

JUDICIAL INDEPENDENCE IN THE PEOPLE'S REPUBLIC OF CHINA
AN ANALYSIS OF THE HISTORICAL AND CURRENT ROLE OF CHINESE JUDGES

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ABSTRACT

The aim of this research is to examine the criminal justice system in the People's Republic of China (PRC) to illustrate the role of judges, and to describe the current scale of judicial independence within the realm of Chinese legal culture and the current political system. The importance of this research is to collect evidence which defines the nature of policy debate on China's judicial reform project to promote greater independence.

The thesis begins with an overview of the current Chinese judicial system. Chapter One takes account of the considerable problems of the judiciary and the debate over reform which is addressed in existing literature, including the most recent policy guidelines of judicial reform announced in late 2007. According to the policy, it is clear that judicial reform is ongoing; what the Chinese Communist government requires is a mature, realistic and overarching reform program that promotes justice, ensures rule of law, and serves to engender political and social stability in China. Put simply, judicial reform towards greater independence must be compatible with the characteristics of Chinese society. Based upon such a background, the research questions and methodology are introduced in Chapter Two. This thesis focuses on two research questions:

- Question One - How can 'Chinese characteristics' be understood in relation to judicial reform?
- Question Two - What are the current factors that have limited judicial independence?

Three methods were employed to obtain data relevant to my research. Firstly, I employed content analysis of secondary data, whereby I reviewed Chinese constitutional and criminal legal codes, and literature on Chinese judicial culture, independence and reform. Secondly, I generated primary empirical data, and employed a structured interview with 60 judges in

order to understand judges' feelings regarding judicial independence. Thirdly, I undertook participant observation, in which I acted as a lawyer's assistant involved in a criminal case, in which a suspect had pleaded not guilty. During this period, I conducted unstructured interviews with five lawyers and one county-level Chief-Prosecutor.

Chapter Three aims to answer the first research question by illustrating 'Chinese characteristics' relevant to judicial reform. On considering Chinese characteristics, according to the most recent CPC guideline policy, judicial reform invokes relationships with legal culture, contemporary political and economic circumstances. Therefore, an analysis of relevant literature is made in order to understand Confucian legal traditions, Marxist and Maoist legal ideology, current political principles and economic conditions. At the end of this chapter, a brief of analysis of the significant relationship between rule of law and economic growth is made in order to explain why China needs greater judicial independence.

Chapter Four, Five, Six and Seven form the core of the dissertation, and answer the second research question, intended to provide an overview of the extent of existing judicial independence in China, and highlight the major factors that could influence judges' decisions. I have analysed judges' responses regarding the current constitutional and institutional design, and on the recommendation of some judges, selected some additional evidence to highlight influences over the judiciary from other government bodies. In Chapter Four, findings from the interviews with judges concerning their occupational environment are analysed, to give a picture of the judge's position in China today. Chapter Five explores the Congress' lawful power of supervising judicial decisions on individual cases. This presents one of the core Socialist constitutional configurations, whereby all state organs are answerable to the Congress. Following this, findings are given from the participant observation of a criminal trial in which a suspect pleaded not guilty. These findings are analysed in Chapter Six in

order to provide a detailed examination of the links between the executive and the judicial branches. Chapter Seven analyses the relationship between the Communist Party and judges, which is the most sensitive, yet unavoidable topic regarding judicial reform in China.

Chapter Eight brings the findings of the two research questions together to engage in a comprehensive debate of policy and draft possible judicial reform suggestions which may promote judicial independence within the parameters of established ‘Chinese Characteristics’.

GLOSSARY

BPC	Basic People's Court	基层人民法院
CAC	Court Adjudicative Committee	审判委员会
CDI	Commission for Discipline Inspection	纪检委
CDIG	Court's Discipline and Investigation Group	法院纪检组
CECC	Congressional – Executive Commission on China	美国国会对华委员会
CPC	Communist Party of China	中国共产党
CPLA	Committee of Political and Legislative Affairs	政法委
CPLG	Court's Party Leadership Group	法院党组
HPC	High People's Court	高级人民法院
ICS	Individual Case Supervision	个案监督
IES	Imperial Examination System	科举考试
IJA	Committee of Internal and Judicial Affairs of Congress	人大内务司法委员会
IPC	Intermediate People's Court	中级人民法院
NJE	National Judicial Examination	全国统一司法考试
NPC	National People's Congress	全国人民代表大会
PRC	People's Republic of China	中华人民共和国
PP	People's Procuratorate	人民检察院
RMB	Renminbi (Chinese Currency)	人民币
SPC	Supreme People's Court	最高人民法院
SPP	Supreme People's Procuratorate	最高人民检察院
Stantee	Standing Committee of a local CPC	地方党委常委

TITLE OF ACTS - ENGLISH LANGUAGE TRANSLATION

English	中文
The Constitution of the PRC (1982)	宪法
Judges Act (1995)	法官法
Criminal Code (1979)	刑法
Courts Organization Act (1979)	法院组织法
Criminal Justice (Procedure) Act (1979)	刑事诉讼法
Constitution of the CPC (1982)	党章
ICS Rule for Standing Committees of All Levels of Congress in Jiangsu Province (1999)	江苏省各级人民代表大会常务委员会对司法机关个案监督的规定
Arrest and Custody Act (1979)	中华人民共和国逮捕拘留条例
Regulation of Pre-trial (1979)	公安部预审规则
PP Criminal Lawsuit Rule (1999)	人民检察院刑事诉讼规则
Court Criminal Lawsuit Rule (1994)	最高人民法院关于审理刑事案件程序的具体规定
CPC Temporary Legislation Procedure Act (1999)	中国共产党党内法规制定程序暂行条例

Party and State Higher Officials Selection Act (1995)	党政领导干部选拔任用工作条例
Judges Act (2001)	法官法修正案
Criminal Justice (Procedure) Act (1996)	刑事诉讼法修正案
Courts Organization Act (2006)	法院组织法修正案
Presiding Judges Provisional Election Rule (2000)	人民法院审判长选任办法（试行）
Legislation Act (2006)	立法法
Government Officials Act (2006)	公务员法
Supervision Act (2006)	监督法
Lawyers Act (2008)	律师法
The Rules of the CAC of Lijiang IPC (2004)	丽江市中级人民法院审判委员会工作规则
Lijiang IPC CPLG Rule (2004)	丽江市中级人民法院党组议事规则
Temporary CPC Internal Party Supervision Act (2004)	中国共产党党内监督条例（试行）
Party Discipline Punishment Act (2004)	中国共产党纪律处分条例
Election Act (2006)	选举法

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The PP vs. Mr ‘X’ (2007)

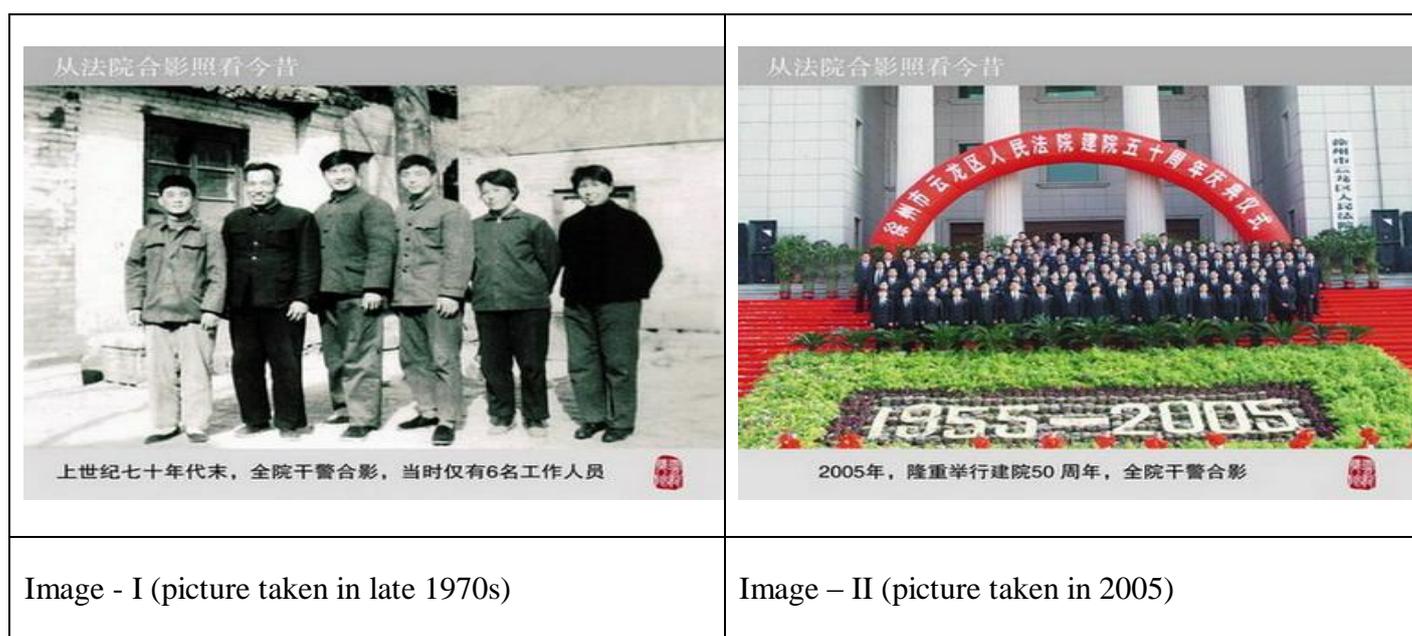
CHAPTER ONE

Introduction to the thesis, literature review and research questions

1.1 - Introduction of the thesis

Judicial reform in the People's Republic of China (PRC) has been a considerable issue since the late 1970s. When economic reform began in 1978, the legal system was effectively at “ground zero”. The judiciary was destroyed during the Cultural Revolution. The first task in rebuilding the legal system was to devise a system of rules, establish procedures to govern the operation of society, and to provide reassurance and comfort after the anarchy and lawlessness of the previous decade of the Cultural Revolution. The judiciary was officially established in 1978 and based upon a variant of the classic Marxist revolutionary constitution that was first introduced in 1954.

Image 1.1.1 – Changes of Yunlong People's Court¹



Three decades have past, and the above two pictures (see Image 1.1.1) illustrate the obvious changes of the judiciary in China. Image I and II were taken at the same local court but in two very different times. In 1978 (see image I), only six people were working at the court, they together performed the role of judges, clerks and court police. The court building was based

¹ Sources: Justice Li H. , 2008

in an old temple. At that time, the judiciary only dealt with criminal and simple civil matters; at Yunlong Court during the late 1970s for example, each judge dealt with around 10 cases each year. In fact, at that time there were only two areas of law (criminal and family) available for judges to enforce. In 2005 (see image II), over 100 people work at the same court, with each judge dealing with over 300 cases each year. The court now deals with many different lawsuit areas including complex civil, commercial, administrative, criminal and executive cases. The new court building is located in zone three of the city occupying over 10,000 square metres, and boasts modern equipment and facilities. The publisher of the above photos, Justice Li Hong (2008), stated that:

“...as a person who saw the changes over the past three decades, for the hardships that were spent in every minute of every hour of every day, [I] feel incredible glory and pride ... it was not easy, but we made it.”

The changes made at Yunlong People's Court can be seen as an example of judicial reform over the past three decades. However, beyond such significant developments, it is perhaps fair to suggest that in 1978 reformers did not regard judicial development to be as important as economic growth. Compared with the rapid change associated with the economic boom in China, it seems as though judicial reform has progressed at a relatively slow pace. Uneven development of different aspects of society is a common trait that features in both domestic and international commentary of China. In fact, there are two polar opposite views of China today; one is of a budding economic superpower, with over one trillion dollars of FECs (foreign exchange certificates) and hundreds of modern cities. The other perspective focuses on increasing social problems, such as administrative corruption, a poor industry safety record, and a growing gap between urban rich and rural poor. These two perspectives are in some ways reflected in the relationship between the disparate stages of economic and social development. As a result of this, a new dominant ideology serving as the guiding direction of

social development - known as the 'Construction of Socialist Harmonious Society' (Social Harmony) - has been introduced by the fourth generation of the leadership of the Communist Party of China (CPC).

The concept of building social harmony, according to President Hu Jintao (2006) is to provide for, "The needs of the development of democracy, the rule of law, justice, sincerity, amity and vitality as well as a better relationship between the people and the government and between man and nature." Following Hu's statement, the Supreme People's Court (SPC) declared that it would, "continue following the guidance of both persisting in fair judicial process and providing service for the people, improving the current judicial efficiency and effectiveness, in order to safeguard harmonious socialist society" (Chief Justice Xiao, 2007a). In order to achieve this, it seems that the judiciary - as the arbitration body, applying law on individuals - must, "satisfy most men's strong sense of justice, at least with regard to their own interests" (Thompson, 1985, p. 263). For trials to be regarded as fair it is important that judges are regarded as independent and not subservient to political or other interests. Hence, judicial independence appears to be a keystone for the court to safeguard social harmony. In addition, as one of the largest economies in the world, China is already part of the global village, and plays a highly significant role. In this global era and for many reasons - future economic development, good governance, human investment and political stability - China must apply a greater level of judicial independence if it is to ensure rule of law, which is an established pre-requisite for international economic cooperation.

Research on how to increase judicial independence is not a new subject for debate in China, but has always faced significant obstacles. When comparing judicial reform with a view to greater independence and economic reform towards a market economy, an obvious difference becomes apparent. Whilst most people have not and will not stand in the way of reform

intended to stimulate economic growth, many question the necessity of reform which pushes for greater judicial independence.

The aim of judicial reform was given by Former President Jiang, Zemin (2002) as, “establishing the institutional support for the People’s Courts and People’s Procuratorates to *independently* exercise their powers ... emphasizing the *supervision* from the CPC and the National People’s Congress (NPC) over the judiciary.” It seems there is an obvious contradiction within this definition of judicial reform, which centres on the question of how the judiciary can exercise its power independently under supervision from other public bodies. As a result, two opposing views have been established whereby some legal scholars espouse the importance of judicial independence, and others favour supervision of the judiciary. These two opposite views have come to influence judicial reform in China, and as a result, judicial reform has obtained ideas, suggestions and support from two totally different directions. Professor Cai Dinjian (2005) observed the dualistic nature of reform in China,

“How we apply justice into society is an eternal topic. The answer to this in a Western nation is judicial independence; in China, it is judicial supervision. Here we share two completely different cultures...the direction of judicial reform in China is driven by both western and traditional views.”

The effect of judicial reform does not appear to have had the same kind of impact as economic reform. Perhaps this is because the debate between the two views is still ongoing. Perhaps there will *never* be an agreement. However, though judicial reform in China does not enjoy a widespread consensus of which direction to take, a significant question must be asked - *what is the next stage?*

This introductory chapter aims to provide background to the research and introduce the research questions. Firstly, it gives an overview of the current judicial system. Secondly, the chapter reviews the problems of judicial independence and the difficulties of reform that have

already been highlighted by judges and scholars in existing literature. Nine judges' articles from official court websites from 2000 to 2007 are selected in order to chronologically understand a basic evolutionary history of judges' contemporary concerns. In addition, popular views regarding judicial reform towards greater independence addressed by Chinese legal scholars have been selected for analysis. Finally, the chapter looks at the most recent guideline policy made by the Communist Party regarding judicial reform. Based upon such a backdrop, two research questions are established.

1.2 - The current judicial system in the PRC

The current Chinese judicial system was created by *the Constitution of the PRC (1982)*. The framework of the Constitution is based upon Marxist ideology of state centralisation. However, class struggle is no longer considered an important factor in China; it has been replaced by the strive for economic development and modernisation. The term ‘rule of law’ was added into the constitution as a result of an amendment in 1999. The fundamental functions and framework of the judiciary can be understood from Articles 123 to 128 of the constitution (see table 1.2.1).

Table 1.2.1 - Articles relating to the judiciary of *the Constitution of the PRC (1982)*

Article 123. The people's courts in the People's Republic of China are the judicial organs of the state.

Article 124. The People's Republic of China establishes the Supreme People's Court and the local people's courts at different levels, military courts and other special people's courts. The term of office of the President of the Supreme People's Court is the same as that of the National People's Congress; he shall serve no more than two consecutive terms. The organization of people's courts is prescribed by law.

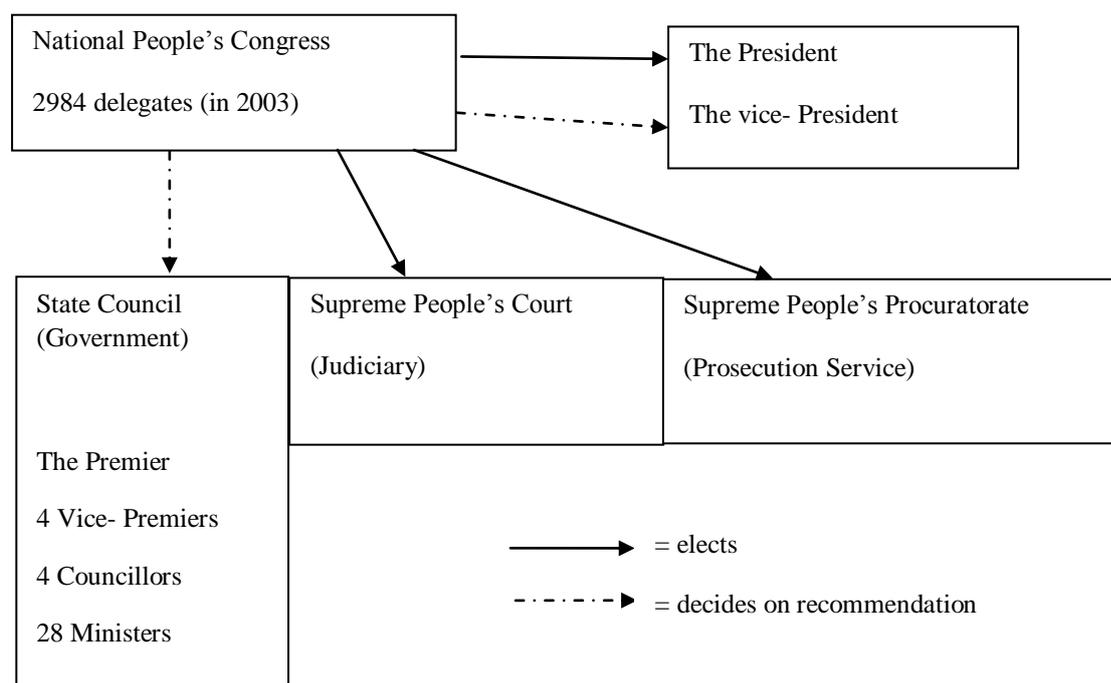
Article 125. All cases handled by the people's courts, except for those involving special circumstances as specified by law, shall be heard in public. The accused has the right of defence.

Article 126. The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.

Article 127. The Supreme People's Court is the highest judicial organ. The Supreme People's Court supervises the administration of justice by the local people's courts at different levels and by the special people's courts; people's courts at higher levels supervise the administration of justice by those at lower levels.

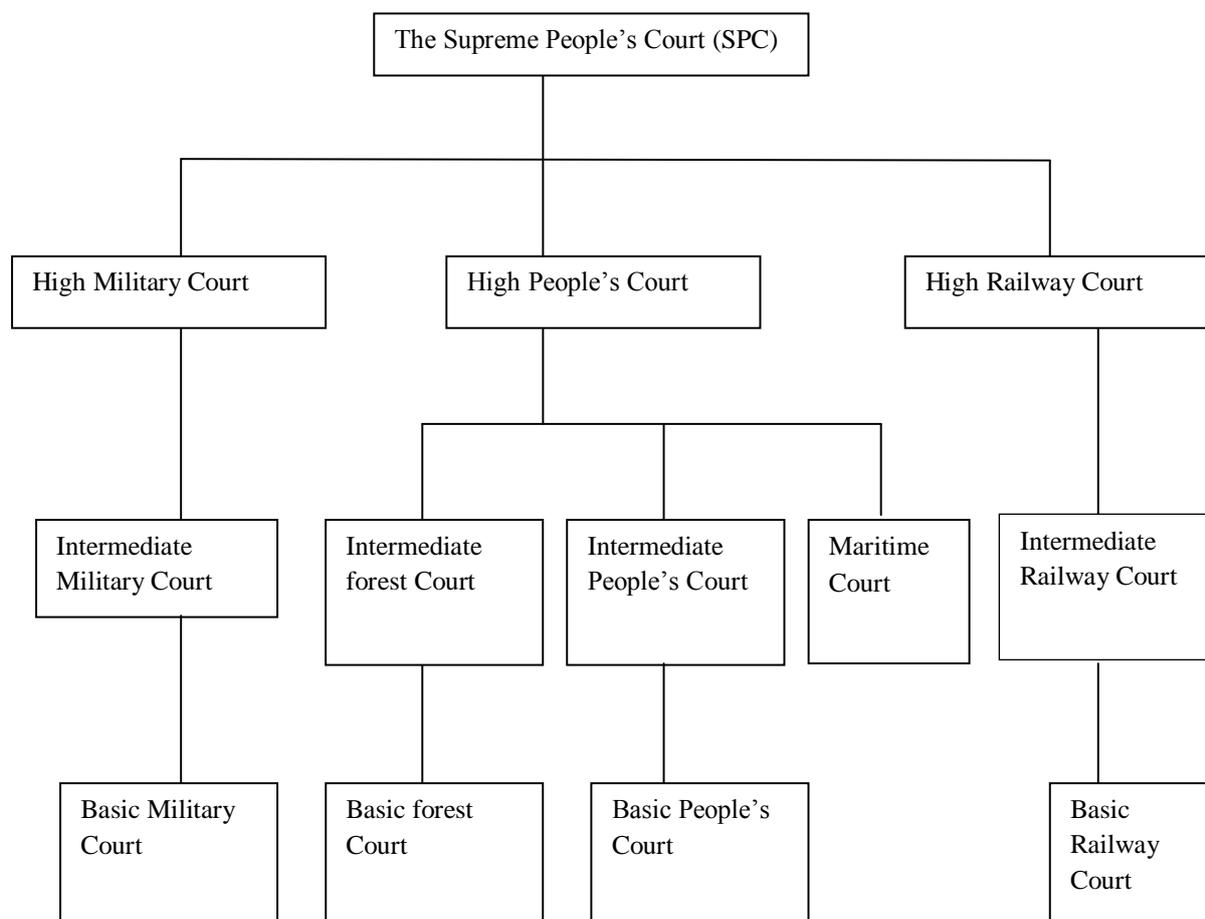
Article 128. The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local people's courts at different levels are responsible to the organs of state power which created them.

As the above articles describe, the functions of the judiciary – with an established appeal system - exercise state judicial power, which is generally considered to be the power of interpreting law, and passing verdicts and sentences on individual cases. Articles 126 and 128 are highlighted because they reflect the most contradictory points. Article 126 states that judicial power shall be exercised independently but conversely, Article 128 states that the judiciary is responsible to Congress. There is not an official interpretation of how to deal with such a contradiction in any particular instance. However, Article 128 reflects one of the key principles of the Chinese constitution. All branches of state power are entwined with the NPC. Three different state organs are established by the NPC through election: the Government, the judiciary and the state prosecution service. Officials of all three branches are elected by the NPC and answer to the NPC (see Fig 1.2.1). Hence, it seems that the constitutional statement of Article 126 means that the Courts are independent from other state organs – namely, the Government and state prosecution service, but not the Congress.

Fig 1.2.1 – Constitutional map of the PRC (1982)²

The People's Courts system include the Supreme People's Court and subordinate levels of courts, which consist of the high courts, intermediate courts, local courts and special courts (see Fig 1.2.2). Each court has one president and a number of vice-presidents. A president of a court is elected by the corresponding level of congress. Vice-presidents and judges are subject to appointment by the corresponding level of the standing committee of congress.

² Sources: Saich, 2004, p. 128

Fig 1.2.2 – The structure of the court system³

China is divided into four regional levels – national, provincial, metropolis (city-level) and county level⁴. The judicial hierarchy is established based upon such a division. Following is a list of different types of courts and their role in mainland China.

³ Sources: Zhu, 2003, p. 54

⁴ Four metropolises - Beijing, Tianjin, Shanghai and Chongqing – were considered by law as provincial level regions. Special Administration Regions (i.e. Hong Kong and Macao) are classed as provincial level region but with very different judicial systems. Taiwan Province also maintains a different judicial system from other provinces.

- *Special Courts*

Special Courts include Military Courts, Railway Courts, Maritime Courts and Forest courts. A military court's duties are to deal with criminal cases involving military servicemen. A railway court is responsible for criminal or civil cases relating to or occurring on railway transportation. Maritime courts are mainly located in the East coast provinces and are responsible for cases relating to customs and sea transportation. Forest courts' duties normally involve criminal cases where suspects are charged with damaging forestry. The highest judicial authority for all special courts cases is the SPC.

- *Basic People's Court (BPC)*

There are approximately 2860 of these courts in China. They are the lowest level of People's Court found in all county-level regions, taking responsibility for civil, criminal and administration malpractice cases. For criminal cases, the maximum sentence that can be passed by a BPC is 15 years.

- *Intermediate People's Court (IPC)*

There are around 340 of these courts. Each city-level region has an IPC, and in provincial level cities there are normally two or more IPCs. As the criminal justice system allows for only one level of appeal, many cases are dealt with at this stage. The most important high-profile criminal cases start at this level. The IPCs have the power to sentence individuals to death.

- *High People's Court (HPC)*

There are 34 provinces in China, and each provincial region has one HPC⁵. HPCs deal with appeals from IPCs, forest courts and maritime courts. They are the first instance for dealing with civil and criminal cases that are considered to be the most significant and highest profile cases in the province. A HPC is also responsible for supervising all courts in the province and formulating case guidance at a provincial level.

- *The Supreme People's Court (SPC)*

As the highest court in China, the Supreme People's Court also takes responsibility for appeals from the provincial High People's Courts (except Hong Kong, Macao and Taiwan provinces). Additionally, the SPC is responsible for making judicial policies or case guidance; supervising all courts in China (except courts located in Hong Kong, Macao and Taiwan province). The newest amendment of the *Court Organisation Act (2006)* gave additional power to the SPC to confirm all capital punishment cases, which means that suspects found guilty and sentenced to capital punishment will automatically appeal to the SPC for confirmation trial.

Each court establishes three types of tribunals. According to the *Court Organisation Act (1979)* and the *Criminal Justice (Procedural) Act (1996)*, the organisation of trials differs between three different structures as follows;

- *Single Judge Tribunal*

This structure is normally used in simple civil matters, in which one judge presides over the cases.

⁵ The high courts in Hong Kong, Macao and Taiwan are termed differently and act as the highest judicial authorities in their respective regions.

- *Joint Tribunal*

Most criminal cases come through this system, which utilises a presiding judge coupled with judges or People's Jury members. The number of people involved in this system is always an odd number. In 2000, the Supreme People's Court passed the *Presiding Judges Provisional Election Rule (2000)*. Under this rule, a judge may be appointed as a presiding judge through an election process held by the Courts Adjudicative Committee. The People's Jury in China differs from that of the USA or England; a member of the People's Jury is elected by the local People's Congress. The congress generally chooses people from amongst the well-educated classes. In the joint tribunal, the jury and judges have the same level of power and frequently deliberate cases together. In fact, the term 'People's Jury' is better translated as, 'magistrates'. In a joint tribunal for most criminal cases, there is one presiding judge and two jury members.

- *Courts Adjudicative Committee (CAC)*

As a result of the *Courts Organisation Act (1979)*, the CAC has the final right of passing judgements on individual cases. The role of the CAC is to pass verdicts and sentences in important cases. The CAC is chaired by the President of the court and involves approximately 20 well-experienced judges who often hold higher-ranking positions at the court. All members of the committee enjoy an equal level of power, and decisions are voted upon. A CAC meeting will be called if a presiding judge – or any CAC members – feel that a case contains particularly important factors or elements to consider. The table below (Table 1.2.2) summarises the purpose of different types of tribunals:

Table 1.2.2 – Different types of tribunal and their role

Types of tribunal	Mainly involved in
Single Judge Tribunal	Deal with civil matters normally
Joint Tribunal (chaired by a presiding judge)	Deal with indictable offence or suspect who plead not guilty and important commercial matters
Courts Adjudicative Committee (chaired by the President of the court)	Deal with “important” cases (with civil or criminal)

The staffing requirements for these tribunals across courts in China are enormous - there are a huge number of judges throughout the country. Official statistics showed there were nearly 200,000 judges in China (Chief Justice Xiao, 2004). The image of judges in China has changed significantly over time. For a long time in China, all judicial staff wore military-style uniforms, with differing insignia to denote rank. A changes initiated in 2000 made was to permit judges to wear robes (see Image 1.2.3).

Image 1.2.3 – Changes of judicial uniform



The *Judges' Act* was adopted in 1995 and amended in 2001. As a result of the Act, the qualifications required of potential judges should incorporate the following qualities (see table 1.2.3):

Table 1.2.3 – Pre-requisite criteria for aspiring judges in the *Judges' Act* (2001)

- Support for the existing constitution
- No criminal convictions
- Over 23 years old

⁶ Sources: Justice Li H. , 2008

⁷ Sources: Wang, 2007

- Chinese citizen
- HND or Degree in Law or any subject & minimum of two years related work experience OR Masters/PhD law-related qualification with a minimum of one year related work experience
- Pass National Judicial Examination
- Be elected by the local congress

Generally, being a judge can be seen as a secure post until retirement (between the age of 55 and 60 years old). The *Judges' Act (2001)* does not specifically acknowledge this characteristic. However, the Act states that judges are liable to lose their position given certain conditions (see Table 1.2.4).

Table 1.2.4 – Conditions for dismissal of judges

- The judges loses his/her Chinese citizenship
- The judge leaves the court, or resigns
- The judge breaks the law
- The judge does not pass the Annual Qualification Test in two concurrent years

Currently, the People's Court provides for 12 levels of judge, each with an incremental increase of seniority. The President of the Supreme People's Court is called the Chief Justice.

A Vice President of the SPC is given the title *Senior Justice, 1st Class*, and there are ten more ranks in between the lowest, titled *Justice*. Judges are able to progress through 12 levels based upon their performance in their roles. Clearly, the current judicial system is complex and systematic. In fact it is hard to believe that the existing system has been built from ground zero in just 30 years.

1.3 - Scholars' and judges' views of current judicial problems and reform in China

Are there significant problems with the current judicial system? For a judiciary only 30 years old, there will naturally be issues and room for further development and improvement. In the 21st century, judicial reform has become a hotly debated issue. Considerable research relevant to judicial independence and reform has been carried out by legal scholars and judges.

Kang (2004, p. 306) stated that “[in China] it is very difficult for judges to resist outside influence”. He addressed four areas in which judges can be subjected to outside influences. Firstly, Kang pointed out that the appointment of judges was highly influenced by local authorities. Judges are normally nominated by the corresponding Communist Party Committee and appointed following an election in the corresponding legislative body. Moreover, “there are not any procedure rules relevant to the relocation of judges from one region to another, but this depends on the leaders’ decision.” (Kang, 2004, p. 307). As a result of this, argues Professor Kang, judges are likely to not only deal with cases in accordance with the law, but also to take heed of the opinions and intentions of their superior. Secondly, Kang commented that the financial resources of the judiciary are derived solely from the local government. Consequently, judges may pass decisions favouring the local government for financial benefits; especially for cases involving local nationalised industry. Thirdly, Kang indicated that the management of the court is more similar to that of a government department. Those judges who hold administration titles are the superior of those who do not. As such, court leaders often influence presiding judges as they exercise their judicial discretion. Finally, Kang highlighted that judges are short of understanding in judicial independence. “Most judges are retired army officers, obeying the command of a superior is their culture. The required qualifications to become a judge are very low” (Kang, 2004, p. 309).

The above points addressed by Kang are not new issues. Justice Xu Ping (2002) in his open article pointed out that, “in accordance with the constitution and the *Courts’ Organization Act (1979)* the courts are independent, but judges are not. Judges do not have any power to be independent.” He argued that the fundamental principle of judges’ independence is not applied under the current judicial institutional design. In practice, each court establishes a CAC, which represents the local court and enjoys independence, but this is not extended to individual judges. As such, in judges who are members of the CAC can simply influence the judicial decisions made by other judges in the same court. “As a result of this, judges are finding it very difficult to act as independent arbiters in the courtroom.” (Justice Xu, 2002). Furthermore, Justice Xu highlighted that even the CAC has very limited independence. He stated that the courts are under the influence of both legislative and executive branches. The legislative body is viewed as the highest authority of the State, as both government and courts are answerable to the congress. The congress holds the power of judicial appointment. The president, vice-presidents of a court and members of a CAC are all elected by the corresponding congress. Accordingly, the courts are established by and answerable to the Congress. The Congress is able to lawfully oversee individual cases and pass judicial decisions that override the Court.

More importantly, Justice Xu pointed out that in accordance with the Constitution, the Courts should be equal to the government. However, in reality, the government control the courts’ finance. The court’s annual budget and judges’ remuneration are all dependent on the corresponding level of government. Hence, the government has a financial advantage over the court, and this could lead to the court favouring the government’s interests. Furthermore, Xu commented that the management of court personnel is supervised by both the corresponding Communist Committee and higher-level court. Hence, many committee members who become court leaders (higher-ranking judges) do not necessarily have to be

law graduates, but normally must have relevant knowledge in administrative and Party affairs. “If a case occurred and it related to the interests of the local government, judges who undertake the case would not normally exercise their discretion until consulting with some ‘top man’ in that region” (Justice Xu, 2002). It seems that there is a chance for judges to take the interests of the state into account in their judicial decisions. Xu stated that the courts may accept supervision, but should never accept any orders, and both the courts’ and judges’ independence is important. In order to achieve this, Xu suggested that judicial reform in China should focus on increasing the courts’ status, in order to permit the court become more independent from other public bodies. Equally important for Xu is the development of professional judges, in order to increase their independence from illegitimate influences and maintain high standards of judicial operation.

Regarding the issue of professional judges, Justice Chen and Justice Wang (2003) utilised the following statistics to prove that judges’ qualifications are insufficient.

“As of February 2003, in the court where we’re working, we had a total of 89 judges. However, only 19 judges (21.3%) were university law graduates. Moreover, university graduate judges have not been appointed since 1998. Today, many military veterans are still appointed as judges.”

Chen and Wang observed that becoming a judge is not considered a very honourable career. Judges’ remuneration is generally lower than other government officials, and crucially, judges have a much lower status within the Communist Party compared to other public servants. An example of this is given which concerns a local police chief using his Party post to pressurise the judiciary:

“A president of a county-level court presided over an administration case between a citizen and the local police force. The local chief of police who represented the police force sat in the dock. After the trial but before sentencing, the local police chief used his party title – Secretary of the Committee of Political and Legislative Affairs of the Communist Party [of the same local region] and called an

emergency party meeting in order to discuss the case. In the party meeting, the local chief of police presided over the meeting and the president of the court was only an ordinary member. It is very obvious to see that the court's independence was nullified in this case." (Justice Chen & Justice Wang, 2003)

It seems that the police enjoy a higher status within the Communist Party than judges, and such a high status could allow the police to obtain favours from the judiciary. They also stated that the current methods of court administration are not very systematic, in the sense that judges' decisions may be influenced by the courts' leaders.

