business community where company leaders are also given a rank depending on e.g. the size and turnover of the company, discussion with Professor SUN Shiyan, 15 September 2003.

<sup>291</sup> Susan FINDER, 2002, pp. 33–34; INSTITUTE OF LAW (Ed.), 2002, p. 31.

<sup>292</sup> Susan FINDER, 2002, p. 16; the old ranking system is described in Hikota KOGUCHI, 1987, p. 202.



rank. The third level (*gaoji faguan*) has four ranks (*yiji gaoji faguan* to *siji gaoji faguan*); at this level one typically would find a head of a court division. The fourth and final level is divided into the remaining five ranks, eight to twelve (*yiji faguan* to *wuji faguan*). The lowest ranking judges would not serve at the intermediate or high-level court.<sup>293</sup> Depending on the rank of a judge, they have the capacity to deal with a certain level of cases.<sup>294</sup>

In addition to the ranking system there is also a hierarchy of titles that is used in everyday situations that is linked to a certain level within the bureaucracy, as described above. A court president (*yuanzhang*) would by way of example be at the ‘deputy minister’ level (*fu buzhangji*), and in a high people’s court and on ‘deputy department head’ level (*fu ting/ju ji*), at an intermediate level court. Under the President, the sequence is the vice president (*fu yuanzhang*), the division head (*tingzhang*) and the deputy division head (*fu tingzhang*), the ordinary ‘judge’ (*shenpan yuan* or *faguan* as used in the Judges Law). Below the ‘judge’ sits the assistant judge (*zhuli shenpanyuan*) and the court clerk (*shuji yuan*). The lower two levels are appointed by the president of a court.

The ranking system has largely developed into a seniority system in a negative sense.<sup>295</sup> An additional floating rank was created by the SPC in 2000 with Chief Trial Judges or Presiding Judges (*shenpanzhang*) selected through open competition.<sup>296</sup> In the city of Nanjing, only some 30 out of almost 250 judges have acquired this status. Presiding judges, as mentioned above, are also to be provided with assistants to make their work the most efficient.<sup>297</sup> HE Weifang criticizes this system as just adding another bureaucratic layer to the hierarchy.<sup>298</sup> The impact of the ranking system is overall difficult to discern.

### The Adjudicative Committees

The role of ‘adjudicative committees’<sup>299</sup> in the Chinese courts has been a hotly debated topic throughout its existence.<sup>300</sup> An adjudicative committee consists of

<sup>293</sup> See articles 16 and 17 of the Judges Law, and 46 and 47 on evaluation in this respect; Baoping MAO (Ed.), 1995, p. 81; see also Chunming GUO and Zhigang LIU, 2000, p. 156; discussion with Shanghai HPC Judge, 20 March 2003; discussion with Shanghai Prosecutor, Shanghai, 19 March 2003; in China there are about 40 *dafaguan*, and 30,000 *gaoji faguan* according to XINHUA, 7 July 2002.

<sup>294</sup> Yongquan ZHANG, 2000, p. 94.

<sup>295</sup> Qianfan ZHANG, 2003, p. 88.

<sup>296</sup> Randall PEERENBOOM, 2002, p. 292; see also SPC Measures on Appointing Presiding Judges, 11 July 2000, available at [www.cecc.gov](http://www.cecc.gov).

<sup>297</sup> Qianfan ZHANG, 2003, pp. 87–88.

<sup>298</sup> Interview, Beijing, 10 March 2003.

<sup>299</sup> The Chinese *shenpan weiyuanhui* is commonly translated as ‘adjudication committee’ but at times also as ‘judicial committee’ or ‘trial committee’; adjudication suggest a more active and specific role which given the increasingly

senior judges, typically the court president and the heads of court-chambers. The Organizational Law of the Courts (article 11) stipulates that the adjudicative committee is to be used to build expertise of the courts by gathering experience from the multitude of cases and consider large or complex cases, as well as for ‘other issues’.

When the Committee convenes, the division head of the division concerned should take part, as should the judge in charge of the case. The latter presents a written report to the plenary, which can number between 10 and 25.<sup>301</sup> The Organizational Law also gives the chief procurator the non-voting right to attend sessions of the adjudicative committee (article 11), but there have been proposals to remove this possibility.<sup>302</sup> Members of the committee question the judge on details followed by a vote, with a simple majority decision, and with the possibility of recording the minority opinion.<sup>303</sup> The Criminal Procedural Law of 1996 however does not mention the committees.

A problem with the adjudicative committees is that they can change decisions given by judges. Not even a majority bench (see however the discussion below) can change the verdict of the committee.<sup>304</sup> The committees negatively influence efficiency and fairness through compromising the public trial by relying only on reports but also through causing delays with extended handling time. The duties of the committees are not clear and they take on cases that are not always important.<sup>305</sup> Starting only recently, litigants may make a claim of committee member bias but the meetings of the committees are so secret that implementing this protection may be difficult. The collective decision making by the courts in this way reflects the socialist tradition of sharing risk and blame, Susan Finder argues.<sup>306</sup>

Each court has its own rules on what cases are considered by the adjudicative committee, for an IPC they generally include: cases concerning economic crimes, reversal of lower court decisions, procuratorate protest of a lower court decision, lack of bench consensus, large monetary sums, major labor disputes, cases regarding Hong Kong, Taiwan, Macao residents, foreigners, and cases where the application of the death penalty is foreseen.<sup>307</sup>

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passive role of the Committee may be less appropriate, another more appropriate option is ‘adjudicative committee’ (Peerenboom) that I opt for.

<sup>300</sup> See e.g. HE Weifang’s repudiation of SU Li’s arguments for a reduced but maintained form of adjudicative committees, Weifang HE, 1999; and Zhiyong LU, 1999; see also Ruihua CHEN, 1999, p. 496.

<sup>301</sup> Yuwen LI, 2001, pp. 77–78; Jerome A. COHEN, 1997, p. 798.

<sup>302</sup> Susan FINDER, 2002, p. 27.

<sup>303</sup> Yuwen LI, 2001, pp. 77–78.

<sup>304</sup> Wusheng ZHANG and Zeyong WU, 2000 (b), p. 54.

<sup>305</sup> Guangzhong CHEN and Duan YAN (Eds.), 1999, p. 295; see also Xinyang YU, 2001, p. 33.

<sup>306</sup> Susan FINDER, 2002, p. 27.

<sup>307</sup> *Id.*, p. 26; see also Jerome A. COHEN, 1997, p. 798.

In criminal cases there are often pre-trial discussions.<sup>308</sup> Focus within the committees easily ends up on social and political implications of the rulings.<sup>309</sup> At basic level courts, the involvement of the committee is limited to a smaller number of cases, where government officials are involved or in administrative cases, or more serious criminal cases.<sup>310</sup> The SPC has issued an opinion with working rules on the adjudicative committees that give some basis for their work.<sup>311</sup>

Reform proposals for the adjudicative committees by Chinese academicians range from complete abolishment to more moderate transformations into bodies with limited mandate and powers.<sup>312</sup> Arguments are made in favor of maintaining the system of adjudicative committees on grounds such as ensuring the quality of the judgments, and that it is more economical through the summing up of experiences.<sup>313</sup> There are also those suggesting that it is necessary to maintain the committees until the competence level of the individual judges has been raised.<sup>314</sup> Some advocate an advisory role for the committees in which the members must attend the actual trials.<sup>315</sup> Others propose transferring the tasks of the committees to a grand chamber in difficult cases.<sup>316</sup>

The adjudicative committees' role is commonly described as a Party forum but this may not certainly be the case. Empirical data supporting this interpretation is lacking.<sup>317</sup> The role of these committees was previously quite substantive in screening cases after the trial and before the verdict, and the system has been criticized for providing the actual consideration of the case after the trial (*xianpan houshen*). In a move to enhance the personal independence of judges, cases are now handled and decided by a single judge or a panel of judges that has final decision making powers, as opposed to the previous practice of having the court president or head of chamber approving the verdict. Under the new system, the panel refers cases through the court president for consideration by the adjudicative committee to discuss and decide cases that are complex or important (FYRP, paragraphs 20 and 22).<sup>318</sup> The president individually may no longer change a panel decision.<sup>319</sup> The work of

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<sup>308</sup> Susan FINDER, 2002, pp. 26–27.

<sup>309</sup> *Id.*, p. 27.

<sup>310</sup> Yuwen LI, 2001, p. 78.

<sup>311</sup> Susan FINDER, 2002, p. 26.

<sup>312</sup> Rikai HE, 1999, p 8; Hongbin GAO, 2000, p. 32.

<sup>313</sup> Guangzhong CHEN in Ping XU et al, 2000, p. 45.

<sup>314</sup> E.g. as retold by Susan FINDER, 2002, pp. 27–28; and Jerome A. COHEN, 1997, p. 799.

<sup>315</sup> Chunli YIN, 1998, p. 56.

<sup>316</sup> Bing TAN and Zhisheng WANG, 2001, p. 141.

<sup>317</sup> Randall PEERENBOOM, 2003 (a), p. 81.

<sup>318</sup> Qianfan ZHANG, 2003, p. 91.

<sup>319</sup> Susan FINDER, 2002, p. 24.

the adjudicative committees will also be more regularized and the powers more limited under the scheduled reforms.<sup>320</sup>

### 7. Public Confidence

Public confidence in the judges and indeed of the judiciary as a whole is a major challenge in China.<sup>321</sup> A number of surveys suggest that the credibility of the judiciary is very low. One news article reports on three different surveys,<sup>322</sup> in the first, 40 per cent of people asked thought that the judges' image was negative. A Beijing company made a survey in a large number of the major cities in China, polling over 5,500 adult residents, which revealed that well over ten per cent of those questioned had negative impressions of the judges, while some 21 per cent thought positively of judges, and almost 70 per cent were neutral. In a smaller on-line survey, 500 respondents were asked to state which of four legal professions had the most positive connotations: Lawyers received almost 60 per cent, prosecutors over 22 per cent, the police less than 10 per cent, and judges, surprisingly even less than the police, at 8.7 per cent. Statistics from the system of Letters and Visits (*Xinfang*) where governments receive complaints on performance suggest that 40 per cent of the issues concern the courts, prosecutors, and police. One of the major problems is dissatisfaction with court judgments and the length of the judicial procedures.<sup>323</sup>

The standard or 'quality' (*suzhi*) of the judges is often criticized.<sup>324</sup> By referring to the 'low standards' of the judges as a catch-all-phrase for criticism of non-structural problems, the criticism is more related to the individual judge, such as issues of professional ethics and the level of education. Professional ethics is considered a fundamental problem in this regard according to many Chinese commentators.<sup>325</sup> Efforts have been made to improve the situation through various campaigns aimed at strengthening the professionalism of the

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<sup>320</sup> *Id.*, p. 28.

<sup>321</sup> See e.g. Chongyi FAN (Ed.), 2003, pp. 524 *et seq.*, and the discussion on transparency, pp. 491 *et seq.*

<sup>322</sup> *Zhengti xingxiang piandi faguan mianlin xinren weiji* [The General Image is Low; Credibility Crisis of Judges], *ZHONGGUO XINWEN ZHOUKAN* [China News Weekly], 29 November 2001, as reported by: <http://news.sohu.com/28/74/news147307428.shtml>; The article argues that a few high profile reports of corrupt and unprofessional judges have seriously tainted the reputation of the judiciary.

<sup>323</sup> XINHUA WANG, 8 December 2003.

<sup>324</sup> See e.g. *Zhongguo faguan suzhi ling renyou tigao suzhi cheng chuan shehui guanzhu jiaodian* [The Standard of Chinese Judges is Worrisome; Raising the Standards is becomes the Focus of Attention of the whole Society], XINHUA WANG, 25 September 2003; Shigui TAN, 2001, p. 96.

<sup>325</sup> Weifang HE, 2000, p. 644; Desen ZHANG and Youyong ZHOU, 1999, p. 27.

judges.<sup>326</sup> In 2002 the SPC issued an Opinion on the Professionalization of the Judicial Corps.<sup>327</sup> Further efforts made to improve the quality of the judicial work are for instance the establishment of a number of complaint bodies in local courts in Beijing coupled with a scheme to scrutinize the countries top judges.<sup>328</sup> One source indicates that some 2,512 judges were punished for not following the legal procedures during one year.<sup>329</sup>

### Professionalism

Legal education as it is understood in the West started in China in 1904 and in the 1940s there were 27 legal education institutions. In the early 1950s, only around seven of these remained and in 1971 all law departments were banned, save the two of Beijing and Jilin universities.<sup>330</sup> Since the law departments were allowed to open again in the late 1970s, the annual number of graduates has increased tremendously from about 1,000 in the mid-1980s to more than 10,000 a decade later.<sup>331</sup>

The Judges Law of 1995 and its 2001 revisions established higher educational standards for judges.<sup>332</sup> The requirements are a university law degree with two years of work experience; or a non-law university degree with specialized legal knowledge as well as two years of work experience; or a graduate degree in law or with specialized legal knowledge, in which case the work experience is waived (article 9).<sup>333</sup> Locally even higher standards are set, such as in Jiangsu HPC where a graduate degree is required.<sup>334</sup> However, in actuality these requirements are often circumscribed.<sup>335</sup>

The lack of judges with a good legal education is considered a major problem in China.<sup>336</sup> In 1987, 17 per cent of the judges had some kind of

<sup>326</sup> See e.g. Guzhou QIAN, 2001, p. 17.

<sup>327</sup> SPC Several Opinions on Strengthening the Professionalization of the Judicial Corps, 18 July 2002, available at [www.cecc.gov](http://www.cecc.gov).

<sup>328</sup> *Watchdog to Judge the Judges*, HONG KONG STANDARD, 15 May 1998.

<sup>329</sup> In 1998, INSTITUTE OF LAW (Ed.), 2002, p. 3.

<sup>330</sup> INSTITUTE OF LAW (Ed.), 2001, p. 77, in 1978 it was also these two departments who started off educating in law again together with the Southwestern University of Politics and Law.

<sup>331</sup> Albert MELONE and Xiaolin WANG, 1999, p. 151, according to statistics from the Ministry of Education.

<sup>332</sup> See also SPC Regulation, Judicial Training Regulations, of 20 October 2000 (effective 1 January 2001), available at [www.cecc.gov](http://www.cecc.gov); article 9 (6) of the Judges Law open up for lowering educational requirements.

<sup>333</sup> Susan FINDER, 2002, p. 33.

<sup>334</sup> Qianfan ZHANG, 2003, p. 89.

<sup>335</sup> Yuwen LI, 2001, p. 84.

<sup>336</sup> *Id.*, p. 97; Stanley LUBMAN, 1999, pp. 253 *et seq*; emphasis is often placed on the large influx of retired military officers into the judiciary, in particular in the 1980s.

university law training and in 1993 the figure was up to 66 per cent because many universities instituted three-year evening courses.<sup>337</sup> By the end of 1995, some 80 per cent had at least a two-year college level (*dazhuan*) legal education, sometimes labelled ‘junior college’.<sup>338</sup> Other scholars dispute this high figure, even if it should relate to any college education, not only in law.<sup>339</sup> Sources suggest that in 1998, only 5 per cent of the judges had earned a full undergraduate (*benke*) law degree and only one-quarter of one per cent had graduate degrees nationwide.<sup>340</sup> Another 1998 study of BPCs found only 3 per cent had a legal undergraduate degree (LL.B.) while 45 per cent did not even have a junior college degree – in any field.<sup>341</sup> Another estimate from this time suggests that less than 10 per cent of the judges in the country had proper LL.B. degrees.<sup>342</sup>

In Beijing, 75 per cent of judges have now the two-year college level legal education, and 10 per cent have undergraduate degrees but not necessarily in law.<sup>343</sup> Another survey from Beijing shows that among some 250 Presiding Judges and 330 single judges, there was one with a PhD, 25 with master’s degrees, more than 300 with bachelor’s, and the remaining 250 or so had the two-year junior college degree.<sup>344</sup> Most court presidents, at least at the intermediate level, lack legal education due to the cadre system of appointing leaders.<sup>345</sup> Overall, no reliable statistics seem to be available. In any event, the numbers have risen dramatically in the last few years. Judges, as others within the administration of justice, are prodded toward securing university degrees in law, but this continuing education, or in some cases basic education, is however not always of good quality.<sup>346</sup> More than half of the two-year college level legal degrees of Beijing judges have been issued by so called TV or non-professional (*yuyu*) colleges.<sup>347</sup> Reports indicate moreover that exams are taken and degrees are awarded with regular possibilities for cheating.<sup>348</sup>

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Many of these old-timers have however retired, undergone training, or transferred to non-adjudicatory positions.

<sup>337</sup> Susan FINDER, 1993, p. 219.

<sup>338</sup> Randall PEERENBOOM, 2003 (a), p. 82.

<sup>339</sup> INSTITUTE OF LAW (Ed.), 2002, p. 26; a great source of confusion is the distinction between judges and court officials.

<sup>340</sup> Junju MA and Dezong NIE, 1998, p. 25.

<sup>341</sup> Donald C. CLARKE, 2003 (b), p. 176.

<sup>342</sup> *Id.*

<sup>343</sup> Qianfan ZHANG, 2003, p. 79.

<sup>344</sup> Keyuan ZOU, 2002, p. 1052.

<sup>345</sup> Susan FINDER, 2002, p. 22.

<sup>346</sup> Donald C. CLARKE, 2003 (b), p. 176, and note 52.

<sup>347</sup> Qianfan ZHANG, 2003, p. 79.

<sup>348</sup> *sifa kaoshi: “menkan gao” haishi “gezi ai”?* [The Unified Judicial Exam: “High Threshold” or “Short Legs”], XINHUA WANG, 25 September 2003.

Starting in the late 1990s, lawyers had to pass a national exam in order to become member of the bar association. The result of this quality check was deemed positive and was expanded to include judges. In the spring of 2002 the lawyer's examination was unified with an examination of prosecutors and judges in the Unified Judicial Exam (*sifa lianhe kaoshi*).<sup>349</sup> Of the more than 310,000 that sat for the exam, almost 25,000 passed, about seven per cent.<sup>350</sup> This is believed to raise the standard of the judges both through higher requirements and through the status of taking the same examination that the more popular profession – lawyers – are required to take. New judges are also required to sit for a provincial test and undergo training before being appointed.<sup>351</sup> A strict system for checking future judges through examinations is another effort to secure the independence of the judges, which had already been proposed by many.<sup>352</sup>

In the city of Tianjin, about a quarter of the judges of the basic level courts failed the Judicial Exam and was removed from adjudicative positions.<sup>353</sup> In order to sit for the exam one must have a law degree from a recognized university. In addition to a mandatory judicial exam, which will be discussed below, required of prospective judges, some courts have even instituted competitive exams for promotion within their courts.<sup>354</sup> Judges already employed are also required to pass regular internal examinations in many courts. The HPC of Shanghai organizes tests for all the courts in Shanghai including tests required for promotion. In 2003 the first test for eligibility to become assistant judge was organized, which builds on the previously existing testing policy for full judgeships that is getting increasingly difficult and which effectively restricts judgeships to only the top scoring candidates.<sup>355</sup> According to the Judges Law (articles 48 and 49), and the Judge Examination and Assessment Commission Constituting Measure of 1996, courts are to set up a Commission in charge of supervising training, examination, and assessment of judges. The Commission is composed of five to nine members and headed by the court President and vice-presidents.<sup>356</sup>

Another measure to improve the professionalism of the judges, but also to improve the fairness of the court procedures, increase transparency, and raise the quality of the judgment, is the emphasis placed on the argumentation and

<sup>349</sup> See generally e.g. Chongyi FAN, 2003 (b); see also Qi ZHANG, 2002, p. 26.

<sup>350</sup> *Establishment and Enhancement of National Legal Examination System: An interview with Chinese Deputy Minister of Justice Liu Yang*, 2003, p. 57; see also Jie CHENG, 2003, p. 22, who however give another pass rate.

<sup>351</sup> *Numbers of Chinese Judges to be Cut Back*, PEOPLE'S DAILY, 8 July 2002.

<sup>352</sup> Rikai HE, 1999, p. 8; Hongbin GAO, 2000, p. 33; Desen ZHANG and Youyong ZHOU, 1999, p. 26.

<sup>353</sup> Qianfan ZHANG, 2003, p. 95.

<sup>354</sup> Susan FINDER, 2002, p. 32.

<sup>355</sup> Communication with Shanghai IPC judge, 17 December 2003.

<sup>356</sup> *Id.*, *Faguan kaoping weiyuanhui zhanxing zhuzhi banfa*.

structure of court decisions as well as the case-file (*panjueshu*) as a whole.<sup>357</sup> The SPC publishes standard cases as models to improve the written court decisions.<sup>358</sup> In the past, verdicts often did not specify the connection between the applicable provisions and the judgment through reasoning.<sup>359</sup> In the late 1990s the SPC adopted a ‘model adjudication case-file’ for criminal cases to set the standards for how verdicts were to be formulated.<sup>360</sup> A progressive example in this regard is the Guangzhou Maritime Court that even records the dissenting views of the panel-judges.<sup>361</sup> Also the Second IPC in Shanghai has started recording dissenting opinions.<sup>362</sup> This system is actually also required by the Criminal Procedural Law (article 148).

A news report argues that even though the Judges Law has raised the requirements to become a judge, this threshold is still nominal.<sup>363</sup> The intermediate court in Huhhot, Inner Mongolia, has only been able to recruit one person with a law degree in the last three years, and one of that person’s parents was a city official. The same article continues that it is always possible to obtain employment as a judge if you have contacts, disregarding qualifications. Further, once a person has been hired, it is very difficult to dismiss the person.<sup>364</sup> The SPC is however said to be reconsidering the removal criteria listed in article 13 of the Judges Law.<sup>365</sup> At present courts ordinarily recruit directly so there is no system for promotions within, such as from a lower court to a higher seniority post. This is however changing and by 2009 new staff for higher courts must come from lower courts, other than special cases involving highly qualified legal persons who may still be recruited directly.<sup>366</sup> As of late 2001, presidents of BPCs are to be selected from among

<sup>357</sup> Hua XIA, 1998, p. 37; Guzhou QIAN, 2001, p. 19; see also SPC Measure on the Management of Publication of Judgment Documents, 15 June 2000, available at [www.cecc.gov](http://www.cecc.gov).

<sup>358</sup> Qianfan ZHANG, 2003, p. 91.

<sup>359</sup> Wen GAN, 1999, p. 31; see also Qianfan ZHANG, 2003, p. 88.

<sup>360</sup> Guzhou QIAN in: *Caipan Wenshu: Sifa Gongzheng de Zaiti* [Adjudication Case-file: The Carrier of Judicial Fairness], 1999, p. 47; see also Qianfan ZHANG, 2003, p. 88.

<sup>361</sup> Guzhou QIAN, 2001, p. 19.