"The court's leaders are all appointed as judges but they do not hear cases. In our court, 25 out of 89 judges (28.1%) do not hear cases. Their duty is to maintain the court system, although most of them are members of the Court Adjudicative Committee. They hold the power to submit judges' decisions to the CAC" (Justice Chen & Justice Wang, 2003)

For the issue of court administration, some judges believed this is one of the most important elements preventing judges from becoming more professional. Justice Shang Lifu (2006) analysed the current characteristics of court administration in China:

"There are two types of power inside the court: administrative power and judicial power. The administrative power means the management of the court business and personnel. Such power is held by the leaders of the court; the president, vice-presidents and heads of divisions. Judicial power is held by every single judge."

Furthermore, Shang pointed out that the administrative power and judicial power is often entwined within the court. He stated that inside a court, all judges should be equal. Judges who undertake cases should only be answerable to the law, yet judges who also hold positions with administrative power can influence other judges' decisions. As a result of this, people generally think that the organization of the court is not really different from that of a government department. Ordinary judges do not enjoy much public respect. Hence, ordinary

judges aim to become court leaders as a normal part of their career advancement. As such, gaining trust from the local state authorities is very important for a judge. It seems that judicial reform should require that administrative and judicial power in the court is divided between two different groups of people, and such a change would require institutional reconstruction.

For the issue of institutional reform of the judiciary, many judges focused upon the CAC. Justice Li Fujing (2003) stated that, “the members of the CAC are normally individuals who are involved in bureaucratic matters, not hearing cases, but able to exercise their judicial discretion over presiding judges.” This would appear to create the potential for individuals with little judicial experience or ability to be involved in the adjudicative committees. At the end of his article, Li suggests that the disadvantages of the CAC system far outweigh the benefits, and that it would be better to abolish this committee completely. Some judges disagree with this view, such as Justice Zhou Xiaoping (2006), noting that, “The CAC is formed by a group of the most experienced judges. Poor judgements can be overturned by the CAC.” However, Justice Zhou also observed that there is a demand for reform of the CAC system, and that the CAC in its current format is more likely to act as an administrative body dealing with bureaucratic matters than as a professional judicial body. Furthermore, he noted the CAC decision-making process is not very open, “When the CAC discusses cases, none of the parties involved in the case are able to access the meeting” (Justice Zhou, 2006). Though CAC members may be very experienced, their qualifications – like all judges – are not considered to be particularly high. Hence, Justice Zhao suggested that the reform of this committee should focus on professionalising its members.

For the issue of professionalising CAC members, Justice Du Haijun proclaimed that in many courts, the CAC members spend most of their time involved with administration, rather than hearing cases. While conducting administrative duties, CAC members build a significant relationship with the local government. If a lawsuit occurs between a citizen and the government, the court's leaders are likely to make decisions regarding the case. As such, "It is normal for the court to protect local government's interests." (Justice Du, 2005). In fact, many judges noted that such a lack of judicial independence could easily make the court appear to be protecting the local government.

"Judges are the arbiters, situated between the citizen and government. Currently, when an administrative case is being dealt with, the presiding judge faces two choices; on one hand, if the civilian wins, judges may lose a chance to be promoted; if the government wins, the civilian may appeal to judges at a higher level court or the Communist Committee, and judges may also lose the chance to be promoted. As a result of this, the best idea for a judge when hearing an administrative case is to try to act as a negotiator, and ask the civilian to withdraw their lawsuit and ask the government to pay some compensation." - Justice He Zhonglin (2005)

Disputes between government and citizens largely seem to be resolved, but whether or not the public will feel as though the judiciary is operating effectively in such matters is another question entirely. Justice He (2005) observes that, "Ensuring judges exercise their judicial discretion independently from the corresponding Communist Committee and government is perhaps the most important issue when thinking about judicial reform."

The goal of judicial independence from local government has become one of the most popular views held amongst judges. Justice Ling Caochang (2007) stated that:

"In the view of the local governments, the courts are just [government] departments. The courts are likely to be subservient to the local governments ... mainly because of the appointment and finance system, independence of the courts is almost impossible."

It seems that judges have significant concerns over the close relationship with other public bodies, especially at a local level. Clearly, as the judiciary is closely linked with other public bodies, it is unavoidable for it to have connections and relations with other public bodies. What concerns judges is how to ensure that such connections do not result in extra-judicial influences entering the court with the intention of promoting private interests.

Some judges believe that judicial institutional reform may be very difficult due to Chinese cultural influence. Justice Zhao Jing and Dan Yuhua (n.d.) pointed out that judges in China do not have a culture of independence. They stated that the term 'Court' was created in 1909. Before then, the government took the responsibility of the judiciary. The current court system was established in 1954 during the command economy system. However, after over 25 years of economic reform, the current court system does not seem fit for purpose in the current social structure anymore. Additionally, Chinese judges have often historically had very low public credibility, and people do not have a culture of respect for law. It is common for people to go to the CPC or congress to lodge a complaint about the court after losing a lawsuit. As a result of this, during the practice, local congress and government often intervene in the court's decisions (for example, the congress will exercise its supervisory power over an individual case). Members of the congress are normally higher-ranking government officials and it is possible for them to influence the court's decisions according to their own interests. It seems that judicial reform towards greater independence could be achieved through institutional reform, but this may be very difficult to achieve until culture has shifted somewhat.

Judicial problems as identified in the selected literature above have been frequently addressed and repeated openly by many judges since 2000. Such concerns may represent a popular view regarding judges' lack of independence in China, and there is clearly a possibility for extra-

judicial influences to enter the courts. Some legal scholars believe that such influences are mainly a result of judicial supervision from other public bodies. For example, research conducted by Professor Cai (2005) showed that supervision from Congress and prosecutors over the judiciary, as well as supervision between higher ranking judges and ordinary judges within the judiciary, is widely utilised. However, there are two very different views regarding judicial supervision in China. One view is that increased judicial supervision is required to prevent judges from abusing their power. Another view is that based upon the experience of Western nations, judicial independence is the only way to protect justice.

A popular view given by many Chinese legal scholars suggests that an important reason that judicial supervision is preferred is in part due to the fact judges in China have very low public support. One of the earliest pieces of research⁸ regarding judges' low public credibility was carried out in 2002. The research shows that in 2002, 63.5% respondents held the view that judges were trustworthy. However, the other 36.5% disagreed, and did not trust the integrity of judges. The research states that, "...Chinese judges face a crisis of low credibility amongst the public" (Beijing Lindian Research Ltd, 2002). Many scholars believe that the main reason is partly due to judicial corruption and thus, there is a need for supervision. Professor Ma Huaide (2004) once stated that:

"Both government and public fear the prospect of judicial independence. Part of the reason is ideology, but more importantly the public dread of judicial corruption, which currently still occurs despite widespread supervision; if given more independence, judges could abuse their power more easily and judicial corruption may be more frequent."

It is generally believed by most legal scholars and reformers that judges' low public respect is mainly due to judges' low qualifications. Hence, it seems that increasing judges'

⁸ A company known as Beijing Lindian Research Ltd conducted telephone interviews with 5673 individuals who were above the age of 18 from 11 of China's largest cities.

qualifications was considered by the reformers as one of the most important parts of judicial reform. In addition, compared with the intense debate over reform in relation to institutional issues, developing judges' professional skills has unified agreement amongst legal scholars, judges and the Communist leadership. The adoption of the *Judges' Act (1995)* and its amendment in 2001 can be seen as a great effort from the reformers to try to increase judges' qualifications, and is celebrated by the SPC. "Since the adoption of the *Judges' Act (1995)*, the qualification of judges has quite clearly increased. A National Judicial Exam started last year [2002] and it brought a significant benefit for the state in choosing well qualified judges." (Senior Justice Zhou, 2003).

As a result of the *Judges' Act (2001)*, a National Judicial Examination (NJE) was introduced as a part of judicial reform. Since this time there has been an exam which all applicants must pass before appointment as judges. However, some local judges have criticised this exam, stating that it may cause further problems (mainly due to economic conditions).

"The economic difference between East and West China is great. Judges' remuneration is based upon the local economy. In the East, a court clerk could earn over 30,000 Yuan a year; but in the West a judge who with over 30 years experience may only earn less than 10,000 Yuan a year. Hence, those highly-qualified applicants may not wish to move to West China to work as judges. Furthermore, those judges who are already working in the West, upon passing the NJE, can easily move to the richer East." (Justice Zhao L. , 2004)

Another notable problem is that the NJE is a universal qualification that allows holders to choose between becoming lawyers, prosecutors, judges or even to apply to become officials working at government executive or legislative branches. Furthermore, passing the judicial exam is very difficult. Hence, "many people who pass the NJE prefer to become government officials or lawyers" (Justice He, 2005). Notably, individuals who became judges before the creation of the NJE system do not have to take the exam, as they have already proven their

judicial ability in the field. However, “many of those judges take the exam, and after they pass, quit their job and open up a law firm” (Justice He, 2005).

Adoption of the NJE is perhaps the most celebrated achievement of judicial reform thus far. However, according to the above two judges’ statements, it seems as though the judicial exam has led to a shortage of judges in both East and West China. Many scholars have discovered that judicial reform may not have been very successful in the past 20 years. Professor He Weifang (2006) summarised the difficulty of judicial reform and pointed out that the following:

“The result of the reform may disappoint many legal professionals. Many reform ideas have been applied, yet they do not seem to have changed anything. Chinese judges still struggle to achieve public credibility. The reform did not solve the old problems but created new problems. The reform did not achieve the wishes of the decision makers...one of the most important elements that made reform difficult is Chinese judicial culture.”

Recently, study of Chinese legal traditions has become a hot topic. If judicial reform is to be applied, reform ideas must be compatible with Chinese culture and accepted by Chinese society. However, for 2000 years in China, the traditional mode of government is against the separation of power. There has never been an independent judicial branch in Chinese history. Moreover, before 1978, most judges were not qualified in the legal field at all. People in China do not respect law, and do not know about the importance of judicial independence. Clearly, judicial reform towards greater independence in China is very difficult.

Notably however, over the past decade there has been great debate regarding reform towards greater judicial independence, and this debate has been allowed to be conducted relatively freely and openly. The issues addressed and repeated by the judges from 2000 to 2007 also prove that, unsurprisingly, there seems to have been little change. Judicial reform in China

has far-reaching consequences; it has to be considered as an all-around overall project that services justice and rule of law, but also suits the Chinese situation. It seems as though debate of judicial reform has mainly focused on three major areas, which are:

- Constitutional issues

There is a considerable relationship between the judiciary and other public bodies. Judicial supervision has been adopted as a constitutional method to oversee judges' work and ensure their integrity. However, such supervision may result in influence.

- Practical issues

There are problems regarding the issues of judicial administration, the management of the court and judges' remuneration, and social benefits.

- Professional development

Judges have been considered under-qualified by a large number of legal scholars and the process of judicial appointments is considered by judges to not appear to promote the selection of qualified and professional judges. Though current reform has focused on the development of legal professionalism, the results have been limited, and there is still the need for much judicial reform.

It seems that during the past decades, legal scholars and some scholarly judges have played the most active roles in debating the reform of judicial independence. The Chinese Communist Government has often highlighted policy concerns or guided debate but a formal and fundamental policy for judicial reform was only launched in December 2007, known as the 'Three Supremacies'. All too often, the Communist Party's guideline policies are simply dismissed as vague, non-pragmatic political slogans. There is some truth to these

characterisations. China seems to have a tradition of making guideline policies that are no more than slogans. Slogans normally provide a vague motto of general and positive principles. At times, political slogans can be vague, difficult for the public to understand and offer no specific guide for public bodies to follow. Hence, sometimes, guideline policies and political slogans - just like many other government official reports or statements - simply cannot and should not be taken completely seriously. However, it is also true that in China, political slogans are not introduced without significant experience gained from the past. They may not be easily understood or believed to have significant meaning, yet they provide valuable insights into how policy-makers in China perceive and frame the issues. This is why the introduction of the 'Three Supremacies' as the judicial reform guideline policy is significant. This policy can be seen as a conclusion of the experience learned from judicial reform over the past decades and the blueprint for China's ongoing judicial reform.

1.4 - The 'Three Supremacies' guideline policy and the research questions

The most recent guideline policy of judicial reform was set out by President Hu Jintao (2007), he stated that:

“[Judges should] always be aware of the superiority of the leadership of the Communist Party, the superiority of the interests of the people, and the superiority of the Constitution and law...[and they should] protect systematic social development, promote social harmony and political responsibility, and keep making great efforts to build justice, efficiency and public trust in the socialist legal system.”

The above policy has been referred to as the 'Three Supremacies' which refers to, “the leadership of the Communist Party, the master-ship of the people, and the rule of law.” The judiciary must obey the 'Three Supremacies', and as such the 'Three Supremacies' form an unmovable pillar within the judicial reform program. Hence, judicial reform should not overstep the boundaries of the 'Three Supremacies'. Chief Justice Wang (2008b) pointed out that the 'Three Supremacies' policy is indeed to emphasize that the fundamental principal of judicial reform in China is to continue down the 'Chinese-style' socialist road and - based upon currently established legal principles - to promote rule of law and justice. Rather than copy other countries, particular the Western legal ideology, the 'Three Supremacies' sets out a new and unique way forward.

“There is no such legal system as one without cultural characteristics” (Chief Justice Wang, 2008a). China has a very different legal history and ideology to other countries, and this has lead China down a very different path of constitutional design compared to Western countries. Chief Justice Wang argued that, any Western legal system is developed as a result of Western history, and therefore reflects Western culture and ideology. This may work perfectly well in the West, but when those ideas are directly transplanted into China, it could results in a conflict with Chinese society and cultural values. Hence, “if we imitate the western legal

system in an automaton-like manner, we may lose the Soviet legal system. This is extremely dangerous; the People's Court must be aware of this, and must be confident in our socialist legal system.” (Chief Justice Wang, 2008a). It seems as though Wang advocated a judicial reform program that promotes justice, ensures the rule of law, and does not aim to bring China down the same path taken by any other countries, particularly not Western countries. In simple terms, the goal for China is to modernise its judiciary, but modernisation does not equate to Westernisation.

Apart from cultural issues, another serious concern that must be considered in judicial reform ideas is China's booming economy and ever-changing social circumstances. Following economic reform, China has adopted many laws to protect the market environment, which includes ensuring individual property rights, commercial competition and many other rights. Chief-Justice Wang's assertions of the need to protect the interests of the people reflect that human rights are considered to be one of the concerns of the judiciary. Notably, human rights – in particular individual rights and economic rights – have increased dramatically over the past 30 years in China. The CPC, government and the judiciary have established many channels for protecting human rights (such as the adoption of the *Private Property Protection Act 2007*, *Arrest and Detention Regulations 1979*, and so forth). Of course, compared with many developed nations, China still has many problems, but that does not mean that ongoing judicial reform will ignore the issue of improving human rights. In fact, if we take the 'Three Supremacies' at face value and link the three elements – Party, People and Law – together, it can be understood as “The Party's leadership takes the interests of the people as the fundamental principle on which all policy is based. The Party's leadership and the interests of the people are protected by law.” (Chief Justice Wang, 2008a). It seems that the intention of the 'Three Supremacies' to protect the interests of the People is no less important than protecting the Party and the state.

Chief Justice Wang highlighted that judicial reform in the future will continue in the following major areas; to increase public confidence in the judges and judicial ability, and ‘the management of judicial teams’, ensure better oversight of judicial organization and promoting judicial supervision and particularly the supervision from the Communist Party. This is an important consideration within the topic of judicial independence. It is a key principle in many theories where the rule of law is considered to be the objective of legal reform. However, if there are problems of judges’ public credibility then judicial independence will not be supported by the public. Hence, judicial supervision - particularly from the Party - is likely to be maintained.

In summary, the ‘Three Supremacies’ policy establishes three characteristics that must be taken into account within the judicial reform program. Firstly, judicial reform must be compatible with culture. Secondly, reform must be within the limits of current political principles. Finally, the reform must be affordable according to China's economic circumstances, and not impede further economic growth. In 1978, the second generation of the CPC leadership, lead by Deng Xiaoping, established a market economy with ‘Chinese characteristics’, which is commonly referred to as a ‘socialist market economy’. Clearly, the fourth generation of the CPC leadership lead by Hu Jintao, aims to establish a ‘socialist rule of law’, which involves an evolutionary process of incorporating rule of law within the parameters of Chinese Characteristics; Chinese legal traditions, current political principles and economic conditions.

In fact, the study of judicial independence is not new territory in the West, however, to suggest to the Chinese government that they copy the institutional design of judicial independence from Western countries would be a useless gesture. This is because law is not only a simple compilation of rules or judicial precedents. It reflects and expresses a whole

cultural outlook. A Westernised form of judicial independence may not be enforced and may not be accepted by the Chinese government and people. Hence, this thesis is not about how judicial independence can be applied in theory, but focused on how to establish a method that can be acknowledged by the Chinese Government so as to increase judicial independence in China. As such, this research aims to give possible ideas of how China can achieve greater judicial independence with ‘Chinese characteristics’. Therefore, two research questions must be answered in order to find a suitable road for judicial reform for China. The two research questions are:

- How can the ‘Chinese characteristics (legal traditions, political principles and economic conditions)’ be understood in relation to judicial reform?
- What are the current factors that have limited judicial independence?

1.5 – Conclusion

It is clear that there is a modernised Marxist constitution in place in China which consists of a vast judicial body with a very systematic structure. Since the mid-1990s, judges and legal scholars have been increasingly active in highlighting their concerns over judicial problems and reform. There are common problems that concern judges, who have openly published articles on the internet for the general public to read. In fact, it is very difficult to believe that judges would be permitted to critically analyse the judicial system even just ten years ago. Clearly, from the criticisms published by the judges, there are many academically-minded, intelligent judges serving in the courts, who are well-experienced and willing to share their experiences and thoughts with the public. More importantly, it appears that there is a significant level of free speech in China regarding the topic of judicial reform.

Criticisms of the current judicial system from existing literature concern three major issues; constitutional issues, practical issues, and issues of professional development. The constitution gives many other public bodies a connection with the judiciary and prefers a method of judicial supervision rather than independence. In practice, there are many problems within the administration and management of both the courts and judges. For the issue of developing professional judges, it seems that despite significant achievements over three decades of development, many judges can still be considered 'under-qualified'.

Clearly, there is significant room for the judiciary to develop in the future. In fact, as Hu Jintao stated in his 'Three Supremacies' policy, judicial reform is ongoing and will continue, but where China is headed is a 'Chinese-style' rule of law, and as such, any reform suggestions must take into account Chinese characteristics. The rest of the thesis seeks to introduce the research methodology, answering the two aforementioned research questions

and bring findings together to try to find a Chinese road towards greater judicial independence.

CHAPTER TWO

Research methodology

2.1 – Introduction

Chapter One introduced the background to the research, and two research questions have been established - *How can the 'Chinese characteristics' be understood in relation to judicial reform?* - and - *What are the current factors that have limited the level of judicial independence?* In this chapter, an explanation is given of the methodology used to answer the two research questions. Firstly, an overview is given of the research limitations and problems. Following this is a detailed explanation of how the data was collected. Finally, the experiences derived from the pilot study are analysed.

2.2 – Research limitations and problems

The first problem for the research was the limited availability of statistics in China relating to the judiciary. The first *Blue Book of the Development Report of the Rule of Law* was published in 2003. However, all data inside the book was collected and analysed by research organisations connected to the Chinese authority. Moreover, almost all media in China is under the supervision of the Xinhua News Agency, and there are very limited independent research organisations in China. It is reasonable to assume that CPC political views may have influenced this research of the judiciary. Some researchers may have an inherent bias to publish findings in such a way that presents CPC policies in the most favourable light. In view of this, the accuracy of this data is not entirely reliable. In addition, information relating to judicial reform from official sources is very limited, and available information often simply provides an overview of CPC policies and aims of judicial reform without providing detailed, specific information about what changes are actually taking place. As such, there was a very compelling reason to interview judges in order to uncover detailed and reliable information relevant to judicial reform.

Even just ten years ago it would have been impossible to interview judges as a means of research. However, many recent studies relating to the judiciary now widely involve interviewing judges or other such officials. Furthermore, literature relevant to judicial reform is widely available in Chinese law libraries and on the internet. Many judges, based upon their own experience, have written articles concerning judicial independence and suggested ways to reform⁹.

⁹ . For example, as of the last time reviewed in November 2007, the official website of the Chinese Courts <http://www.chinacourt.org/html/fxyj/> - listed 1,628 articles written by ordinary judges, and 1,177 articles written by presidents of various local courts.

Nevertheless, judges may still remain cautious, especially when a student from a foreign university tries to disclose ‘confidential’ information relating to them. A previous researcher stated that “controlling access to the courts is thought to be the simplest way to avoid sensitive information being disclosed” (Shen, 2004 p 26). However, the question that I am researching is perhaps one of the most sensitive questions. Because my research aims are to collect their responses in relation to the institutional design of the judiciary and its everyday practice. China has a strong centralised political culture. Furthermore, in accordance with the *Judges Act (2001)*, judges are not authorised to speak critically about the current constitutional design. Additionally, most judges are members of the CPC, and after the events of 1989 the CPC government has been very conservative in regard to Western ideological influences. Therefore, I made use of a personal network in order to gain access to and interview the judges rather than through official channels.

My personal network allowed me access to a local Basic Court, and I chose this court for my pilot study. During this pilot study, I interviewed seven judges, one of whom is currently the vice-president and head of the criminal division of the court. I requested access from him to more judges at higher-level courts. He stated that a PhD-graduate high court judge used to work at his court, and is now responsible for the compilation of landmark case decisions to be used as guidance in future cases, therefore he knew many judges throughout the whole province. Through this personal network, I contacted this High Court judge, and he agreed to arrange interviews with a variety of judges for this research, but not before stipulating some very clear conditions, as follows:

- 1) The interviews must be based upon a structured questionnaire.
- 2) Before the interviews take place, he must be allowed to view the questionnaire design.
- 3) He has the right to amend the questionnaire or delete any questions.

- 4) The time of the interview with each judge must not exceed thirty minutes .
- 5) I was not allowed to mention the location of where the research had been taking place in my thesis.
- 6) I was not allowed to ask any questions which may be used to identify any judge.

I agreed with him on these conditions and successfully gained access to sixty judges (three High Court judges, 39 Intermediate Court judges and 18 Basic Court judges). Despite successfully gaining access to these judges, there were still other methodological limitations of the research that were not immediately apparent, but this is not to be unexpected in any judicial research in the PRC. Firstly, it is not easy to clearly ascertain the nature of legal practice in China from the codified constitution and laws. Secondly, the details of most available cases were not presented very clearly, especially with regard to the procedures used. Finally, difficulties in translation between English and Chinese have a tendency to be more pronounced when discussing such a complex topic as legal theory.

It is necessary to comprehend the constitution and legal codes relating to the Chinese criminal justice system. However, the worth of studying the formal aspects of the constitution is questionable when taking into account the huge disparity between codified law and its real life application. Saich (2004, p. 124) suggested how to deal with such a difficulty:

“While much of the important politics in China is informal and thus parts of the Constitution cannot be taken at face value – for example, rights extended in one part may be contradicted in another – as a whole it does provide a useful guide to the leadership’s thinking about the present situation and gives an indication of the way in which they would like to see it evolve.”

It seems necessary therefore to understand the constitution and law, even if it bears little resemblance to actual legal practice. However, a further difficulty occurs when considering what the Chinese Constitution and law actually consists of. This seemingly naive and simple

question became the first problem during the data collection from content analysis. One narrow definition of constitution, such as a "...whole system of government of a country, the collection of rules which establish and regulate or govern the government" (Wheare, 1966, p. 1), can lead us to look towards the *Constitution of PRC (1982)*. However, a wider definition of constitution is not so easy to identify and analyse in China. If we take the following two definitions that move beyond the state agencies then, a wider methodology would be required to understand the current political reality.

"A constitution is not the act of government, but of a people constituting a government, and a government without a constitution is power without right...A constitution is a thing antecedent to a government; and a government is only the creature of a constitution" (Paine, 1792/1998 pt II p. 93) and "The creation and operation of governmental institutions" (Jennings, 1955, p. 36)

Considering the wider definitions, it seems as though the *Constitution of the PRC (1982)* as an act concerns the creation of the congress, government, the courts and the Procuratorates but would need to include role of the party organizations of the CPC, because, some of the party organizations exercise power within the criminal justice system. Davies et al. (2005, p. 8) states that "criminal justice is about society's formal response to crime and is defined more specifically in terms of a series of decisions and actions taken by a number of agencies in response to a specific crime or criminal or crime in general." Taking this into account, both the Commission for Discipline Inspection (CDI) and the Committee of Political and Legislative Affairs (CPLA) of the CPC have become involved with criminal investigation and judicial administration in China. As such, the CPC can be considered to be a part of the criminal justice system together with many other state organisations. In light of this, the Chinese constitution effectively includes both the *Constitution of the PRC (1982)* and the *Constitution of the CPC (1992)*. This is important because the *Constitution of the PRC (1982)* has gives the CPC the status of 'the only ruling party in China', and as a result of this the

state political operation has and will continue to operate in accordance with both the constitution of the state and the constitution of the Party¹⁰.

Furthermore, the *Legislation Act (2006)* allows all state organs to make rules that correspond with their roles (as long as they do not contradict the acts adopted by the NPC). Hence, for criminal justice, the police force, the SPC and the Supreme People's Procuratorates (SPP) have all adopted many procedures and substantive rules to guide the operation of the criminal justice system. As such, the legal codes related to the criminal justice system have been collected from many different organisations. The list of the various legal codes (including web addresses) is as follows:

- CPC policies and regulations (<http://cpc.people.com.cn/GB/64162/71380/index.html>)
- Parliamentary Acts adopted by the NPC (<http://law.npc.gov.cn:87/home/begin1.cbs>)
- Relevant rules of procedure for the prosecution adopted by the People's Prosecutors (<http://www.spp.gov.cn/site2006/region/00017.html>)
- Legal interpretations and judicial reviews by the SPC (<http://www.chinacourt.org/flwk/>)
- Relevant rules of procedures for investigations adopted by the People's Public Security Department (http://vote.mps.gov.cn:9080/gab/flfg/show_more_two.jsp?type1=3)

In my research, the CPC Constitution, policies and regulations appear to be just as relevant as parliamentary acts. In addition, as a piece of legal research it is necessary to analyse cases in my thesis. However, similar to the lack of statistics relating to the judiciary in China, details of most court cases are either provided by the Judicial Review or other official sources, and they are not very detailed or clear. Hence, in order to discover the 'true story' of what

¹⁰ For instance, many official policy documents have been published under the name of *the CPC Central Committee together with the State Council*

essentially happens inside the courtrooms in China, I chose to utilise participant observation in my research. Finally, the question arises of how to make sure the differences between Chinese and English legal terms do not conflict with each other. For example, in China the official translation of a legal document adopted by Congress is a 'Law' (for example, Judges Law, Criminal Procedure Law). In the United Kingdom, the legal document adopted by Parliament is termed an 'Act' (for example, the 2003 *Criminal Justice Act*). This thesis is written in English, and most readers will perhaps be British and American legal scholars, thus, I translated the Chinese legal terms in accordance with the corresponding terms of the English and Welsh legal system (for example, the 2001-adopted *Judges Law* and 1996-adopted *Criminal Procedure Law* are translated as the *Judges Act (2001)* and *Criminal Justice (Procedure) Act (1996)*). Of course, some specialist Chinese legal terms such as 'Procuratorate' follow the official Chinese translation.

In fact, translation can become an important factor that causes serious problems for comparative research; the same legal word in different jurisdictions can differ greatly. For example, the term 'judiciary' in some jurisdictions such as England and Wales means 'judges', but in China the term 'judiciary' refers to a broad concept consisting of, "...the People's Courts, the People's Procuratorates, the police force, state security organs and judicial administrative organs." (Zhu, 2003, p. 52). In this research the term *judiciary* will be used to refer to Chinese judges only. Furthermore, some legal terms in China do not even exist in the English language. In these cases, the legal term is explained when it first appears.

2.3 – Data collection

Three methods were employed in this qualitative-based research project, they are: interviewing Chinese judges, content analysis and participant observation.

- Method One – interview

The main method of data collection was interviewing judges in China. Interview techniques are widely used within research to probe deep thoughts and to gain deeper explanations with a variety of responses. This is because within an interview, the questions can be clarified and expanded upon in follow-up questions to the interviewee if the initial answer was not clear or incomplete and to avoid misunderstandings.

Initially I wanted to use unstructured interviews, because “less structured approaches allow the person interviewed much more flexibility of response, and at the other extreme is ‘depth interview’” (Miller & Carabtree, 1999, p. 270). However, the person who granted me access to the judges requested a structured plan. As such, I employed a semi-structured interview with a structured questionnaire. This is because “a semi-structured interview has predetermined questions, but the order can be modified based upon the interviewer’s perception of what seems most appropriate. Question wording can be changed and explanations given; particular questions which seem inappropriate with a particular interviewee can be omitted or additional ones included” (Robson, 2002, p. 270). The final design of the questionnaire was decided as follows (see Table 2.2.1), with each question targeting an element regarding the principles of judicial independence or about judges’ views in relation to judicial reform.

Table 2.3.1 – The interview questionnaire

Appointment 任免

- When were you appointed as a judge? 您还记得您是何时被任命为法官的吗?

-

- Have you ever taken the National Judicial Examination? What is your opinion of the NJE? 您有无参加过“全国司法考试”，您对其的看法是什么？

-

Income 收入

- With regard to your income and status, how do you classify yourself in relation to the rest of society? 根据您的收入，您认为自己属于社会中的那个阶层？

-

- Which societal class do you feel that judges should belong to? 您认为法官应该属于那个社会阶层？

-

Influence on your independence as a judge 审判影响

- What are the current issues concerning the independence of the judiciary that you consider to be the most important? 您认为当前司法系统中哪些主要因素影响到“司法独立”

- What kind of judicial environment would ensure greater judicial independence?

您认为，什么样的司法环境可以确保最大限度的司法独立？

- ‘What organization or body should take the lead on matters to do with the independence of judges in China?’ 那个组织或单位应该领导中国的“司法改革”事务？（效率，效果）

Reform 改革

- Which body or bodies do you think *should* be responsible for the judiciary in China? 那个单位应该对中国的司法权利“负责”？或者说，中国的司法权力机关应该包括哪些单位

- What one change to your duties and conditions of being a judge would you like to see reformed? 您最希望看到的“司法改革”是什么？

Other suggestions:

Many sensitive questions relating to judicial administration and the judicial role of the CPC were achieved through the use of follow up questions.

- Methods Two - content analysis

“A common approach to documentary analysis is *content analysis*, for quantitative analysis of what is in the document” (Robson, 2002, p. 349), it has been defined in various ways. Krippendorff (1980, p. 21) defines content analysis as, “...a research technique for making replicable and valid inferences from data to their context.” Unlike directly observing or interviewing, content analysis - dealing with written documents that were produced for some other purpose - is an indirect method of collecting data. Hence, there are concerns over problems of selection and evaluation of evidence from the contents. Moreover, “Content analysis cannot be used to probe around a mass of documents in the hope that a bright idea will be suggested by probing. Content analysis gets the answers to the question to which it is applied” (Carney, 1973, p. 284). In light of this and in order to increase the accuracy of the data, I collected and analysed the content of literature and documents that have the same purpose as my research. I designed three record cards in order to collect data (see Table 2.3.2).

Table 2.3.2 – Content analysis record cards

Characteristics of judicial culture	
Title of the literature	
Year and place of publishing	
Author’s education and political background	

Research methods employed by the author	
Aim of the article	
Major point(s)	
Finding(s) of the article	
Evidence	

Suggestions of judicial reform	
Title of the literature	
Year and place of publishing	
Political circumstances when the suggestions were made	
Author's education and political background	
Author's profession	
Research methods employed by the author	
Reasons of why the suggestions were made	

Key points of the suggestions	
Outcome of research suggestion(s)	

Case Study	
Case name	
Title of the literature where the case was collected	
Year and place of publishing	
Author's education and political background	
Author's profession	
Purpose of the author using this case	
Brief introduction of the case	
Legal codes related to this case	
Findings or suggestions from this case by the author	

Data from the content analysis allowed me to examine the characteristics of Chinese judicial culture. Some of the sample cases were employed in my thesis in order to understand the trial

procedure. Data related to the suggestions of judicial reform from literature written by legal scholars or judges were referenced in designing the questionnaire.

- Method Three - participant observation

Certain research has shown that, “Over the past few years [2003-2007], Chinese courts have maintained a consistent conviction rate above 99 percent” (CECC¹¹, 2007). It seems as though the high conviction rate illustrates remarkable success on the part of state prosecutors in China. However, such a high conviction rate gives rise to the view that, “China's criminal justice system is strongly biased toward presumption of guilt, particularly in cases that are high-profile or politically sensitive” (CECC, 2007). It is necessary to fully explore the true reason behind this high conviction rate in order to understand the intensity of influence – if there is any – from the state prosecution service, known as the People’s Procuratorate (PP) over the judiciary.

Therefore, I started to select cases related to the operation of the current criminal trial procedure. However, the available sources for cases are all published by the government and the details of these cases do not clearly explain the criminal procedure and the different roles of legal agents. As a result of this, I applied to undertake participant observation with additional unstructured interviews with prosecutors and lawyers. Participant observation as a methodology is to, “watch what they do, to record this in some way and then to describe, analyse and interpret what we have observed” (Robson, 2002, p. 309). The purpose of my observation was to fully understand the procedure of criminal trials and discover the reason why the PP wins almost every case. Thus, it was necessary for me to observe cases where criminal suspects have pleaded not guilty.

¹¹ Congressional – Executive Commission on China

I returned to China in 2007 from mid-June until late September. I visited a law firm and met with one of the directors. After I explained my reasons for being there, it was agreed upon by the director for me to enter his law firm as an observer. From 2nd July 2007 until the end of the month, I witnessed the entire handling procedures of three criminal case trials, which were all summary offences, as an observer. However, all of the defendants pleaded guilty. After one month, on 1st August, I met with the director of the law firm again and I explained to him that I would be very grateful if I could observe some cases where defendants plead not guilty. He enquired with many of his colleagues, and luckily one of them was going to deal with this type of case as he had been assigned to it as part of the state legal aid system.