<sup>362</sup> Chris X. LIN, 2003, pp. 309–310.

<sup>363</sup> *Bie ba faguan dangcheng “guar”* [Don’t make the Judges into “Officials”], XINHUA WANG, 25 September 2003; On the lack of applicants to become judges, see also *Bianyuan fayuan: neique liangcao, waique jiubing* [Remote Courts: ‘Lack of Provisions Within, Rescuing Soldiers Away’], NANFANG ZHOUMOU [Southern Weekly], 21 August 2003.

<sup>364</sup> See also Ping XU et al, 2000, p. 42; Randall PEERENBOOM, 2002, p. 294; there are also reports of contracts where judges have to commit to work for six years or else pay a substantial fine of many months of salaries, interview with former Beijing Judge, 24 November 2003.

<sup>365</sup> Yuwen LI, 2002, p. 73.

<sup>366</sup> Susan FINDER, 2002, p. 33.



the best judges in the court, and they should be around 35 years of age.<sup>367</sup> Every court is also to establish a limited number of posts for judges and conduct regular evaluations.<sup>368</sup>

### Corruption

The most common form of corruption is acceptance of gifts and services from the litigants.<sup>369</sup> The relatively low salary is a problem in terms of recruitment and it is also an incentive for corruption.<sup>370</sup> Some courts have a system where the salary is reduced if a certain percentage of the cases a judge has adjudicated are overturned or remanded for further review.<sup>371</sup> In the first half of the 1990s the judicial salaries were tripled but still remained relatively low.<sup>372</sup> More recently, some courts in economically developed areas like Shanghai, have raised the salaries to quite competitive levels. Still, corruption within the judiciary is said to be in particularly extensive in the large cities with strong economic indicators like Shanghai, Beijing, and Guangdong.<sup>373</sup> An obstacle to greater independence of judges is the perception that they are corrupt to the extent that it may not be possible to increase their independence.<sup>374</sup> Many hold that the more independence given to the judiciary, the more corrupt they will be (*sifa yue duli, faguan yue fubai*).<sup>375</sup> The China International Economic and Trade Arbitration Chamber (CIETAC) has also marketed itself as a better alternative for dispute settlement, by arguing that the courts are corrupt and incompetent.<sup>376</sup>

Related to corruption are the rules of avoidance (*huibi*) that have been used through out Chinese history. The Organizational Law of the Courts and the procedural laws all deal with such rules of avoidance or recusal to avoid bias. Mainly there are four different categories applicable to judges: relatives can not work at the same court; ex parte meetings are not allowed; gifts and favors of various forms are illegal; and it is also illegal to recommend lawyers to parties.<sup>377</sup> Until recently there was no requirement for a judge to withdraw or

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<sup>367</sup> Randall PEERENBOOM, 2002, p. 292.

<sup>368</sup> Qianfan ZHANG, 2003, p. 88.

<sup>369</sup> Yuwen LI, 2002, pp. 57–58.

<sup>370</sup> See e.g. Ronald C. BROWN, 1997, p. 130; a number of extensive benefits such as housing should also be considered together with salary but since 1999 judges have not been provided free or subsidized housing, interview with Shanghai HPC judge, 17 March 2003.

<sup>371</sup> Randall PEERENBOOM, 2002, p. 294.

<sup>372</sup> Albert MELONE and Xiaolin WANG, 1999, p. 157.

<sup>373</sup> Randall PEERENBOOM, 2002, p. 295.

<sup>374</sup> Qianfan ZHANG, 2003, p. 84.

<sup>375</sup> Yuwen LI, 2001, p. 101.

<sup>376</sup> Randall PEERENBOOM, 2002, p. 296.

<sup>377</sup> Keyuan ZOU, 2002, p. 1058.

recuse him or herself when having a personal interest in a case, but in 1999 the SPC issued regulations on recusal in such cases.<sup>378</sup> Now parties to a trial can request a judge to withdraw, and judges are barred from practicing as lawyers for a limited period at their former court or in that area.<sup>379</sup>

To counter corruption and strengthen professionalism, in the late 1980s some local courts initiated a “misjudged case responsibility system” (*cuo’an zhuijiuzhi*), which holds judges liable for cases where they intentionally misapply or breach the law.<sup>380</sup> The system was further tested and developed in the early 1990s.<sup>381</sup> In one province (Heilongjiang in the Northeast) there were some 1,400 corrections through this measure in 1995–1997.<sup>382</sup> As late as 2001 the SPC issued measures for removal of court leadership in ‘misjudged cases’ aimed to increase the effectiveness of the system.<sup>383</sup>

The demands placed on the judges in this regard have however only been vaguely defined, which has led to diverse interpretations.<sup>384</sup> The vagueness causes courts to seek instructions from higher-level courts, creating delays and downplaying the appeal system as well as lessening of the individual independence of the judges. Also, a higher court may refrain from changing a verdict in order not to make a lower court appear as having made mistakes.<sup>385</sup> Professor Yuwen LI finds that only a minority of cases is related to actual “misjudgments” while most are doubtful cases. She also argues that the system is superfluous, since breach of law is already regulated by the Judges Law (article 33) as well as the Criminal Law (articles 31 and 399).<sup>386</sup>

### C. On-Going Reforms and Further Proposals

Judicial reform, aimed at addressing the various obstacles to a fair and efficient judicial system has been underway, as mentioned, in particular since the late 1990s when the rule of law was pronounced as a fundamental goal for China. The underlying purpose of the reform is fairness and efficiency aimed at

<sup>378</sup> Susan FINDER, 2002, p. 23; see also SPC Methods on Strict Observance of the Recusal System, 31 January 2001, available at [www.cecc.gov](http://www.cecc.gov).

<sup>379</sup> Keyuan ZOU, 2002, pp. 1055–1056; INSTITUTE OF LAW (Ed.), 2002, p. 3.

<sup>380</sup> Yuwen LI, 2001, p. 85; Yanjin YI, 2000, p. 765.

<sup>381</sup> Youxi CHEN, 1994, p. 27.

<sup>382</sup> Yuwen LI, 2001, p. 86.

<sup>383</sup> Keyuan ZOU, 2002, p. 1056; see also SPC Provisional Measures on Liability for Judgments Not in Accordance with the Law, 4 September 1998, and SPC Regulation on Strictly Enforcing the Relevant Punishment Systems of the PRC Judges Law, 10 June 2003, both available at [www.cecc.gov](http://www.cecc.gov).

<sup>384</sup> Hanchao JING and Zijuan LU, 1997, pp. 58–59.

<sup>385</sup> Guzhuo QIAN, 2001, p. 17; Yuwen LI, 2001, p. 87.

<sup>386</sup> Yuwen LI, 2001, pp. 88, 86, citing Chenguang WANG, 1998, pp. 248–249.

essential challenges to the legitimacy of the government and the Party, such as the widespread corruption.<sup>387</sup> Central in the reform process is also the role of the independence of the judiciary.<sup>388</sup> Scholars in China, in summary, find the following issues most problematic and urgent for the reform process: local protectionism; requirements and appointment procedures for judges; the many forms of supervision; lack of resources; the internal structure of the courts; and the relationship between the administrative and the adjudicative.<sup>389</sup>

The Five Year Reform Platform (FYRP) that the SPC adopted in October 1999 prescribes around 40 specific changes in addition to the establishment of a reform group.<sup>390</sup> At the National People's Congress in the spring of 2000, the President of the SPC presented the Platform.<sup>391</sup> Later that spring the Supreme People's Procuratorate issued an equivalent strategy, a Three Year Reform Platform. In August 2000 the Central Committee of the Party approved both of these reform plans.<sup>392</sup> The FYRP was said to be drawing on experiences developed by the courts at various levels and locations.<sup>393</sup> The FYRP recognized that judicial independence was restricted mainly due to four features: local protectionism, low professional and moral standards among the judges, the bureaucratic management model, and the lack of resources. These four areas were to be addressed in the five years starting in 1999.<sup>394</sup> The identified areas largely correlate with those identified by the academic community, mentioned above.

At the forefront of the FYRP is the increased independence of the collegiate panels (*heyi ting*) and the individual or sole judges (*duren ting*), and selection of the most qualified judges as Presiding judges (*shenpanzhang*), reducing powers of the adjudicative committees and the court leaders as a

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<sup>387</sup> See e.g. Lixian LIU and Zhijun ZHANG, 2000, p. 16; Weidong CHEN and Xunhu LI, 2003

<sup>388</sup> See e.g. Shigui TAN, 2001, pp. 27–42.

<sup>389</sup> Lixian LIU and Zhijun ZHANG, 2000, p. 35; and Xiabing HU and Renqiang FENG, 2000, p. 56; see also e.g. Renren GONG, 2001.

<sup>390</sup> Outline of the Five Year Plan for Reforming the People's Court, issued 20 October 1999, reported in FAZHI RIBAO [Legal System Daily] 23 October 1999, p. 2, (on-line edition) as reported in Susan FINDER, 2002, p. 3; see also INSTITUTE OF LAW (Ed.), 2002, p. 30, for details, including all legal texts and a selection of important political texts in relation to the FYRP up until 1999, ZUIGAO RENMIN FAYUAN YANJIUSHI [Research Office of the Supreme People's Court] (Ed.), 2000; see also Weirong CHENG, 2003, pp. 444–447.

<sup>391</sup> Shigui TAN, 2001, p. 54; see also e.g. Yuwen LI, 2002, pp. 74 *et seq.*

<sup>392</sup> *Id.*, p. 55; see also Susan FINDER, 2002, p. 6.

<sup>393</sup> *People's Courts, Special People's Courts, People's Republic of China*, 2002, p. 23.

<sup>394</sup> Qianfan ZHANG, 2003, p. 87.

consequence.<sup>395</sup> One part of the Platform is also to separate court clerks from judges. This has been tested in Shenzhen and is now being implemented on a national scale.<sup>396</sup> In the fall of 2003, a Provisional Measure on the Management of People's Courts' Clerks was issued that clarifies the position of clerks as separate from judges.<sup>397</sup> Overall, the FYRP limits what can be reformed by establishing that the Party leadership and the people's congresses will remain constants, which it intends will safeguard the unity of the country.<sup>398</sup>

Even though the Reform Platform is trying to approach judicial reform in a coherent way, many commentators still find the reforms chaotic.<sup>399</sup> Essentially, an overall scheme for the reform process is lacking. Some have advocated a legal reform committee that will reach across the administration of justice to get beyond the departmental interests and achieve a macroscopic strategy.<sup>400</sup> Jerome Cohen has aptly stated that for China, “[w]hat is needed is not a succession of bandaids for a patient that is severely ill but radical surgery and structural rehabilitation”.<sup>401</sup> The legal reform measures undertaken and underway are seen by many as too limited and only aimed at addressing the most urgent needs.<sup>402</sup> The reform process has also been compared to dealing with health problems, “when you’ve got headache you cure the head and when you have foot ache you cure the foot”.<sup>403</sup> Contrarily, a more holistic approach is needed for the legal and overall development process in China to really be efficient. It has also been reported that in the summer of 2003, the Standing Committee of the Politburo – the core decision makers of the Party – appointed a Central Leading Group on Judicial Reform under the leadership of State Councilor, LUO Gan, and with other prestigious positions also going to Party-members.<sup>404</sup> The Group is intended to coordinate the reform measures among the SPC and the SPP, and others.

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<sup>395</sup> Shigui TAN, 2001, p. 54; The system with Presiding judges was tested out already in 1999 in Beijing courts, *Beijing Court Experiments with Chief Judge Responsibility System*, CHINA NEWS DIGEST, 4 April 1999.

<sup>396</sup> Weifang HE, *Shujiyuan buzai shi faguan de yubeidui* [Court Clerks are no Longer Reserv Judges], NANFANG ZHOUMO [SOUTHERN WEEKLY], 30 Oct 2003.

<sup>397</sup> *Renmin fayuan shujiyuan guanli banfa (shixing)*, 20 October 2003, Issued by the Organizational Department of the Central Committee, National Ministry of Personnel, and the SPC, published with a model contract of employment for court clerks, issued by the SPC on 21 October 2003.

<sup>398</sup> INSTITUTE OF LAW (Ed.), 2001, p. 5.

<sup>399</sup> Randall PEERENBOOM, 2003 (a), p. 93.

<sup>400</sup> See e.g. INSTITUTE OF LAW (Ed.), 2002, p. 32; also suggested by Randall PEERENBOOM, 2003 (a), p. 93.

<sup>401</sup> Jerome A. COHEN, 2001, p. 6.

<sup>402</sup> Interview with Profesor HAN Dayuan, 18 March 2002; Weifang HE, 1995, p. 1; Linping YANG, 1999, p. 33.

<sup>403</sup> *Touteng yitou, jiaoteng yijiao*; Wusheng ZHANG and Zeyong WU, 2000 (a), p. 55.

<sup>404</sup> *Zhongyang sifa tizhi gaige lingdao xiaozu*, SOHU.COM, 7 January 2004.

Peerenboom has argued that in particular given the relatively weak position of the courts in recent Chinese history, strong institutional guarantees are required to boost the credibility and independence of the judiciary, both for the individual judge and the judiciary as a whole.<sup>405</sup>

### *1. Proposals and Reform Plans*

As discussed, the judiciary in China is restrained through a number of mechanisms. Some Chinese commentators find that such control to some extent is needed.<sup>406</sup> The views on the format of the supervision are however diverse.<sup>407</sup> Commentators in particular argue that the main supervision should be through procedural measures such as the procuratorate's possibility to appeal, drawing on, as they say, the experience from the majority of the countries in the world.<sup>408</sup> A more extraordinary proposal is to establish a new and completely independent appeals-system with courts falling under the NPC.<sup>409</sup> Commonly however commentators express the need for some form of increased independence for the judiciary. In the next section I will discuss the main crux of judicial reform, which is the scope of the reforms vertically and horizontally. Vertical reforms refer to the extent that the central regime can control the localities against strong local interests. Horizontally, the challenge relates to the extent of reforms beyond the limits of the judiciary it self, in particular the role of the Party.

#### The Vertical Aspect

Many commentators see local protectionism as a root cause in restricting judicial independence. One of the major schemes proposed to combat this is the reorganization of the courts. At present the hierarchy of courts generally follow that of the administration, and many scholars and practitioners argue for changing the geographical jurisdiction of courts so that it does not correspond with that of the administration.<sup>410</sup> This is the case given, in particular, the system of funding of the courts that was described above, but also due to the multitude of corresponding interests between the courts and the administration,

<sup>405</sup> Randall PEERENBOOM, 2002, pp. 301, 325.

<sup>406</sup> See e.g. Lixian LIU and Zhijun ZHANG, 2000, p. 27; Junju MA and Dezong NIE, 1998, pp. 27, 32–35; Rikai HE, 1999, p. 3.

<sup>407</sup> Desen ZHANG and Youyong ZHOU, 1999, pp. 23, 28; Junju MA and Dezong NIE, 1998, p. 27.

<sup>408</sup> Rikai HE in *Renda "gean jiandu" wenti tantao* [Inquiry into the Parliaments Individual Case Supervision], 2000, pp. 5–6; Congyi PAN, 1998, p. 92.

<sup>409</sup> *Sheli shensu fayuan: chongzhen fayuan weixin* [Establish Appeals Courts: Reinvigorate Popular Trust in the Courts], 1998.

<sup>410</sup> Wen GAN, 1999, p. 28, he argues in particular for changing the intermediate people's courts; Pengcheng XIE, 1999, p. 35; Yanjin YI, 2000, p. 742.

judicial and otherwise.

Some scholars suggest limiting the number of HPCs with cross-provincial jurisdictions to one-third of the present number, or about 10.<sup>411</sup> Another proposal made by a staff member of the Research Office of the SPC is to have two separate systems of courts; one three-layered that is centrally funded and under SPC management, and another with three levels with local funding.<sup>412</sup> A proposal to reorganize the courts at the local level has also been made in Shanghai that would have two basic courts limited to administrative cases while the remaining 13 also handle civil and criminal cases. This proposal also foresees that if one of the parties to a dispute or an accused person claims that a local court is biased, the case will start directly at the intermediate level.<sup>413</sup> In Hubei province, in central China, a similar system has been introduced with administrative complaints going directly to the intermediate level when a case is concerned with a lower administrative entity.<sup>414</sup>

The Bank of China has undergone a reorganization that has been suggested as a model; struggling with similar problems of local protectionism they have separated management from the provincial divisions.<sup>415</sup> To prevent corruption in land transactions, local land officials were transferred from “city mayors” to report to the provincial level land administration.<sup>416</sup> The specialized maritime courts are another example of ongoing reform, with each court responsible for disputes in more than one province. The maritime courts have been under strict reform in the last few years.<sup>417</sup> These courts are used as test ground to gather hard evidence on the functioning for a greater scheme of overall reform. The maritime courts have been used to introduce a system where the jurisdiction of the courts no longer corresponds to the geographical limits of the administration. So far this reform has received very little attention but has seemingly been well received. Another proposed partial redress to the problem with the judiciary is, as discussed above, centralized funding to reduce the horizontal dependency, and funding directly provided by the Supreme People’s

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<sup>411</sup> Wusheng ZHANG and Zeyong WU, 2000 (a), p. 66; Yanjin YI, 2000, p. 743.

<sup>412</sup> The proposal as well as criticism to the proposals discussed are described in Shigui TAN, 2001, pp. 100–101; see also proposal in Xiabing HU and Renqiang FENG, 2000, pp. 69–70.

<sup>413</sup> Proposal was made by Professor SUN Chao (then member of the Standing Committee of the Shanghai People’s Congress, appointed Vice President of Shanghai High People’s Court in 2003), in interview, 2 October 2001.

<sup>414</sup> ZHONGGUO QINGNIANBAO [China Youth Daily], 21 October 2003, as reported by XINHUA: [http://news.xinhuanet.com/legal/2003-10/17/content\\_1127652.htm](http://news.xinhuanet.com/legal/2003-10/17/content_1127652.htm).

<sup>415</sup> Chunming GUO and Zhigang LIU, 2000, p. 156; Professor SUN Chao, in interview, 2 October 2001.

<sup>416</sup> CHINA DAILY, 29 December 2003.

<sup>417</sup> Interview with a Chinese researcher, 12 November 2002, who had discussed the issue with leaders of the SPC.

Court.<sup>418</sup>

The vertical aspects provide a major incentive for the Beijing regime to provide for a more independent judiciary to counter local power. The major challenges to the establishment of judicial independence lie however in the horizontal aspects.

#### The Horizontal Aspect

In a larger context the courts also need to be situated in the political system.<sup>419</sup> Some proposals on the wording related to judicial independence in the Constitution and in the laws have been made; if article 126 of the Constitution would be amended to regulate court and local government relationship so that “administrative organs” are changed to “state organs”, it is argued that the political parties would fall within the provision as well.<sup>420</sup> Another commentator is even more detailed on the amendment of article 126, which suggests the problems at the present: “legislative organs” should be added before “administrative organs”, and after “social organizations”, “political parties and groups” should be added.<sup>421</sup>

The people’s courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual. (Article 126)

Scholars have also argued for a formalized mandate of the courts,<sup>422</sup> including public policy issues.<sup>423</sup>

In a book on judicial independence in China that was written and published by two judges from the Supreme People’s Court in the late 1990s, the major areas of concern relating to independence were defined. In particular the book emphasized the rule of law, procedural guarantees, judges’ legal education and professionalization, as well as judges’ social status. Other issues raised were

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<sup>418</sup> Dezhi WANG, 1999, pp. 154–155; Shigui TAN, 2001, pp. 98–99; Xiabing HU and Renqiang FENG, 2000, pp. 64–65, 70; see also *Faguan buneng chengshou zhizhong* [Judges Cannot Shoulder the Unbearable Burden], XINHUA WANG, 25 September 2003; also as mentioned above, central funding has been provided on a pilot basis to a few courts, discussion with YANG Runshi, head of the Research department of the SPC, Beijing, 2 April 2003.

<sup>419</sup> See e.g. Chongyi FAN (Ed.), 2003, pp. 476 *et seq.*

<sup>420</sup> “*xingzheng jiguan*” changed into “*guojia jiguan*”; Wen GAN, 1999, p. 27; or remove the enumeration and only state that a judge should obey the Constitution and the law; Dezhi WANG, 1999, p. 154.

<sup>421</sup> Desen ZHANG and Youyong ZHOU, 1999, p. 24.

<sup>422</sup> Weifang HE, 2000, p. 643; see also Wen GAN, 1999, p. 24.

<sup>423</sup> Xianjin JIANG and Jun ZHENG, 2000, p. 47.

the budgetary control and the role of the adjudicative committees. But more interestingly, the book stressed the need to clearly formulate the role of the Communist Party in the judicial work.<sup>424</sup> Also scholars raise the Party as the major challenge to address in order to get an overall reform scheme in place.<sup>425</sup> The issue is however quite naturally rather sensitive where arguments for judicial independence even can be taken as being against the Party, in that the non-interference also should apply to the Party.<sup>426</sup> Some scholars even suggest removing People's in the names of courts, in order to get away from the jargon of the Communist past.<sup>427</sup> The economically advanced southern city of Shenzhen tested a stricter form of separation of powers between government and Party where the Party would only be able to make general guidelines while staying away from the actual implementation. Separate organs were also to be established to supervise and evaluate performance.<sup>428</sup> Recent reports indicate however that the experiment was discontinued owing to the decreased power of the Party.<sup>429</sup>

Addressing the role of the Party in the judiciary will inevitably also have ramifications on the political structure as a whole and is therefore at present out of reach for any greater reforms. Even more restrictively, excluding the role of the Party, the judiciary is not able to reform more than at the most, its own organization. The issue of central financing for instance is not within the purview of the SPC or its President but on a broader political and ultimately Party level.<sup>430</sup>

## *2. Reforming a Heterogeneous Country*

In particular related to the 'vertical aspects' discussed above, the sheer size of the country is a challenge.<sup>431</sup> In the ongoing judicial reform in China, many of the changes made have generally been seen as positive steps, but all measures have not been well received in all parts of China. There are great discrepancies among different parts of the vast country in terms of economic development, levels of education, and types of problems faced. To generalize about the situation of the judiciary, judicial independence, and judicial reform in China is difficult if not impossible. When contrasting two regions with tremendously different preconditions, the wide gap becomes apparent.

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<sup>424</sup> Min ZHANG and Huiling JIANG, 1998.

<sup>425</sup> See e.g. Keyuan ZOU, 2002, p. 1061; see also Xiabing HU and Renqiang FENG, 2000, pp. 61–63; and INSTITUTE OF LAW (Ed.), 2001, pp. 20–21.

<sup>426</sup> INSTITUTE OF LAW (Ed.), 2002, p. 24.

<sup>427</sup> Keyuan ZOU, 2002, p. 1061.