The law firm director requested me to help his lawyer in this case as his assistant. I accepted the offer, and from 2nd - 23rd August 2007, I took on the 'complete participant' role, observing a swindling case which involved nine different victims. Robson (2002, p. 317) suggested that "researchers should avoid taking on the complete participant job." However, taking on this role was unavoidable as it would be extremely valuable to my research to observe a case where the defendant has pleaded not guilty. On 3rd August 2007, we received the Bill of Indictment to which the defendant chose to plead not guilty. Until the trial started on 12th August, we had around twelve hours to discuss the case. The judgement and sentence was passed on 21st August, which is also the day that I completed the participant observation. During the observation, I designed some recording cards for note taking (see Table 2.3.3)

Table 2.3.3 – Note taking record card for participant observation

Event	Date	
Location	Involved	
Notes From The Event		
My Behaviour	My Statement	To Who
Lawyer's Behaviour	Lawyer's Statements	To Who
Prosecutors' Behaviour	Prosecutors'	To Who
Judges' Behaviour		
The Criminal Suspect's Behaviour	Criminal Suspects	To Who
Additional Information and My Feelings		

I recorded a significant amount of data from the participant observation including the understanding of the true procedure and involvement of different agents in the criminal justice system. In order to confirm my findings, I asked the high court judge to help me gain access to some prosecutors for unstructured interviews. Eventually, he permitted access to a county-level local chief prosecutor. After the interview with him, more data was collected and added into my research. Eventually, I was able to answer the question of why the conviction rate is so high in China.

2.4 – Pilot Study

A pilot study was carried out during June 2006. I spent nineteen days interviewing seven judges - one of them a vice-president and head of the criminal division of the local court - and he spent three hours with me. The pilot interviews provided a great deal of experience for the planning and carrying out of the main interviews that would be conducted in the near future.

It became clear that much of the information I collected would not have been available in books, journals or official documents. Before the pilot study took place, I reviewed a significant quantity of literature, which was often critical of judges' qualifications and lack of wisdom. However, during the pilot, Chinese judges - even those who were military veterans - appeared to have great knowledge in relation to judicial independence. They enjoyed discussing certain problems about the current lack of judicial independence, based upon their experiences.

It seems that judges are very interested and welcoming towards people conducting research on how they can gain more independence – they are aware that such research is intended to be more of a help than a hindrance – hence access and discussion of judicial issues with judges was not as difficult as I thought it would be. However, the reform of the judiciary towards greater independence is beyond the capabilities of judges in China. This is mainly because the current constitution does give equal status between the judiciary, congress and government. As such, the People's Court has relatively little power to engage in any reform itself.

Chinese judges, when asked many of the questions in the pilot questionnaire, demonstrated that their view on judicial independence is not far removed from that of Western theory. However, that does not mean Chinese judges are Westernised. In fact, on one hand they criticised conservative views that counteract greater judicial independence; but on the other

hand, they also feel antipathy if a complete and total adoption of Western concepts of judicial independence is suggested – this will not help and may lead the Party and public to feel uneasy about the judiciary.

In the pilot study, judges were also afraid that a Western academic institution or organisation may hold some institutional bias. Judges demonstrated wide consensus that promoting Western theories of judicial development in China will not have any use or benefit; it is far more beneficial to listen to the path of judicial reform envisioned by contemporary judicial and Party leaders. Therefore it is important to make clear to the judges that the thesis is only focused on China, not on any Western judicial system or its corresponding cultural values, and that the thesis is not about to compare or contrast differing systems, but to try to ascertain ideas for reform that are based upon aims and conditions highlighted by Chinese leaders.

One of the most significant findings from the pilot study was that a senior judge enjoyed giving me a historical background of judicial reform in China. In his view, the theory of judicial independence has been sought after over three clearly identifiable periods in Chinese political history. The first was in 1984, when the proposal for judicial reform towards greater independence was quickly rejected. The second was in 1989, when a similar series of events occurred. The third time was over a relatively long period; between 1995 and 2005, and involved the President of the Supreme People's Court, together with the Chairman of China's National Social Science Academy, and a form of union of legal scholars. Since 1995, these three forces have effected many changes in Chinese judicial culture, such as the change of judges' uniforms to robes rather than military style uniforms, the instigation of judicial examinations, the permitting of local courts to undertake limited independent reform, and preventing automatic judicial posts for ex-army officers.

In 2004, Professor He, Weifang and Professor Zhang, Zhiming together with many other legal scholars, composed a Reform Proposal known as the '*Courts Organization Act*' to the NPC. The reform ideas were largely based on the American judicial system (see Table 2.4.1).

Table 2.4.1 – 2004 reform proposal of '*Courts Organization Act*'¹²

- The office of the president of the courts shall be held by a judge
- The state has obligations to support and to protect the judges' right of independence.
- The *Court's Adjudicative committee* shall be reconstructed.
- Judges' decisions made by lower level courts shall be free of higher level courts' supervision.
- *The People's Courts* shall be renamed *The Courts*
- China should be divided into circuits to reduce the administrative influence from the local government over the local judiciary
- A specialized organisation, similar to the British Bailiffs, should be established to carry out sentencing
- Professional assistants for judges should be recruited
- A professional supervision committee within the courts should be established to replace all other current judicial supervision organisations.

The above reform suggestions can be understood as a popular view held by many Chinese legal scholars. However, the suggestions have not satisfied the reformers. In 2006, the

¹²Sources: He, 2005

proposal was effectively rejected by the legislators, and the *Government Official Act (2006)* was passed, which classified judges as government officials. The experience of the reform proposal has drawn much interest and a great lesson should be retained from this case. In the pilot study, some judges are afraid that as the above example shows, ‘Westernised’ scholars may just make matters worse. The senior judge suggested that legal scholars are welcome only if they understand the complex situation of judicial reform in China. The pilot study has illustrated that if a thesis is intended to have meaning, and the reform suggestions are to be taken into account, they must be applicable within contemporary Chinese political principles. Many pilot judges emphasised this point, and advised to always bear this in mind when researching the topic of judicial independence.

The experience of the pilot study gave me great confidence. The most notable issue is that during the interviews with judges, the topic should always focus on China's experience and needs. When talking about sensitive issues such as constitutional concerns, one always has to bear in mind that this is China, and the existing system has evolved from a complex historical background.

2.5 – Conclusion

Interviewing judges was not an easy process, but also not as difficult as I expected. The most significant experience from the interview was that it seemed as though Chinese judges were generally very kind and knowledgeable. Judges possess wider knowledge relevant to the theory of judicial independence. Some judges - especially those who participated in telephone interviews - behaved quite negatively or just tried to finish the questioning as soon as possible. One judge told me that he believed there were also lots of judicial problems in Britain, and that I should just mind my own business. However, he did go on to highlight many problems in the Chinese judicial system. Perhaps the judges are largely aware that we are attempting to help them.

It seems to me that on one hand judges are quite happy to have the support of many legal scholars in favour of judicial independence, but they also respect and understand that some scholars do not agree with the idea of judicial independence. On another hand, many judges criticised the fact that both views seem to be based on polar opposite standards. One judge told me that in his view, the active supporters of judicial independence generally ignored the current political reality and traditional Chinese legal ideology, and suggested in simple terms that directly copying Western ideas will not help. Comparably, argued the judge, conservative scholars who keep rejecting every Western idea do not help either. Perhaps the celebrated term, “the West as means, China as principle” could form the most fundamental principle for legal reform in China. Many judges expected that this research could be ‘useful’. As the pilot study has illustrated, there are suggestions for judicial reform in the past that have been unsuccessful and never adopted. Therefore, for this research to have the potential to be noted by the Chinese leadership, it is necessary to understand what the conditions for

reform towards judicial independence to take place are. As I finished the interview, the High Court judge gave me a recommendation for my research:

“Research on such a sensitive topic must remain as impartial as possible. Not everything China has done is negative, nor is everything the West done infallible. If you want to make any recommendation for reform, make sure it based only on the experience of China.” - Judge 1 (2005, Interview with Yaliang)

CHAPTER THREE

‘Chinese Characteristics’ and the need for judicial independence in China

3.1 – Introduction

The ‘Three Supremacies’ policy adopted by the current Chinese leadership stipulates that Chinese judicial reform must take account of three factors; Chinese legal culture, current political principles and economic conditions. This chapter explains these factors in order to create a framework for Chinese judicial reform, and describes why it is important for China to promote greater levels of judicial independence.

As already addressed in the first chapter, the study of judicial independence is not a simply a matter of applying Western methods to the Chinese justice system. Such a transformation would never be as simple and straightforward as this. This is because law, “is not only a simple compilation of rules or judicial precedents. It reflects and expresses a whole cultural outlook” (Cotterrell, 1992, p. 21). Savigny (1831/1975) pointed out that law is an expression of the spirit of the people and an encapsulation of the collective experience of society and its whole history. “The law of such a people or nation written down at any given time is no more than a static representation of a process which is always continuing: the ‘evolution of culture’” (Cotterrell, 1992, p. 21). The evolution of culture leads to different ideologies of law, and these differing ideologies produce different understandings and methods for establishing judicial systems.

Judicial independence is not only a focus in Western judicial systems. The term appeared within the first Chinese Republic’s Constitution in 1911, and has remained ever-present up to the current 1982 constitution, apart from the 1975 constitution (which was replaced after a short time by the 1978 constitution). It can be argued that judicial independence is perhaps a common value of all people. However, the answer to the question of how to establish judicial independence differs according to different legal doctrines, ideologies of law and aims of the judiciary. It seems that everything about law’s institutions and conceptual character is best

understood in relation to the social conditions that have given rise to it. In this sense, law is indeed an expression of culture, while simultaneously culture influences the inherent values of law.

Friedman (1985) used the term ‘legal culture’ to refer to “[the] whole range of ideas which exists in particular societies—and varies from one society to another—about law and its place in the social order.” Therefore, for the issue of legal development in China, “reformers cannot afford to look only west or only east, only up to the state, or only down to grassroots movements, only to culture, politics, or economics. A more context-sensitive approach is needed.” (Peerenboom, 2007, p. 296). As the second-generation Communist Party leader, Deng Xiaoping said many times, “[China] will cross the river by feeling the stones.”

This Chapter firstly analyses and explains the evolution of the constitution of Imperial China by providing an understanding of Confucian theory, which has been the dominant thought and had great historical influence in China for over 2000 years. Secondly, this Chapter provides a detailed analysis of the evolution of Marxist theory, inherited from dialectical materialism, regarding law and state. In addition, Mao’s interpretation of Marxist theory is explained. Afterwards, an overview is given of the practical operation of the Communist constitution in Mao’s era. Thirdly, the Chapter analyses China’s current economic conditions, and explains why China needs greater rule of law and judicial independence.

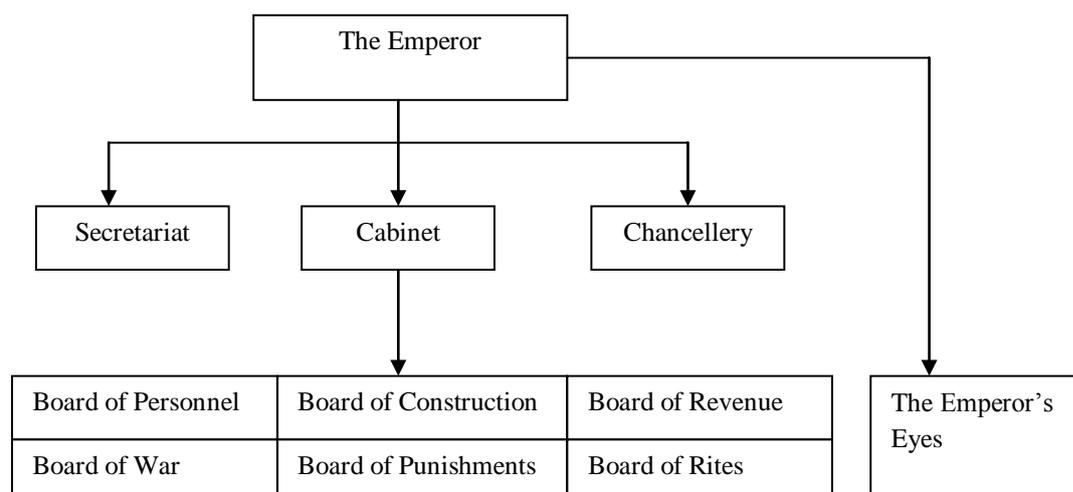
3.2 – The nature of judicial power in traditional Chinese legal ideology and the historical role of Chinese judges

There have been over 2000 years of feudal history (from 135 BCE to 1909 CE) in which the constitutions of Imperial China were based upon Confucian ideology and established an unchallengeable Imperial power. During the imperial era, judicial power was highly entwined with executive and legislative power, and exercised by individuals who lacked professional legal qualifications. It seems that Confucian ideology has led China to authoritarian methods of governance and autocratic legal traditions, as it is an ideology which has an ongoing influence in Chinese society today.

- The characteristics of constitutions in Imperial China

Imperial China has witnessed a number of different dynasties, but commonly the central government has always established a very similar constitutional design (see Fig 3.2.1).

Fig 3.2.1 – Constitutional map of the Imperial China



This type of constitution first took shape in 206 BCE, and was formally established in 589 CE. Since the beginning of the Yuan dynasty (1271 CE), the secretariat and chancellery were no longer part of the government. By the time of the beginning of Ming dynasty (1380 CE), the cabinet was abolished, and the six departments were under the Emperor's direct control. This became the final constitutional arrangement of Imperial China, and remained in place until the beginning of the Republican era in 1911 CE.

Different state organs in the various dynasties had slightly differing tasks. Generally, the Secretariat was the body responsible for making policy or legislative suggestions to the Emperor. The Chancellery was responsible for supervising the policy-making and legislative processes in order to make sure they conformed to principle Confucian theory. The Cabinet was the body responsible for administering the various departments of central government and the day-to-day running of the country. The Emperor's Eyes was a legal supervisory body, whose responsibility was to oversee the operation of government officials and prevent corruption.

The above constitution shows that the judiciary (known as the Board of Punishment) was completely integrated into the executive as a department. The branches of state power were never separated in Imperial China. The Emperor held the highest legislative power and was the head of the Cabinet. The Board of Punishments, together with the Emperor himself, formed the Supreme Court. In theory, the only element which could limit the Emperor's power was Confucian theory. In reality however, the body to ensure that all of the laws and government actions were made in accordance with Confucian theory was the Chancellery, a body which was also under the control of the Emperor.

Government bureaucracy was remarkably small; Imperial China was divided into three local levels; provincial, city, county and village. At the county-level, which may have included hundreds of villages, there were “only a few government officials tasked with administering all the affairs of the entire county” (Weber, 1915/1968, p. 134). Such a government’s powers would have been the executive, legislative and judicial branches of power all rolled into one. Therefore, when a dispute arose in one of the villages, the individuals in question would often face a long journey to the office of the county-level government, and they would have to present their case in written format (which was impossible for most people to do themselves, and therefore required the hiring of someone to do this for them). Hence, when most disputes arose at a village level, these were simply resolved within the unofficial systems of governance in each village; village elders would resolve disputes according to Chinese culture and Confucian theory. Over time, this led to a Chinese legal tradition of disputes not being resolved through official channels.

In a county government, there was one mayor who also acted as the sole judge of that county; “The power of a mayor of a county in Imperial China was almost omnipotent” (Rozman, 1981, pp. 120-121). This omnipotence had a considerable effect on ordinary citizens. “To a citizen, the county government represented the law of Imperial China, and the mayor of the county in the eyes of the citizens resembled a judge, more than anything else.” (Guo, 1999, p. 196)

The constitution of Imperial China at a local level demonstrates that the judiciary was a sub-function of the executive body, or alternatively, that acting as the executive officer was another duty of a judge. The judicial appointments required either accredited knowledge of Confucian theory or such appointments were made on a hereditary basis.

- Fundamental principles of Confucian theory

In 135 CE, Confucian theory became the sole ruling ideology of China and dominated for a period of over 2100 years. The key element to Confucianism is *Li*, which is in itself very difficult to provide a specific definition for. In a narrow sense, “Li can refer to rituals or rites, although in a wider sense it can be understood as referring to etiquette or codes of conduct” (Bodde & Morris, 1967, p. 19). Effectively, Li enshrines the customs and values of a society, seeking to preserve the established order in a conservative manner. Confucianism asserts that there is an unshakable social order according to instinctive and individual status, and goes against the idea that law can be proscribed to nullify such differences and make all men equal. In Confucian theory, law is a form of punishment, and it is made by man to represent man’s interests, and can therefore be tyrannical:

“A government based on Li functions harmoniously because the Li, being unwritten, can be flexibly interpreted to meet the exigencies of any particular situation. A government based on law creates contention because its people, knowing in advance what the written law is, can find means to circumvent it, and will rest their sophistical arguments on the letter rather than the spirit of the law.” (Confucius, 552 BCE – 479BCE)¹³

“A government based on virtue can truly win the hearts of men; one based on force can only gain their outward submission. The Li are suasive and hence the instrument of a virtuous government; laws are compulsive and hence the instrument of a tyrannical government.” (Confucius)

“The Li give poetry and beauty to life. They provide channels for the expression of human emotion in ways that are socially acceptable. Law, on the contrary, is mechanistic and devoid of emotional content.” (Confucius)

¹³ It is unknown when Confucius wrote many of his teachings, and what survives today is clearly only a smattering of a much larger body of work that has been gradually eroded away over time. As such, it is impossible to provide references to Confucius' writings, as there is no definitive consensus on what *is* Confucius' work.

Confucianism believes that Law is a negative element compared with Li. Hence, Confucian theory is opposed to the rule of law or rule by law, and instead favours governance according to principles and established customs ('Li'). Confucianism asserts that Li was established at the very beginning of human society, and that disorder only arises when Li is disregarded by significant elements of society. Hence, the opposite is also true in Confucian theory; adherence to Li brings stability, harmony, and prosperity:

“The Li derive their universal validity from the fact that they were created by the intelligent sages of antiquity in conformity with human nature and with the cosmic order. Law has no moral validity because it is merely the ad hoc creation of modern men who wish by means of it to generate political power.” (Confucius)

“Laws are no better than the men who create and execute them. The moral training of the ruler and his officials counts for more than the devising of clever legal machinery.” (Confucius)

It can be argued that Confucian theory is concerned with achieving a kind of utopian society. Clearly, Confucianism states that there is one goal that law cannot achieve, which is to destroy all social conflicts and disputes, whereas Li can do this. Li is a very vague concept; only people qualified in Li studies can interpret and practice it. Professor Xia Yong (2004, p. 152) stated that:

“From the Confucian view of managing a country, the goal is for Li to rule the people. Confucian theory believes in the rule by man, and the rule of man. The population should be under the rule of man. This individual should be very well qualified in Confucian studies. The ruler has a duty to be nice to his subjects, and create harmony, but this can only be achieved through furthering his knowledge of Confucian theory, rather than making laws.”

Confucian theory believes that a great and harmonious state is more likely to be established by a leader and officers with very extensive Confucian knowledge. At the same time, Confucian theory also dictates that people who do not have knowledge in Confucian theory

should respect the dominant group's rule. Effectively, the key characteristic of Confucian theory is that favours the concept of rule of man. Five hundred years after Confucius died, when Imperial China entered a stable and unified period in 135 BCE, Emperor Han Wu abolished other studies and made Confucian theory the ideology of China. Naturally a theory such as Confucianism was conducive to the Emperor consolidating his power and establishing respect for hierarchy and government authority.

Law in Imperial China was the embodiment of the ethical norms of Confucianism and was largely focussed on reflecting the contemporary and respective values of Chinese society. In Imperial China there was an expansive collection of codified law, and law throughout much of the history of Imperial China was primarily concerned with punishment. Notably, civil disputes went largely unmentioned in Imperial China's codified laws, and such disputes were often quite simply resolved using the same modes of punishment as criminal cases. However, Chinese society during the Imperial period was not organised according to these codified laws. Perhaps most strikingly, the power of law was often not exercised at all during this era, as other, non-codified methods of arbitration and punishment were favoured instead.

The natural evolution of different societal groups and their respective relationships created a tried and tested method of resolving localised disputes in Imperial China. These 'unofficial' customs and means of resolving disputes filled the voids which existed in the codified law of the time. However, such customs were actually *preferred* over using the official channels (i.e. the courts) for resolving disputes by most people. During this time, there was no such thing as legal aid; hence the Chinese proverb, "win your lawsuit, lose your money." Understandably, such conditions created a widely-held distrust of courts and their ability to effectively mediate and resolve disputes.

Moreover, the Chinese language is very difficult to learn. There was never an established state education system in Imperial China. In 1949, the new government released statistics on literacy which showed that 80% of people could not read or write (Xinhua News, 2009). It is difficult to believe that literacy rates were better at any time during the Imperial era. Hence, even when courts made their reports available to the general public, most people would be unable to read them. As such, the majority of decisions made by the judicial authorities were seen to be secretive and subjective by most people. As another famous Chinese proverb goes, “Of ten reasons by which a mayor may decide a case, nine are unknown to the public.” It is reasonable to say that codified law was considerably underdeveloped during the Imperial era.

- Legal professionals and judicial appointment in Imperial China

From 605 CE to 1905 CE, judicial appointment had been dependant on the Imperial Examination System (IES), which was a closed exam which tested Confucian knowledge. The most obvious advantage of the IES was that it was reasonably fair; such factors as location, age, and family background did not matter, although the test was only open to men, and required an education in Chinese language. Language education was only available privately, and therefore completely inaccessible to some sectors of society. One of the clearest disadvantages of the IES was that the content of the test was almost completely irrelevant to everyday life. The examination was more akin to a test of one’s literary abilities than one’s ability to govern, mediate or legislate. The IES was reformed many times as dynasties came and went, but from the Ming dynasty (1368 CE) through to 1905 CE, the IES remained largely the same. The ‘eight-legged essay’ was the principle method of testing in the IES. Examinees were required to write a rigid, structured essay with eight clearly identifiable parts, in which the applicant had to demonstrate their aptitude at Chinese calligraphy, knowledge of vocabulary, and ability to write in prose (amongst other things).

The questions of the IES were mainly focused on interpreting the meaning of *Li* in a positive manner.

Clearly, successful applicants of the IES had no legal knowledge; whether or not they understood *Li* was almost completely irrelevant to their duties as judges. Every individual who was able to read and write would be inclined to take the IES in order to increase their status and prosperity relative to the rest of society. Hence, the development of legal professionals was severely hampered as the majority of the literate class were focussed on preparing for the IES. Therefore, the fact that legal professionalism had not been developed was no accident.

The authority, especially at the lower levels of governance, was without any legal expertise or knowledge. However, the head of each of these authorities acted as a detective, prosecutor, judge and jury all in one. There were legal assistants who passed applicable legal knowledge to aid the local governors in many of their duties. However, these legal secretaries were not formally part of the Imperial administrative system; rather they were privately employed by the mayors, and were not permitted to take an active role in the hearing of cases. There was an established appeals system in which most cases could be escalated up to a higher level of authority, and for capital crimes such appeal cases could even be taken as far as the Emperor himself.

According to Confucian theory, the responsibility of solving social disputes should not be given to judges or courts, but only dependent on *Li*. The government is formed of individuals qualified in Confucian studies, and has the authority to represent *Li*. Perhaps this is why the local governor or mayor also acted as a judge to solve social disputes. In fact the title of 'judge' did not exist. The picture below (see Image 3.2.1) was taken in 1900 CE, and illustrates how a trial looked at this time.

Image 3.2.1 - Image of trial at a local court in China in 1900 CE¹⁴

Image 3.2.1 illustrates how a trial was conducted in Imperial China. A defendant (the figure kneeling down) can be seen kowtowing to the judge (behind the desk). The figure sitting down on the right of the photograph is the judge's legal adviser, and the two figures in black flanking the judge are his guards. The two figures in white standing on either side of the defendant are responsible for carrying out sentencing. The sentencing they carry out would simply involve repeatedly and publicly hitting the convicted criminals on the behind with wooden bats. The legal profession was not developed in 20th Century Imperial China. Perhaps the only 'legal professional' in the courtroom was the judge's legal adviser. Usually there would be no lawyer representing the defendant. The judge would simply ask the suspect questions, and he would be expected to answer them. Furthermore, evidence obtained under duress or torture would be permissible, and the judge also acted as the jury.

¹⁴ Sources: Hong Kong Police Club, 2008

- Law and historical role of Chinese judges

A form of case law was established by the Board of Punishment. Judicial practice in late Imperial China can be observed from the case law. Notably, before 1840, judicial practice was established from the uninfluenced Chinese ideology of Confucianism. Hence two cases that occurred in the 18th century were dealt with as follows:

Table 3.2.1 – Case One: Henan Government v Mrs Chang (1791)¹⁵

The Governor of Henan province reported the following case to the cabinet (central government).

Mrs Chang was recently married to her husband. She committed adultery and her biological father felt so shameful that he committed suicide. According to established case law at the time, if a son or unmarried woman engaged in illicit sexual relations which caused one or both of their parents to commit suicide in shame, they should be executed. According to Li, once a woman is married she becomes part of her husband's family, and the connections to her biological parents become weaker. As such, the local government sentenced Mrs Chang to a suspended death sentence (effectively, a life sentence). After reporting the details of this case to the central government, Emperor Ch'ien-lung – in his Imperial Rescript – stated that a child's relationship with his or her parents is divine and everlasting. Therefore, the Emperor stated that Mrs Chang should be sentenced to death immediately, as a woman would normally be if she had shamed her parents in a similar way before marriage.

From Case One it is clear that the case law was established in accordance with the principle of Li. However, the ultimate power to interpret Li appears to have been held by the Emperor himself. Before the above case took place, the principles of Li were well-established; a

¹⁵ Sources: Bodde & Morris, 1967, p. 360

married woman was not held as responsible for her biological parents as she was her husband's. After the Emperor intervened and sentenced Mrs Chang to death, this changed. From this point onwards, a married woman was equally responsible to her own parents and her husband's parents, and Li had effectively been changed by the Emperor. According to this precedent, if a future Emperor again altered the sentencing in such a case, then the resultant change in case law would also cause a further change in Li as well. From this case it can be observed that if a local judge was not satisfied or confident about a point of law, he could refer this case directly to the central government.

Clearly, the overall holder of the power to interpret law was the Emperor, who was effectively the supreme justice of the state. However, in China there was a severe lack of procedure law, and as such decisions made by the Emperor and local judges were unpredictable. In this case, the Emperor did not respect case law, and he changed Li to reflect his own views. The local governor did not have the authority to interpret *Li* himself. This power was solely held by the Emperor, who could replace any previous case laws as he saw fit. Historically however, the Emperor did not always ignore previous cases or established precedents. There are examples of when the Emperor respected existing case law.

Table 3.2.2 – Case Two: Shanxi Government v Mr Sun (1796)¹⁶

The Governor of Shanxi province reported the following case to the cabinet (central government).

Mr Sun Shouzhi beat a distant and senior relative, Mr Sun Lunyüan, after the latter stole three tree branches from him. Mr Sun Lunyüan later committed suicide as a result of the shame he felt after being beaten by his younger relative. On the grounds that they were

¹⁶ Sources: Bodde & Morris, 1967, p. 298

relatives (albeit very distant relatives), the governor of Shanxi sentenced Mr Sun Shouzhi to 100 lashes from a heavy bamboo stick and a permanent exile from his home outside a radius of approximately 500 miles. The Emperor Jia-Qin later felt that this sentence was too harsh, reasoning that the whole incident was precipitated by the theft of the three tree branches, and that this should provide a mitigating circumstance in the sentencing of Mr Sun Shouzhi. The Board of Punishments (part of the cabinet) rejected the Emperor's assessment of this case, stating that Mr Sun Shouzhi's precipitation of his elder relative's suicide was more serious than the initial theft committed by Mr Sun Lunyüan. The Emperor subsequently accepted the original decision made by the Board of Punishments and agreed that this decision had been made in accordance with established case law.

In this case, an individual tried to protect his property against his senior relative using a very unorthodox method (by beating his relative). The suicide of the senior relative was a result of his shame, and in accordance with Li this shame was created by the actions of the junior relative who beat him. Hence, a punishment should have been passed, even if the Emperor was not content with this decision. The case shows that the Board may challenge the Emperor's decision if they believed the Emperor's interpreter of Li is obviously incorrect.

The above two cases seem to illustrate that law is not simply a form of punishment as Confucius presumed. In fact, law can be seen to function as a double-edged sword. Taking Case One, law can be seen by the public as little more than a form of punishment. Yet Case Two shows that law could also – if infrequently – constrain the Emperor's power. However, most of the time law in Imperial China invariably acted as a single-edged sword that could only inflict harm on the public but not the government. Perhaps this is why Chinese society struggles to see the benefits of law, and furthermore perhaps why China lacks a certain social stability.

After analysing the case law of Imperial China, it seems that the Board always seemed to know all of the relevant facts - by their own standards - in order to make a judgement or pass sentence. There are at least three possible reasons for this. The first is that judges had the judicial right to apply torture to defendants or witnesses¹⁷, and the second reason is that society during this time was largely illiterate. Certainly, most people had no education in law, and therefore most citizens would have felt compelled to defer to the wisdom of the Board on judicial matters. Secondly, the fact that lawyers did not exist at this time meant that there were no external challenges to judicial decisions, and as such the Board and other judicial organs would not have felt any need to confess to making errors or misjudgements. Furthermore, judges rarely acquitted defendants entirely, as this would be an indictment of their own investigative and prosecuting deficiencies. This is a major difference with Western *jurisprudent*. Thirdly, according to Confucian theory, the government is almost equal to *Li*. Hence, the government - especially the central government - cannot make mistakes. Nor will they create social conflict, because if *Li* is exercised fully, disputes should not exist anymore. Disputes or mistakes will only be made by those who do not know *Li* properly. Or, by people who know *Li* but did not act in accordance with it. When deciding whether or not an individual's actions have broken *Li* or not, the government has absolute authority to determine innocence or guilt.

- Important characteristics of Chinese judicial cultural

It seems that law in Imperial China was not for protecting or ruling anyone or anything, but to punish those who appear to have infringed upon or acted against the flow of Chinese societal values. For the above reasons, "...the official law always operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two

¹⁷ This could be proven from the Imperial criminal codes of 1740, when there was enough evidence to prove that a suspect was guilty, but the suspect still would not plead guilty, the judge was permitted to beat the suspect with a bamboo stick for a limited number of times.

individuals” (Bodde & Morris, 1967, p. 4). Most importantly, according to Confucianism, the government and its officials are supposed to be moral examples that can ensure the natural and spiritual well-being of the citizens. A local governor should never break *Li*. Hence historically, Imperial China never really established a body to solve disputes between individuals and the state or government.

When someone has a dispute with the government, they can either accept the government's resultant actions, or appeal to a higher-level authority. If someone has a dispute with the state, there is no neutral arbitrator to ensure settlement, and it is very likely that he or she will lose the dispute without due process. If he or she is extremely fortunate, the Emperor or government may admit their mistake, but this has rarely occurred throughout the history of Imperial China. Effectively, there were no real places to resolve disputes between the central government and the people. In Confucian theory, to ensure the people and state do not have a dispute, the ruler must keep studying and practising Confucian theory.

Given this, the characteristics of judicial power in traditional Chinese legal ideology can be understood. Law was defined as a form of punishment. Rule of law or rule by law was considered a negative element of governance. Law operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals, or individuals and the state. Judicial power was highly mixed with executive and legislative power. It was held by the executive leader of any given region, with the Emperor as the highest ranking judicial official. Judicial power was also supervised by a formal established legal supervisory body (known as the Emperor's Eyes), which was directly answerable to Emperor. Legal professionalism was not formally established in the Imperial era. Legal professionals had to pass the IES - which did not test any legal knowledge - and such professionals were remunerated with very low incomes. Furthermore, the trial process was

often closed to the majority of the public, and strongly based upon a presumption of guilt. Notably, evidence collected through torture was admissible in court and could be used by judges during the investigation. Additionally, legal access was not available for individual citizens. Perhaps unsurprisingly, many citizens did not want to use the court system to resolve disputes unless absolutely necessary.

The inherent values of Confucianism stipulate that law is a negative phenomenon and that the rule of law should be denied. Confucianism advocates the rule by government, comprised of well-qualified individuals able to ensure the material and spiritual well-being of the citizens. Confucian legal ideology disadvantaged China in establishing rule of law, good governance and social stability; all of which are important for creating a capitalist economy with strong civil and human rights. At the same time, without the development of an ideology which protects human rights and ensures good government, the theory of rule of law was never required in Imperial China.

According to Confucianism, for a qualified king and his officials to be able to deal with any social affair, they should be omnipotent. Whether we view the Imperial system as having employed judges with part-time jobs as government officials, or government officials having part-time jobs as judges, it is clear that there was no separation between state powers. Throughout Chinese history, there have been more than twenty nation-wide revolutions in which dynasties changed, but the nature of the constitution always remained largely the same. Therefore, after years of gradual evolution, the constitution became increasingly centralist and established an authoritarian culture of government. In this system, the nature of a judge is not to impartially solve social disputes, but to directly represent ‘good social values’, and to punish ‘bad’ individuals.

Without any argument, Confucianism was granted government a powerful and unchallengeable position in society. As a result of this, Imperial China presented a largely, “unchanging, despotic regime where the lack of individualism reduced human beings to selfless servants of the greater authoritarian state” (Peerenboom, 2007, p. 282). Hence, Chinese legal culture prevented the possibility of adopting manifest judicial independence and rule of law. Historically, revolutions have arisen as a result of a dispute between state and people. As such, one of the prime concerns of central government has been how to prevent local judges from breaking Li. For the Emperor, the answer was legal supervision. A body known as the Emperor's Eyes, independent from the cabinet and directly under the control of the Emperor, was established to supervise all government officials and make reports to the Emperor himself.

In Chinese history, together with the development of centralist ideology, legal supervision has been built up to become one of the most important elements of Chinese legal culture. However, the historical methods of legal supervision were not under the authority of the people, but under central government control. Furthermore, central government is seen as being superior and unchallengeable. Two thousand years of Imperial China has established an authoritarian government, engendered a society that grants law very low credibility and a judiciary that lacks almost any independence. Judicial power in traditional Chinese legal ideology can be defined as the power from the state to punish individuals who break the established social or political order. Unsurprisingly, Confucian ideology is unlikely to help China gain long term political stability. The Imperial Examination System - a key element of Confucian domination - was abolished in 1905. Following this is the 1905-1911 constitutional movement and republican revolution. In 1909, Imperial China was replaced by the Republican Government through a violent revolution.

3.3 – 20th Century modernization and changes: The Marxist theory of law and state and the effect on China's legal structure and culture

From 1911 to 1949, the continued disruption of several wars plagued Chinese society. Several Republican governments attempted judicial reform, but in the unstable environment, were unsuccessful with no money, resources or large-scale support. In 1949, the new People's Republic was established and started to transfer the Soviet legal system into China. By the end of the 1950s, the Soviet constitution was fully established.

Marxist legal ideology is the dominant theory in the current constitutional structure. As such, Confucian theory is of less importance, as further development of Marxist legal theory will lead the way forward for future Chinese legal reform. President Hu's "Three Supremacies" policy requires judicial reform to be compatible with current political principles. Such principles can be observed from Article One of the *Constitution of the PRC (1982)*:

“The People's Republic of **China is a socialist state under the people's democratic dictatorship** led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China. Sabotage of the socialist system by any organization or individual is prohibited.”

The core value and guidance of the current Chinese political principles is expressed as, “a socialist state under the dictatorship of the proletariat”. This concept of dictatorship of the proletariat was first conceived by Marx and Engels in their series of analytical work on philosophy, society, politics and economics. This series of work (see Table 3.3.1) forms the classic fundamental principle of Communist legal ideology.

Table 3.3.1 – Series of analytical work on philosophy written by Marx and Engels

- *Debates on the law on thefts of wood* (1842) by Marx
- *The Divorce Bill* (1842) by Marx
- *Contribution to critique of Hegel's philosophy of law* (1843) by Marx
- *The German Ideology* (1846) by Marx and Engels
- *The Poverty of philosophy* (1845 -1846) by Marx
- *The Condition of the working class England* (1845) Engels
- *Manifesto of the Communist Party* (1848) by Marx and Engels
- *Letter to Joseph Weydemeyer* (1852) by Marx
- *Contribution to the Critique of Political Economy* (1857) by Marx
- *Das Capital Volume I* (1867) by Marx
- *The Housing Question* (1873) by Engels
- *The Origin of the Family, Private Property and the State* (1884) by Engels
- *Das Capital Volume II* (1893) prepared by Engels from notes left by Marx
- *Das Capital Volume III* (1894) prepared by Engels from notes left by Marx

Classic Marxist theory did not provide a comprehensive or systematic account of law, but highlighted the relationship between law and economics (or material conditions, e.g. *Das Capital*), and stressed law's repressive aspects. For Marx, law is accorded an inferior position

to economic factors: it is merely part of the superstructure – along with various cultural and political phenomena – determined by the material conditions of each society (the economic base), whilst acknowledging a causal link between the two.

Marxist accounts of law adopt three standpoints in respect of the relationship between base and superstructure and the position of law. The first has been described as, ‘crude materialism’ for it argues that law purely ‘reflects’ the economic base: the form and content of legal rules correspond to the dominant mode of production. The second view is a direct expression of the will of the dominant class. The third is the ‘foundation metaphor’ which means that the economy is self-limiting in terms of what can be achieved economically, but otherwise allows for a degree of autonomy for the judicial institutions.

- Dialectical Materialism, Classic Marxist’s view on notion of law and the concept of the *dictatorship of the proletariat*

A formal explanation of the origin and nature of law by Marx and Engels (1846/1976, p29) is suggested in *The German Ideology*, “The dominance of religion was taken for granted. Gradually every dominant relationship was pronounced a religious relationship and transformed into a cult, a cult of law, a cult of the State.” Marx and Engels (1846/1976, p90) continued to observe how law was derived:

“Since the State is the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomised, it follows that the State mediates in the formation of all common institutions and that the institutions receive a political form. Hence the illusion that law is based on the will, and indeed on the will divorced from its real basis — on free will. Similarly, justice is in its turn reduced to the actual laws.”

In *The Poverty of Philosophy* (1847/1955, p170), Marx criticised Proudhon's idealist methods of legal analysis, stating that:

“Truly, one must be destitute of all historical knowledge not to know that it is the sovereigns who in all ages have been subject to economic conditions, but they have never dictated laws to them. Legislation, whether political or civil, never does more than proclaim, express in words, the will of economic relations.”

For Marx, law is from the condition of productivity, but later confirmed by the legislative body to become man-made law. Hence, law is a reflection of the formation of the relationship of production and reflects class conflict. Given this, it seems that Marxism does not take into account the theory of natural law, but approaches the theory of classic legal positivism – law as commands. As society developed into different classes, law attempted to represent the interests of the ruling class. As a result of this, Marxism specifies that laws are subject to economic forces, and in turn laws are *only* designed to ensure the ruling classes' status by protecting their economic interests.

Engels (1845/2008, p118), in his *The Condition of the Working Class in England* pointed out that in a capitalist society, “the proletariat is helpless...the bourgeois monopolise all means of production”. The bourgeois control everything the proletariat needs, and the bourgeois monopoly is protected by the state, hence, “The proletarian is, therefore, in law and in fact, the slave of the bourgeoisie, which can decree his life or death” (Engels 1845/ 2008, p121). According to Engels, law is a negative element, “The only provision made for them [the proletariat] is the law, which fastens upon them when they become obnoxious to the bourgeoisie” (Engels 1845/ 2008 p151). Furthermore, Engels pointed out that the bourgeois understands that maybe some laws make their life more difficult, but law in its entirety is designed to protect them. Classic Marxism contends that as long as private ownership exists, society will be separated into different classes, and as law has already been identified as a

tool of class domination, it is unsurprising that judges are not given much credence in Marxism.

“Laws are necessary only because there are persons in existence who own nothing; and although this is directly expressed in but few laws, as, for instance, those against vagabonds and tramps, in which the proletariat as such is outlawed, yet enmity to the proletariat is so emphatically the basis of the law that the judges, and especially the Justices of the Peace, who are bourgeois themselves, and with whom the proletariat comes most in contact, find this meaning in the laws without further consideration.” (Engels 1845/2008 p302)

Here, law’s dominating aspect is stressed by Engels, and he considered judges to be a part of the ruling class and described in detail how the English judicial body used law to protect the bourgeois and punish the proletariat:

“If a rich man is brought up, or rather summoned, to appear before the court, the judge regrets that he is obliged to impose so much trouble, treats the matter as favourably as possible, and, if he is forced to condemn the accused, does so with extreme regret, etc., etc., and the end of it all is a miserable fine, which the bourgeois throws upon the table with contempt and then departs. But if a poor devil gets into such a position as involves appearing before the Justice of the Peace -- he has almost always spent the night in the station-house with a crowd of his peers -- he is regarded from the beginning as guilty; his defence is set aside with a contemptuous "Oh! We know the excuse" and a fine imposed which he cannot pay and must work out with several months on the treadmill. And if nothing can be proved against him, he is sent to the treadmill, none the less, "as a rogue and a vagabond". ... only when a working-men's association, such as the miners...does it become evident how little the protective side of the law exists for the working-man, how frequently he has to bear all the burdens of the law without enjoying its benefits. ” (Engels 1845/ 2008 p302-303)

Compared with Confucianism, which presumes that judges possess good self-control and are honest officials, Marxism depicts judges in a capitalist state in a far more negative light. According to this, the origins of law are given by Marxism as follows:

“At a certain, very primitive stage of the development of society, the need arises to co-ordinate under a common regulation the daily recurring acts of production, distribution and exchange of products, to see to it that the individual subordinates himself to the common conditions of production and exchange. This regulation, which is at first custom, soon becomes law. With law, organs necessarily arise which are entrusted with its maintenance – public authority, the state.” (Engels 1873, p88)

Later, in *The Origin of the Family, Private Property and the State*, Engels gave a full explanation of the historical dialectical materialist view of law and the state. Engels believed that at the same time the state is established, different classes emerged and law was created. He believed that the first form of law originated from the development of early civilisation’s commune-like division of labour through to the establishment of a slavery-based society. The slave-masters created the notion of state and authority, and used the state to force the slaves to accept their customs, which were based upon their own interests, as the common economic regulator, and this was the very first law. Hence, for Engels, once there is a state, there is a law. In this article, he later analysed the *Codes of Athens*, Roman law, and Germanic law, and concluded that these three examples were all attributable to customs. However, Engels (1884/1962 p315) noted that there was a difference between customs and law as, “the legislation of ancient Athens and ancient Rome - and in both cities it arose spontaneously, as customary law, without any compulsion other than the economic.”

Engels pointed out that the law is always in accordance with the custom of the people who created the law, but custom will not become law unless class struggle appears. Hence, law is a facet of class society, and will become useless when class differences are destroyed. The final conclusion of law and state was given by Engels (1884/1962, p272-273) as:

“an essential characteristic of the state is the existence of a public force differentiated from the mass of the people ...The state is nothing but the organized collective power of the possessing classes, the landowners and the capitalists as against the exploited classes, the peasants and the workers.”

Engels' explanation of the ruling class uses the customs, which is based upon their interests to formulate law. Therefore, the concept of law in classic Marxism is formally defined as a tool of domination for one class to use over another.

For Marxists, those who hold the means of production are the ruling class. Law represents their interests and protects their dictatorship; it is a weapon which is utilised by the ruling classes. Judges are the people who most directly exercise law to punish class enemies. The model of society and the nature of the ruling class (i.e. slave-masters, feudal lords, or bourgeoisie) change with the development of productivity. However, law always services the ruling class, except in a Communist society (see Table 3.3.2).

Table 3.3.2 – Marxist theory about the role of law in different models of societies

The model of society	Ruling class	Exploited class	The purpose of law
Slavery	Slave-master	Slave	Protect the slave-master's dictatorship
Feudalism	Feudal lords	Peasant	Protect the feudal lord's dictatorship
Capitalism	Bourgeoisie	Proletariat	Protect the bourgeoisie's dictatorship and interests
Socialism	Proletariat	Bourgeoisie	Protect the proletariat's dictatorship and interests, destroy all class differences.
Communism	None	None	Not applicable

According to Marxism, it is never possible for the proletariat's interests and benefits to be protected in a capitalist state. Only when the proletariat becomes the master of the state are they able to formulate law themselves to protect their own interests. However, the bourgeoisie will never wish for this to occur, similar to the way in which the feudal lords feared a revolution of bourgeoisie. Therefore, a proletariat revolution appears to be necessary before a society progresses into Communism. Lenin (1917/1971, p278) in his *State and Revolution* stated that:

“The inevitability of a violent revolution refers to the bourgeois state. The latter cannot be superseded by the proletarian state (the dictatorship of the proletariat) through the process of 'withering away", but, as a general rule, only through a violent revolution.”

For Marxism, a communist party is considered to embody, “... the desire of abolishing the right of personally acquiring property as the fruit of a man's own labour, which property is alleged to be the groundwork of all personal freedom, activity and independence” (Marx & Engels, 1844/2008 p16) and “the revolutionary vanguard of the proletariat” (Lenin 1917/1971, p603). However, even after a successful revolution, society will not directly advance from capitalism to communism; there is a temporary stage known as socialism:

“Between capitalist and communist society there lies the period of the revolutionary transformation of the one into the other. Corresponding to this is also a political transition period in which the state can be nothing but the revolutionary dictatorship of the proletariat.” Marx (1875/1962 p32-33)

Therefore, when the proletariat, under the leadership of the Communist Party, removes the bourgeois from power, the class dispute will still exist in the state. The bourgeoisie will still exist, hence law and state authority are still necessary to control the bourgeois and protect the proletariat's interests. Hence the socialist constitution and laws naturally become the proletariat's weapons to protect their own dictatorship. As such, the principle of the Communist Party's legal ideology represents the dictatorship of the proletariat.

The idea of dictatorship of the proletariat was transferred into China in the early 20th century. It was interpreted by Mao Zedong and become known as *The People's Democratic Dictatorship*. Mao (1937/1964a, p339) declared that, “To consolidate the dictatorship of the proletariat or the dictatorship of the people is in fact to prepare the conditions for abolishing this dictatorship and advancing to the higher stage when all state systems are eliminated.”

Mao viewed the main role of the people's dictatorship as to resolve class conflict. Mao (1937/1964a pp. 338-340) pointed out that class disputes always occur in society, without the bourgeois there would be no proletariat, and vice-versa, hence when the socialist revolution succeeds, there would still be a proletariat, and therefore still a bourgeois. The difference is that the proletariat becomes the ruler and the bourgeois becomes the ruled, although at this stage class dispute still exists. A proletariat's dictatorship is needed to continue resolving the class disputes in a soviet state. Mao (1949/1964b, p418-419) asserted that the people's democratic dictatorship is intended, “to deprive the reactionaries of the right to speak and let the people alone have that right... The right to vote belongs only to the people, not to the reactionaries. The combination of these two aspects, democracy for the people and dictatorship over the reactionaries, is the people's democratic dictatorship.” Mao continued in this article to question why state authority, law and legal enforcement bodies still remained after the success of the Communist Revolution:

“Our present task is to strengthen the people's state apparatus - mainly the people's army, the people's police and the people's courts - in order to consolidate national defence and protect the people's interests. Given this condition, China can develop steadily, under the leadership of the working class and the Communist Party, from an agricultural into an industrial country and from a new-democratic into a socialist and communist society, can abolish classes and realize the Great Harmony.”(Mao 1949/1964b, p419)

Therefore, according to Mao, in a socialist state, the judiciary only deals with disputes which are between the nation/people and their class enemies. The disputes amongst people do not require the involvement of the judiciary. Furthermore, Mao (1949/ 1964b, p419) pointed out that the court in a proletarian state is a part of state apparatus:

“The state apparatus, including the army, the police and the courts, is the instrument by which one class oppresses another. It is an instrument for the oppression of antagonistic classes; it is violence and not ‘benevolence’...”

Effectively, the judiciary was considered by Mao as an arm of the state, to protect the people’s rights. Notably, the definition of the people’s class enemies does not only include the bourgeoisie, imperialists and landlords, but also criminals and corrupt Communist government officials. Mao noted that there was a historical pattern in China of corrupt government officials causing serious damage to the interests of the people and the state. Hence, the fundamental aim of the judiciary, even if all the class enemies have been destroyed or reabsorbed into a classless society, is to protect the people and the state against corruption:

“...In the Party there may be some members who unflinchingly support the will of the people in the face of danger, these people are heroes. However, they may be susceptible to bribery...” (Chairman Mao, 1949)

As noted before, the purpose of the judiciary in a Communist state is not to neutrally solve disputes, but to favour the interests of the people and the state and punish their class enemies including capitalist reactionaries, anti social criminals and corrupt government officials. Hence, the judiciary cannot be independent, but must be answerable to the people, the state and the Communist Party.

- Legal practice and role of Chinese judges during Mao's era

In 1954, the state constitution was adopted. A congress elected by the people was termed the highest state authority; known as the NPC. The state's legislative, executive and judicial powers all belonged to the NPC. The NPC itself exercised the power of legislation and legal interpretation. The NPC elects the government which exercises the executive power, elects the prosecution service - which exercises the legal supervision and public prosecuting power - and elects the courts - which exercises judicial power.

Before 1978, the courts never heard a civil/commercial or administrative compensation case as there was no such legislation for these matters of dispute. The law in Mao's China operated vertically, from the state to the individual, rather than horizontally between two individuals or between individual and the state. This is because Mao believed the state directly represented the people's interests and would protect them more than anything else. Since the state is equated to the people, and likewise the people equated to the state, the law must serve the people *and* the state. The party – as the vanguard – has a responsibility to ensure that law is really representative of the people and the state. Hence, the Party supervises the court's work, and sees this as lawful and necessary, and is open to the public. In practice, the Party nominated qualified judicial candidates to the Congress to be elected to hold posts in the judiciary. The two fundamental characteristics of the Communist Constitution in China can be understood as follows:

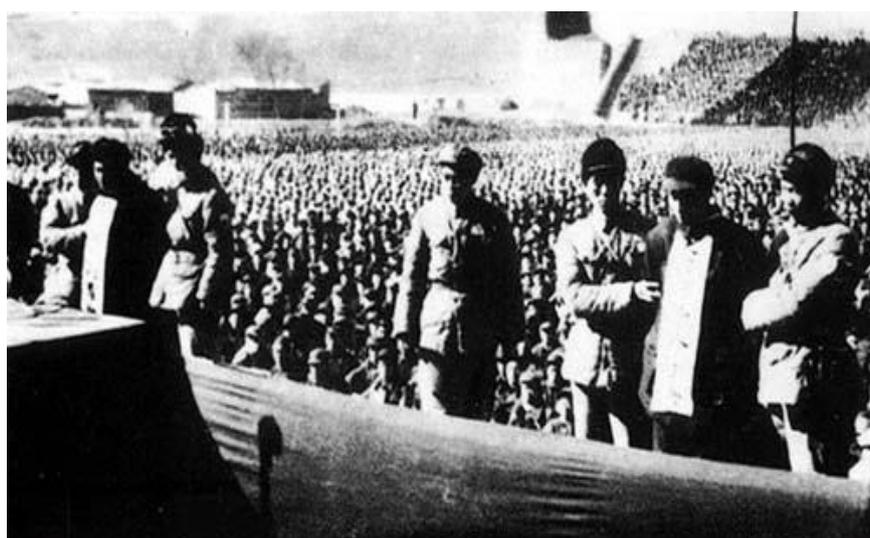
- 1) The Communist Party can lawfully supervise all state authorities including the judiciary
- 2) All government authorities are answerable to the People's Congress

Certainly, in classic Marxism, judicial independence is not accepted. Instead, there must be a strong supervisory power of the people over the judiciary. A court is not a neutral body; they

must accept this pervasive supervisory influence to ensure that they will act against the people's class enemies rather than against the people themselves. Perhaps, in the case of China, it is particularly important because judges have historically had quite a poor public image. Therefore, the Party's supervision over the judiciary is necessary and important for maintaining the interests of the people and their democratic dictatorship.

How did the courts operate in early Communist China to punish the people's class enemies? A very famous case (see Table 3.3.3 - Case Three) offers an answer. In September 1951, two high-level government officials took money from the government totalling over 17 billion Yuan. Both of the officials were military leaders with excellent service records during both the Second World War and the Communist Revolution. Both of them were brought to public trial, and received the death penalty. Most important was not the case itself, but *how* this case was managed. Image 3.3.1 shows the trial, where there was no defence lawyer for the accused, and published historical documents have shown that the sentence issued was formed by Mao himself together with the Communist Party.

Image 3.3.1– Trial of Tianjin Prosecutor v Mr Liu and Mr Zhang (1951)¹⁸



¹⁸ In 1952, two war heroes were brought to public trial and both of them received the death penalty
Source: Lianchang Shuili Information, 2007

Table 3.3.3 – Case Three: Tianjin Prosecution Services v Mr Liu and Mr Zhang (1951)¹⁹

The case was initiated at a Communist Party Conference, when many members accused the two individuals of corruption in mid-November, 1951. An internal party investigation began, and by the 29th November a report from this investigation was sent to Mao Zedong and the Politburo. The following day, Mao wrote a letter to the local Communist Committee, praising them for their investigation, and insisting that the two men should receive a severe punishment. By the 14th December, the local Communist Committee sent a letter to the Politburo, stating their belief that the two accused men should receive the death penalty. The Politburo responded by saying that in order to protect the state law and educate the people, they agreed with the recommendation of the death sentence, or at the very least would be supportive of a custodial life sentence; the Politburo stated that the provincial government should ask the Central Government for direction in this matter. Mao Zedong personally wrote a letter to the local Communist committee to suggest that bribery is a product of capitalism, and that the war against capitalism was still not complete. He stated therefore that the punishment should be very severe. Some higher-ranking party officials suggested that the two accused men had a very high status in the party as war heroes, and that a life sentence may be more appropriate. Mao responded as follows:

“The two of them have a very high status, have made great contributions and have significant influence; therefore we must make up our minds to execute them. This is the only way to save another 20, 200, 2000 or 20,000 officials who may commit the same mistake.”

The trial took place in early 1952, and the two war heroes received the death penalty

¹⁹ Source: Lianchang Shuili Information, 2007

The most important lesson from this case is that Mao made an open judicial decision and the public accepted and celebrated this decision. Even today, Mao's intervention in this case is still considered as, “a brilliant decision which insured China would be free from governmental bribery and corruption” (Lianchang Shuili Information, 2007). While it may seem that Mao's actions were out-of-place according to Western culture, his intervention in the case was quite acceptable according to Chinese culture. In addition, at this time China still had the recent memory of civil war and the judicial system retained militaristic characteristics that fit with the context of the time. Yet, there appears that trial in Mao's era is not that different compared with that in Imperial China. There appears to be a significant yet perhaps unintentional similarity between Confucian theory and Mao's legal ideology.

It seems that Mao applied a very similar legal ideology to Confucianism. Both Maoism and Confucianism arbitrarily determine social values, believing that there will not be disputes between the state and individuals if the state is under the direction of a group of ‘qualified people’ and it is the leader's duty to ensure justice for the public. It seems that in Mao's era, judges played very similar roles as they did in Imperial China and in some aspects they were less developed. Firstly, there were not many laws for judges to follow. In fact, before 1978, the Chinese legislative body only adopted largely criminal, family and state authority organisation laws. At this time, there were many informal bodies and methods for solving civil disputes. Secondly, judges were not trained legal professionals, but largely composed of military veterans. Judges were not expected to determine guilt or innocence, their job was to adhere to the law and punish criminals. Thirdly, judges did not have any particular role in the state's economic management; if disputes arose regarding the planned economy, then these would not be arbitrated or solved by the judges.

However, there was a significant move forwards for the Chinese judiciary in Mao's era; that is for the first time, judicial power – at least at face value – was held by people who were not government executive officers. Judges in Mao's era may still have been under the government's control, but at least the local governor did not act as the local justice anymore. Mao was born towards the end of the Imperial era in China, in 1893. Certainly, he was influenced by the Confucian nature of contemporary society. After Mao's interpretation of Marxist theory, Maoism incorporated a strong, traditional Chinese influence. Nevertheless, several key factors during Mao's era – the lack of a legal system, a command economy, personal veneration of Mao, and the failures of the Great Leap Forward and the Cultural Revolution – led China to near economic collapse by the mid-1970s and political instability ensued.

In 1978, Deng Xiaoping led the pragmatic move towards economic reform to create more social stability for normal citizens. From this time, China entered a new era of modernisation and globalisation. Notably, China adopted a new constitution in 1982, which stated that class conflict was no longer the most important concern in China, and the role of the judiciary has shifted from punishing criminals, to promoting market economics and solving social disputes.

3.4 - The modernising agenda and the potential for greater judicial independence and the development of the Rule of Law

- Economic reform and China's modernization

The economic reform began in the late 1970s, after the end of the Cultural Revolution, when the CPC government faced serious economic problems and social instability. Since 1958, the Great Leap Forward slowed down economic development. The command economy was not able to function properly for a national population of around 700 million people (circa late 1970s). This led to great public dissatisfaction with the government, and in 1978, the second generation of the CPC leadership led by Deng Xiaoping started to reform the economic system in an attempt to shift China towards a market-based economy.

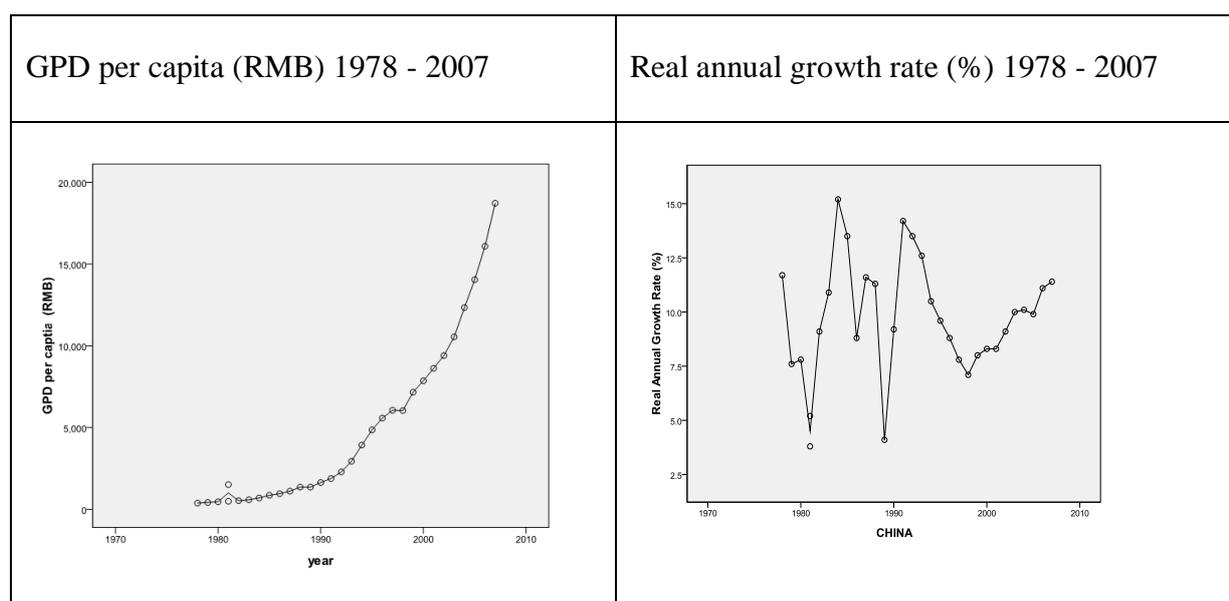
A command economy used to be considered as one of the core characteristics of a socialist state. Initially, a command economy was beneficial for China to rebuild and recover from the after-effects of the Second World War. As time grew on, certain defects of the command economy became particularly pronounced. Firstly, the government maintained strong control over this economic management, and there was almost no difference between the affairs of the government and the affairs of state-run businesses. Ignoring the economic regulations between supply and demand prevented the development of a market. Secondly, public ownership – which prohibited private ownership – ensured that all work was equally shared, which led to people not being pressured or interested to any great effort or quality in fields of work that were not in accordance with their interests. It is clear that – in long term - in a command economic, there was lack of development.

In 1978, for the purpose of quickly increasing economic growth, Deng Xiaoping employed the market economy system to bring China's markets to life. Deng's reforms included decreasing the government's control over the markets through the Communist Party's policies

or orders. The reform also sought to alter the traditional ways of thinking that had resulted from Communist rule under Mao Zedong. The most important thing to consider about the reform is that it was not comparable with Gorbachev's revolution; in fact, it was almost completely and diametrically opposite.

Deng Xiaoping's reform was more similar to the 'East Asian Model' of reform; focusing on economic growth whilst maintaining the existing political system, and using the government's authority to provide a catalyst for development. In fact, maintaining the Communist Party's status and increasing China's social welfare were the most fundamental goals of the economic reform.

Over three decades, China enjoyed significant achievements since the economic reform began. The restructuring of the economy and resulting efficiency gains have contributed to a significant increase in GDP since 1978 (see Fig 3.4.1). In China in 1978 was only RMB 379 (considering inflation, in real terms this is about RMB 471.6 in 2007). In 2007 GDP per capita increased to RMB 17,909. In real terms, Chinese wealth has increased fourfold between 1978 and 2007. The economic growth rate since 2003 has generally stabilised at around 8%.

Fig 3.4.1 - Changes of wealth in China from 1978 to 2007²⁰

Put into an international context using a Purchasing Power Parity (PPP) basis, in 2007 China stood as the second-largest economy in the world after the United States of America (see Table 3.4.1). However, in per capita terms China is still lower-middle income class and nearly seven times lower than the United Kingdom. (See tables 3.4.2)

Table 3.4.1 - GDP rank (purchasing power parity)²¹

United States	\$ 13,840,000,000,000	2007 est.
China	\$ 6,991,000,000,000	2007 est.
Japan	\$ 4,290,000,000,000	2007 est.
India	\$ 2,989,000,000,000	2007 est.
Germany	\$ 2,810,000,000,000	2007 est.

²⁰ GDP Sources: National Bureau of Statistics, 2008 (Figures produced by Yaliang)

²¹ Sources: CIA, 2007a

Table 3.4.2 - GDP per capita rank (purchasing power parity)²²

United States	\$ 45,800	2007 est.
...		
United Kingdom	\$ 35,100	2007 est.
...		
World	\$ 10,000	2007 est.
...		
China	\$ 5,300	2007 est.

Table 3.4.3 - Exports rank²³

Germany	\$ 1,334,000,000,000	2007 est.
China	\$ 1,217,000,000,000	2007 est.
United States	\$ 1,149,000,000,000	2007 est.
Japan	\$ 676,900,000,000	2007 est.
France	\$ 548,000,000,000	2007 est.

²² Sources: CIA, 2007b

²³ Sources: CIA, 2007c

China's economy has changed from a centrally-planned system that was largely closed to international trade to a more market-oriented economy that has a rapidly growing private sector and is a major player in the global economy. China was noted in the *Foreign Direct Investment Magazine* (2008) as, “the most attractive destination for foreign investment ahead of both Eastern and Western Europe”, and already the second largest country in exporting goods (see Table 3.4.3 above). In 1978, there were almost no privately-owned companies. In 2007, privately-owned companies constituted 69% of China's economy (Chen, 2007) . It is clear that after 30 years of Deng Xiaoping’s reform, a form of market economy has been established and accepted in Communist China by the majority of Chinese people. Today, the sprawling modern cities of China demonstrate that Mao’s age is a distant memory and very unlikely to return. However, new social problems have emerged following the economic boom, such as disputes between the government and people. The reform of agriculture brought 70% of the Chinese population out of poverty, but since China began economic reform in the urban cities, their development quickly surpassed that of rural areas. The gap between rich and poor citizens has increased significantly. Urban development has disrupted social harmony as old ideas have been challenged by the very visible and material benefits brought by the market economy.

In 2008, China held the Olympic Games, which are normally considered to be a privilege of developed countries. On another hand, the Sanlu milk scandal gave a very bad image of China around the world. In fact, there are two completely opposite views of today’s China; one is of a high-tech, modern, developed and cultured economic powerhouse, and the opposite is of a centralised, oppressive state with a lack of human rights and democratic freedoms. In fact,

“comparing China to much wealthier countries, leads to the unsurprising conclusion that China has more problems: there are more deviations from the rule of law, government institutions that are weaker, less efficient and more corrupt; and citizens enjoy fewer freedoms while living shorter and more impoverished lives...[However], China’s performance across a range of variables from economic performance to elimination of poverty to the establishment of a functional legal system and government institutions is on a whole demonstrably superior to the performance of most African, Middle Eastern and Latin American countries.” (Peerenboom, 2007, pp. 11, 20)

Clearly, China is still a developing country; there is significant ‘breathing room’ for the economy to develop. However, increasing social problems have hindered further economic development. Perhaps this is why the fourth generation of the CPC leadership has begun to include social harmony as an important goal together with continued economic growth.

Therefore, protecting social harmony is a principle contemporary goal of the Chinese legal enforcement body. The Secretary of the CPC Committee of Political and Legislative Affairs²⁴, Luo Gan (2007) pointed out that, “Stability is the fundamental requirement of social harmony”. Consequently, a core element of harmonious society in Luo’s view is to first establish social stability. It seems that establishing a stable society together with promoting economic growth are the most fundamental political goals of modern-day China. For both the purposes of increasing social stability and furthering development of the economy, perhaps China should take further account of legal reform. It seems that China should further develop its levels of judicial independence and rule of law because there is a significant mutually reinforcing relationship between rule of law and economic development.

²⁴ This position is generally considered as the head of the judiciary in China, which is responsible for mediating among police force, the prosecution service and the courts.

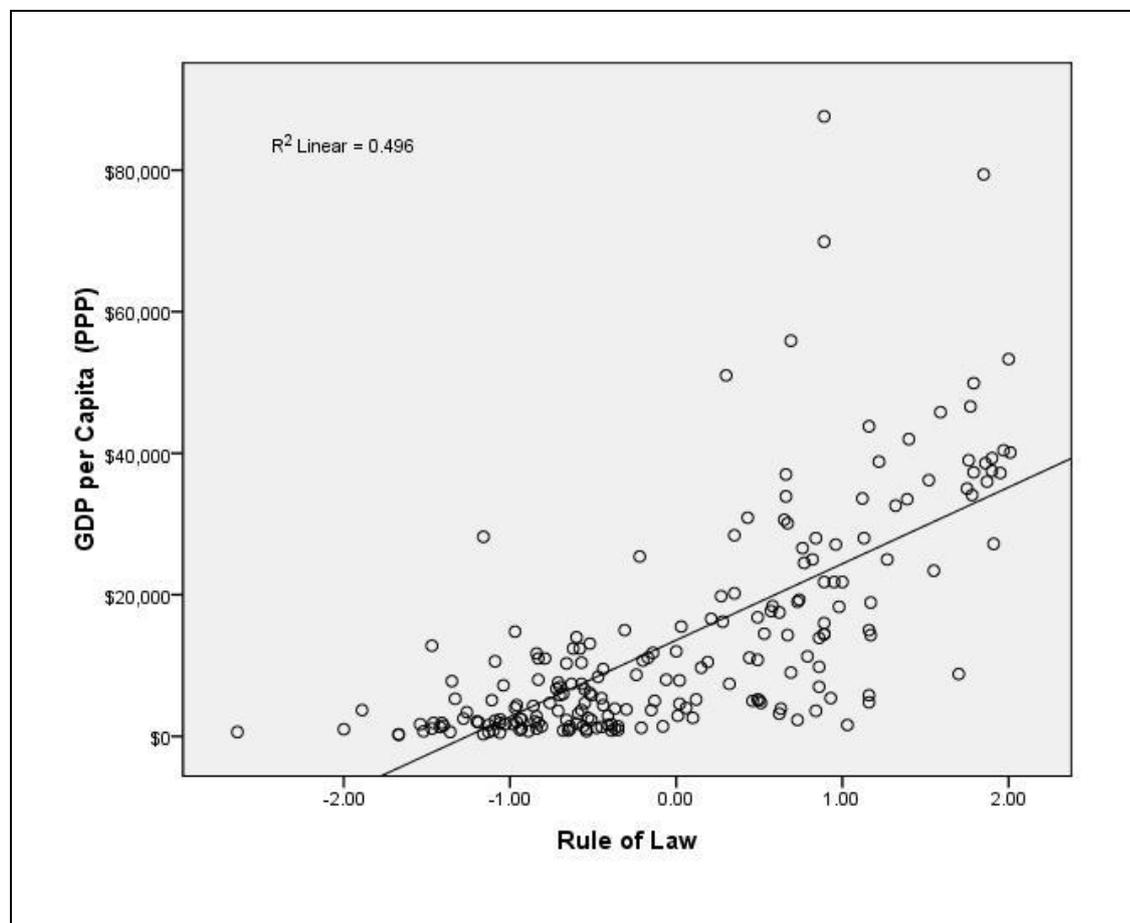
- Rule of law - importance for economic development?

Economic reform has been taking place for 30 years; China is largely out of poverty but is also far from being wealthy. In past decades, many foreign and Chinese legal scholars have suggested that the CPC take a serious step towards deeper and further political and legal reform with the aim of increasing the level of judicial independence and rule of law. Part of the reason given is that there appears to be a significant relationship between rule of law and economic growth. Historically, the idea of rule of law is generally considered to safeguard individual rights, private property, liberty and equality. Certainly, none of these elements has been considered as important issues in either Confucianism or classic Marxist theory. In fact, both theories stress the importance of collectivism, loyalty to the superior and obeying orders. Hence, it is no coincidence that neither Confucianism nor classic Marxism has developed the notion of rule of law. However, President Hu's theory of social harmony is very different to the Confucian concept of social order and the classic Marxist concept of governance. In fact, it is even quite different from classic Marxist and Maoist theory. Hu places emphasis on the importance of rule of law, and it appears that this direction of policy is intended to deliver overall social balance in China.