<sup>428</sup> *Hu uppmuntrar reformer* [Hu Encourage Reforms], DAGENS NYHETER [Daily News], 16 January 2003.

<sup>429</sup> SOUTH CHINA MORNING POST, 5 November 2003.

<sup>430</sup> Yuwen LI, 2001, p. 100.

<sup>431</sup> See e.g. Dongyu WU and Fu HUA, 2002, p. 448 on the relevance to judicial reform



The Eastern coastal city of Shanghai is one of the four directly governed cities in China due to its size and level of development, which means that it is placed on a level equal to the provinces in the administrative hierarchy.<sup>432</sup> Shanghai is the powerhouse of the Chinese economy with an amazing pace of development, which continues to build on an already advanced economy. In China, Shanghai is at the very top among the provincial level entities in terms of both GDP and the Human Development Index (HDI). Per capita GDP in Shanghai is more than four times as high as that of the Southwestern province of Tibet and more than twice as high on the HDI. Xinjiang, the Western most region, has a GDP and HDI score at about midway between Shanghai and Tibet.<sup>433</sup>

Xinjiang or Xinjiang Uygur Autonomous Region (XUAR) is an autonomous region that was created to provide the Uygurs, the largest ethnic minority in the region, with some extent of self-governance.<sup>434</sup> The population in Shanghai is almost as large as that of the whole of Xinjiang, 19 million, but Xinjiang is the largest geographic province level entity, occupying one-sixth of the total Chinese land territory, 250 times that of Shanghai.<sup>435</sup> The foreign direct investment in Xinjiang is a mere 0.5 per cent of that of Shanghai.<sup>436</sup> Shanghai had in 1997 more than 10 times as many computers per capita than Xinjiang, although Xinjiang at least had more bicycles.<sup>437</sup> While Xinjiang mainly is producing agricultural products, Shanghai is a financial and maritime hub with advanced industrial processing and is also the greatest contributor to the central government of the province level entities.<sup>438</sup> Together with other

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<sup>432</sup> The other three are Beijing, Tianjin, and Chongqing.

<sup>433</sup> UNITED NATIONS DEVELOPMENT PROGRAMME, China (Ed.) 1999, pp. 13, 58; in 1996 GDP per capita in Tibet was 3,000, and in XUAR over 6,000 and in Shanghai over 20,000, Robert BENEWICK and Stephanie DONALD, 1999, p. 25.

<sup>434</sup> XUAR is 1 out of 5 autonomous regions (Tibet, Inner Mongolia, Ningxia Hui, and Guangxi Zhuang, there are also some 30 autonomous prefectures and almost 100 counties in various minority dense areas of the country, Robert BENEWICK and Stephanie DONALD, 1999, p. 20; the Uygurs is the 5<sup>th</sup> largest recognized ethnic minority in China after Zhuang, Manchu, Miao (Hmong), and Hui with more than 8 million people, see Robert BENEWICK and Stephanie DONALD, 1999, p. 20; see also generally Matthew MONEYHON, 2002; E/CN.4/Sub.2/AC.5/2003/WP.16, 5 May 2003, *China's Minorities: The Case of Xinjiang and the Uyghur People*, paper prepared by Dru C. GLADNEY.

<sup>435</sup> Colin MACKERRAS, 2001, p. 215, The People's Liberation Army personal stationed in Xinjiang is not included but the number is substantial; the figures are disputed but according to official statistics well over half of the population is of non-Han ethnicity, XUAR White Paper, 2003, available at <http://test.china.org.cn/e-white/20030526/index.htm>.

<sup>436</sup> Robert BENEWICK and Stephanie DONALD, 1999, pp. 98–99.

<sup>437</sup> *Id.*, pp. 100–101.

<sup>438</sup> Colin MACKERRAS, 2001, pp. 235–236, 242.

Western provinces such as Tibet, Qinghai, and Gansu, Xinjiang is an example of Chinese areas with the lowest levels and pace of development. The huge difference between provinces reflects the diversity of challenges that the judiciary faces in different parts of China.

The major proposals for reform, such as court reorganization and central funding for the courts are not entirely unproblematic. It is believed that the richer areas in China are unlikely to share their spending on the judiciary to the extent needed, to fund courts also in the poorer areas of the country.<sup>439</sup> Many courts in the hinterland are very poor and lack technical equipment and even courtrooms. A number of revenue-making activities have therefore sprouted in many local courts such as accepting out of jurisdiction cases for a fee, quotas on judges to collect fees, illegal confiscation of property, and arbitrary increase of bail.<sup>440</sup> The reform measure of selecting “presiding judges” (*shenpanzhang*), judges that are qualified enough to be the chairman of a collegiate panel with greater independence, has in some locations lead to selection on the basis of being able to generate the most money to the court.<sup>441</sup>

Judges in the city court of Kashgar (*Kashi*) in Western Xinjiang found that the presiding judges system that had been introduced was good although a local attorney thought the reform in this respect had not added much to resolving the problems.<sup>442</sup> A judge at the provincial high court of Xinjiang, in Ürümqi, saw many problems remaining even though the FYRP had been quite influential in relation to the qualifications of judges. He said that the various forms or retrial in addition to appeal was the most problematic aspect for independence but also the level of professionalism of the judges.<sup>443</sup>

Professionals in the legal field perceive the reform plans somewhat differently. In areas like Shanghai, the reforms introduced seem fairly suitable to the problems faced. Even though Shanghai is reorganizing the handling of administrative cases so as to address local protectionism, one judge of the Shanghai High People’s Court suggests that local protectionism is more of a problem in Western China.<sup>444</sup> The mere fact that Shanghai was one of the first to reform the handling of administrative cases, suggests nevertheless that the problem is real and severe also in Shanghai. An attorney in Xinjiang, even though positive about the limited reforms already made, raised local protectionism as the most urgent problem yet to solve, and connected to that, the need for allocation of funding from the central government to the courts. So

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<sup>439</sup> INSTITUTE OF LAW (Ed.), 2002, p. 26.

<sup>440</sup> Randall PEERENBOOM, 2002, p. 294.

<sup>441</sup> According to a CCTV program reported in INSTITUTE OF LAW (Ed.), 2002, p. 31.

<sup>442</sup> Interview with Kashgar HPC judges 14 March 2003; interview with Xinjiang attorney, 14 March 2003.

<sup>443</sup> Interview with Xinjiang HPC judge, 18 March 2003.

<sup>444</sup> Interview with Shanghai HPC judge, 20 March 2003; I have mentioned above claims of the opposite however.

far, only studies have been made about separating administrative from adjudicative jurisdiction, but it was now necessary to implement the changes foreseen in this regard, the attorney argued.<sup>445</sup>

Two judges from Kashgar stated that the separation of duties within the courts introduced with the FYRP had worked well and the level of education among the judges had been improved. The judges also found that the reasoning in court decisions with the greater independence of the judges had improved.<sup>446</sup> In Shanghai a judge claimed however, that the argumentation in the verdicts was now becoming too extensive, making the drafting overly time consuming and the text difficult to penetrate for the reader.<sup>447</sup>

A great source of low esteem for the judges among the people in China, and an important aspect in the reform scheme, is the relatively low professional level of the judges. The newly introduced Unified Judicial Exam (*sifa lianhe kaoshi*) has caused problems, although it is generally perceived as one of the main achievements in the reform process. It has become very difficult to recruit qualified judges to the courts in the poorer areas because of the very low pass rate. Even though the exam allows for a slightly lower standard for participants from inner China, the standards are apparently still too high.<sup>448</sup> It is also possible to get approval from higher courts to lower the requirements for applicants from remote areas, including requirements that are supplementary to the Exam.<sup>449</sup> When the first Judicial Exam was held in 2002, the national pass rate was at about 7 per cent. In the province of Inner Mongolia, over 2,000 persons within the court system took the exam and only 8 persons passed, a rate of 0.4 per cent.<sup>450</sup> In Xinjiang some 4,000 sat for the Exam but only 7 passed, less than 0.2 per cent.<sup>451</sup> In Tibet only 7 persons passed, even with the support of preferential treatment, which helped only 1 of the 7. In Qinghai province, 23 passed, which is a 1.5 per cent pass rate. Without preferential treatment the Qinghai rate would have been 1.3 per cent. In Shanghai however,

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<sup>445</sup> Interview with Xinjiang lawyer, 15 March 2003; He was also concerned about the general possibility of supervision by the procuratorate over the courts and the people's congresses individual case supervision.

<sup>446</sup> Interview with Kashgar BPC judges, 14 March 2003; two Kashgar prosecutors did not seem to know about the three year reform plan of the procuratorate but talked about the reform of the Criminal Procedural Law that was introduced in 1997 with the explanation that it takes a while for new initiatives to come to Western China, Interview with Kashgar prosecutors, 15 March 2003.

<sup>447</sup> Interview with Shanghai HPC judge, 20 March 2003.

<sup>448</sup> 240 is the national pass rate while only 235 for regions receiving preferential treatment *Establishment and Enhancement of National Legal Examination System: An interview with Chinese Deputy Minister of Justice Liu Yang*, 2003, p. 57.

<sup>449</sup> Randall PEERENBOOM, 2002, p. 292.

<sup>450</sup> *sifa kaoshi: "menjian gao" haishi "gezi ai"?* [The Unified Judicial Exam: "High Threshold" or "Short Legs"], XINHUA WANG, 25 September 2003.

<sup>451</sup> Interview with Kashgar BPC judges, 14 March 2003.

the pass rate was 11 per cent, and altogether some 1,200 persons were successful.<sup>452</sup>

In the Southern parts of Xinjiang, it is reported that only 20 per cent of the judges read Chinese.<sup>453</sup> Even though the Exam is supposed to be available also in minority languages,<sup>454</sup> the linguistic barrier remains a great challenge and this is also likely part of the reason for the low pass rate in minority areas.<sup>455</sup> In Xinjiang the Exam is only available in Chinese but there are also other exams that are offered in the major minority languages. These exams are temporary, provided by the XUAR authorities, and only qualify judges to serve within the Region.<sup>456</sup> One scheme designed to address the imbalance in the judges' qualifications between different regions of China is to assign judges from the more developed areas to the less developed. For instance the Eastern province of Jiangsu, north of Shanghai, sends judges to lead lower courts in Western provinces but maintains their Jiangsu salary level.<sup>457</sup> Supreme Court judges are also sent to provincial HPCs.<sup>458</sup>

Guizhou is one of the less developed provinces in China. The Dean of the Guizhou University Law School, argues that if they cannot recruit a Beijing professor to come to the provincial capital to become a professor, how would it be possible to get judges to serve in the local courts in the countryside of the province?<sup>459</sup> Additionally, there are problems getting judgeships for the region. In another less developed region, at the Inner Mongolia University, of the almost 200 that graduated from the Law School, less than 10 secured a job within the judiciary. Even though most of the students are from the countryside

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<sup>452</sup> *xibu diqu: faguan "houjifaren"?* [Western Region: Judges "Lack of Successors"], NANFANG ZHOUMO [Southern Weekly], 30 September 2002.

<sup>453</sup> Interview with Beijing researcher, 6 December 2001.

<sup>454</sup> *Implementation Methods of the Unified Judicial Exam*, Notice No. 2, jointly issued by the Supreme People's Procuratorate, the SPC, and the Ministry of Justice, 1 January 2002.

<sup>455</sup> See suggestions in this direction: *Xibu diqu: faguan "houjifaren"?* [Western Region: Judges "Lack of Successors"], NANFANG ZHOUMO [Southern Weekly], 30 September 2002.