In fact, in the past few decades the idea of rule of law has become widespread. Some scholars believed rule of law “has become the motherhood and apple pie of development economics” (The Economist, 2008, p. 95), noting that rule of law is held to be not only good in itself, because it embodies and encourages a just society, but also a cause of other good things, especially economic growth. Brian Tamanaha once stated that, “no other single political ideal has ever achieved global endorsement” (at St John’s University, New York). Clearly, there is an affiliation between rule of law and economic growth and this relationship is ever significant in the global era. The World Bank rule of law index has provided evidence (see

Fig 3.4.2) that there is a mutually reinforcing relationship between rule of law and social wealth.

Fig 3.4.2 - Rule of law rank and GDP per Capita²⁵



As the above graph shows, there is a common similarity amongst the countries or jurisdictions ranking in the top quartile on the World Bank's rule of law index: developed, wealthy economies. North America, Western Europe, Australia, Israel, five East Asian countries and regions - Singapore, Japan, South Korea, and China's two special administrative regions: Hong Kong and Macao – together with Chile, French Guiana and oil-rich Arab countries fill the top ranks of World Bank's rule of law index. The top quartile consists of high or upper-middle income countries. This is considered to be due to the fact

²⁵ Rule of law data Sources: World Bank Aggregate Governance Indicators 2007; GDP data sources: CIA the World Fact Book 2007 (Figures produced by Yaliang)

that the rule of law and economic developments are closely related, and tend to be mutually reinforcing (Peerenboom, 2007, p. 34). Notwithstanding theoretical arguments for and against the claim that rule of law contributes to economic development, the empirical evidence is surprisingly consistent and supportive of the claim that implementation of rule of law is beneficial for sustained economic development.

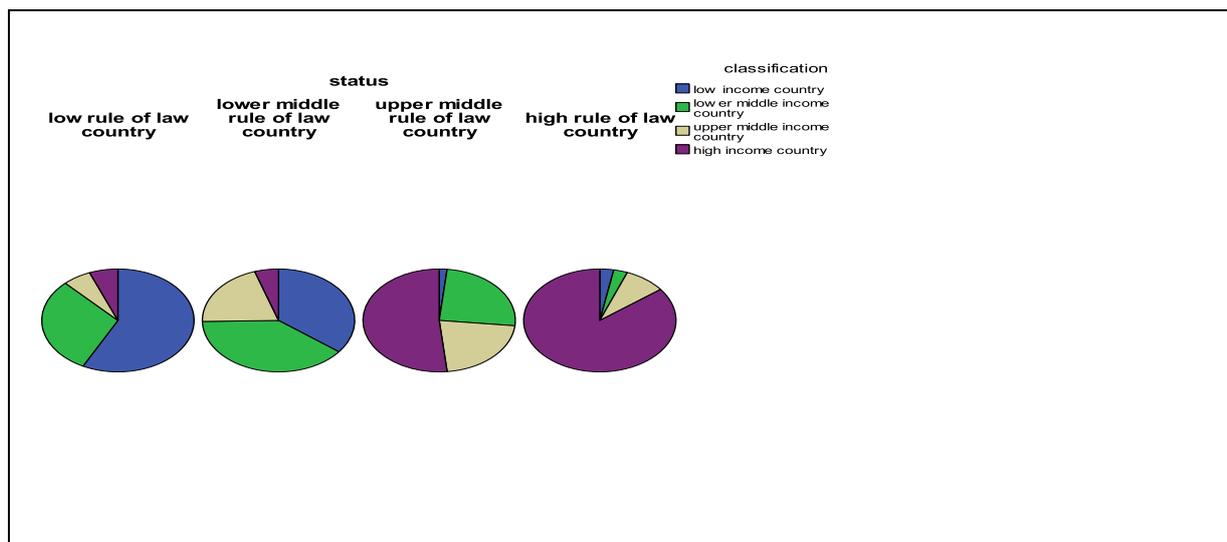
In the past three decades, China's economic growth has drawn the most attention. Yet, concurrent with economic development, China has speedily increased its legislation agenda; vast numbers of laws pertaining to economic development were adopted. There were very few laws before 1978 in China. By the end of 2007, 229 acts had been passed by the NPC, 600 national administrative regulations had been adopted by the central government, and over 7,000 local acts had been passed. Out of 229 parliamentary acts, 105 acts were adopted between 2003 and 2007. Since 1982, the State Constitution has been amended four times (1988, 93, 99 and 2004). Notably, in 1999 for the first time the constitution added the term '*rule of law*' and in 2004 prescribed that, "citizen's legitimate private belongings cannot be impinged.

However, the "rule of law in economic development in China is frequently underestimated due partly to the tendency to elide rule of law with democracy and a liberal version of rights that emphasizes civil and political rights" (Paul, 2003, p. 310). The Chinese political regime is not considered to be democratic, and the Chinese legal system is considered to possess insufficient protection for civil and political rights. In addition, China's economic growth has generally not provided protection of economic interests and the facilitation of economic transactions – in other words, economic freedom in China is considered to not be very high.

Economic freedom includes the protection of the value of money, free exchange of property, a fair judiciary, few trade restrictions, labour market freedoms, and freedom from economic coercion by political opponents (Peerenboom, 2007, p. 34). It seems that there is still room for further development in the aforementioned areas in China. It also follows that for further economic development, a better legal system is likely to be required. In fact, the World Bank rule of law index demonstrates that countries with better legal systems tend to have higher growth and more wealth, and vice versa. Some scholars note that the relationship between rule of law and economic growth also appears to be non-linear (Kurczewski & Sullivan, 2002, pp. 218-2). In order to provide a more detailed understanding of this relationship; I decided to separate countries into different groups of 'rule of law' ranks and then compare them with their position in economic ranks, and using Chi-Square test to see the P value, and whether or not such a relationship is significant.

The World Bank divides nations into four different groups for economies difference. The groups are (by 'atlas method', according to 2007 GNI per capita): low income, \$935 or less; lower-middle income, \$936 to \$3,705; upper-middle income, \$3,706 to \$11,455; and high income, \$11,456 or more. The World Bank Aggregate Governance Indicators 1996-2007 measured nations' rule of law status. The statistical compilation of a nation's rule of law position is between -2.5 to +2.5, with the higher value indicating greater rule of law. I divided nations into four groups in accordance their rule of law figure. The groups are: Low rule of law country, less than -1; lower-middle rule of law country, between -1 and 0 (including -1); upper-middle rule of law country, between 0 and 1 (including 0); high rule of law country, over 1 (including 1). Table 3.4.4 illustrates how the two ranks – rule of law and economy – correlate with each other.

Table 3.4.4 - Relationship between rule of law and economy



status * classification Cross tabulation

Count

	Classification					Total
	Low income countries	Lower middle income countries	Upper middle income countries	High income countries		
Status Low rule of law countries	19	10	2	2	33	
Lower middle rule of law	28	31	17	3	79	

countries					
Upper middle rule of law countries	1	15	18	26	60
High rule of law countries	1	1	3	29	34
Total	49	57	40	60	206

Chi-Square Tests

	Value	df	Asymp. Sig. (2- sided)
Pearson Chi-Square	123.530(a)	9	.000
Likelihood Ratio	136.619	9	.000
Linear-by-Linear Association	81.181	1	.000
N of Valid Cases	206		

A 0 cells (.0%) have expected count less than 5. The minimum expected count is 6.41.

As the Chi-Square test above shows (Table 3.4.4), the P value (Asymp. Sig.) is 0.000, which is less than 0.050, and therefore proves that the difference is significant²⁶. Therefore, the chance for a country with a higher rule of law to become a higher-income nation is much higher than for a country that has a lower rule of law. However, it is true that the relationship between rule of law and social wealth is complicated and difficult to define.

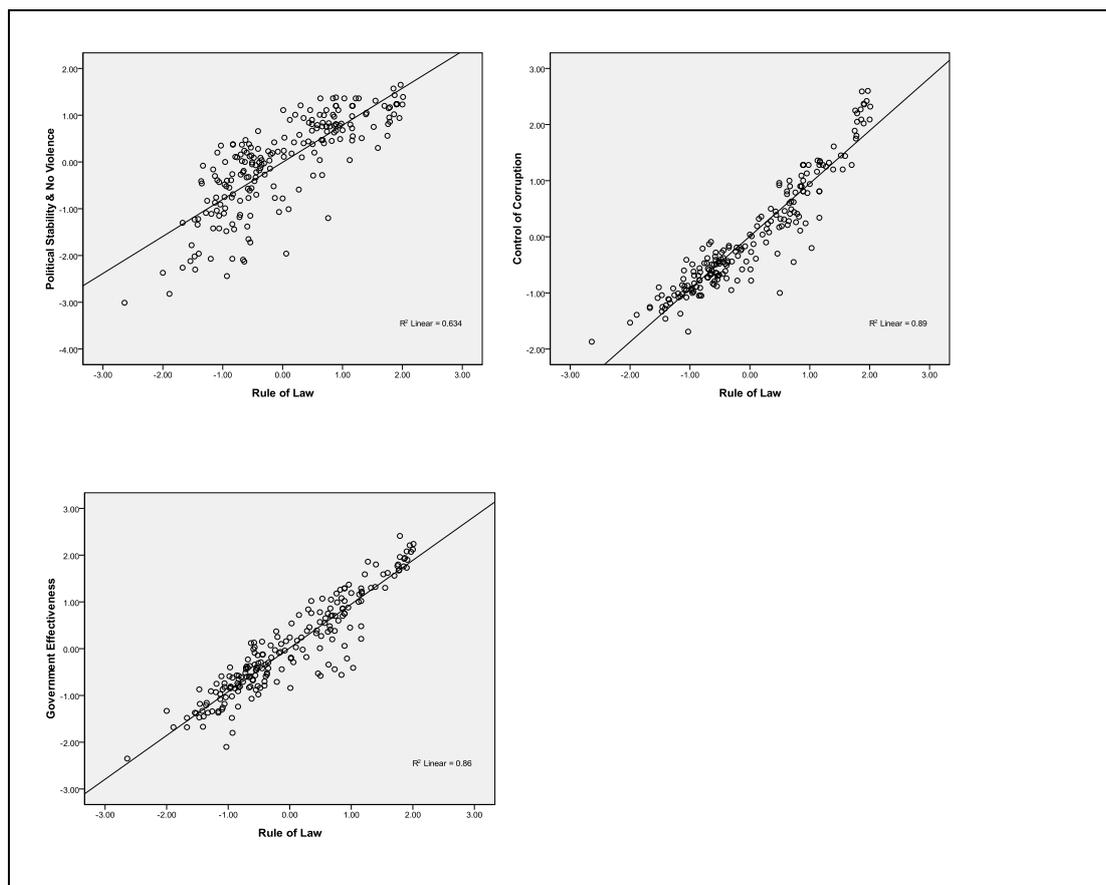
Following economic growth, society becomes more complex; a formal legal system that meets the standards of rule of law provides a fair method of solving economic disputes. Moreover, dispute resolution is only one of the economic functions of a legal system. A legal system also creates the basic infrastructure for transactions, including markets, security exchanges, mortgage systems, accounting practices, and so on. In addition, particularly for China, a good legal system can also serve laudable functions other than promoting economic growth; for example, limiting arbitrary acts of government officials and thereby reducing social instability. Another form of evidence that illustrates the relationship between rule of law and economic growth has been provided by China's experience. Following 30 years of economic change, vast numbers of laws have been adopted by Chinese legislators. On one hand, these laws promoted economic growth, but on another hand economic booms demand increasing legislation for more advanced laws.

In fact, following economic reform in China, the role of the judiciary has naturally changed over time and is continuing to change today. Chinese judges no longer 'fight against the class enemies'; but are more likely to act as arbitrary agents. Following economic growth, Chinese society has become far more complex than it was in Mao's era. At the same time, increasing

²⁶ The chance for a high rule of law country to enjoy higher income is 29/34 (85.29%). The chance for an upper middle rule of law country to be a high income country is 26/60 (43.33%). The chance for a lower middle rule of law country to be a high income country is 3/79 (3.78%). The chance for a low rule of law country to enjoy high income is 2/33 (6.06%). The chance for a high rule of law country to be a low or lower middle income country is 2/34 (5.88%). The same chance for an upper middle rule of law country is 16/60 (26.67%). the Chance for a lower middle rule of law country to become a low or lower middle income country is 59/79 (74.67%). The same chance for a low rule of law country is 29/33 (87.88%).

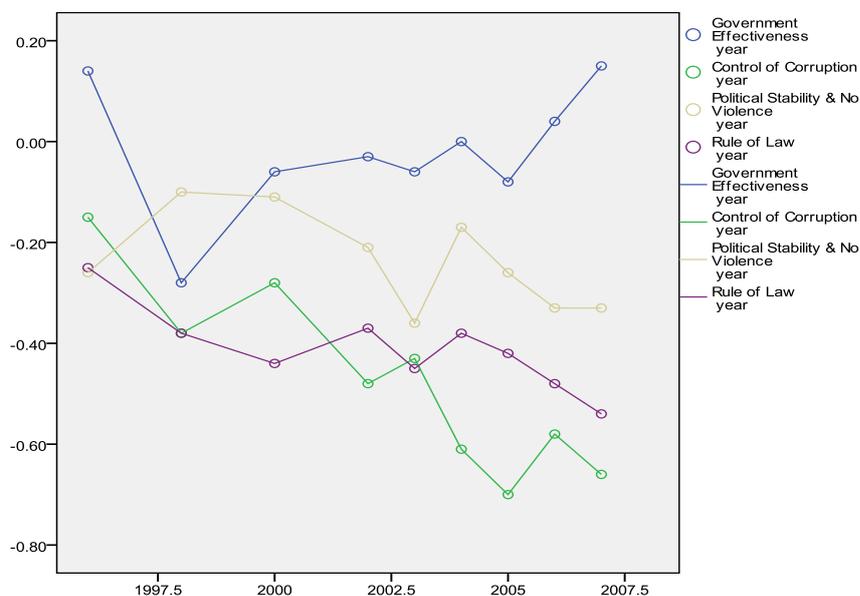
legal development requires the law enforcement body – particular the judiciary - to have improved and relevant knowledge to deal with contemporary social matters. Therefore, in 1995, the first adoption of the Judges Act by the NPC required aspiring judges to pass an examination before judicial appointment. Following further economic growth, in 2001 the NPC amended the Judges Act to require more qualifications from applicants to judicial vacancies. Without economic growth and resultant changes, the NPC would not seek to pass the Judges Act. Conversely, without the Judges Act there may have been more impediments to China's economic growth.

Rule of law is also important for ensuring good governance, and it seems logical to assume that good governance in turn promotes economic growth. For example, unlike China, in many post-communist countries, well-intentioned policies were quickly established, but it soon became clear this was not enough. “I was a traditional trade and labour economist until 1992...” says Daniel Kaufmann head of the World Bank's Global Governance Group 2008, “...when I went to Ukraine, my outlook changed. Problems with governance and the rule of law were undermining all our efforts.” (The Economist, 2008, p. 95). Perhaps, for economic matters, rule of law may not be as necessary or as significant in poor, rural based countries. However, for matters of governance, such as maintaining political stability, preventing violence, controlling corruption and maintaining effective government, the relationship between such issues and rule of law is much more linear and applies to all large societies (see Fig 3.4.3).

Fig 3.4.3 - Relationship between rule of law rank and good governance rank²⁷

The above figure appears to illustrate that a higher rule of law allows for better governance and the better the governance, the richer the nation. However, China seems an exception to such a relation (see Fig 3.4.4).

²⁷ Data Sources: World Bank Aggregate Governance Indicators 1996-2007 (Figures produced by Yaliang)

Fig 3.4.4 - Changes of good governance rank of the PRC from 1996 to 2007²⁸

The above image shows that following significant growth of the economy since 1978, political stability, control of corruption and rule of law in China has decreased. Yet despite this, a reduction in good governance has not damaged the country's economic growth. What does this mean? Perhaps it is because China has a very special system that does not demonstrate such a relationship between rule of law, good governance and economic growth. Or, perhaps the measure of China's good governance index is not very reliable. In fact, to complicate matters further, the rule of law agenda has continually expanded in China. As the world's second largest economy (in GDP PPP), China is already part of the global village, and plays a significant role. In this global era, to ensure future economic development, good governance, political stability and civil and human rights, China cannot continue to avoid promoting rule of law.

What happened in Mao's age has shown that classic Marxist economic ideology – in the long term – fails to increase social wealth. Moreover, a lack of understanding of the notion of law

²⁸ Data Sources: World Bank Aggregate Governance Indicators 1996-2007 (Figures produced by Yaliang)

and the concept of rule of law seems to be the main thrust of Marxist legal theory, including the ignorance of law's economic, political and legal aspects. Marx attempted to show how historically, the rule of law has played an important but negative role in capitalist nations (for example, through land enclosures, confiscations, forced conditions of work, control of population movements). However, the main thrust of Marx's analyses is that – regardless of ideology – a state is not simply the direct servant of the ruling class, (for example, working-class political power and welfare provision have grown considerably since Marx wrote); in fact, in some states, law is rarely capable of being interpreted as the direct expression of the will of a dominant class (Collins, 1982, p. 66), and the state seems more like an institution that emerges to maintain order and stability with the context of the dominant mode of production in a society.

It seems there is a difference between rule of law and class power. History has already proven that disputes between people and government will always appear in a state regardless of ideology, and disputes can be resolved in some states, but can also be turned into conflict in others. Conflict theory failed to account for the fact that law does not operate as a purely repressive mechanism in all societies. Therefore, it is necessary to rethink the meaning of the rule of law, especially in nations that are or have been influenced by classic Marxist theory.

The core difference between rule of law and class power is given by E P Thompson (1985, p. 263) when he stated that, “most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and injustice, then it will make nothing, legitimize nothing; contribute nothing to any class's hegemony.” Of course, the ruling class may attempt to protect their own interests through the law. However, law should clearly stipulate that it applies equally to all citizens, and therefore cannot appear to the public to favour only the ruling class. Hence, the law must not only have an effect on normal

individuals, but also produce the same effect on the people who made the law. Therefore, the “law” whether in capitalist or socialist states - as a body of rules –will only be respected and followed by the people if it has been applied with logical criteria, with reference to standards of universality, justice, impartiality and equity.

In fact, the effect of law, from its occurrence and operation throughout the history of the human race, has had at least two very clear effects on nations and people. On one hand, many nations have collapsed because unjust laws forced people to resort to violence against the state (this happened particularly under the dominance of Confucian theory). On another hand, many nations prevented this from occurring with just laws.

Consequently, law cannot only be defined by the Confucian theory that law simply equates to punishment. Nor can it be defined by the classic Marxist definition of ‘law = class power’, but rather requires a more complex and perhaps contradictory understanding. A lesson that can be learned from Imperial China’s legal history is that law is a sword that cuts both ways; one side can ‘harm’ the government, preventing arbitrariness, and the other side can ‘harm’ the people by implementing law which will legitimize government. Therefore, the rule of law serves the need for the security of economic transactions and the general conditions of individual livery which accompany that need. But, at the same time, it also serves the technical and ideological needs of the state and more generally, the efficient structuring of power. As E P Thompson (1985, p. 266) noted that:

“We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages

us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power.”

In Thompson’s view, rule of law is an unqualified human good. However, in my view, compared with Confucian theory’s contestation of ‘rule by qualified men’, rule of law has historically played a successful role as a ‘human good’, furthering social stability.

As the result of the above theoretical analysis, the meaning of the rule of law can be concluded as the English jurist A. V. Dicey formulated in the late nineteenth century. The most celebrated conception of the rule of law involves three elements - first, the absolute supremacy of law over arbitrary power, including wide discretionary powers of government; secondly, that every citizen (particularly, including lawmakers), are subject to the ordinary law of the nation administered in the ordinary courts; thirdly, that rights are based not upon abstract constitutional statements but upon the actual decisions of courts. In this conception, law is regarded as the rules governing all society. Government, no less than citizens, is seen as subject to law. The state can change law freely as it requires, through recognised processes, but the actions of all state servants and agencies are to be subject to law. Thus, if the Chinese government wishes to maintain social stability, the application of rule of law will perhaps be an important contributing factor in doing so. In addition, this would appear to be beneficial for China’s further economic development.

- The importance of judicial independence

The rule of law demands that law acts as the primary source of rules governing society. From the experience of Confucianism’s dominance in Imperial China, it seems that a society without rule of law can be characterised by the following: firstly, an absence of development of legal professionals, and secondly, a judiciary that is significantly dispersed amongst

various governmental bodies. Conversely therefore, a society with rule of law must consist of at least two core aspects, which are:

- 1) Legal professionalism, and
- 2) Judicial independence

Out of the above two aspects, judicial independence seems to be the most crucial. This is because law is worth little more than the paper it is written on for too many people in China. In fact, most people may never be concerned about the law, until they enter a dispute with other citizens or the government and require a settlement by law. This is why, from many perspectives, adjudication and courts seem to be an obvious and necessary central institution of the legal system. In many people's view, the courts are the primary organs to represent the law, because judgements are passed by judges in the courts. According to this, the courts and the judges must appear as having a necessary level of justice and impartiality, in order to maintain credibility amongst the people. Therefore, judges must appear to the public to be making decisions independently and according to the law, and nothing more. As such, the concept of judicial independence is a keystone of the rule of law.

Judicial independence is an idea that has either internal (or normative) and external (or institutional) aspects. From a normative viewpoint, judges should be autonomous moral agents, who can be relied on to carry out their public duties independent of venal or ideological considerations. Independence in this sense is a desirable aspect of a judge's character. In fact, regardless of the ideology of a nation, similar requirements for judicial independence are normative features of most written constitutions of modern nation-states. However, historically, institutional support is far more important than moral autonomy. This is due to the fact that judges are human and the decisions they must make can have a great influence on people, so it is necessary to provide institutional shields against any possible

threats or temptations that might come their way. Judicial independence in this common sense is a feature of the institutional setting within which judging takes place.

According to the above analysis, the principle of judicial independence is the ability of a judge to make a decision on a matter free from pressures or inducements. Furthermore, the institution of the judiciary as a whole must also be independent by being separate from government and other concentrations of public power. “If the judiciary is to exercise a truly unbiased and independent adjudicative function, it must have special powers to allow it to ‘keep its distance’ from other governmental institutions, political organizations, and other non-governmental influences, and to be free of repercussions from such outside influences.” (Kelley, 1990, p. 2)

In order to ensure this occurs, many factors of judicial independence should be considered. As the Justice Thurgood Marshall (1981) of the US Supreme Court once said, “We must never forget that the only real source of power that we as judges can tap is the respect of the people.” There is a famous adage: *justice must not only be done, but must also be seen to have been done*. A court can only be truly accepted as being just if it has the confidence of the public that it is just and fair. “For trials to be regarded as fair it is important that judges are regarded as independent and not subservient to political or other interests” (Davies, et al., 2005 p. 244). In order to inspire confidence from people that justice is being applied independently, judges must not be under the influence of any outside sources (which includes the government, political organisations, non-governmental organisations, state/public companies, private businesses and individuals). To avoid such a perception, judges must have no real or apparent contact with outside sources. “If indeed they [judges] had such contact with outside sources, such as a political party, it would appear to be biased in favour of the policies of that party, or, if that party controls the current government, to be biased in favour

of the state” (Kelley, 1990, p. 5). If a court or an individual judge is subject to, or even appears to be subject to, inappropriate pressure or interference by the executive or administrative arm of government, this is considered to be an inappropriate interference with judicial independence. It must be so in order to limit the formal interaction between the courts and outside sources.

The history of the judiciary around the world demonstrates that the greatest danger of interference comes from other government institutions or political parties. This is because it is inevitable that there are some dealings between the courts and the executive branch or the legislative branch for financial and administrative purposes. To standardise the principle of the independence of judiciary, the government should only provide necessary security, finance and administrative support to the courts.

Therefore, according to the principle of judicial independence, the relationship between the government and the courts regarding the above issues is a relationship of support, not control. As such, if the government has the power to set judges’ appointments or remuneration, or the power to set courts’ administrative methods or operations costs, then the government has effectively set up a connection between itself and the courts. Judges, acting in their own interests must do all they can to acquire more support from the government. As the old proverb goes, ‘One does not bite the hand that feeds’. People may think that courts will often protect the state-owned companies and government interests, but people will lose their respect for the judges. Judges will lose their ‘power’ to find solutions to problems. Without public confidence, society as a whole is at risk of becoming less harmonious and stable.

Therefore, the institutional principle of judicial independence means that judges do not have contact with any other (non judicial) sources, and particularly with other state institutions in matters which judges are concerned. This represents an idealistic view of complete judicial

independence. However, history has shown that it is difficult to completely cut judges' connections with state bodies. Simply writing such a principle into codified law will not necessarily result in an independent judiciary. In fact, no country can claim to have a complete independent judiciary; the subject of real interest is the degree to which the judicial branch is separated from other state powers. However, the characteristics of rule of law are more likely to be established if there is a high level of judicial independence.

3.5 - Conclusion

This Chapter has analysed ‘Chinese Characteristics’, and it is clear that finding a Chinese road to judicial reform is far more difficult when compared with the already successful economic reform that has taken place. China’s rich tradition and ongoing influence of classic Marxist/Maoist legal theory has resulted in China facing many obstacles to further legal reform approaching rule of law. In my research, a judge noted that there is a serious question which I should bear in mind and try to answer.

“When Western institutions conduct research on such issues in China, you should always question yourself as to why Chinese people chose Communism, Chairman Mao and the socialist road? – Judge 14 (2006, interview with Yaliang)

In fact, it seems that it is no accident that China adopted classic Marxism as the dominant ideology. There seems to be a historical coincidence in which classic Marxist law bears an uncanny similarity to Confucianism. Law is considered to be a negative element and is operated vertically rather than horizontally in both ideologies. Also, both ideologies hold that the government – if it is representative of only specific elements of society – is able to fully represent the interests, cultural values and justice throughout society. Moreover, both ideologies give very little concern or even oppose individualism and rule of law. Perhaps such similarities between the two ideologies made the introduction of Marxism to Chinese society relatively ‘trouble-free’. However, history has shown that any grandiose aims require a stable society as a foundation, and without rule of law it is almost impossible to maintain a

stable society. Perhaps this is the most harmful factor for both Confucianism and classic Marxist theory.

Of great importance is the introduction of Hu's development of Marxism – ‘Social Harmony’ & ‘the Three Supremacies’ – which will transform China into a rule of law nation, and will perhaps place greater importance on individual rights. This can be seen as evidence that the CPC is aware that rule of law is especially important in a complex modern society and the global economic era. Hence, promoting greater rule of law is an unavoidable element of China’s future economic development. The judiciary can form the vanguard of the rule of law, and establishing rule of law in China will require judges to have a certain level of independence. A society where people know their rights, are guaranteed by fair laws which apply equally to all citizens, and are applied in an open and public way by an independent and impartial judiciary, will always be a secure and stable society (Kelley, 1990, p. 20).

At the end of this chapter, I feel it is necessary to note that it may seem I have criticised Chairman Mao. It is true that during his rule, China endured tragic mistakes in policy. However, this does not mean that I respect him as a founder of the PRC any less. In fact, I believe that Mao Zedong fulfilled the goals that were most important to his generation. I have to state clearly that when Chairman Mao came to power, China was a country without any industry, based mainly on Confucian values and rural living. By the time Mao died, China was one of the five countries on the UN Security Council, possessed nuclear weapons and a sizable industry and rail network. It is true that Mao made many errors, but no one is infallible. Dwelling on the past will not serve the needs of China’s development into the 21st century. The importance is how to put President Hu’s theories into practice in modern-day China.

CHAPTER FOUR

The development of legal professionals and the role of judges in China

4.1 - Introduction

As made clear in Chapter Three, the rule of law requires that judges are independent *and* professional. A key aspect to ensuring legal professionalism is the judicial appointments system. Qualified judges should only be selected through an established process. Decisions on appointments should be made in accordance with an agreed procedure, and the process must be meritocratic and not appear to favour any particular group of people. Another important factor relating to judges' professional development relates to judicial appointments, this is also important in ensuring judicial independence. This is because judges must be independent from their paymaster, who is normally either the legislative or executive branch of the state. Another significant issue is whether or not judges are satisfied with their salaries, especially when considering how to eliminate bribery and corruption. In addition, only high salaried positions are likely to attract intelligent and well-qualified individuals to apply for judicial posts.

This Chapter firstly outlines the development of China's legal professionals. Secondly, the chapter analyses the *Judges' Act (2001)* and the procedure of judicial appointment in China. Thirdly, the *Government Officials Act (2006)* is analysed in relation to judges' remuneration and the financial relationship between the courts and government. Finally the Chapter discusses judges' political status and the administration of the courts.

4.2 - Overview of the development of legal professions

Lawyers, prosecutors and judges make up the legal professionals in China. Therefore, in order to illustrate the development of legal professions it is necessary to look at the development of these three occupations. The development of professional lawyers has made significant achievements over the past three decades. As shown in Chapter 3.1, lawyers did not exist during the Imperial era of China. The earliest Provincial Lawyers Associations were established during the 1950s, and were banned during the Cultural Revolution until 1979. Notably, there were almost no lawyers before the late 1970s. The national lawyers association ('All China Lawyers Association') was established in July 1986, which can be seen as the formal conception of the development of professional lawyers in China.

The number of lawyers in China has since increased significantly in the past two decades; from less than 300 in 1986, to 145,196 by the end of 2004 (Xinhua News, 2008). Since then, “the number of lawyers in China has increased annually by approximately 7.4%. Lawyers' qualifications have also risen rapidly. In 2004, 62.4% of lawyers had graduated from university, and 8.4% held a Masters or Doctorate. Just one year later, the number of university graduate lawyers increased to 70%, and the number of lawyers holding Masters or Doctorates was up to 10%” (Blue Book of Rule of Law, 2007, pp. 219-220).

Moreover, as is the case in many countries, lawyers in China enjoy a high income. In 2005, China had 12,000 law firms, and the turnover of the law business was 15.6 billion RMB. The average salary for a lawyer was 90,000 RMB per year, which is far greater than most other popular professions. For instance, the average salary for an IT professional in the same year was 34,988 RMB; an accountant or other financial worker earned 26,982 RMB, estate agents earned 18,712 RMB, and teachers earned 16,277 RMB on average (Blue Book of Rule of

Law, 2006 pp. 225, 229-231). Clearly, lawyers in China receive a very high salary which has resulted in a very expensive legal services market which many people cannot afford.

It is clear that there is a significant increase in the number of lawyers in China, which can be seen as a success of the Chinese Government in developing legal professionalism, as well as a consequence of growth in business, commerce and property development in the PRC. However, the number of lawyers in relation to the population of the country is still extremely low. For every 100,000 people, there are 8 lawyers. Moreover, there are significant problems in the geographic distribution of lawyers. In 2005, the number of lawyers in Beijing was 7.9 times the national average of the distribution of lawyers, and the number of lawyers on the East coast of China was generally 2-3 times greater than the national average distribution. Notably, 206 out of the 2,860 counties did not even have a single lawyer.

The low numbers and unevenly geographic spread of professional lawyers presents a problem in China. In 2004, only 44% of criminal cases involved defence lawyers, which means that many defendants do not have any lawyer to represent them in court. In comparison with 1981, when only 14% of cases involved defence lawyers (Blue Book of Rule of Law 2006 p232), this is an encouraging figure, but there is much room for improvement. Part of the reason for a lack of defence lawyers in criminal cases is due to defendants' lack of funds for expensive legal services. China is still a developing country; simply, the government cannot afford to fund total and comprehensive legal aid. Even if funds were available to do this, there would not be enough lawyers to fulfil the demand. It seems that not having many lawyers is one the most critical problems in China for the development of legal professionals. As a result, legal aid is only a pre-requisite in cases which may result in life imprisonment or a death sentence.

In contrast with the 140,000 lawyers, there are more than 200,000 judges in China. Similar to the lawyers, there is also an unequal geographic distribution of judges amongst the courts. In West China, there is a shortage of judges for the courts. President of Guizhou High Court, Zhang Lingchun (2005), stated that the courts in the province needed to recruit 400 new judges in total to fill vacant positions. In Shanxi Province 200 judges and prosecutors left their profession after passing the NJE (Senior Justice Zhao, 2005). In one of the poorest provinces, Qinghai, from 2004-2005, not one person passed the NJE. Across 16 specific Basic People's Courts in Qinghai, the judges number less than 20, and some of the courts have less than five judges (MP Li, 2005). The Supreme People's Court in Beijing has 340 judges, but recent research conducted on the SPC states that, “the SPC faces a very heavy workload” (Zuo, 2004, p. 269). The People's Procuratorate employees face a very similar situation as the judges, they also lack manpower and are unevenly distributed across the country. The qualifications required to become a judge are considered by many Chinese scholars to be too low (see Chapter 1.2), and the need to develop judges' professional skills is seen as one of the key areas for potential improvement by legal professionals since the early nineties. It seems that reform of judicial appointments has been at the heart of proposals from Chinese judicial reformers over the past three decades.

4.3 - *Judges Act (2001)* and the procedure for judicial appointment in China

The appointment of judges in China has undergone a very significant change over the short lifetime of the PRC. Before 1988, no particular academic qualifications were required to become a judge. Judges were largely drawn from former military officers. From Table 4.3.1 below, it is clear to observe that from 1954 through to 1988 the SPC was chaired by military veterans, and it is reasonable for people to suspect that the judicial appointment process at that time favoured those with military backgrounds. It is likely that most judges did not have a legal background because legal education will not have been an important part of their military training. However, since 1988 appointments to Chief Justice have always required the successful applicant to possess a significant amount of experience and relevant knowledge in the legal field. For example, current Chief Justice Wang (appointed in March 2008) is not a law graduate, but his wide experience in legal areas provides him with sufficient knowledge to function as the head of the Chinese judiciary. It is important to note that formal official law education only started in 1978. Therefore, it would be difficult for China to employ an experienced law graduate as Chief Justice at this time.

Table 4.3.1 - Lists Presidents of the Supreme People's Court

Term		Name	Education background	Experience preceding	Political party affiliation
1	October 1949 to October 1954	沈钧儒 (1875-1963) Shen, Junru	Qualified in Confucian studies in Qing Dynasty, studied in Japan later	Senator of Republic of China, director of Shanghai Law School	China Democratic League
2	October 1954 to September 1959	董必武 (1886-1975) Dong, Biwu	Studied Law in Japan, later (1928) went to USSR	Took part in 1911 revolution, involved in the establishment of CPC, Vice-Premier of Government after 1949, Director of Political and Legal Reform Committee, 1949-1954	CPC former Military officer
3	September 1959 to January 1965	谢觉哉 (1884-1971) Xie, Juezai	No academic background	Personal Secretary to Mao Zedong, Justice Minister of North China, After 1949 his first job was as Secretary of Home Office	CPC former Military officer
4	January 1965 to January 1975	杨秀峰 (1897-1983) Yang, Xiufeng	Studied in USSR	General of West Hebei Red Army, President of North China Procuratorate, Chairman of Hebei province after 1949 and then Minister of Education Department from 1954.	CPC former Military officer
5/6	January 1975 to June 1983	江华 (1907-1999) Jiang, Hua	No academic background	President of Labour Union in Car Factory, later became a General in Red Army. After 1949 first job as Secretary-General of CPC in Zhejiang Province	CPC former Military officer
7	June 1983 to April 1988	郑天翔 (1914—) Zhen, Tianxiang	Central University of Nanjing, Agronomy College	Worked as a information officer in the Red Army, After 1949, Secretary-General of Beijing	CPC former Military officer
8/9	April 1988 to March 1998	任建新 (1925—) Ren, Jianxin	Chemistry Degree from Peking university	Secretary of State Council Legal Affairs body , Vice-President of Supreme People's Court	CPC
10/11	March 1998 to March 2008	肖扬 (1938—) Xiao, Yang	Law Degree from People's University of China	Police Officer, President of Guangdong High People's Procuratorate, Vice President of Supreme People's Procuratorate, Minister of Justice Department	CPC
12	March 2008	王胜俊 (1940 —) Wang, Shengjun	Educated in History at Hefei Teacher's College	The Secretary-General of the CPC in Liuan City in Anhui province, Minister of the Police Force of Anhui province, while also holding the Party post of Secretary-General of the Committee of Political and Legislation Affair in Anhui province. Secretary of the Central CPLA and a member of the Central Commission for Discipline Inspection	CPC

As the above table shows, the historical presidential appointments of the SPC can be arguably said to demonstrate favouritism for individuals from military backgrounds. However, this does not mean that the military veterans could simply become judges in court room after leaving military service. There was an established procedure for appointment before the *Judges' Act (1995)*. A senior judge spoke in my interview about his experience in becoming a judge, and his view is typical of many judges of his generation.

After leaving the army, I worked as a court clerk for ten years and later through an internal selection and interview process, I was finally nominated to the local congress for election to become a judge. This was the particular procedure for appointment during my time. From the early to mid-1990s, a great change occurred whereby an examination should be passed before appointment, and this first exam system was designed by the courts themselves. Each court had their own exam which differed to the other courts. In 1999, the judges' exam in this province was united by the high court. At the same time, applicants who had successfully acquired their lawyer's licenses were also accepted. The current method of judicial examination was created as a result of the amendment of the Judges Act (2001), when the Justice Department, together with the Supreme People's Court and Procuratorate set-up a NJE system. The first NJE took place in 2002; once an individual passes the NJE, they can choose to become a judge, a member of the Procuratorate, or become a lawyer. Many young judges in this court have passed the NJE, and they said the exam was very hard. In China, some media outlets termed the NJE as the number one exam in China - Pilot Judge 1 (2006, interview with Yaliang)

As touched upon by Pilot Judge 1, the first congressional act concerning judicial appointment was adopted in 1995; known as the *Judges' Act (1995)* (latest amendment in 2001). This Act was considered as a great step for China towards judicial professionalism. The following articles (see Table 4.3.2) are relevant to the process of appointment of judges.

Table 4.3.2 – *Judges Act (1995)*: Articles of judicial appointment²⁹

Section 5 – Appointment

Article 11 – The processing of appointments should follow the directions specified in the existing constitution.

The President of the Supreme People's Court is elected by the National People's Congress.

The NPC is also permitted to dismiss the President. The respective Vice Presidents, Supreme Court Judges, and the Heads of the Divisions are nominated by the President of the SPC, and approved by the NPC.

The President of a local court is elected by the corresponding local people's congress, which also holds the power to dismiss this President. The Vice Presidents, Judges and Heads of Divisions are nominated by the President of the local court and approved by the corresponding local congress.

Article 12 – Individual citizens wishing to become a judge (starting from the level of Basic People's Court) must pass an examination. The examination takes place in order to determine a candidate's relevant knowledge and good character.

Article 13 – If judges do one of the following, they must resign:

²⁹

Translated by Yaliang Xu

1. Loses their PRC nationality
2. Leaves the court(s) over which they preside
3. Attains a new position outside of the judiciary
4. Fails their annual judicial test
5. Can no longer serve in their position due to ill health
6. Resigns or refuses to serve
7. Gains a criminal conviction

Article 14 – If a judge, after his/her appointment is found to have breached one of the above conditions, the body responsible for appointing them is required to remove them from their position. If higher courts find that lower courts have judges guilty of breaching one or more of the above conditions, then they are required to suggest to the relevant lower court(s) that these judges be removed.

Article 15 – Judges are not permitted to become members of a Standing Committee of the People’s Congress, employees of the People Procuratorate or to take up positions in any private company or act as lawyers.

One most notable point which is widely supported by senior judges is the Article 12 of the *Judges Act (1995)*, which states that, “Individual citizens wishing to become a judge (starting from the level of Basic people’s Court) must pass an *examination*”, which *is* concerned with one important area.

The most effective aspect from *Judges' Act* is that an exam has been added. I am an old judge so I did not take the exam, but in my opinion this is a great development. This is a better method to prevent judicial appointments from favouring any particular group of people. – Pilot judge 1 (2006, interview with Yaliang)

However, the articles relating to judicial appointment selected in Table 4.3.2 do not give an understanding of what the appointments process actually involves in practice. During the interview, a young judge explained her experience of becoming a judge.

Since 1995 there has been an exam to become a judge, and in 2002 the NJE came into force. The NJE qualification allows you to choose one of three different career paths; judge, prosecutor, or lawyer. I have passed this exam...but don't think that once you pass the NJE you can become a judge automatically; there is also a local process waiting for you. Each province is a little bit different. For example, in this province, once I passed the NJE, I started searching on the different courts' websites to find a vacancy for a judge. Once you find a vacancy and you start working, you also have to attend a part-time training course which is run by the provincial high court. Then, there is another test waiting for you with the provincial high court, and after passing this your job is secured...finally the court will nominate you to the congress to be elected. – Judge 9 (2006, interview with Yaliang)

The appointment process is as follows:

- 1) Pass the NJE
- 2) Apply for vacant judicial posts
- 3) Pass a training course run by the Provincial-level High People's Court
- 4) Court presents a list of nominees for judges' positions to the corresponding level of congress to be voted upon

In accordance with the *Judges Act (2001)*, the NJE is open to, "all Chinese citizens over the age of 23, who do not have criminal records, hold at least an HND-level qualification, and are competent in one of the five languages of the PRC." The exam is open for everyone to apply, as it no longer allows for favouritism in appointments, or restricts appointment to a single group of people, as the preference for former military officers once did. Judge 9 also stated that once an individual passes the NJE, training is provided by the high court which also forms part of the appointment process. As noted by Judge 9, not everyone can pass this training, as it is not just a simple exam, but more about practical experience.

"Altogether we have 14 people that have had High Court training. Only two candidates did not pass. They will just try again next time [a vacancy arises]...the training is focused on real court life, there isn't any exam at the end of the training, but instead a pass or fail is dependent on the reference that the high court will give you...not many people become judges in the same way I did. We passed the NJE but none of us had experience in the court before...the court prefers experienced employees, most judges start as a clerk, and later when they pass the NJE they can become judges." - Judge 09 (2006, interview with Yaliang)

From Judge 9's statements, it seems that the appointment process does not necessarily have to remain the same. What Judge 9 described is another appointment process, which can be understood as follows;

- 1) Find a vacancy in a court as a clerk or court staff
- 2) Pass the NJE
- 3) Court presents a list of nominees for judges' positions to the corresponding level of congress to be voted upon

Many applicants go through the above process. In the 2006 NJE, 11.87% applicants already held posts in the People's courts, 8.16% similarly held posts in the People's Procuratorate, and 4.6% were already employed by law firms. In total, 24.79% of applicants already had a professional legal background of some description (National Justice Department, PRC , 2006). There is also further evidence to support the second interpretation of the appointment process. Following is an advertisement for a vacant post as a Judge's Assistant at WuHan University Law School:

“NinBo City, JinHai District People's Court requires a male with a Master's Degree (for Judge's Assistant, increasing to Justice once the applicant has passed the NJE). If interested, please contact Teacher Zheng at WuHan University Research Student Employment Office, 13th June 1005” (Wuhan University, 2005)

The second judicial appointment procedure may still permit the usage of applicants' personal networks to obtain appointments. In the literature review (see Chapter 2.2) some local judges pointed out that military veterans are still recruited by courts. However, once again the NJE is a pre-requisite for appointment, which should go some way to reducing the influence of 'network appointments'. The greatest achievement of *the Judges' Act (2001)* is that the chances of local government or the military appointing their former officers is now extremely

remote. As a result of this, the most important stage of the whole appointments process is passing the NJE. The NJE was first introduced in 2002, and the test has continued since. As of the end of 2007, over 1,000,000 applicants had taken the exam (see Table 4.3.3).

Table 4.3.3 – Statistics of the NJE 2002 to 2007³⁰

Year	Approximate total of applicants	Pass rate of applicants	East China Pass Score	West China Pass Score
2002	310,000	7.9%	240/400	235/400
2003	170,000	11.1%	240/400	225/400
2004	180,000	12.3%	360/600	335/600
2005	219,000	14.39%	360/600	330/600
2006	280,000	14.4%	360/600	330/600 (300/600 in Xizang)
2007	300,000	11.22%	360/600	320/600 (290/600 in Xizang)

As Table 4.3.3 illustrates, the pass rate of the NJE is approximately 10%, which appears to suggest that the exam is very difficult. From the above table, another notable factor is the difference in the passing score in East and West China. In fact, this demonstrates the

³⁰ Sources: Souhu News, 2006

unbalanced development of professional judges between East and West³¹. Clearly, there is a huge gap between East and West China, and the NJE system attempts to address the imbalance by lowering the pass rate for aspiring judges in Western China. Once passed, no matter where the applicant is from or where they took the exam, the applicant is free to choose to work anywhere in China. On one hand, those who did not pass the necessary score in the East can go to West China to take up a post. However, individuals from West China who achieve a high enough score to work in the East are very likely to do so. It seems that giving Western China a lower pass score may not actually address the imbalance in the geographic distribution of legal professionals in China.

In my research, 15 out of 60 judges had taken and passed the NJE. Judges generally hold a very positive view of the operation of the NJE. They say it is well organised and fairly open to all citizens. However, judges who had passed the NJE took a critical view of the contents of the exam. A high court judge who did not need to take the NJE when he became a judge was also critical of the examination system.

“The NJE is a form of examination which is necessary to help select the country’s legal professionals. However, the current NJE system does not meet this requirement. I personally think there should be an interview process after examination. Most of the People’s Courts do not have enough judges and the NJE impedes the recruitment of a sufficient number of judges, especially in Western China. The content of the examination is too theory-based, not focusing enough on more contemporary and relevant issues. Many younger judges pass the

³¹ For example, in Beijing in 2005, out of 21,000 applicants only 6% did not already have a Bachelor degree in law. In West China in the same year however, less than 10% of applicants were comparably qualified to their Beijing counterparts. Normally in Eastern China, 85% of applicants have graduated in law. In West China, this figure is less than 50% (Eastern Legal Eyes, 2005)

NJE but cannot manage trials properly, which indicates a very inefficient system.” – Judge 1 (2006, interview with Yaliang)

A general criticism of the NJE is that the test is not related to judges' real life work. While all the necessary information to pass the test is in the official guidebook, the guidebook is more extensive than most large single-volume encyclopaedias. In fact, the greatest weakness of the NJE is that it is excessively focused on testing candidates ability to remember facts, some of which have very little use in the real world for Chinese judge³², but does not test applicants' ability to analyse legal principles, and the chance of one passing the NJE may not even depend on one's legal knowledge. One judge thought there was an element of luck.

“I passed the NJE last year, I felt very happy. When you take this examination, all you want is to pass, you don't think about the score. The official NJE guidebook is like a giant encyclopaedia. You can't possibly memorise all the contents, so luck plays a large part in one's success at the NJE.” - Judge 46 (2006, interview with Yaliang)

Furthermore, judges argued another shortcoming of the NJE is that the test is significantly set apart from law school education. This has resulted in law school graduates facing a difficult challenge to find employment. It is worth considering the background of law school

³² For example, Part One Question 29 of the 2006 NJE, “According to the constitution of the United Nations' which of the following statements regarding the election of the Secretary-General (UNSG) is correct? A) The Security Council will elect the UNSG. B) The General Assembly will elect the UNSG, based on 2/3 approval C) The Security Council will nominate the candidates, and the General Assembly will elect one of the nominees or D) The Security Council will nominate candidates, and the General Assembly will elect one of the nominees based on 2/3 approval”.

education in China to understand the problem in more detail. In 1976 there were only eight law schools, with approximately 100 students across the whole of China. As at the end of 2005, there were 620 law schools (Blue Book of Rule of Law 2006 p35), and in 2006, over 200,000 law students graduated, nearly 200,000 new students were recruited and in total over 900,000 students studied in law schools. In total, there were 53,884 teachers working at law schools in 2006 (National Education Department, PRC, 2008). However, research carried out in 2005 found that law graduates were the last of all 214 subjects for finding graduate employment (Legal Daily, 2008). More importantly, the chance for law school graduates to pass the NJE is very low. From 2002 to 2008 the pass rate of NJE is little more than 10%. Therefore, it is not that people are not interested in studying law, but that they find it very difficult to become legal professionals. It is clear that the NJE fails to test judges' abilities to analyse legal principles, and has debased the purpose of law school education. Hence, it is necessary to consider a reform of the NJE system.

4.4 - *Government Officials Act (2006)*, the financing of the courts and judges' remuneration

In accordance with the *Government Officials Act (2006)*, judges in China are classed as government officials, and the amount of their remuneration is established according to their level within the government official hierarchy system. A judge pointed out that judges remuneration is mainly sourced from the local government and depends on the judge's rank.

“A judge’s wages are set by central and local government, and are dependent on his rank within government. If a judge works for five years, generally he will move up one level, but this is also dependent upon the availability of vacancies. Working at the same level for ten years is quite common.” – Judge 2 (2006, interview with Yaliang)

In China, government officials are separated into 12 levels, and their salary is paid by a combination of funds from central and local government. The central government portion is paid purely based upon the rank of the individual. The local government portion is dependent upon its fiscal resources. Some judges stated that they were disappointed with the *Government Officials Act (2006)*, as it classified them as normal government officials. Nevertheless, a number of the judges who were interviewed provided a fascinating insight to this development. This is because for the first time, the act ensured some portion of judges' remuneration from the central government's budget.

- Financing the court

Before the *Government Officials Act (2006)*, judges' remuneration - including standard salary allowance and any other annual bonuses - were all set by the local government. The local government finance bureau was responsible for fulfilling judges' remuneration. From the information gathered from the interviews, it seems that this had caused many problems in the past. A few judges commented on their experience of how poor judges could be in certain regions in China.

“We visited West China, and we saw a person wearing judge's uniform working as a street-seller. After talking to him we realised that the local government had serious funding problems, and the judge had not received his salary for six months. We did not believe this, and we went to the local courts. We saw that the door was closed and displayed a sign instructing people to direct their enquiries to a higher level of administration.” – Judge 3 (2006, interview with Yaliang)

“In some places, judges are too poor. They need to run their own small business for sustenance. Some judges in Inner Mongolia have to work as shepherds in order to survive. We know that the quality of our lives is less than that of many Western judges, but compared to these poorer judges in West China we feel quite happy.” – Judge 29 (2006, interview with Yaliang)

“If you go to West China, some judges don't even get paid on time. Finance is under the control of the [local] government, and the government loves to spend and make money. Certainly, the courts will never bring them profits.” – Judge 17 (2006, interview with Yaliang)

The local government delayed pay to judges because of the financial problems that had occurred in some areas of West China; clearly, the local government had a very strong influence over the courts through financial controls. This caused a very serious problem, of which the Chinese government was well-aware, and attempted to solve it with the *Government Officials Act (2006)*. After 1st January 2006, judges' remuneration was determined by both the central and local government. The central government Personnel Department specified the standard salary of all government employees, and the local government added local allowance to top up this salary. Some judges believe this is a clear benefit of the *Government Officials Act (2006)*, even if other benefits of the act may be somewhat lacking.

“I hope that these occurrences [judges not being paid on time] will not happen anymore. After the Government Officials Act 2006, many judges may not be satisfied with their classification [as government officials], but this act has formalised part of judges' salaries. Perhaps this is a benefit of the act...however; another part of judges' salaries is still highly dependent on the relative wealth of the local government. Furthermore, the funding of the court is still fully dependent on the local government. Hence, the financial situation of the judiciary is only getting a little bit better ” – Judge 45 (2006, interview with Yaliang)

The strong connection between the financing of the judiciary and the local government's relative wealth may cause problems for the courts to remaining impartial and independent from the interests of local government-owned companies. There are many local government-

owned companies in China, which are normally used by the local government to raise capital. This may result in local governments making policies which favour the state companies, despite the supposition of a free-market environment. As such, there is the potential for the courts to favour state-owned companies as an indirect influence from its paymaster, the local government. For China, this may present a serious problem in the future, as it may deter potentially lucrative foreign investment as well as discourage the growth of privately-owned Chinese businesses. If the courts need more funding, or judges wished for an increased allowance, then they might attempt to improve their personal network with the members of the local government, especially the head of the finance department. Some judges argued in the interviews that such a dependant relationship may cause the court to spend a great amount interacting with the local government in order to maintain a good relationship and secure further funding.

“Judges working for the court have three different areas of duty. The first involves the judges who preside over trials and so forth. The second area falls under the remit of the heads of division, who operate in largely administrative roles. The third area of duty is the responsibility of the President and Vice-Presidents of the court. They are mainly involved in acquiring funding for the court, in an almost public relations-type role.” – Judge 2 (2006, interview with Yaliang)

“An important job of the President of our court is simply to secure funding from the government for us.” – Judge 54 (2006, interview with Yaliang)

Many judges shared the same view as two given above. It seems that at the local level in China, the head of the court acts as a public relations officer, attempting to secure funding for the courts through personal networks. It is possible that such networks may lead the court to sacrifice its impartiality in matters involving the interests of the local government. Although the *Government Officials Act (2006)* has improved the independence of judges by ensuring them a stable salary direct from the central government, judicial independence from local government is still questionable.

- Judges' views regarding their income

Judges' remuneration is split into two parts; the basic salary is set and controlled by the central government, and the local government also gives an allowance to a judge in addition to their basic salary. This salary of judges increases on an annual basis, but is regarded to be in the same pay-scale as government officials. There are 12 levels of government officials, and each level increases by between 80 to 800 RMB (see Table 4.4.1 below).

Table 4.4.1 - Chinese Government Officials Pay Structure³³

Position		Income(RMB/month)	
		Manager	Staff
1	State Leader	4000	
2	Vice- State Leader	3200	
3	Ministry Leader	2510	
4	Vice- Ministry Leader	1900	

³³ Sources: State Council Personnel Department, 2006

5	Bureau Officer	1410	1290
6	Vice- Bureau Officer	1080	990
7	Departmentalism Officer	830	760
8	Vice-Departmentalism Officer	640	590
9	Faculty Officer	510	480
10	Vice- Faculty Officer	430	410
11	Officer		380
12	Staff		340

On top of such remuneration, judges are given additional allowance from their corresponding level of government. In each different province, additional allowances are received by judges. To illustrate how this scale works in a developed area such as Beijing or Shenzhen, most judges would be at or below level 10 or 9, with a standard salary and local allowance totalling 3,000 RMB or less per month; presiding judges would be at level 8 or 7, earning around 5,000 RMB or more; senior justices would be at level 6 or 5, earning 8000 RMB; leaders of the High Court would be at level 4, earning 10,000 RMB. Clearly, local allowances are a large part of respective Government Officials salaries, and they cannot simply rely on the money provided by central government. As such, it seems that there is still a significant financial link between the judiciary and the local government. The research involved interviewing the 60 judges to ascertain their level of contentment with their remuneration (see Table 4.4.2).

Table 4.4.2 – Judges' perceptions of their social class

With regard to your income and status, how do you classify yourself in relation to the rest of society?	
Upper Class	none
Upper –Middle Class	1/60
Middle Class	9/60
Lower-Middle Class	38/60
Lower Class	9/60
Prefer not to say	3/60

Some judges found it very difficult to place themselves in a particular social class. However, from the answers given in the interviews, it is clear to see that they were not fully content with their remuneration. In the interviews, most judges believed they are close to lower-middle income.

“Which class I am in depends on who I compare myself with. If I compare myself with a farmer, I really earn a lot more than them. But, if I compare myself with state company managers then I’m really a lot lower than them. I put myself into lower-middle class, but that would be *lower-lower-middle class*.” – Judge 42 (2006, interview with Yaliang)

“I think I am lower class. My salary wouldn’t allow me to afford a car, or any property inside the city. I think lower-middle class citizens have a better life than me.” – Judge 41 (2006, interview with Yaliang)

“My wage is far from the average wage of the province, but it is also much higher than working-class citizens. I would like to say that I am lower-middle class, and I believe most people are below the average provincial wage.” – Judge 15 (2006, interview with Yaliang)

Some judges did not wish to place themselves in a social class, but they were clearly unhappy with their level of income. For example, judge 53 pointed out that:

“I am not going to tell you what sort of class judges should be. Let me give you an example; a normal member of staff working for the state electricity company earns 96,000 RMB per year. A senior judge like me earns 60,000 RMB a year. Everyone knows this isn’t right, and has been saying this for years. I haven’t seen any change yet, and you can trust me, in the next 20 years there won’t be any change.” – Judge 53 (2006, interview with Yaliang)

“I wouldn’t place myself in any class in China, but I would like to tell you that in China, judges’ wages are not high; they’re not even close.” – Judge 19 (2006, interview with Yaliang)

In the interview, many judges were not satisfied with their current pay, and some stated that according to recent Chinese Communist theory, they felt as if they had been treated unequally, and deserved better pay.

“Deng [Xiaoping]’s development of Communist theory stated that people should only earn pay equivalent to the work they do. However, this does not happen in China – at least not in the court. The senior government officials work less and yet earn more than most people. In China, official income is only based upon position. This is very unfair.” – Judge 57 (2006, interview with Yaliang)

“Marxist theory says that you should get equal pay for equal work, but I don’t think this theory applies to judges.” – Judge 56 (2006, interview with Yaliang)

Some judges immediately stated in the interviews that they were unhappy and unsatisfied with their current remuneration. Since the general feeling amongst most judges indicated a significant degree of dissatisfaction, concerns are raised that the potential for judicial corruption exists. Bearing this in mind, 38 of 60 judges believed that they were lower-middle class. Nine of the 60 judges believed instead that they were working class. Nine others believed that they were middle class, and only one judge considered himself as upper-middle class. The three remaining judges did not wish to answer this question. In the interviews, judges argued particularly that both lawyers and judges require the same qualifications yet have significantly disparate income.

“Lawyers are generally very rich. They could earn 20 times more than we do. The university reunion gave us a chance to compare our lives with each other, and reflect upon it. The official reform of income has happened, but will it change things? We will see.” – Judge 55 (2006, interview with Yaliang)

In 2005 the average income of government officials including judges and prosecutors was only 17,623 RMB. In the same year, a Chinese lawyer's annual salary was over three times more than judges. In fact, in some locations the financial difference between lawyers and judges is extremely vast. The Blue Book of Rule of the Law 2006 (pp. 229-231) states that in Beijing, a lawyer's salary is 450,000 RMB on average. In Shanghai, the average is 210,000 RMB. However, in Beijing and Shanghai, the average annual salary for a presiding judge at a Basic Court is only 72,000 RMB. With vast differences such as these, it is not surprising that in some locations judges leave their jobs to become lawyers.

The salary provided by the central government is clearly insufficient to reliably prevent outside influence, and the status of judges is generally lower than that of other government officials. Therefore, local government is still able to play a strong part in judicial finance policy, and the possibility remains of local government influencing the courts. This means that it is possible for courts and local government to build relationship networks with each other in order to satisfy their respective needs. The concern here is not only how much money judges earn, but also the process by which their salaries are set. The process of setting judges' salaries must be based upon rational reasons, such as ensuring a comfortable life for judges and thus helping to prevent judicial corruption. Any contact between the courts and

government must be as transparent and limited as possible. Therefore, how judges' remuneration is set, and how much it is, remain open questions.

4.5 - Judges' political status and the administration of the court

Amongst the hierarchy of government officials in China, the head of a court at each level is one rank lower than the head of the corresponding level of government (see Table 4.5.1).

Table 4.5.1 - Chinese Government Official Structure³⁴

Ranks			Examples
1	正国家领导	State Leader	President, premier, speaker of the NPC
2	副国家领导	Vice- State Leader	Vice-premier, President of SPC
3	正部级	Ministry Leader	Provincial Governor,
4	副部级	Vice- Ministry Leader	President of HPC
5	正局级	Bureau Officer	Mayor of a City,
6	副局级	Vice- Bureau Officer	Police Chief of a City , Director of Justice Bureau of a City, President of IPC
7	正处级	Departmentalism Officer	Mayor of a town,
8	副处级	Vice- Departmentalism Officer	President of BPC
9	正科级	Faculty Officer	
10	副科级	Vice- Faculty Officer	
11	主任科员	Officer	
12	科员	Staff	

³⁴ Source: State Council Personnel Department, 2006

To provide an example of how this works, in Henan Province, the President of the High Court is level 4, which is same as the head of the finance bureau and the chief of the local police department. However the governor of Henan Province would be level 5. It is seems that the status of a court is no different to that of any other government executive department. This has resulted in many problems in the operation of administrative support.

Furthermore, the administrative structure of the court is no different to the executive branch. Judges of different ranks operate within the same court and Higher-ranking judges are considered superior to the lower-ranking judges. This creates the potential for these higher-ranking judges to override the judicial authority of the lower-ranking judges. The *Courts Organisation Act (1979)* established the administration process in the court. Once the courts receive funding from the local government, it is their own responsibility to manage this money properly and to maintain the court system. Governmental administrative support to the judiciary does not really exist in the current system. Furthermore, many duties exist in the court which are completely unrelated to the judicial process, yet judges find themselves taking responsibility for such tasks. In the literature review (see Chapter 1.2), many scholars and judges were concerned that there are too many distractions for judges trying to carry out their official judicial duties.

Despite the vast number of judges in China, in 2007 each judge heard only 50 cases per year (Chief Justice Wang, 2009). This indicates that Chinese courts are seriously lacking in efficiency. In the interviews, a few judges argued that there were less than 100,000 judges who were actively hearing cases. This is because many judges have to focus their time on the operation of the courts. Higher-ranking judges rarely hear cases; for example, in an Intermediate Court there are normally six divisions (administration, criminal, civil, commercial, family, and intellectual property), and each division will have one Vice-

President of the court, and a Head of Division. Two higher-ranking judges operate a division, but neither of them normally hear cases. Instead, their job is to focus on managing personnel, keeping the court in good physical repair, and many other bureaucratic matters. In addition, a judge who hears cases does not normally have any assistance to help with his/her workload, which includes scheduling cases for hearing, amongst many other duties. Every court normally maintains an equipment office, and a media relations office, the duties of both of which are largely carried out by judges. Clearly, there are too many roles in Chinese courts that are performed by judges, when in fact they should be assigned to dedicated court administrative staff.

4.6 - Conclusion

From the above analysis, it is clear that three decades of development of legal professionals in China have seen a significant leap forwards, but that there is still vast room for improvement. One problem is that there are not enough legal practitioners. It is clear that the legal industry is not very advanced in China; in fact in 2005 the GDP of legal services were RMB 15.6 billion (Blue Book of Rule of Law 2006 p229), which only made up 0.086% of the total national GDP, which was RMB 18.2 trillion in 2005. As such, it seems there is significant room for further development of the legal industry. A clear contradiction can be observed in that there is an undesirable situation in China, where there are a very small number of legal professionals, and yet a large number law graduates having a very difficult time finding professional jobs. This is the result of having a peculiar NJE system which has a very low pass rate, which indicates that the content of the test is not coherent with law school education. Perhaps the NJE is one of the most critical issues. The NJE qualification allows holders to freely choose between becoming judges, lawyers or prosecution officers. Therefore, the NJE is a keystone for legal professionalism. During the interviews, some judges noted the fact that the NJE may not help the development of legal professionalism in China.

The NJE focuses on testing applicants' ability in remember facts, but not the ability to analyse legal principles, which is perhaps the most important ability that judges should possess. Furthermore, as a result of the NJE, it seems that legal professions in China are restricted to a '*memory elite*' – those with the memory retention skills that few individuals can ever hope to possess. More importantly, the 10% pass rate of the NJE does nothing to help bolster the extremely low number of lawyers relative to the national population.

In China, lawyers make up just 0.009% (120,000 out of 1,300,000,000) of the total Chinese population³⁵. Perhaps it would be better for legal professionals to have enough knowledge in their own field to operate successfully, and the development of legal professionalism in China should first focus on how to make lawyers a more common profession. By doing this, there would be a significant increase in scale of the legal sector in China.

Another notable issue is that judges in China have very low remuneration and political status. Perhaps it would be better to increase judges' income and their rank within the government structure. However, this simple suggestion may not be easily implemented. Even ignoring the fact that China is still a developing country, the public may not support such a policy of increased remuneration and power for judges who possess little substantive training. It seems to be a vicious cycle; on one hand, high remuneration may attract intelligent people to join the judiciary, but on another hand, without intelligent people to join the judiciary in the first place, the public will be unlikely to support increased remuneration of judges. Ideally, a judge should be professional, enjoy reasonable benefits, be independent from their paymasters, and be able to focus entirely and exclusively on the task of hearing cases. It is clear that current legislation does not guarantee such standards.

In an ideal world, a judge should have a mature knowledge of law, significant experience as a legal professional, and their everyday duties should simply comprise of hearing cases. The state should provide any and all necessary support to ensure that judges are able to focus solely on their duties and develop their relevant knowledge. Clearly this environment does not yet exist for judges in China. However, this does not mean that Chinese courts do not take

³⁵Compare the population of lawyers in China with a developed country, for example the UK, In 2006, there were 151043 Total number of lawyers members of the Bar 11777 registered by the Law Society of Scotland, 758 registered by the School of Advocates in Scotland (460 practising), 586 registered by the Northern Ireland Bar, 2408 registered by the Law Society of Northern Ireland and 135,514 registered by the Law Society of England and Wales. The number of lawyers in the UK makes up 0.25% of the total British population. (CCBE, 2006)

responsibility for hearing cases. During the participant observation (see Chapter Six), presiding judges were very professional and kept their courtrooms well-organised.

This could be attributed to the current generation of judges being old enough to have legal professional roots in pre-NJE times. During the interviews, senior judges did not have a particularly favourable view of those who have passed the NJE, whilst those judges who had passed the NJE stated that it had been a waste of their time and of little value. The NJE is the entry ticket for the legal professional world in China, but its content falls woefully short of what could be considered a logical and productive means of assessing judicial applicants. In fact, during my research I found that judges - particularly senior judges – are generally intellectual, wise, and have a sense of responsibility.

For the issues of judges' remuneration and the finance of the courts, throughout my research judges expressed dissatisfaction with their pay, but generally agreed that the local government allocated them a reasonable allowance. However, this is still very low when compared with other individuals who work for the government, or compared with lawyers. China is still a developing nation; the outstanding economic boom over the past three decades has resulted in average income in China still being just a little over half of the world average. Compared with developed nations who spend billions of dollars on their respective judiciaries, China simply cannot afford to do this. However, the strength of this excuse is beginning to wane, as China is getting richer and richer every day. It seems likely that there will be increasing demand for the Chinese government to increase the budget for the judiciary in the future.

CHAPTER FIVE

Judges, Congress and the judicial process

5.1 - Introduction

To establish rule of law, two prerequisites are required: *legal professionals* and *an institutional structure that ensures a certain level of judicial independence*. Judges must be seen as being neutral if they are to be regarded as fair arbiters of disputes. Neutrality demands that judges should be able to reject any outside influences, direct or indirect. Therefore, to ensure judicial independence there needs to be a certain level of disconnection between the courts and any other individuals or bodies. Furthermore, judges are human beings and as such they possess human frailties and fallibilities. It is unlikely that they will behave independently unless they know that their rights are secured by a trusted and systematic institution. It seems that a systematic institutional design providing judicial independence appears to be one in which judges do not have observable pressure from outside sources. This is perhaps why historically the greatest danger to judicial independence comes from the state. However, contact between the judiciary and the state is often unavoidable.

This Chapter firstly seeks to introduce the relationship between Chinese legislation and the judiciary that is defined by the Constitution of the PRC (1982). Secondly, the chapter examines the procedure of Congressional supervision over the judiciary in individual cases. Finally, the chapter reviews three relevant cases that were subject to Congressional supervision.

5.2 – Constitutional relationship between the Chinese legislative and the judiciary

The 9th NPC Standing Committee (1998 - 2003) strove to increase its supervisory power over the judiciary (Jiang, 2002, p. 270). The NPC's supervision of the SPC can be divided into two functions: general supervision and Individual Case Supervision (ICS). General supervision refers to the head of the court delivering an annual judicial report to the congress at the beginning of the open session. The annual judicial report must give a summary of the court's work over the last year, achievements in reducing crime and maintaining social order, general statistics for the cases heard during the previous year and a future plan. In some region, local Congress found that "the general supervision over the judiciary was ineffective and unproductive in preventing poorly judged cases with inconsistent judgements and/or sentences" (Jiang, 2002, p. 271). Therefore, the local congress pursued the new policy of ICS. Notably the ICS occurs very frequently in some areas, but very rarely in others; there is no consistency in its usage.

ICS involves congressional members reviewing and/or altering judicial decisions, either before or after they have been made by the courts. In this process, the presiding judge in question can be called up to explain his or her verdict or sentencing before the corresponding or higher level of congress. Many scholars (Li Lin, for example) have noted that this results in control by local public delegates over the judiciary. This is because in many instances of ICS, verdicts or sentences passed by judges were overturned.

In China, there are two opposing views regarding ICS. The argument between the two opposing perspectives began in 1998. Li Lin³⁶ (1998, p. 26) argued that judicial power should never be subject to outside powers. He pointed out that in accordance with the current constitution, congress should avoid interfering with judicial work. Li's view was shared

³⁶ A *jurisprudent* of the Chinese Academy of Social Science

mainly among legal scholars. For example, Cai (1998, pp. 412,413) stated that, “the judicial modernisation of China should head towards independence, the congress should support the judiciary but not control it”. More importantly, Cai (1998, pp. 412,413) warned that “excessive and over-interference with individual cases will result in profound damage to our rule of law approach.”