<sup>456</sup> Interview with Beijing scholar, 4 December 2003, basing information on discussion with Xinjiang University Law School Party Secretary.

<sup>457</sup> Interview with Shanghai HPC judge, 20 March 2003.

<sup>458</sup> A former scholar turned SPC judge at the reserach department was in late 2003 appointed as deputy President of Yunnan HPC for a years duration, communication with Beijing scholar, 16 December 2003; inter-provincial cooperation projects also exist where the better off provinces alleviate poverty in Western China, see e.g. Robert BENEWICK and Stephanie DONALD, 1999, p. 24, e.g. Shanghai assists Yunnan and Shandong Xinjiang.

<sup>459</sup> *xibu diqu: faguan "houjifaren"?* [Western Region: Judges "Lack of Successors"], NANFANG ZHOUMO [Southern Weekly], 30 September 2002.

and would be willing to work in basic level courts, they still have great difficulties in finding employment in courts because of lack of job openings.<sup>460</sup>

### The Vertical and the Horizontal

The Five Year Reform Platform of the Supreme People's Court and subsequent reform plans have addressed many of the aspects that are possible to resolve within the judiciary.<sup>461</sup> It leaves out however, many of the overarching issues that lie beyond the control of the judiciary that would have to be included in a viable reform plan. From the perspectives of the three strands of judicial independence as discussed in the first two Chapters, the reforms have been concerned with aspects of impartiality and of public confidence in the judiciary in particular, while leaving out many of the aspects related to the strand of independence. Larger scale reforms are bound to address also more of the aspects related specifically to the independence strand. The President of the Supreme People's Court, has recently stated that the reforms seen so far have dealt with the present problems but the future requires larger scale reform.<sup>462</sup>

A balancing act is required to match the slower development pace of Western China with the affluent East to avoid excessively wide gaps within the country. This requires setting high standards for and giving priority to development of Western China. Higher standards may at the same time be counter-productive in, for example, enabling stronger bureaucratization through poor application of the selection of presiding judges. Another problem is insufficient funding which increases the risk of various forms of corruption. Moreover and not the least, overly restrictive education and examination requirements for the less-developed regions prove counter-productive. These requirements are at the core of the reform. Clarke questions the importance of the level of education: Will better educated judges lead to better judges considering the tasks of judges in Chinese courts? Is education enough to resist the various forms of influence that the judge is exposed to?<sup>463</sup> ZHU Suli, the Dean of Beijing University Law School, has addressed the issue of the low educational level of judges. Zhu's research on rural basic people's courts show

<sup>460</sup> *Bie ba faguan dangcheng "guar"* [Don't make the Judges into "Officials"], XINHUA WANG, 25 September 2003.

<sup>461</sup> On subsequent reform plans, see e.g. the 23-step proposal made by the SPC President, 24 August 2003, that mainly reiterates the previous schemes but also opens up for further reform, *Fayuan jiang tuichu 23 xiang sifa weimin xin jucuo* [The Court Put Forward 23 New Measures of Justice to the People], RENMIN RIBAO [People's Daily], 26 August 2003; see also Yang XIAO, 2003 where he discusses constitutional and legal reforms as necessities for further reform.

<sup>462</sup> *Xiao Yang: Faguan meiyou sili; kaichuang sifa weimin xin jingjie (dawen)* [Xiao Yang: Judges without Personal Interests; Creating a New Horizon of Justice to the People (interview)], ZHONGXIN WANG [China News Net], 15 October 2003.

<sup>463</sup> Donald C. CLARKE, 2003 (b), p. 177.

that the issues dealt with are relatively easy, therefore little or no legal training would be enough if judges know the local conditions.<sup>464</sup>

As well intended as the overall national scheme for legal reform may be to address the many problems faced, not the least at the local level, the actual outcomes of the reforms suggests mixed results. China is a large country and national legal reform, as with many other issues, is difficult to address from Beijing. Even though the leadership is aware of the many problems in the implementation of the reform, they are not always able to resolve the issues on the ground. Obstacles to providing central funding to local courts is an example of the unwillingness of the provinces to surrender power to a more independent national system of courts, but also an indication of the relatively weak position of the central government.

Many reform measures have been tested on a smaller scale and proven effective. Other measures have not been tested or tested in areas too different from other parts of the country. Reform measures such as raising requirements for local judges at the lower level courts may, in a short term perspective, be uncalled for and may even prove counterproductive to the overall legal reform. At the same time as the reform may need more regional variations, at least in a shorter perspective, a more holistic and farsighted approach would be needed for a more efficient legal and comprehensive development process in China.

Overall, a more extensive reform is required to conform to international commitments. More far-reaching reform is also called for, as discussed, to cope with corruption but also to provide a high status, high credibility institution that can serve as vent in resolving the many social issues, such as various forms of protests due to unemployment.<sup>465</sup> Fundamentally for the regime, the issue for further reform is therefore that of balancing legitimacy with control. This balance is two-dimensional. At the horizontal level, the obstacle for further reform is the balancing of the regime between control and unrest. At the vertical level, local interests compete for power with the central authorities. Localities will have to have enough independence to make them content and prosperous, but at the same time not more power than they need for maintaining them as stable, committed, and tax-paying parts of the country. The underlying reasons for differences between localities in terms of results of

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<sup>464</sup> His research findings are summarized and discussed in Randall PEERENBOOM, 2003 (a), p. 78, 82; the argument is also made by Peijie TIAN, 2002, p. 448; see also *xibu diqu: faguan "houjifaren"?* [Western Region: Judges "Lack of Successors"], NANFANG ZHOUMO [Southern Weekly], 30 September 2002; Zhu also makes references to lay-judges used in some countries at the lower level in the court hierarchy, such as in England; a system with local lay judges has recently been introduced in France (*Juges de Proximité*), *Loi N° 2002-1138*, 9 September 2002, *Loi Organique N° 2003-153*, 26 February 2003; and has existed for a long time in e.g. Greenland, see Henrik GARLIK JENSEN, 1996, p. 151.

<sup>465</sup> On the importance of judicial independence for the protection of human rights and to maintain the unity of the country, see Shigui TAN, 2002.

judicial reform are to the greatest extent economical, but also include strong political and social components. Political influence on the judiciary is more important in socially restive areas to maintain the overarching command for stability.

## **Conclusions**

This Chapter has elucidated and analyzed the contemporary judicial system in China, highlighting the various challenges to the independence of the judiciary. While the rationale to enable the judiciary to act independently through for example improved legitimacy of the regime exists, numerous negative restraints on the independence of the judiciary remain. The fundamental dilemma for the regime in moving toward greater independence for the judiciary is the consequent loss of the monopoly on power for the Communist Party. Additionally to this horizontal perspective of power sharing, a vertical dimension is challenging in China with the great differences within the country and the strong local interests that often conflict with the central dictates. On a less macroscopic level, drawing on the three strands developed in the first Chapters, the main remaining problems are those concerned with specific aspects of independence rather than with impartiality, and to some extent also with public confidence.

The following chart of selected international and regional documents on judicial independence is matched with the relevant documents in China to show comparative coverage. As with the general chart in the conclusions to the first Chapter, this chart is based on the provisions of the United Nations Basic Principles on the Independence of the Judiciary (UNBP, from 1985) with additions for major provisions covered in other texts. The Asian (LABS, LAWASIA Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region, revised 2001) document is included in addition to the most recent international document, the Bangalore Principles of Judicial Conduct, (JGBP, revised 2002) of the Judicial Group on Strengthening Judicial Integrity. The Chinese documents included are the Constitution of 1982, as revised in 1999 (Const.), the Organizational Law of Courts of 1979, as revised in 1983 (Org.Law), the Judges Law of 1995, as revised 2002 (Judge Law), and the Code of Judicial Ethics for Judges of the PRC (PRC CJE) of 2002. Parenthesized references indicate a partial coverage.

## VI. Overview of Coverage; Comparing International and Regional Instruments on Judicial Independence with PRC Law

	UNBP	LABS	JGBP	PRC CJE	Judge Law	Org. Law	Const.
Const. or law	1	4				4	126
Improper influences	2	3(a), 38, 4	1.1	2, 4, 7, 15	1, 8(2), 45	4	126
Jurisdiction	3	3(b) 33-4					
No revision	4						
Established, ordinary	5	(2)					
Fair trial/impartial	6	10	2.1	1, 4, 8-12	7(2)	5	
Resources	7	31-2, 41-2					
Freedom - expression	8	8					
Freedom - association	9	8, 9	4.13	41-43 <sup>466</sup>			
Qualifications	10	11-12	6	34-7	1, 7(5), 9		
No Discrimination	10	13					
Conditions of Service	11	31, 40			8, 36-8, 42		
Tenure	12	18-21			8(3), 11-2		
Objective promotion	13	17			22-5		
Case assignment	14	35					
Professional secrecy	15						
Immunity (civil)	16	32, (22)			(4), 32-4 <sup>467</sup>		
Discipline - fair hearing	17	26, 29-30			44, 47		
Suspension - unfit, etc	18	22			8(3), 13, 40		
Discipline - est. procedures	19	27			41		
Indep. review of discipl.	20	(36)					
Disqualification/Recusal			2.5	3	16	16	
Efficiency		(37)	6.5	19-22			
Internal indep. (hierarchy)	(4)	6	4	13	(8(2))		
Public Confidence		7	1.3, 2.2, 3, 4	1, 11, 31			
No conflicting assignments		(7)	4, 6.7	25, 38-46	15, 17		
Fair reflection of society					(51)		
Judicial Councils		15-16, 36			(48-9)		
Intl. human rights law		(10)	6.4				
Transparency			4.2, (1.5)	6	7(7)		

<sup>466</sup> Inversely, article 41 specifies that judges may not join organizations of ‘evil cults’ and article 43 places profit-making organizations and organizations exploiting the influence of the judge off limits.

<sup>467</sup> According to articles 32–35 judges are responsible through an internal system of punishments as well as criminal responsibility.



The Basic Principles and the Bangalore Principles represent the international standards, with the former correlating to legislation on judicial independence and the latter to a code of ethics. The Beijing Statement is the expression of consensus by Asian supreme court judges, including one from China. The document corresponds fairly well with the UN Basic Principles. Additionally the Beijing Statement emphasizes criteria such as internal independence and Public Confidence in the independence. The PRC Code of Judicial Ethics clearly shares the main concerns of the Bangalore Principles even though a marked shortcoming is the failure of the Chinese Code to stress international human rights law as important for the judiciary. The legislative coverage in China is however less conforming. The Judges Law, being the most relevant document, show lacunae, some of which the Code has mended however. In particular the Chinese judiciary, as far as these documents indicate, falls short in terms sufficient constitutional guarantees for individual independence as well as clarity on independence in general, and also lack of authority to determine its own jurisdiction. Moreover, the limitation that only judicial bodies can make revisions is not provided for and the criteria of regular and established courts are also not mentioned in the Judges Law. The Chinese texts also lack details about the resources for the judiciary, freedom of expression, discrimination in the appointment of judges, independent case assignment, and professional secrecy.