This view from many legal scholars prompted a vociferous opposition among the People’s Congressional circles. MP Guan Fengting (1998, p. 29) argued that in accordance with the current constitution, the judiciary is answerable to the congress, and in a people’s constitutional state the judicial power should not be independent from the people’s congress. MPs Yu Xiaoqing & Li Yonghong pointed out that the people’s congress is answerable to the people, and as such it is necessary to oversee judicial decisions if damage has been done to the people’s interests (misjudgements), and especially when judicial corruption is evident (Jiang, 2002, p. 271). Clearly, legal scholars and MPs have different views on the Constitution regarding the sections relating to the judiciary. Indeed, such an argument reflects the contradiction in the current constitution between articles 126 and 128. Article 126 states that, “the People’s Courts must follow the law and independently hear all cases, the executive branch, non-governmental organizations and individuals are not allowed to interfere.” However, Article 128 points that “the Supreme People’s Court is answerable to the National People’s Congress, and the Local People’s Courts are answerable to the corresponding level of People’s Congress”.

Legal scholars and judges who oppose the idea of ICS point to Article 126, which states that there should not be interference with the courts. MPs and ICS supporters point to Article 128 of the state constitution which gives the NPC the status of the highest political body, over all other political/government bodies including the courts which are answerable to the congress.

Therefore, they argue, judicial supervision is legitimate and is one of the most fundamental characteristics of the current Chinese Constitution. The argument regarding the two contradictory articles began in 1998 and shows no sign of ending soon.

However, there is a point of view shared by both sides that the People's Congress must abide by strict procedures in conducting ICS (Jiang, 2002, p. 272). Towards the end of 1998, Li Peng, the Speaker of the NPC, requested that all levels of congress should engage themselves in drawing up rules of procedure for ICS, in order to ensure that the congress does not handle cases for the propose of furthering personal interests of congressional members. After Li Peng's announcement, many local congresses adopted a local act to ensure the ICS procedure. For example, the procedure of ICS can be observed from the *ICS rule for standing committees of all levels of congress in Jiangsu province (1999)*.

5.3 – The procedure of Congressional Individual Case Supervision

Many provinces in China have already adopted local ICS Rules, which differ slightly from one province to another but all hold the same basic principles. Following is an analysis of the *Jiangsu Province ICS Rules 1999* (JPIR99), to illustrate the general process of ICS. The *JPIR99* offers a clear definition of ICS, which allows the Standing Committee of the Congress to supervise the work of the courts, whether cases are still being heard or have already undergone sentencing.

There are two instances in which ICS should be undertaken; if the court or any agent in the court breaks the procedure laws, or if the verdict or sentence passed by a judge is clearly in error (Article 2, JPIR99). The JPIR99 also clearly states that when the Standing Committee undertakes ICS, it must be conducted by a collective group, not just an individual, and they must not be personally involved in the case or disrupt the due judicial process (Article 3, JPIR99). Congressional members who are involved in ICS during their duty must act in accordance with the law, must not favour themselves or pervert the law, and must refrain from taking part if there is a personal relationship between them and a member of the judiciary. During ICS, if one of the congressional members were to break the law they will face prosecution (Article 18, JPIR99).

In accordance with Article 5 of the JPIR99, rationale for ICS cases can be one of the following:

- (1) When any citizen, lawyer or other organisation appeals to the congress on the grounds that their case was treated unfairly
- (2) When any case is selected by a member or group of members of the people's congress for ICS.

- (3) When any case is selected by the upper or lower level congress for ICS (accompanied with written justification).
- (4) When a case is selected for ICS by judicial bodies themselves

In practice, both the Standing Committee and committee of Internal and Judicial Affairs (IJA) of the congress take responsibility for the ICS. The IJA can exercise several key powers. Firstly, the IJA can hear reports prepared by the presiding judge. Secondly, the IJA can read the details of archived court proceedings, and demand information related to the case(s) of the presiding judge. Thirdly, the IJA may offer suggestions for court verdicts or sentences. Finally, the IJA can set deadlines for the court to make a report of the verdict or sentence after ICS.

The court does not have to accept any suggestion from the IJA. At this stage, it seems as though the IJA attempts to discuss cases with the court, and during this procedure, it is difficult to ascertain whether or not the IJA interferes with the courts' work. However, Article 9 of the JPIR99 provides support for the IJA. If the findings of the IJA and the court are not same, the case shall be brought forward before the Standing Committee of Congress to make further decisions. At this stage, it is very difficult for judges to gain equity with the members of the standing committee. This is because judges are elected by the standing committee of the Congress and their further promotion is also partially dependant on the election of the congress.

Article 13 of the 1999 JPIR99 defines the standing committee as the core of the congress, with the power to reach the following decisions:

- (1) Order the courts to produce a report of cases selected for ICS
- (2) Form a special body to investigate cases selected for ICS
- (3) Produce a 'Supervisory Decision Paper' for the courts

A notable issue is that the content of the *Supervisory Decision Paper* should have the following elements (1) The facts of the cases (2) The relevant articles of law (3) The decision made as a result of the supervision (4) A request for the final sentence or verdict given by the presiding judges, by a specified date (Article 14, JPIR99). The judiciary must follow the recommendations made in the Supervisory Decision Paper. If the court has different findings to those of the Supervisory Decision Paper, it must report to the Standing Committee of Congress within 30 days. In this report, the court should explain its reasoning. The Standing Committee normally answers the report during the next open session. If the decision provided by the court is valid, the congress will reject the decision of the Supervisory Decision Paper.

After reviewing the JPIR99, it seems that the ICS process is quite vaguely defined. Some local ICS acts permit cases to be selected, but they do not state *how* the particular cases are selected. Important details, such as the qualifications required to serve as part of the ICS process, the type of information that should be provided by the courts, and what specific actions the congress can or cannot take, are omitted. The most notable issue is that a *Supervisory Decision Paper* can be passed to the court in the name of the Standing Committee of the Congress. This may influence the courts' decisions. Clearly, ICS is a system which lawfully connects the legislative and judicial bodies together. Many local congresses have adopted ICS Rules in order to ensure the procedure is carried out. However, that has not stopped the heated debate between legal scholars and MPs.

In early 2005, MP Zhou Xiaochun (2005) proposed an *ICS Act* and stated before the NPC that:

“The fundamental element of China’s constitution is the sovereignty of the NPC. The officials employed by both the executive and judicial branch are all elected by, answerable to, and under the supervision of the Congress.”

MP Zhou also pointed out that if the congress does not check individual cases, the NPC's supervisory responsibility of legal practices cannot be undertaken appropriately. To deny ICS would be the same as denying the NPC's supervisory right that has been endowed by the constitution. Many MPs support Zhou's standpoint. MP Zhang Yixiang (2005) alleged that:

“We cannot ignore the fact that there is injustice and bribery involved within the trial process. Sometimes the courts behave irrationally to correct a very obvious mistake, and this has led to many problems in society.”

At the same time, some MPs have pushed for a national ICS Act. There are some alternative ideas from the courts and many legal scholars. MP & Senior Justice Zhang Daomin (2005) stated that:

“The supervision from congress over the courts should only happen when the case is finished and the decision has been made. The congress should focus on important matters such as whether justice has been carried out, or whether judges perform their moral and legal duties. The congress should not supervise individual cases.”

In August 2006 the NPC adopted the *Supervision Act (2006)*. This act ensured the congress' power of supervision over other state bodies. Article 13 stated that the Congress may request the Government, Courts and Procuratorates to submit reports on particular issues. However, this Act did not address the meaning of 'particular issues' and did not mention the term 'ICS'. It seems that the content of this act is quite vague, and may easily be accepted by both ICS supporters and opponents. However, the argument surrounding ICS is not easily solved. Nonetheless, the fact is that ICS is happening and is more likely to continue to happen in the future. Hence, the question must be asked - will ICS reduce judicial independence or address poorly-judged cases? In order to answer this question it is necessary to examine some examples of ICS.

5.4 – Cases that were judged under Congressional supervision

Table 5.4.1 - Case Four: Anhui Provincial People's Procuratorate vs. Mr. Chen (1999)³⁷

Case synopsis

Mr Chen was a director of a local state-owned bank in Taihe County. In 1998, Chen had a disagreement with a Mr Guo. An argument ensued, and Chen used a hunting gun to kill Guo. In 1999, the Hanyang People's Intermediate Court sentenced Chen to death immediately. Chen appealed the decision to the High court. The High court found that the evidence was not clear enough to pass a death sentence, and requested the Intermediate court to re-try Chen. After the re-trial, Hanyang People's Intermediate Court passed an identical sentencing as it had the first time, and Chen appealed once more.

Call for ICS

In 2000, Guo's mother sent many letters to the Provincial Congress to complain that the High court was influenced by external sources. During this communication with the congress, she discovered that Chen's sentence may be altered to a 'delayed death sentence'³⁸. She was not happy that this might happen, and demanded that the congress should apply ICS over the High Court. Following these letters, the Standing Committee requested a hearing with the IJA of the congress to assess a verbal report given by the presiding judge of the High Court. During the report, the presiding judge stated that they would like to change the sentencing decision to death after two years. Following the report, the IJA noted that the justification for changing the sentence was not acceptable by law, and held hopes that the high court should be more honest during future investigations.

³⁷ Sources: Cai, 2005

³⁸ In China, the death sentence can be carried out immediately, or delayed for two years. If it is delayed, usually the death sentence will be commuted to a life sentence.

ICS process

The IJA of the Provincial People's Congress adopted the following measures,

- (1) High court judges gave a verbal report to the IJA
- (2) The IJA Committee reviewed the records of the case
- (3) Judicial Supervisory Consultants were invited to assist the IJA in inspecting the records and analysing the case
- (4) The IJA sent a letter to the High Court stating their opinion, and asked the court to make another report to them after the judges had made their final decision over sentencing.

Result of the ICS

In March 2002, following the suggestions from the Provincial Congress, the High Court passed a final sentence to Mr Chen which was immediate execution.

In this case the congress did not overturn the verdict made by the judges, but in a way passed sentencing over the courts. The congress interprets law on individual cases over the judicial authority. The argument here is that during the process of supervision, the People's Congress should act in accordance with the law and must not exceed its authority. Is it legitimate for the congress to have the power to interpret cases? Article 67 of the Constitution of the PRC gives the People's Congress powers to interpret the Constitution, law and statutes, and supervise their enforcement. Therefore, unlike the common or civil legal systems, the primary organ in interpreting law in China is the legislative body, not the courts. In the above

case, there are different views between the Congress and the judiciary about how to interpret the law. According to *the Criminal Code (1979)*, PRC (see Table 5.4.2 below), there are three articles that are relevant to Case Four and need to be interpreted to pass sentence.

Table 5.4.2 – Articles 62, 63 and 232 of the *Criminal Code (1979)*

Article 232 - The offence of murder shall receive the death sentence, life or at least a minimum of ten years imprisonment. If there are mitigating circumstances, the sentence can be reduced to at least a minimum of three years imprisonment.

Article 62 - If the offences have been proved to have mitigating or aggravating circumstances the offender shall be sentenced according to the relative article.

Article 63 - if the offence has mitigating circumstances, the sentence should follow the law; if the offence is proven not to have mitigating circumstances, but if a special event has been involved in the case and been authorised by the Supreme People's Court, then the sentence can be reduced.

In Case Four, the Provincial Congress interpreted the law in such a way that there were not any mitigating circumstances for the defendant, and the offence should carry an immediate death sentence. This view differs from that of the High Court.

This case raises some very important concerns. When the congress and the judiciary have different interpretations of a point of law, the congress holds the higher authority. This case reflects a key point that is lacking in the Chinese legal system - that statutory law in China seems very vague and there is an absence of case law, formal case precedents or any formal

specific rules. As a consequence, there are not many specific rules for judges to follow. It is clear to see how vague the laws in China are. As such, congress informally acts to build more specific legal points in China. However, there is no evidence to observe whether or not such congressional interpretation will become a form of case law which applies to all similar cases in future. In fact, congressional interpretation of a point of law that came into force for an individual case may be altered again by congress in future similar cases, or even completely ignored. If congressional interpretations became formal case law, this would mean that all presiding judges would have to follow these interpretations in future. Ideally, if a similar case occurs later in the same region, the presiding judge should pass a judgement in accordance with the ICS decision previously made. However, if by any chance the suspect could influence his public delegators in the Congress, the congress can still change the judgement through ICS. In fact, the Congress can always use ICS to alter a specific point of law that was made before. This may not be beneficial for the certainty of law in China.

Table 5.4.3 - Case Five: Jinghua City PP vs. Mr Zhao & Mr Huang (1999)³⁹

Case synopsis

In September 1998, Mr Zhao and Mr Huang met a lady - Ms Yang - in a park. After a long chat, Mr Zhao and Mr Huang took her to a bar. In the middle of the night, Ms Yang went to a hotel with Mr Zhao & Mr Huang. Mr Zhao asked her for sex, Ms Yang requested 1,000 RMB from each of them. After Mr Zhang and Mr Huang refused to pay any money. Ms Yang planned to leave the hotel, but was stopped by Mr Zhao and Mr Huang. Mr Zhao and Mr Huang had sexual relations with her that night. The next day at 8am, Ms Yang went out for breakfast, and when she went back to the hotel Mr Zhao and Mr Huang had already left the hotel and her handbag was missing. Ms Yang called police.

³⁹

Sources: (Cai, 2005)

In December 1999, a County-level Court found that both Mr Zhao and Mr Huang were guilty of raping Ms Yang, and were given an 11 year custodial sentence. In April 2000, Mr Zhao and Mr Huang appeared at the City Intermediate Court, and at the second instance the presiding judge believed that the reason Ms Yang called police is because she lost her handbag, not because of the rape. The Intermediate Court altered the judgement passed by the county court, and instead passed a guilty verdict of theft with a six month sentence, and fined Mr Zhao and Mr Huang 1000 RMB. In the judgement, the presiding judge pointed out that, “when the sexual relations took place, Ms Yang was not forced by Mr Zhao or Mr Huang. Therefore, the evidence did not prove that Mr Zhao and Mr Huang had raped Ms Yang”.

Call for ICS

In June 2000, the County-level People’s Congress wrote a letter to the City Congress stating that, “It is true that Ms Yang called the police because she lost her handbag. However, Mr Zhao and Mr Huang had sex with her against her will, which meets the definition of rape. We hope the City Congress will conduct ICS on this case and recommend that the Intermediate Court alters their judgement.” The City Congress questioned Ms Yang, who stated that she demanded 1,000 RMB from each of them because she knew they would rape her anyway, and that she had no means of escape. After one week’s investigation, the City Congress submitted a judicial supervision paper to the Intermediate Court. The paper stated that the judgement passed by the presiding judge of the Intermediate Court was a mistake. “Ms Yang did not call the police until she lost her handbag because according to local culture, it is very shameful for a girl to call the police after she has been raped.” The paper requested the Intermediate Court retry this case and report the result to the City Congress.

Result of the ICS

November 2000, the Intermediate Court retracted its previous judgement, and maintained the judgement passed by the County-level Court.

In this case, the judiciary and the congress had different views about a point of law in identifying the facts of a case. The judiciary thought that the woman was a prostitute, and hence the case was considered to be one of a broken contract between a customer and client. The congress believed that regardless of whether or not she was a prostitute, the woman was not willing to have sex with the suspects after they refused to pay, hence this was considered to be a rape case. In fact, according to Article 236 of the *Criminal Code (1979)*, if a female refuses to have sex with another individual who then proceeds to do so anyway, this is classed as rape.

The Vice-Director of Jinghua City People's Congress commented that this was a very successful case and proved the importance of ICS. He stated that, "[in China] judges' qualifications are not very high, and misjudgements frequently appear. In order to stabilise society, it is necessary for Congress to supervise judicial work" (Tang, 2005). Moreover, another Vice-Director of the City Congress noted that the authority of the congress had increased after publishing the details of the case in a newspaper. In 2000, the congress had received over 200 letters making complaints towards the police force and courts. In the same year, the Congress sent 14 Judicial Supervisory Papers to the courts.

Jingshua City Congress noted the following difficulties encountered by ICS, and stated that two notable issues often occur when ICS takes place. Firstly, judges are often indignant and obstructive about the prospect of ICS being conducted over their verdicts and sentences.

Secondly, after ICS has been applied, the Congress attempts to punish judges who have made judicial errors, but this is difficult, as the court always attempts to protect the judges. It seems that the Congress was not satisfied with the cooperation of the judiciary during the ICS. The President of the Jinghua Intermediate People's Court, Senior Justice Liu, stated that a mistake had been made in this case and the court accepted the ICS. However, Senior Justice Liu expressed some concerns regarding the ICS process. Firstly, during ICS, the congress normally only questioned the victims, but not the defendant. Secondly, the congress should focus on supervising the judiciary's operating principles, and not individual cases. This is because most MPs are not legal graduates, and do not have sufficient knowledge to understand the purpose of law.

The concerns raised by Senior Justice Liu are very reasonable, yet despite these concerns he did admit failures in the judicial process. Judges are only human, and all humans can make mistakes. In theory, ICS may be considered to infringe upon judicial independence, but - as case three shows - if a judicial mistake can be corrected then there must be some benefits of ICS to consider. The events of Case Five, including the subsequent ICS, do not indicate any personal motives from the state bodies. If ICS is intended to prevent judicial mistakes, then the procedure should not be vague, simple, and ill-defined. Instead, the procedure should have the necessary characteristics to ensure the ICS is conducted independently from outside sources.

As illustrated by Cases Four and Five, ICS is normally called for by a lawsuit party. However, there was a very special case that occurred in Anhui province in 1999, where an ICS was called for by the judiciary (see Case Six below).

Table 5.4.4 – Case Six: Anhui-Xuzhou Huasheng Chemical Plant vs. Mr Ma (1999)⁴⁰**Case synopsis**

In 1994, Mr Ma acted as an agent in introducing a Japanese chemical company - New Technology Ltd (NTL) to Anhui-Xuzhou Huasheng Chemical Plant (AHCP). In the same year, AHCP and NTL signed a contract that NTL would transfer its chemical technology to AHCP. NTL provided the relative information to AHCP after the contract was signed. According to the contract, AHCP paid RMB 2.51 million to a Mr Shanlang as an agent's fee and another RMB 11 million to a Mr Zhihuang as the inventor's patent fee. Ma, as the agent of AHCP, took responsibility to transfer the fee to the above two parties. For some reason the cooperation between AHCP and NTL was aborted and AHCP took Ma to court, accusing him of fraud. The tribunal took place at an Intermediate court in Anhui province, and the case revealed that Ma only paid RMB 810,000 to Shanlang and RMB 6.66 million to Zhihuang. The rest of the money (RMB 4.33 million in total) remained in Ma's bank account. The judges found Ma guilty and he received a life sentence. Ma appealed the sentence at the Provincial People's High Court.

Call for ICS

In December 1999, the High Court itself requested ICS from the provincial Congress, for the following reasons:

- The High Court felt pressure from outside sources during the trial
- The High Court would like to maintain the support of the congress

The High Court made a report of this case and stated before the IJA of Anhui Provincial

⁴⁰ Sources: Cai, 2005

People's Congress. Afterwards, the IJA reviewed the transcript of the case and made suggestions to the Standing Committee, asking for their decision. Later, the Standing Committee sent a letter to the court and requested that the court should do more research and make their judgment according to the law.

ICS process

The provincial congress adopted the following measures

- (1) IJA Committee reviewed the transcript of the case
- (2) The Judicial Supervising Consultants were invited to assist the IJA Committee in inspecting the facts and analysing the case
- (3) The judges were invited to assist the IJA Committee in examining the case and exchanging their opinions. The High Court judges returned with the opinion that the decision be overturned, and the sentence changed from life to not guilty.
- (4) As a result, the IJA concluded that Ma was not guilty

In February 2002, the IJA Committee again invited judges and told them that the decision to overturn the sentence was a reasonable one. The Standing Committee of the Congress demanded another report from the court.

In May 2000, the High Court made a report to the Standing Committee to consider the possibility that Ma was not guilty, and at the same time asked for instructions from the SPC. In August 2001, the SPC made their conclusions and in this case they considered Ma to be not guilty. One month later the High Court made another report to the congress by letter, this time explaining the current situation of this case. After an investigation by the Standing

Committee, a request was sent to the High Court that demanded a judgement based on the statement offered by the SPC as soon as possible.

Result of the ICS

In 2001 the High Court came to the conclusion that there was simply not enough evidence to convict Ma and accordingly he was found not guilty.

The case above seems to show how difficult it is even for a high court to act independently from two commercial parties. Evidently, there is an obvious connection between the court and the congress. As a result of this, the congress could be suspected of influencing the court. However, in this particular case the contact between the congress and the judiciary was intended to protect the judiciary from being influenced from outside sources. Furthermore, the congress did not question the decision made by the judiciary in this case, but fully supported it. Does this case show that ICS can strengthen judicial independence?

Other notable points have also been highlighted by Case Six. Firstly, it seems there is no evidence to show that the congress investigated the source of the ‘external influences’ of the High Court, and no action seems to have taken place to ensure this doesn’t happen again in the future. Secondly, the case did not explain in any real detail what kind of information was exchanged between the IJA and the courts. However, the courts gave their decision to the IJA. After re-evaluating the report from the courts, the IJA acted as an authority to confirm the court’s decision. Finally, it seems quite obvious that the congress acted as an external ‘appeal court’.

5.5 – Cases analysis

In Case Four, the congress altered the duration of the sentence. In Case Five, the congress altered the judgement, and in Case Six the congress influenced the result of the verdict. The duration of the sentence should be based upon the interpretation of the law, and according to the Constitution this power is held by the Congress. When the congress exercises the power of ICS, it is clear that they are not breaking the principles of the *Constitution of the PRC (1982)*.

Case Four highlights the real possibility of individuals with a vested interest attempting to influence the court process if they have the ability to do so. For example, Guo's mother's complained to the congress that there were external influences over the high court. Importantly, her complaint indicated that she had previously been in contact with the court; this is because she already knew that the sentence was going to be reduced by the High Court. Once the congress was involved, it did not investigate what type of outside influences there were on the court. They did not even consider how and why such influences could have affected the court's decision, or how to prevent such external influences from having the same impact in the future. Instead of doing this they acted as the supreme sentencing body, but in light of the Chinese Constitution they were not breaking any laws and were perfectly within their power to interpret the law as they did.

Case Five illustrates that codified law in China is vague, and there is a distinct lack of a developed system of case law. As such, there are not many specific rules for judges to follow. ICS is designed for the Congress to interpret specific rules for judges to address. However, there are many considerable points about how to ensure ICS does not become an undesirable judicial influence. In fact, ICS seems to give the Congress very flexible power to alter any specific points of law. There is a substantial problem with the certainty of law in China.

Case Six is a very special case which proved that ICS may support judges' independence, as long as the congress unconditionally accepts a decision that has already been made by the court. However, while such unconditional congressional support for the judiciary would further judicial independence, it would not necessarily prevent cases from being misjudged. In fact, judicial independence does not ensure cases are judged correctly, but it does ensure lawsuit parties will feel that judges deal with cases neutrally. Of course, judicial independence does not mean unlimited power for judges to do as they please. There should be a proscribed means for addressing misjudged or poorly judged cases. It seems that this should be done through an appeal process. However, in China the public appear to trust congress more than the judiciary. This situation was emphasised by some of the judges in my interviews, they argued that ICS reflects one of the key problems in China, that judges command little respect from the public.

“From my experience, ICS never really occurs in this province. However, in some other provinces it is a quite normal and regular occurrence. Many people in the country argue that the congress just acts as a rubberstamp. I don't believe this is true; the congress exercises their power for the benefit of society, but perhaps they are stricter with the judiciary than they are with the government. ICS is an example. I have reviewed research regarding ICS, and in my opinion if lawsuit parties strongly believe that congress can ensure greater justice than the judiciary, then a call for ICS is fine by me. However, we must note that the procedure for ICS must be systematically and specifically established ” – Judge 1 (2006, interview with Yaliang)

Judicial influence come from almost everywhere...Congress can directly influence us, just think about ICS...ICS is being practised widely across China, but the degree of practice has differed from province to province. Some provinces have already passed the local ICS Act to ensure the general procedure of all levels of congresses in the province. In other areas, the local congress has not passed an ICS Act because it happens so infrequently...I do not think ICS is a good idea. Most members of the congress are not legal graduates...judicial reform has been discussed for many years, but do we judges in China even have judicial power? In accordance with the Chinese state Constitution, the Congress holds the authority to interpret law, not the judges. We judges only hold the power of passing verdicts...constitutional reform is necessary...but congress' influence is often supported by the public. Perhaps this is because we judges do not enjoy as much public trust as congress. I think the key issue of judicial reform in China is to increase judges' public credibility.” – Judge 60 (2006, interview with Yaliang)

The judges' views of ICS show that they have a poor public image compared to congress. The key argument here seems to be over how to ensure supervision does not end up resembling control. It appears very difficult to distinguish between ‘supervision’ and ‘control’, as the current constitution gives congress vast institutional advantages over the judiciary. These can be observed in Articles 62, 63, 67 and 128 of the Constitution of the PRC (1982) (see table 5.5.1).

Table 5.5.1 - Article 62, 63, 67 and 128 of the Constitution of the PRC (1982)

Article 62. - The National People's Congress exercises the following functions and powers:

... (7) To elect the President of the Supreme People's Court...

Article 63. - The National People's Congress has the power to recall or remove from office the following persons:

... (4) The President of the Supreme People's Court; and...

Article 67. - The Standing Committee of the National People's Congress exercises the following functions and powers:

...

(5) To examine and approve, when the National People's Congress is not in session, partial adjustments to the plan for national economic and social development and to the state budget that prove necessary in the course of their implementation;...

...

(11) To appoint and remove the Vice-Presidents and judges of the Supreme People's Court, members of its Judicial Committee and the President of the Military Court at the suggestion of the President of the Supreme People's Court;...

Article 128. - The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local people's courts at different levels are responsible to the organs of state power which created them.

The above articles create the potential for influence from congress to the courts. Any kind of direct contact between the congress and the courts could be considered as external influence. Judges may find it difficult to have a conflicting debate with the bodies which play an important role in their future careers. It is very likely that judges may just accept decisions made by congress. In fact, in 60 cases studied by Professor Cai (2005) there was only one case in which the courts directly rejected a suggestion from congress, which shows that generally during the process of ICS, the courts will either accept congressional decisions without too much resistance or refer the case to the higher level court which will allow them to explain the case to congress. It seems that the efficiency of ICS could result in many different outcomes, and there are some specific points during ICS that should be considered. Professor Cai Dingjian (2006) presented the following statistics (see Table 5.5.2):

Table 5.5.2 – ICS from 1998 to 2001 in five provinces

Period	1998- 2001	1998- 2001	1998- 2001	2001	1998- 2001	1998- 2002	1998-2001
Location	Shanxi provincial congress	Shanxi province	Zhejiang provincial congress	Guangdong Province	Jiangxi province	Anhui provincial congress	Anhui province
Sub-location		All 12 counties' congresses		Shenzhen city congress	Jiujiang city congress		Anqing city congress
Number of 2 nd - time appellants complaining to congress	3361 cases	1078 cases	1147 cases	570 cases	929 cases	1671 cases	1000 cases
Number of reports requested by the congress from courts	259 cases	533 cases	218 cases	---	20 cases	308 cases	61 cases
Number of ICS cases	---	65cases	16 cases	24 cases	2 cases	12 cases	11 cases

The above table shows that even in the areas where ICS most frequently occurs, the number of times that it does occur is very minimal. In most cases, after the courts have prepared a report to congress, ICS action usually ceases. If the report does not satisfy congress, or an obvious mistake has occurred in the court's decision and the court has refused to report on time, the congress would formally begin ICS on the court for that case. In accordance with the above findings, it seems that there are reasons for both supporting and opposing ICS. An idea for reform would be to either abolish the ICS system or make it more systematic and specific. In my interviews, two judges were concerned that abolishing ICS could be very difficult, not just due to the fact that Congressional public delegators enjoy more public trust than judges, but also because Chinese culture considers law to be a negative element, and the public prefer 'powerful men' to protect justice.

“Historically, neither law nor judges are respected in China. Since the 1980s, the increase of judicial corruption has caused a great decrease in their public credibility. Many people avoid the courts' decision directly in order to appeal to other, higher authorities. This is how a new legal term has been established - you must have heard the term '*shangfang*' - which means 'to appeal to a state authority rather than the court'. From my experience, when a person meets one of the following criteria:

- Loses a lawsuit;
- Wins a lawsuit but rejects the sentence passed;
- Brings a lawsuit to the court but it is rejected;
- Feels the courts have not carried out sentencing fully;

Then, these people will normally send a letter or visit higher political bodies such as congress or central government to complain about the situation, usually including their criticism of the court. To respond to these appeals, different government bodies have introduced different methods, and one of the congress's methods is ICS.” – Judge 1 (2006, interview with Yaliang)

Last year China had a great debates regarding to ICS. In this region, the congress never exercises ICS on judges, but my concern is that the ICS can be seen as a sign that people do not trust judges...as a judge I do not support the ICS but it is true that the ICS have overturned some misjudgement – Judge 19 (2006, interview with Yaliang)

The above two judges indicated that there is not only a lack of respect for their profession, but an inherent lack of respect for law itself, as a feature of the long-term influence of Confucian ideology in Chinese culture. It seems as though the public still prefer powerful state organisations to deal with matters of justice. The aim of ICS is to supervise judicial work and promote justice. ICS informally makes specific rules for judges to follow. However, during ICS, there are many ambiguities. Currently, it seems quite necessary, and sometimes it solves judicial problems and supports judicial work. However, if the details of ICS procedures cannot be ensured by specific law, then the increase in demand for ICS will increase the contact between congress and judges. This may increase public delegators' potential influence over the judiciary, and may reduce judicial independence in the future.

5.6 - Conclusion

Arguments regarding ICS began when the system was established, and it seems that such arguments will continue. This research raises some important concerns which may interest Chinese law-makers. Firstly, supervisors responsible for ICS are congressional workers or public delegators. Most of these people are not legal professionals; hence it is arguable whether or not they should participate in judicial matters. Secondly, it seems that supervision from the Congress decreases judges' confidence in exercising independent thought. Thirdly, public delegators will naturally take account of the most popular opinion in their decision-making process, yet public opinion could be wrong. Finally, it is unlikely that the courts will question the decision making process of the congress, due to the fact that the congress enjoys higher constitutional status than the judiciary, and the eventual decision will not penalise congress. In fact there is a high chance that even if congress were to use their power excessively; the courts couldn't really act strongly to reject the decisions made by congress.

ICS rarely occurs in China, but it is a considerable issue. It seems that ICS can be considered as a type of appeal which does not contradict the Chinese constitution. The most notable question that is asked is why is ICS used as an appeal system rather than appeals being made directly through the court system? Clearly, from the cases analysed in this chapter, the judiciary holds relatively low public respect when compared to the congress. This reflects a key problem in China; it seems very likely that judicial reform towards greater independence may not be supported by the public, due to the lesser public respect for judges.

From the three cases addressed, it seems that ICS is mainly focused on judges' power of interpreting the law. As highlighted before, there are no specific rules in China. Statutory law is unsurprisingly vague and merely offers guidelines for behaviour, rather than specific points of law. As a result of this, judges in China enjoy extreme amounts of judicial discretion. This

discretion could mean anything between three years imprisonment and a life sentence. Considering that judges' professional development is unsatisfactory, together with relatively low pay, it is reasonable for the public to presume that judges do not interpret the law in a consistent way - particularly if there is a great financial disparity between two parties disputing in court.

It seems that public delegators are more trustworthy in the eyes of the public in China. Therefore, similar to the House of Lords in the United Kingdom, the congress in China takes responsibility for appeal cases. However, as many judges have argued, many public delegators in China are not law graduates. Furthermore, the congress may limit judges' judicial discretion, yet it does not appear that the congress is willing to form a body of case law for judges to follow. Therefore, the ICS transfers judges' judicial power to the congress. As such, a further question arises – who limits the congress' judicial discretion in individual cases?

Another very notable issue is that the local congress naturally represents local interests. If a local congress can have strong influence over a corresponding judiciary, then this may create local protectionism which will impede China's economic development in a global environment. The judiciary must follow the law that is made by congress. If congress fears that there will be misjudged cases, there are many ways to combat this, such as making law more specific and clear, and limiting judges' judicial discretion to a reasonable level. Furthermore, without case law, statutory law can be interpreted in any direction. Simply because judges and congress differ in their interpretations of law, it does not mean that either one can be absolutely correct, in fact it is very ambiguous and difficult to say what the law actually means if it is too vaguely defined in the first place. Therefore, the crucial problem of

judges having lower respect is that it seems impossible for judges to have a specific point of law to follow.

As frequently addressed in this chapter, the Chinese constitution clearly provides the capacity for the congress to supervise all branches of state power, including the judiciary. It seems that the core of a Marxist constitution is to mix the branches of state power with the congress. As such, abolishing ICS would require constitutional reform. It seems that such reform would not be supported by the public. Another idea to consider is that ICS occurs and is supported by the public, and as such the NPC could adopt a law to describe in detail how the ICS should operate.

CHAPTER SIX

Judges and the prosecutors: the balance of power in the criminal justice system

6.1 - Introduction

Criminal Law is coercive by nature, and is the way in which governments identify and criminalise certain actions that are considered to do harm to citizens. It imposes punishments for those who break the legally detailed rules. The coercive power of criminal law is intended to have a deterrent function for society, because the threat of sanctions induces citizens to act to avoid punishment. Therefore, the state prosecution service brings individuals who appear to have broken the law before court and seeks punishment for these individuals. In this case, the state prosecution service is the body representing the state. This is why both the judiciary and the legal representation for the defendant should be independent from the state prosecution service; if the state prosecutor had control or notable influence over the defence lawyer's argument or a judge's decisions, then the state would be able to sacrifice every individual's interests for the benefit of the state. Therefore, in order to analyse the extent of judicial independence from the state executive branch, it is necessary to analyse the role of the different legal agents in China. Of particular importance is the relationship between the judiciary and the People's Procuratorate (PP). The high rate of conviction in the Chinese criminal justice system is shown below (see Table 6.1.1).

Table 6.1.1 - Supreme People's Court Annual Work Report⁴¹

SPC Work Report	Number of suspects found guilty at the first instance	Number of defendants found not guilty	Conviction rate
March 2006 - 2007	889,042	1,713	99.80%
March 2005 - 2006	844,717	2,162	99.74%
March 2004 - 2005	767,951	2,996	99.61%

⁴¹ Sources: Chief Justice Xiao, 2005, 2006, 2007a, 2008 and Chief Justice Wang, 2009

The above table illustrates that the conviction rate is consistently above 99%. This is considered by some research institutes to indicate that the PP has a very strong influence over the judiciary. For example, the US-based CECC (2007, p. 51) noted that:

“...Over the past few years, Chinese courts have maintained a consistent conviction rate above 99 percent, due in part to the lack of fairness of criminal trials... China’s criminal justice system is strongly biased toward a presumption of guilt...”