In addition to what the Basic Principles cover, the Judges Law thoroughly addresses conflicting assignments for judges as does the Code of Ethics. The Chinese documents also cover transparency, a point raised in the Bangalore Principles but which does not appear in the Basic Principles, or the Beijing Statement. Judicial councils appear to be a global principal of judicial reform, which are also dealt with in the Beijing Statement.<sup>468</sup> In a conference under the auspices of the Council of Europe in 1997 for countries in Central and Eastern Europe on guarantees of the independence of the judiciary, judicial councils were strongly emphasized as a positive measure to improve independence.<sup>469</sup> Judicial councils have also been recommended by the UN Special Rapporteur

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<sup>468</sup> For instance, Italy, France, Spain and Portugal have judicial councils, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, 2002, p. 99, see also pp. 104 *et seq*; when the English system of Lord Chancellor soon will be dismantled, the power to appoint will instead be granted to a judicial council, *Reshuffle Ends Job of Lord Chancellor*, GUARDIAN WEEKLY, 19–25 June, 2003; Latin America reportedly only had a few such councils (*consejos de judicatura/magistratura*) in the 1980s but by the late 1990s there were twelve, Mark UNGAR, 2002, p. 169; see also Pilar DOMINGO, 1999, p. 167.

<sup>469</sup> “High Councils of Judges”, articles 6–8, Themis Plan no. 3: Guarantees of the Independence of the Judiciary in a state governed by the rule of law, Council of Europe Legal Co-operation with the countries of Central and Eastern Europe, Warsaw and Slok, 23–26 June 1997.

as a way to counter corruption through obliging judges to declare their resources to such a Council. Judicial councils can be used for various purposes including ensuring neutral selection processes, monitoring, and disciplining of judges.<sup>470</sup> Provided that such councils by their composition and mandate can avoid promoting the self-interests of the judiciary, they could be a positive addition toward guaranteeing judicial independence. China has with the Code of Judicial Ethics for Judges introduced a requirement for judges to declare personal assets to their respective courts, which could be strengthened by having an external and independent oversight body.<sup>471</sup> A major drawback however is that the documents lack commitment to international human rights laws that support the judiciary and its independence.

In the actual functioning of the Chinese judiciary, numerous restraining mechanisms are in place. The Party, the people's congresses and governments, and the procuratorate at the various levels have various forms and degrees of control on the judiciary. The people's congresses have also in some locations initiated 'individual case supervision', extending control beyond overall aspects of the courts. The bureaucratic styles of management, various forms of supervision by higher courts, adjudicative committees as well as the low level of education of the judges negatively affect the independence and impartiality of the courts and the judges.

Scrutiny of judicial independence in China by the UN Human Rights Committee is enabled through ratification of the International Covenant on Civil and Political Rights. It is likely that a series of the features of the present system will face criticism. Based on situations in other countries that have been criticized by the Committee, elaborated above in Chapter II, China would reasonably be vulnerable for parallel critique related to judicial independence due to: the concentration of broad executive powers,<sup>472</sup> the clear subordination of the judiciary to the parliament,<sup>473</sup> government control over appointment and removal of judges,<sup>474</sup> the possible political influence in measures against

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<sup>470</sup> Mark UNGAR, 2002; see also 2002, pp. 15–17.

<sup>471</sup> See also on the implementation of these measures, where family members of judges are also included in the scheme, *Finances of Beijing Judges Scrutinised in Anti-Graft Fight*, SOUTH CHINA MORNING POST, 5 March 2004.

<sup>472</sup> Morocco, CCPR/C/79/Add.44, para. 16; in *Des Fours Walderode and Kammerlander v. Czech Republic*, Communication No. 747/1997, the inclusion of a document from the prime minister commenting on the outcome of a type of case in the case dossier was however not enough to show dependency or partiality.

<sup>473</sup> As expressed by a member (Mr. Pikis, the Country Rapporteur) of the UN Committee against Torture, questioning the independence of the judiciary in Cuba during the scrutiny of its State Report because the Constitution (article 122) subordinated the judiciary to the country's legislature and executive, CAT/C/SR.309, para. 9; see similar criticism in relation to DPRK (North Korea), 2003, E/C.12/Add.95, paras. 9 and 2.

<sup>474</sup> Slovakia, CCPR/C/79/Add.79, para. 18; Sri Lanka, CCPR/CO/79/LKA, para. 16.

“incompetent rulings”,<sup>475</sup> the potential of internal influence within the judiciary,<sup>476</sup> and the dual function procuratorate with its supervisory functions over the judiciary along with the ordinary prosecuting task.<sup>477</sup>

To address some of the problems related to independence, such as for example local protectionism, restructuring of court jurisdictions are discussed and even tested. Objective impartiality, referring mainly to prior involvement in a case by a judge, is addressed in the reform scheme by the introduction of the ‘three separations’ in China where the various roles of the judges are separated. Also, in line with the long Chinese history of rules excluding biased judges (*huibi*), the impartiality of the courts is also being tackled to some extent. The Five Year Reform Platform of the Supreme People’s Court aims at many of the solvable problems within the judiciary. It leaves out however, many of the overarching issues that lie beyond the control of the judiciary that would have to be included in a comprehensive reform plan. The highly developed and modernized city-province of Shanghai in Eastern China contrasted with the far-Western province of Xinjiang shows the extremes of the spectrum of development that China must consider when planning reforms. In particular the criteria established with the newly introduced Unified Judicial Exam has proven problematic in the hinterlands.

To give a brief and general overview of the lack of formal guarantees in the Chinese system seen in light of international standards on judicial independence, I will summarize the 30-point criteria used in the first chapters.

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<sup>475</sup> Uzbekistan, CCPR/CO/71/UZB, para. 14; see also Italy on civil liability of judges, CCPR/C/79/Add.37, para. 16.

<sup>476</sup> Stanislav CHERNICHENKO and William TREAT, 1994, paras. 23 and 29 respectively.

<sup>477</sup> Ukraine, Question posed by Ms. Gaer, CAT/C/SR.488, para. 41, see also para. 20; Georgia, CCPR/C/79/Add.75, para. 17 and 30; note the *Delcourt* case of the ECtHR however, the system of *Procureur Général* with its dual role, including a supervisory function over courts, was not unduly restricting judicial independence, 17 January 1970, paras. 31 *et seq*; see also *Kulomin v. Hungary*, Communication No. 521/1992, where the prosecutor was not found sufficiently independent to prolong detention.

## VII. Overview of Formal Guarantees in the PRC Compared with International Human Rights Standards

<b>Independence</b>		
<i>Collective Independence</i>		
	Structural	(√)
	Resources	(√)
<i>Individual Independence</i>		
	Occupational	(√)
	Internal Structure	(√)
	Rights of Judges	(√)
<b>Impartiality</b>	Recusal	√
	Non-conflicting assignment	√
<b>Public Confidence</b>	Transparency	(√)
	Representativity	(√)

Parenthesized references indicate a partial coverage.

The Chinese judiciary has its most challenging restraints in the independence strand. Collectively the insulation falters in that the court does not fully determine its own jurisdiction and lacks control over the resources. On the individual level the insulation is also insufficient with restraints on the occupational situations of judges, the internal hierarchy within and between courts, and the insufficient degree of rights. These include: a pronounced lack of freedom of expression, lack of detailed regulations and procedures on discipline and suspension, absence of a judicial council, and lack of references to international human rights law that efficiently bars the interchange between international and national law.<sup>478</sup> The impartial strand is better protected with the clear and extensive rules for recusal and conflicting assignments, even though the implementation seems to fall short. The strand of public confidence is again more problematic since it is without a fully developed system of transparency and also lacks guarantees for incorporating a fair reflection of society among the judiciary, apart from the potential diversity achieved through the Judicial Exam.

The process of change is underway and formal guarantees are approaching conformity with international human rights standards, even though generally the implementation is severely lacking. Despite this a number of positive features are now in place including the newly introduced Judicial Exam, which is noteworthy because it ensures a more objective selection process for future

<sup>478</sup> On insufficient human rights understanding within the administration of justice, see e.g. Min ZHANG and Huiling JIANG, 1998, p. 262.

judges. Further, at least at the lower levels of courts, there are new policies aiming to achieve higher proportions of ethnic minority judges as well as women judges, and to increase representation of non-Party members. Again, efforts are moving in the right direction but a vastly significant opportunity for improvement remains. China falls short on some major points that are highlighted in the above chart but China does however cover some aspects related to all three strands – independence, impartiality, and public confidence.

Supervision of the courts by various actors remains an overarching issue. The ever-existing balance between control and independence of the judiciary is therefore fundamental. For reasons not least of accountability, restraints are needed and relied upon for judiciaries everywhere. The problem in China is the extent and the format of these restraints. The many, non-transparent, and unclear contact points of the Chinese judiciary with the bureaucracy boldly questions the independence. Detailed empirical studies would be required to be able to say with certainty that these forms of supervision are necessarily negative from the point of view of fair trial.<sup>479</sup> In the individual case it may be that the supervision system actually serves to ensure a fair trial more than it does not. These supervision mechanisms will however restrict the development of a more professional judiciary of greater integrity in the long run by not providing independence. To better comply with international human rights law requirements on judicial independence, China would have to consider in the short-term-minimum: increasing the transparency of the present forms of supervision, clearly establishing the procedures of the mechanisms, and limiting the number of procedures enabling supervision of the judiciary to those most efficient with the greatest remaining independence for the judiciary. Supervision should also be limited to clear cases of abuse. For instance, supervision could be modeled after the UN Human Rights Committee's mandate of a more thorough scrutiny in cases that are clearly arbitrary or amount to a denial of justice, although only after the regular remedies of appeals have been exhausted.

The reforms implemented, ongoing, and initiated along with those foreseen, will likely take China further towards an independent judiciary but is not sufficient. The horizontal and vertical considerations discussed are crucial to resolve. The vertical element follows logically from the sheer size of the country and the differences in development between the regions. The horizontal element with the contradiction between increased legitimacy and reduced power for the Communist Party is however more accentuated for a one-party state like China. The reasons for non-compliance with international human rights standards on judicial independence in contemporary China should not be sought in the culture or history but in the more recent political developments. Even though the recent commitment to human rights in the Chinese Constitution fails to link the guarantee to international human rights

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<sup>479</sup> See e.g. Randall PEERENBOOM, 2004 (a).

law in that it only stipulates to respect and protect human rights, the change will hopefully contribute to narrowing the gap between international human rights law requirements for judicial independence and that of the current law and practice in China.

### *General Conclusions*

Our very distance from other societies may yield helpful perspectives not readily available to insiders, but the vantage point also imposes upon us an obligation to be vigilant as to the ways in which the constructs that we have developed for ordering the world reflect assumptions and values that may not be shared by others.<sup>1</sup>

– *William P. Alford*

Conventional assessments of the Chinese judiciary made by Chinese as well as non-Chinese, by and large conclude that the system has historically been and is vastly different from legal systems in Western countries. Contributing to this oversimplification is the typical practice of selecting aspects for comparison that intend only to highlight differences rather than explore common ground. These differences are coupled with a superficial perception of the concept of judicial independence as unrestrained and of exclusive Western origin. This easily provides a depiction of the Chinese judiciary as inscrutable, or possibly even malformed. This study has elaborated on how the phenomenon has arisen, how it has affected and continues to affect the discussion on the judiciary in contemporary China, and even how this potentially affects the reform process in China.

Chinese scholars and practitioners seem largely to agree that the judiciary in China is not independent. The argumentation of scholars and practitioners for and on judicial reform and judicial independence is essential as an engine for further development. In these discussions however, the arguments made in favor of reform tend to take its reference and starting point in an idealized view on judicial independence in foreign legal systems and to treat judicial independence and separation of powers as non-existent in the Chinese history. Describing the development of judicial independence, as is often also the case in many Western countries, as originating in England and developed by Montesquieu and others, Chinese scholars and practitioners conclude that China has not shared the same development.

According to Clarke an idealized legal system has both theoretical and practical drawbacks; it

dictates the questions one asks, what one considers to be relevant data, and how one interprets the phenomenon observed. In the naive version, China's legal system is simply compared to

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<sup>1</sup> William P. ALFORD, 1986, pp. 946–947; see also William P. ALFORD, 2000, p. 56, cautioning approaching China with Western models in mind.

idealized portrayals of modern Western legal institutions, or even more narrowly to an idealized account of the US system and found wanting.<sup>2</sup>

In turn, the way legal development in China is perceived is equally important. Judicial independence can be perceived in three broad ways: (1) judicial independence is an alien concept; (2) it is desirable even if not indigenous;<sup>3</sup> and (3) its historical development is very similar but it differs mainly in the labeling or the perspective. Alternatives 1 and 2 share the same view: judicial independence has evolved in one society but not the other while the third alternative assumes similar if not parallel developments in societies. The latter option appears to be the least biased position as well as the most accurate given the European non-exclusivity of developing judicial independence.<sup>4</sup>

Most observers would agree that the contemporary Chinese judiciary is far from flawless including a multitude of various restraints on the judiciary that are far beyond what can be deemed reasonable. Future efforts to reform and develop the Chinese judiciary and the entire legal system will be greatly enhanced by re-discovering China's history, not necessarily the institutions of the imperial era, but with the crucial realization that judicial independence is a universal phenomenon that has existed also in Chinese history.

Whether and how judicial reform in the PRC will help ensure justice and protection of human rights may depend to a large extent on when and how judicial independence will be re-invented, re-interpreted and made reality in China.<sup>5</sup>

As modern research on China has proven, law existed early in the history of China. Criminal law was moreover not the sole legislated aspect but there were both civil as well as administrative laws. Law was a fundament to society while morality served as an additional layer rather than instead of law. With the number of schemes designed to assure independent and fair adjudication that existed throughout Chinese history such as the multitude of appeals processes and levels, the separated ministries and inspectors with overlapping mandates dealing with specialized tasks and mutual supervisions, professional judges independent from local interests, the scholar-bureaucrat system, and a rotational system for posting of judges,<sup>6</sup> the system was quite advanced. The argument is not that the present situation of the judiciary in China is

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<sup>2</sup> Donald C. CLARKE, 1999, p. 51.

<sup>3</sup> A similar argument as this is used on rule of law in Albert H. Y. CHEN, 2000, p. 1 (as printed).

<sup>4</sup> See e.g. on this point P. G. MONATERI, 2000, p. 498.

<sup>5</sup> Xiaoqun XU, 1997, p. 104.

<sup>6</sup> Relying on a listing made by William P. ALFORD, 1984, p. 1193.



satisfactory but that the development of the concept of judicial independence also occurred in China. Only one article of the several dozens published by Chinese scholars and practitioners in recent years has highlighted the universal roots of the concept of judicial independence.<sup>7</sup>

The historical developments of courts in the Western world and in China are remarkably similar, both in terms of institutional framework and procedural guarantees. The faulty diametrically opposed positions of China and the Western world is an obstacle rather than serving the critical debate on issues such as judicial independence in China. Should this dichotomy be reduced, it would have a positive impact on a number of areas pertinent to the judiciary, such as the discussions on legal reform and the legislative process, but also in areas like international development cooperation in the ‘legal sector’. Recognizing these oversimplifications is the first step towards a sound strategy for reform of the Chinese judiciary. Commentators in both China and the Western world tend to “elevat[e] particularities”<sup>8</sup> at the expense of similarity, reaching levels that cause faulty dichotomies. Chinese scholars and practitioners would better serve the reform process by also referring to and drawing on Chinese experiences in the past and staying clear of stereotypical understandings of China and the Western world. China’s own history must be taken into account and not solely an idealized Western history. Only then can the understanding across the cultures increase, and only then can there be truly progressive reform of the judiciary in China.

The symbols of justice presented at the outset experience the same perceptions as the legal systems. At first glance, Themis, the goddess of justice in ancient Greek mythology, seems to have little or nothing in common with the apparently beast-like symbol, Xiezhi that has represented justice in China since ancient times. Themis, human and graceful, carried the scales and sword as her insignia to balance right from wrong and to defend what is just. This image may appear to stand in stark contrast to Xiezhi – the gruesome beast that gores the guilty with his one horn. Though ancient, these symbols easily reflect the opposing perceptions of justice between the Western world and China today – Themis conjures balance and fairness, while China’s symbol appears brutish and unjust.

However, to borrow the language of Barbara Stafford:

We can begin to understand these man-made creations [society and history] by inventively seeking correspondences between

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<sup>7</sup> Dehai LI, 2000, p. 34.

<sup>8</sup> Göran BEXELL, 2002, p. 13; see also William P. ALFORD, 2000, pp. 52–53, who argues that in the human rights debate, the oppressive side is in focus while many laws in China have had the opposite effect.

early myths, religious rites, political institutions, pictographic languages and those of our own day.<sup>9</sup>

*Xiezhi* (also called *Qilin* or in Japanese, *Kirin*) was a unicorn,<sup>10</sup> seen as “a sage animal . . . a most efficient assistant in judicial proceedings”.<sup>11</sup> From the Han Dynasty, some 2,000 years ago, legal officials wore the crests of *Xiezhi* on their robes and hats.<sup>12</sup> *Xiezhi* has remained the symbol of fairness and justice not only on imperial-time robes but also in contemporary court ornament. *Xiezhi* is even immortalized as a part of the contemporary Chinese language character for law, *fa* (法).<sup>13</sup>

In the same way as two parties to a trial, *Themis* and *Xiezhi* are polarized into binary stations. *Xiezhi* and China have come to stand for the collective, self-sacrificing, consensual society based on moral principles. At the same time *Themis* represents Western society’s individualistic, egocentric, and disputing law-based system. Through these perspectives China and the West are constructed as counter-polar, mutually reinforcing the faulty stereotypes.

Contrary to this dichotomy, on the symbolic level, the unicorn was part of the old Western cultural tradition. The horn of the unicorn was believed to have the power to purify in Europe as it was in Asia. Already Aristotle is ascribed to have believed in the unicorn and references to the unicorn are also found in the Old Testament of the Bible.<sup>14</sup> As a symbol the unicorn represented what was not controllable, even by the king of the land.<sup>15</sup> Many other features of the

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<sup>9</sup> Barbara Maria STAFFORD, 2001, p. 9; in an authoritative book on unicorns it is stated that “. . . there is no more vivid example of our inveterate tendency to see only what we expect to see, to think in terms of labels and phrases, to ignore the unfamiliar, to let the present be ruled by the past.”, Odell SHEPARD, 1930, p. 257.

<sup>10</sup> *monoceros orientalis*, “It has a stag’s body, the head of a dragon, a long tufted tail and horse’s hooves, but its form may vary.”, HALL’S ILLUSTRATED DICTIONARY OF SYMBOLS IN EASTERN AND WESTERN ART, 1994, p. 51.

<sup>11</sup> Zhiping LIANG, 1997, p. 125; see also Derek BODDE and Clarence MORRIS, 1967, introductory pages and pp. 559–560.

<sup>12</sup> Zhiping LIANG, 1997, p. 125, and note 11; Tony ALLEN and Charles PHILLIPS, 1998; in early dynasties the symbolism was depicted as motives behind judges and later on the symbol was embroidered onto official robes and hats of judges and censors.

<sup>13</sup> Huanyue GAO, 1995, p. 97.

<sup>14</sup> Odell SHEPARD, 1930, pp. 34, 41, Pentateuch, Job, Isaiah, and Psalms, and in the Book of Daniel; even several of the early Christian theologians wrote about the unicorn, representing their solitude, p. 80; Alexander the Great is referred to as the unicorn, p. 78; a 3<sup>rd</sup> C.E. book entitled *Physiologus* (*Bestiary*) dealt in particular with the unicorn, p. 46.

<sup>15</sup> *Id.*, pp. 47–48, 69.

unicorn were also shared with those of Themis; the Virgin Mary was depicted by artists at times even blurred with Themis and the concept of justice.<sup>16</sup>

To fairly assess the independence of the judiciary in China from the viewpoint of international human rights law requires reaching beyond not only the oversimplified dichotomy of China and the Western world but also the rhetoric of a totally unrestrained independence of the judiciary. As the treatment of judicial independence by international human rights law shows, independence is restrained in various ways for the sake of accountability and legitimacy. Independence is thus not an aim in itself but a means to the end of upholding human rights. The rhetoric of judicial independence must be translated into specific criteria and yardsticks to make it operational. International human rights law takes the concept of judicial independence beyond rhetoric of an absolute independence and constitutes a reasonable and universally legitimate ground on which to assess judicial independence.

Even though the Chinese legal history attests to the development of similar features as those in the Western world considered pertinent to judicial independence, contemporary China has not seen the establishment of a sufficiently independent judiciary. One fundamental underlying reason for the present insufficient independence of the Chinese judiciary was noted in the introduction: Political competition within a state may require an independent judiciary. This may be the case when the credibility of the governing party is at risk and an independent judiciary can act as a guarantee that fundamental decisions will always remain above party politics, irrespective of which party is in majority, and thus assuring minority protection. If it can be argued that political competition improves the prospects for an independent judiciary because of the inherent risk to the incumbent's power, the present situation in China seems to fall short of ideal since in a unitary state the risk is moot.

Still, in the power struggle within the Communist Party with its various factions and individual protégé-structure, a sufficient level of contention may exist for further development of judicial independence even without a radical change in the political system. Professor deBary argues that the factions within the Communist Party actually can be equated to a multi-party system, and that the various competing schools of thought in the Chinese history may have

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<sup>16</sup> Dennis E. CURTIS and Judith RESNIK, 1987, p. 1745; the Egyptian mother of God, Isis, also lent some characteristics to the Virgin Mary, including the symbol of the unicorn, Odell SHEPARD, 1930, p. 221; the horns, at least some of them, were actually tusks from narwhale that were commonly caught around Iceland, p. 259; the Swedish scientist and explorer, Carl Peter Thunberg, managed to finance his continued biological research in Japan by selling such a unicorn horn in Nagasaki in 1775, pp. 271–272.

served the same purpose.<sup>17</sup> Whether contemporary factions are sufficiently strong to enable independence of the judiciary remains to be seen.

Even though some scholars argue that it may be premature to ask for judicial independence in China today,<sup>18</sup> a continuing increase in independence is highly likely, not least to international commitments and domestic concerns about corruption and stability.<sup>19</sup> An assessment of the judicial independence in the People's Republic of China under international human rights law illustrates many shortcomings in the Chinese system but also highlights that positive reform measures are under way. Fundamentally, the issue for further reform is that of balancing legitimacy with control. Legitimacy increasingly requires a strengthened and depoliticized legal system, apart from continued economic growth and improved social conditions. This balance may prove impossible to achieve because of continuing influence by the Regime over the judiciary inevitably reduces its legitimacy.

An assessment of the present independence of China's judiciary and the potential for its development requires an impartial perspective on China, as well as on the universal concept of judicial independence. Just as Xiezhi should not be seen as the opposite of Themis, contemporary China deserves an unbiased assessment – judicial independence as required by international human rights law provides both the criteria and yardstick to make bias obsolete.

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<sup>17</sup> Wm. T deBARY, 1995, pp. 25–26, see also similar exemplifications, pp. 239, 243, 247.

<sup>18</sup> See e.g. Jianfu CHEN, 2002, p. 9.

<sup>19</sup> For elaborations on the future of the Chinese judiciary, see also Kanishka JAYASURIYA, 1999, pp. 173 *et seq.*

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