The CECC effectively is suggesting that the court is always subservient to the state. However, the SPC states that criminal trials follow the principle of innocence until proven otherwise. In fact, the SPC utilises the same data on Chinese conviction rates as evidence of the courts correctly following the principle of the presumption of innocence. The President of the SPC, Xiao Yang (2007b) stated that:

“In 2006, the court - in accordance with the principle of presumption of innocence – found a total of 1,713 defendants not guilty...51.61% of them were found not guilty due to lack of evidence and another 48.39% were found not guilty due to mitigating circumstances”

Clearly, based upon the same figures, the perspectives of the CECC and the SPC are almost completely opposite to one another. The contradictory perspectives of the CECC and the SPC beg the question of whether or not the PP has strong influence over the judiciary. In accordance with the Constitution (1982), the PP has two major roles within the criminal justice system. The first function of the PP is to act effectively as the state prosecution service, which represents the state as it prosecutes suspects in the court room. The second function, and perhaps the most crucial, is to exercise the power of ‘legal supervision’. The term legal supervision refers to the oversight of the work undertaken by all agencies in the criminal trial process, including the work of the police, the judiciary and the PP itself. A notable issue here is that the PP can appeal against court decisions, which may be considered as interference from the executive into judicial matters. This Chapter firstly illustrates the Chinese criminal

trial procedure in detail, in order to explain the role of different legal agents at different stages. Secondly, the chapter looks at the PP's prosecution functions and examines a case in which a suspect pleaded not guilty. Thirdly, the chapter analyses the PP's legal supervisory functions and the constitutional relationship between the PP and the judiciary.

6.2 - The Chinese criminal trial procedure and the PP's function of legal supervision

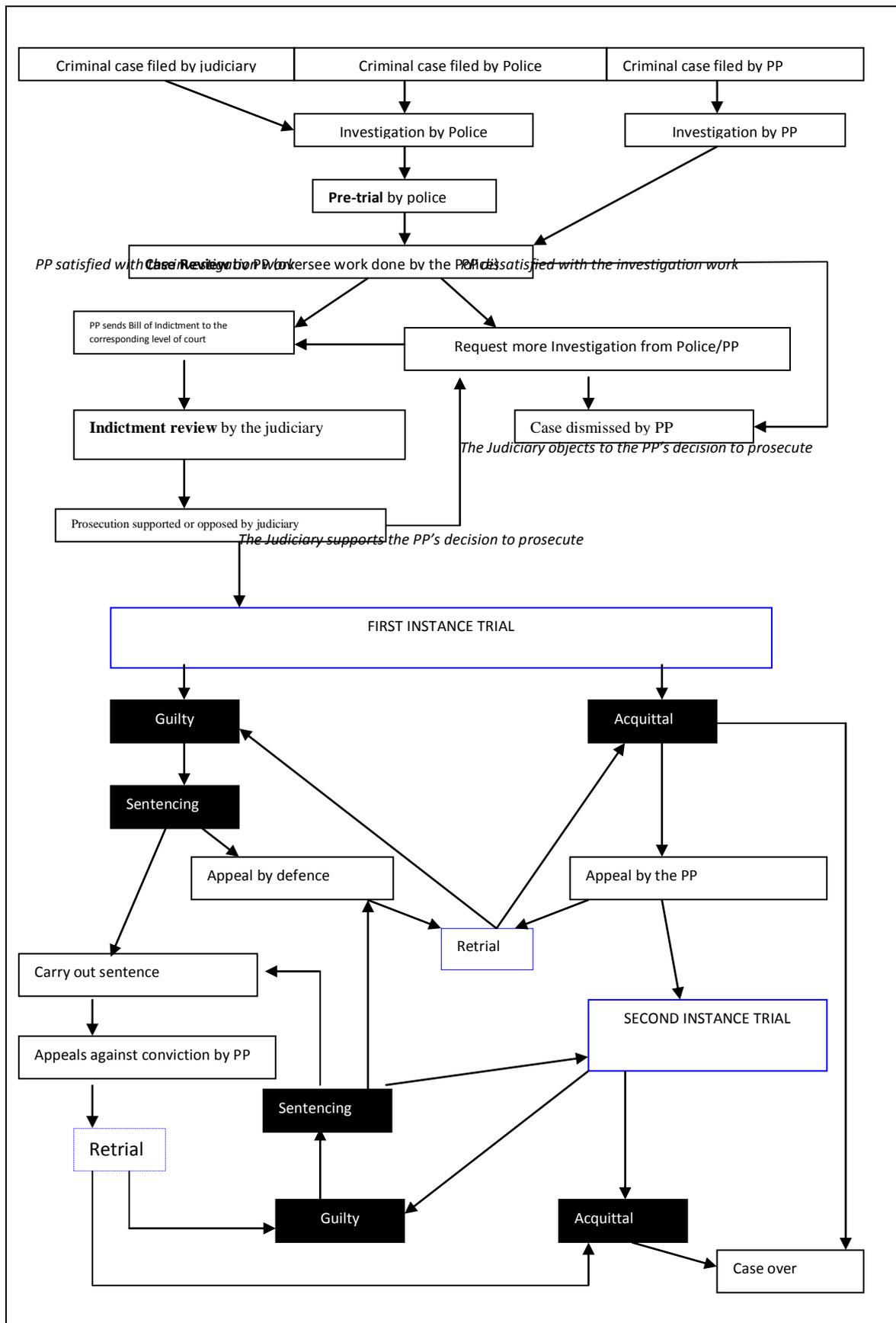
According to the Constitution of the PRC (1982), the criminal justice system involves three legal enforcement agents. These are the police force, the PP and the judiciary. The constitutional relationship between these three agents is described as follows:

“Article 135: The people's courts, people's procuratorates and public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall co-ordinate their efforts and check each other to ensure correct and effective enforcement of law.” (The Constitution of the PRC 1982)

According to the above article, the three legal agents have different functions to work together and supervise each other; this is a means of counterbalancing the respective powers. The judiciary holds the power of organizing the trial and passing judgements and supervises the work done by the PP. The PP hold the power of public prosecution and legal supervision, which means the PP is responsible for overseeing the work done by the police and the judiciary. The police hold the power of investigation and pre-trial. The aim of such a constitutional design is to ensure correct and effective enforcement of law. The whole criminal trial process is conducted by the three agents and the defence lawyer, if the suspect has one.

From the constitution it is clear that China has adopted a balance of state powers, rather than a separation of powers. In order to allow the three agents to supervise each other, the constitution allows them interfere and oversee each other's work. As such, China has a very complicated trial process. The powers held by the different legal agents are highly mixed and result in a very complex trial process (see Fig 6.2.1).

Fig 6.2.1 – Chinese criminal trial process



→ = pass to next stage. For analysis of the diagram sees next page

The above diagram is drawn in accordance with the *Criminal Justice (Procedure) Act (1979)*⁴², *Arrest and Custody Act (1979)*⁴³, *Regulation of Pre-Trial (1979)*⁴⁴, *People's Procuratorates Criminal Lawsuit Rule (1999)*⁴⁵ and *Court Criminal Lawsuit Rule (1994)*⁴⁶.

The criminal procedure can be illustrated as follows:

- Commencing prosecution: filing criminal cases

According to the *Criminal Justice (Procedure) Act (1979)*, the first stage of a criminal lawsuit is filing a criminal case. All three legal agents, the police, the PP and the judiciary are permitted to file cases. Most cases are filed by the police, while the PP is normally responsible for filing government corruption cases. If an alleged victim of crime felt the police force did not file a case which they should have, the alleged victim can complain to the PP. The PP determines whether the police force's decision was correct or not. If the PP thinks that the police force's actions are not in line with law, they will order the police force to change their decision. The police force must follow the decision of the PP unless there are extenuating circumstances accepted by the chief Procurator or the Supervisory Committee of the PP. If the PP upholds the decision by the police not to file a case, then it should explain the reasons to the alleged victim within 10 days. If the police force files a case without justification, the PP should also correct the police forces' mistake. If the both police and the PP refuse to file a case, the alleged victim can also take the case directly to the court.

⁴² adopted by the NPC

⁴³ adopted by the NPC

⁴⁴ adopted by the Public Security Department

⁴⁵ adopted by the SPP

⁴⁶ adopted by the SPC

- Pre-trial

When a suspect is arrested by the police, he will firstly be taken to the Pre-Trial office of the police force for questioning. Normally, at this stage the suspect can make a plea, but even if the suspect pleads guilty they are not considered guilty at this stage; there are no official statistics on what proportion of suspects plead guilty. During the participant observation in China, an experienced lawyer and a county-level chief-prosecutor stated that it seems as though more than 90% of suspects plead guilty at the pre-trial.

“...In most cases, more than 90% of the suspects plead guilty in the pre-trial...” – a Prosecutor (2007, interview with Yaliang)

“I have not seen any official statistics of how many suspects plead guilty in the pre-trial, but in my experience, more than 90% of criminal suspects plead guilty. In fact, I think official statistics would support this. Suspects pleading not guilty are very uncommon.” - A lawyer (2007, interview with Yaliang)

After the pre-trial, the police record all the information they gain from the suspect together with the evidence they collected and send it to the PP for a case review.

- Pre-trial case review

In the case review, the PP focuses their work on testing the reliability of the evidence collected by the police and investigating the legitimacy of the police investigation. The PP will ask the suspect the same questions the police asked. The suspect will be required to make a plea again at this stage. The case review is legislated for as follows:

“If, in reviewing a case, a PP deems it necessary to repeat an inquest or examination that has been done by a public security organ, it may ask the latter to conduct another inquest or examination and may send procurators to participate in it.” (Article 107, *Criminal Procedure Act 1979*)

The PP decides whether or not the process taken by any investigator is legal. Apart from the police force, some other bodies such as the National Security Department, Military Security, Customs and Anti-Contraband Bureau also hold the power of investigation. The PP supervises these bodies during their investigative operation, and any complaint regarding their performance should be directed to the PP. Additionally, according to the *People's Procuratorates Criminal Lawsuit Rule (1999)* the PP should focus on discovering and correcting any of the following irregular actions taken by an investigative agent:

- 1) Inquisition by torture
- 2) Inducing a person to make a confession
- 3) Forging, hiding, destroying or altering evidence
- 4) Practicing favouritism or indulging in crime
- 5) Intentional misjudgement
- 6) Conflict between professional and personal interests
- 7) Dismissing a case without proper reason
- 8) Corruption
- 9) Acting in a way that exceeds legal authority

10) Not acting in accordance with the established rules of criminal procedure

In addition, if the investigator deems it necessary to arrest a criminal suspect, the PP must supervise the arrest. For the PP to exercise these powers, it is able to act as an investigative body together with another authority involved in the investigative process. If the PP believes there was a mistake during investigation, they will advise the investigating agent to correct the mistake. If the investigating agent refuses to correct its mistake, then the PP reports the mistake to a higher level of the PP⁴⁷. If the High PP concurs that there has been an error, it will inform the corresponding level of the investigating agent and ask them to request the lower level investigating agent to correct their mistake. If, for example, a confession was extorted, then the PP may investigate the police.

“The police hold the power of pre-trial. Once they feel they have sufficient evidence, they will transfer the case to us. Most cases transferred here [to the PP] already have a suspect who has pleaded guilty. However, as the legal supervisory body, we have our duty to ensure that the police did not exercise any abuse of power. We will question the suspect and ask him whether or not the information collected by the police is true. If the suspect says the police pressured them into giving false evidence, then we will start to investigate...The methods used to investigate whether the police pressured or abused the suspect are to question the roommate of the suspect. Questions such as, “did you notice that your roommate was injured?” will be asked. If we find out that the police were guilty of this we will make a complaint with them and void any evidence supplied by the police...even if the suspect stated that the information provided by him to the police is true, we will also

⁴⁷ The structure of the PP is very similar to the court. There is a Supreme PP at the national level, a High PP in each province, an Intermediate PP in each region, and a Basic PP in each county.

normally ask him the same questions again...it takes a long time, but this is our duty” – a Prosecutor (2007, interview with Yaliang)

There are no statistics to indicate how the PP’s supervision over police work is done. In addition, the law is very vague over how the PP can effectively carry out their duty to supervise police work. However, as this prosecutor’s statement indicates, the case review will ask the exact same questions asked at pre-trial. It appears as though the case review is a repetition of the work done in pre-trial. If the prosecutor is satisfied that a fair process was conducted at pre-trial, evidence is submitted by the police which is sufficient to build a case. The PP will produce a *Bill of Indictment* and send it to the Court for the Indictment Review.

- Indictment review

‘Indictment review’ refers to the process whereby judges review the Bill of Indictment and decide whether or not the PP’s work adheres to law and the evidence submitted is sufficient for the case to go to trial. The Bill of Indictment generally includes the following information:

- 1) Personal information of the defendant
- 2) A brief introduction of the case and charges
- 3) A report from the police officer who arrested him/her
- 4) A record of police interviews with victims
- 5) A record of the pre-trial (by the police force)
- 6) A record of police interviews with witnesses
- 7) A list of evidence

The information collected in the Bill of Indictment is very detailed and specific. A presiding judge will read through the entire Bill of Indictments and make a decision of whether or not to support the PP's decision to prosecute the suspect. If we consider that one of the prosecutor's main functions is to build a case, then judges can obviously determine whether or not the case will enter the court for trial as they review the Bill of Indictments. The articles relating to the process are as follows (selected from *Criminal Lawsuit Rule 1994*, see Table 6.2.1):

Table 6.2.1 – Articles of the *Criminal Lawsuit Rule 1994* relating to indictment review

Article 89 – Once the court has received the Bill of Indictments, they must appoint a presiding judge to supervise the follow issues:

- Does this case fall into the jurisdiction of this court?
- Is the evidence addressed by the Bill of Indictments clear?
- Does the evidence validate the charge made by the prosecutors?
- Is the charge in accordance with the law?
- Is the number of suspects outlined in the Bill of Indictments correct?
- Does the criminal suspect have legal responsibility?
- Is there any evidence or circumstances to increase or decrease the sentence?
- Is the suspect currently involved in any other criminal trials?
- Is there any evidence that should be re-examined?

- Is the procedure of investigation and prosecution legal?

Article 90 – After supervision, the court will decide if the bill of indictment clearly presents the evidence and facts, and in accordance with this, the criminal suspect shall be punished by law. The date should then be set for the trial.

Article 91 – After the investigation, if one of the following issues happens, the presiding judge shall address the issue and then send the bill of indictment back to the prosecution and request more investigation by the PP:

- Lack of evidence
- Conflicting evidence
- The evidence suggests that additional charges should be brought against the suspect
- The evidence suggests that there should be more suspects than have been charged
- The criminal suspect is not in custody
- Some evidence should undergo examination by professional organisations, but has not yet done so
- The police force or the PP breaks the law during the investigation and prosecution processes

There are some particularly notable issues regarding the above articles. For example, the presiding judge simply reads the papers privately, not inside a courtroom, and his decision

will effectively determine if it is possible to find a suspect guilty or not. After reviewing the Bill of Indictments, if the judge believes that the evidence provided for the case is insufficient to find the defendant guilty, then the Bill together with the judge's reasoning for the decision will be sent back to the PP for further investigation or to abandon the case. If the judge is satisfied that a guilty verdict can be reached, then the first instance of trial in court will begin.

- First instance trial

In accordance with the *Criminal Justice (Procedure) Act (1979)* and the *Court Criminal Lawsuit Rule (1994)*⁴⁸, the trial process at a courtroom is separated into five parts, and each of which has a different focus:

- 1) Part 1: Identification – to identify the defendant
- 2) Part 2: Investigation – to allow the prosecution and defence to show the judges the evidence they each have
- 3) Part 3: Debate on the evidence – for defendants pleading guilty, this involves the debate of evidence to help provide an appropriate level of sentencing; for defendants pleading not guilty, the debate involves the contesting arguments between the prosecution and defence
- 4) Part 4: Defendant's final statement – the defendant expresses his/her personal views on the case.
- 5) Part 5: passing judgement

Normally, a criminal trial is made up of one presiding judge and two members of the People's Jury (lay-judges), or another two judges. Approximately five minutes before the case begins, the victims, court clerk, prosecution and defence lawyers all sit in the courtroom together. The clerk checks everyone's ID, and explains the rules of the court. After this, the

⁴⁸ From Article 98-131

judge and jury members enter the courtroom. The trial officially begins at this point. Following are the details of the trial process.

Part 1: Identification

This part takes approximately five minutes. Firstly, the judge orders the police to bring the defendant to the courtroom. The identity of the defendant is then authenticated with the judge. The judge then introduces himself and asks the defendant if he wants anyone to leave the courtroom, and if so, why. The judge then explains the defendant's basic rights in the courtroom.

Part 2: Investigation

The presiding judge states that the investigation is to begin. The PP reads out the Bill of Indictment and explains the facts of the case, which are based on the evidence collected by the police. The PP also identifies the point of law to which the defendant is presumed subject to, and requests the court to pass a guilty verdict and sentence in accordance with the law. The presiding judge explains to the defendant that if he is found guilty the minimum and maximum sentence he may receive. The judge then asks the defendant to make a plea.

After the defendant's plea, the judge then asks the defence lawyer to make a plea again on behalf of the defendant. According to the law, a defence lawyer does not have to enter the same plea as the defendant. This happens very rarely and only if the evidence provided by the PP is very obvious. When the defence lawyer and the defendant have different pleas, the defendant is permitted to sack his defence lawyer and find a new lawyer, or defend himself. If this occurs, the court will delay the trial until the situation is resolved. Notably, for legal aid cases, if the defendant sacks his defence lawyer, it may be quite difficult to find another lawyer willing to take up his case. If a defendant and defence lawyer contradict each other's

pleas, this does not necessarily undermine the defendant's position, as he or she can continue to explain their point of view as to why they are not guilty, and the defence lawyer can still try to make his point in order to help the defendant receive a shorter or more lenient sentence. Victims sit next to the PP, who asks them if there is anything that they would like to add in order to supplement the existing evidence supplied in the Bill of Indictment. After this, the presiding judge states that the trial will move on to the next stage.

Normally, this part lasts for approximately one hour, depending on the length of the Bill of Indictment. This part is very monotonous, as all of this information has already been given in the Bill of Indictments. However, the defendant(s) and victim(s) have to be apprised of the full details of the case and the evidence which is being levied against the defendant.

Part 3: Debating the evidence

In order to resolve the respective differences between the PP and defendant, there is a need to debate the facts of the case. The debate is firstly conducted through questioning the defendant, witness and victim by both the PP and the defence lawyer; the victim is also permitted to question the defendant. Secondly, a debate between the defence and the prosecution then takes place. After the debate the judge asks the PP and defence for any further information, and if there is none, the trial proceeds to the final stage, where the defendant has the opportunity to make a final statement.

Depending on how large the case is the debate can take between a few hours to several months. Notably, in China it is uncommon for witnesses to appear in court, rather their statements previously made to the police and/or prosecutors are relied upon during the trial. Therefore, the debate around evidence is mainly based upon the information in the Bill of Indictment.

Part 4: Criminal defendant's final statement

The defendant is permitted to make a statement about the case. Normally, if a defendant pleads guilty he will explain himself and make apologies to the victim(s). After this, the judge ends the trial, and states that the judgement will be made within 14 days.

Part 5: Passing judgement

Within 14 days, the judiciary will produce a verdict and sentence. In China, judgement papers normally address almost every issue of the case. Therefore, it normally consists of ten to twenty full A4 pages. In the judgement, judges have to address the point of law that has been used, and how he interpreted. The first instance will then officially end.

- Process of appeal by defendant and PP

As Fig 6.2.1 illustrates, there is a very complex appeal system in China. The defendant is permitted to appeal to a higher level court, if he or she is not satisfied with either the verdict or the sentence. The PP is also permitted to appeal to the higher level court, if the judges' interpretation of a point of law is considered wrong by the PP. The PP's power of appeal seems to be one of the core characteristics of counterbalanced power. The PP and judges are involved in each other's work in order to oversee each other.

After the PP submits a Bill of Indictment, the judiciary reviews the material in order to oversee the PP's work. Effectively, the judiciary has the power to approve or reject the work done by the PP. This occurs before the first instance trial. Conversely, the PP exercises their power of appeal to oversee judges' work. This occurs after the first instance. Considering that one of the main functions of the judiciary is interpret the law and apply law in individual cases, this power is effectively shared by both the PP and the judiciary. Therefore, the PP is a cross-branch body. When it appeals, it is effectively exercising its power of legal

interpretation against the judges' interpretation of law. The PP's power of appeal is considered by law as a means of legal supervision.

“The People's Procuratorates has a duty to oversee the legality of the courts' verdict and sentencing. If the PP believes that there has been a definite error in a verdict or sentencing, the PP shall protest to the People's Court” (Article 396, *People's Procuratorates Criminal Lawsuit Rule 1999*)

The primary responsibility of the PP's legal supervision is to discover and correct any of the following possible irregular actions taken by the courts:

- 1) Incorrect jurisdictions
- 2) Overrunning the time limit
- 3) Tribunal format contradicts the law
- 4) Process of trial contravenes the law
- 5) Judges do not behave impartially
- 6) Judges break the law

If the pp believes that the corresponding level of court has made an error, it can consult with the higher level PP. if the higher level PP concurs that an error has occurred, then they will together appeal the case to the higher level of court (relative the originating court). The higher level court has its own procedure for deciding whether or not to accept an appeal, and if the appeal is successful, the second instance trial will begin.

- Retrial

Retrial refers to when the upper level court, upon examining the records from the first instance trial, discovers that there appears to be discrepancy. Rather than start the second instance trial, it may refer a case back to the first instance for retrial. The retrial is considered to have the same authority as the first instance trial, which means that both defendant and the

PP can still appeal to the second instance if they do not feel satisfied with the retrial. There is no limit to how many times a retrial can take place.

- Confirmation trial for capital punishment

For defendants who receive the death sentence, he/she will automatically appeal to the SPC regardless of whether they wish to or not. This was established in 2006 as an amendment of the *Court Organisation Act*. Such a change can be seen as evidence of the Chinese government placing greater importance on human rights. It is notable that in the past decade there has been much criticism of the large number of executions that take place in China. However, it is important to note that China has the largest population in the world, and if the evidence is sufficient to prove guilt beyond doubt, the public will support such action. In fact, confirmation trials for capital punishment can be seen as relatively advanced for a country that issues the death penalty.

- Role of defence lawyers

According to the *Lawyers Act (2008)*, defence lawyers are permitted to be involved in any stage of the criminal trial process, but this is dependent on whether or not the suspect can afford to hire a private defence lawyer. Only in cases where a suspect may receive a life sentence or death penalty will the state automatically appoint a defence lawyer. Otherwise, in just over of half of the criminal cases which go to trial there will be no defence lawyer until the trial begins. In 2005, a state-appointed defence lawyer was unavailable in 48% of cases (Blue Book of Rule of Law 2006, p. 217).

As the analysis of the Chinese criminal procedure has shown, the PP plays perhaps the most considerable role. It seems that the main characteristic of the PP is that they are involved in

both the executive and judicial branches. In fact, the PP exercises its vast power through the whole criminal justice process, from the very early stages, all the way through to the end.

- The PP's function of "legal supervision"

Article 129 of the *Constitution of the PRC (1982)* gives the PP a status of a "legal supervisory body" to "check the operation of the criminal justice system for any possible mistakes created by any bodies involved in the judiciary." According to the *Criminal Justice (Procedure) Act (1979)*⁴⁹, and the *People's Procuratorates Criminal Lawsuit Rule (1999, last amended in 2007)* adopted by the SPP, the PP is responsible for a range of areas during the practice of law enforcement (see table 6.2.2).

⁴⁹ adopted by the NPC, last amended in 1997

Table 6.2.2 - Areas of the PP's responsibility of legal supervision

Supervision on...	Range of the supervision	Supervisory Objects
Filing Criminal Cases	Check the process of filing criminal cases	Policy force PP
Investigating	Check the investigative process, decide whether the process is legal or not	Policy force National Security Department, Military Security, Customs, Anti-contraband Bureau PP
Verdict or Sentencing	Check the trial process, decide whether the process is legal or not, and appeal to check whether the judges' verdict or sentencing applied law correctly or not.	Courts Judges
Execution	check the legality of the execution process	Court's Policy Prison-police

The table above illustrates that the PP enjoys extensive power throughout the criminal trial. Notably, in many instances the PP is also responsible for supervising itself.

If there is any influence from the PP towards the judiciary, then the conviction rate of more than 99% suggests that such influence is extremely strong. Effectively, decisions made by the PP are almost certainly equal to the decisions made by the judges. Presuming such a statement is correct, there are at least three considerable reasons which may cause such a situation to arise. Firstly, according to Chinese culture (see Chapter 3.1), the PP - as a body of state - may be able to apply very considerable pressure over lawyers, who are often acting simply as an individual responsible for defending a suspect. Can an individual ever challenge the state in accordance with Confucian culture? Secondly, in a courtroom, will a lawyer feel equality with the PP, and will a lawyer feel confident and safe to oppose the PP? Thirdly, as part of the PP's power of legal supervision, the PP can appeal against the court's decision. In addition, as analysed in Chapter 4, the PP and the judiciary are both state bodies, and in a way they may consider each other to be colleagues. Will a judge be willing to let his 'comrade' lose a lawsuit? In order to understand such considerable issues it is necessary to understand the PP's two different constitutional roles in detail.

6.3 - The PP's executive role as the state prosecution service

As a cross-branch body, the PP has both executive and judicial functions. Its executive role is to act as the state prosecution service. Two questions must be answered in order to determine whether or not a conviction rate above 99% is a sign that prosecution by the state is tantamount to conviction even prior to a trial taking place. The two questions are:

- 1) Does the PP have a superior right of argument in the court room over the defence lawyer?
- 2) Does the PP have significant influence over the decisions made by the judges in court?

The difficulty of answering the above two questions is that there is very little existing research and limited statistics regarding such topics. Therefore, an analysis is made of a case (see Table 6.3.1 – Case Seven) I participated in, with a view to answer the aforementioned two questions.

On 8th August 2007, the law firm I was working at received a request from the local Justice Department to work on a legal aid case. The suspect had pleaded not guilty to the charge of swindling⁵⁰. If it seems there is a lack of a fair trial for criminal suspects in China, part of the reason is due to the fact that many individuals are not assigned defence lawyers. This appears to be attributable to relatively low funding for state appointed legal aid. State appointed defence lawyers make very little money from these cases when compared to privately paid lawyers. The defence lawyer was concerned about this and stated that:

⁵⁰ 'Swindling' is a crime in Chinese law, most closely resembling the crime known as 'fraud' in UK law.

“I would not have taken this case were it not for you; this suspect is very lucky, his application for legal aid was successful. The pay for legal aid cases is usually around 400 RMB; this is only enough for petrol money and one lunch. Normally, we try to find an excuse to avoid taking these legal aid cases...As a licensed lawyer, I cannot refuse legal aid cases in which the defendant is charged with an offence carrying a statutory life or death sentence.” – Defence lawyer (2007, interview with Yaliang)

As highlighted in Chapter 4, lawyers in China are expensive, unevenly distributed throughout the country, and generally lacking in number. In fact, in some locations the local justice bureau frequently requests law firms to provide lawyers for legal aid cases, but these requests are often rejected, due to the relatively low pay from the state. As a consequence, the law permits individuals to act as defence lawyers who do not have the proper qualifications or experience. A criminal suspect can appoint anyone – with some exception, such as judicial officials, individuals with unspent criminal convictions, and so forth - to articulate his or her case for acquittal. Though this may not be an ideal solution, there are currently no viable alternatives. Nevertheless, Case Seven is a case in which the defendant did not plead guilty and successfully obtained legal aid. The case may not explain or represent the process across China, but from it a clearer and deeper understanding of what happens inside a courtroom in China was observed.

Table 6.3.1 - Case Seven: A PP vs. Mr X (2007)⁵¹

Between 1998 and 2002, criminal suspect Mr X falsely impersonated a member of the GAM stock market, using his parents' personal network. He swindled RMB 772,900 from nine victims. The amounts given for the much money from the victims was given as follows:

1) Ms Hu from 1998 to 2002; a total of 125,000 RMB was given with witness records from Mr Wu Zonghai and Mr Sun Wenhao and an acknowledgement of personal debt written by the suspect.

2) Mr Wang from 1999 to 2001; a total of 400,000 RMB was given with witness records from Li Shuying, Liu Hongwu, You Feng and Bai Yuqing and an acknowledgement of personal debt written by the suspect and a guarantee paper written by the suspect's father.

3) Mr Qu in 1998; a total of 63,600 RMB was given to Mr X's mother, with an acknowledgment of personal debt written by the suspect's mother.

4) Ms Zhang in 1998; a total of 75,000 RMB was given with witness records from Mr Wu Dongcheng and Mr Guo Shucong.

5) Mr Song in 1998; a total of 28,700 RMB was given to the suspect's father by Mr Song with the suspect present.

6) Ms Dong from 1998 to 2002; a total of 40,000 RMB was given with a witness record from Mr Sun Lian.

7) Ms Wei in 1999; a total of 7,000 RMB was given to the suspect's father.

8) Mr Wang in 1998; a total of 11,100 RMB was given.

⁵¹ The name of this case has been altered by agreement between the researcher and the law firm.

9) Mr Zhang from 1999 to 2000; a total of 22,500 RMB was given.

In 2002, some of the victims launched a civil court case against the defendant, and won the case. After this occurred, the defendant ran away. In 2006, the defendant was arrested. He claimed that he was not guilty of swindling the aforementioned victims. At the pre-trial by the police, the suspect stated that he was not a swindler and that he had been cheated by other people. He said that a person named Mr Meng posed as a manager of the GAM stock market to sell shares. The suspect stated that he realised he had been cheated by Mr Meng in 2001, and by then he had already sold some fake shares to some of his parents' friends. The figures were given by the defendant as follows:

1) Approximately 60,000 RMB from Ms Hu in 1999. Ms Hu brought the money to my home.

2) Approximately 60,000 RMB from Mr Qu in 1999. Mr Qu brought the money to my home. I gave the money to my father and asked him to return it to Mr Qu. I did not know whether my father returned the money to him or not.

3) Approximately 30,000 RMB from Mr Wang in 1999. Mr Wang brought the money to my home.

4) Approximately 70,000 RMB from a Mr Yang in 1999. I have paid 100,000 RMB back to him, so I do not owe him any money.

5) Approximately 20,000 RMB from Mr Song in 1999. Mr Song gave the money to my father, but the money was not passed on to me.

6) Approximately 30,000 RMB from Ms Dong in 2000. She gave the money to my father but

again it was not passed on to me.

The defendant acknowledged that much of the money was passed to his parents, but that this was not passed on to him. His father died in 2003. His mother was terminally ill in hospital. Following the information given by Mr X, an investigation into the existence of Mr Meng was undertaken by the PP. There was clear evidence to prove that Mr X's assertion that he was cheated by a 'Mr Meng' was a lie. The evidence was given as follows:

- The suspect could not recall Mr Meng's full name or contact details
- The suspect stated that he knew Mr Meng through a friend at university but could not recall his friend's name.
- The suspect stated that he visited Mr Meng's office and there were around 20 people employed by Mr Meng working there. When the PP went to his office, the building's reception denied that any such company ever rented this office.
- The PP checked their records to see if anyone else had suffered a similar problem in dealing with these 20 other supposed employees of Mr Meng, but could not find any similar incidents.
- A financial record showed that from 1988 to 2002, Mr X had bought two cars and a restaurant.

Based upon the above evidence, the defence team pleaded guilty on the defendant's behalf. However, they did declare that there was not clear evidence to prove that some of the money had been passed to the defendant. Therefore, the amount of money he swindled was RMB 140,000 rather than RMB 770,000. The defence team gave the reason for this as follows;

“The suspect has written acknowledgement of personal debts to Ms Hu and Ms Wang for a total of 525,000 RMB. According to Article 192 of the Criminal Justice (sentencing) Act (1997) the definition of a swindler is someone who, “...for the purpose of illegal possession, unlawfully raises funds by means of fraud...”. If the suspect had such a purpose he would not write an acknowledgement of personal debt, hence we believe that the relationship between the suspect and some of the victims is borrowing, not swindling. According to the records of many victims - Mr Qu, Mr Song and Ms Wei - the money was given to his parents and not him. The suspect had returned 100,000 RMB to Mr Yang (including 75,000 RMB capital and 25,000 RMB interest), hence the objective of the suspect here was not to swindle. However, it is true that for some cases the suspect did breach Article 192, although the amount is not 772,900 RMB, instead it is only 148,600 RMB. Hence we hope the sentence can be shortened.”

In this case there were three different interpretations of the events.

- The PP contested that the suspect was guilty of swindling a total of RMB 772,900 and asked the judges for a long sentence of imprisonment.
- The defendant claimed he was not guilty of any swindling.
- The defence lawyers stated the suspect was guilty of swindling, but only for a total of 148,600 RMB, and therefore requested that he be given a shorter sentence.

During the trial the defendant kept asserting that he had been swindled by other people, but without explaining in detail what actually happened. He kept blaming his dead father, saying that the money had never been passed on to him. The prosecutor stated that the suspect's behaviour was not acceptable for Chinese culture, and it is obvious that people who lend money have a better recollection of how much was lent than the people who borrowed it. The presiding judge accepted the prosecutor's view, and sentenced the suspect to 13 years imprisonment.

Returning to the questions asked before the participant observation took place, we can now suggest some answers. For the first question, does the PP have a superior right of argument in the court room over the defence lawyer? From the participant observation, it appears that the answer is no; in spite of Chinese culture suggesting that the state takes precedence over individuals, it does not appear that the PP has superiority over the defence lawyer. In fact, many cases I have observed passively indicate that defence lawyers are often very diligent in arguing the specific points of a trial with the PP. It is not uncommon for defence lawyers to bang their fists on the table, point at the state prosecutors and shout at them in the court room. Such instances of an apparent lack of fear of the state prosecutors on the part of the defence lawyers would certainly indicate that the PP do not hold power to influence them. However, this does not mean there is *no* PP influence over the defence lawyers, but such influence may be unintentional.

This influence appears to exist as a result of the Bill of Indictments. The purpose of the Bill of Indictments is to give defence lawyers a clear view of what the state believes the defendant has done, and why. The Bill of Indictments is made available in the PP office for defence lawyers to visit and make copies of anything they feel pertinent to building their case for the defence. The information given in the Bill of Indictment is very detailed, specific, and addresses the point of evidence very clearly. Obviously, the Bill of Indictment is prepared and recorded by the police and the PP. It does not have (nor is it intended to) any favourable aspects for the defendant. If evidence provided by the prosecution strongly indicates guilt, yet the defendant maintains innocence, then a state-appointed defence lawyer may plead guilty on his or her behalf. Of course, if a defendant is fortunate enough to be able to afford to privately hire a defence lawyer, then this will not occur.

According to Article 12 of the *Criminal Justice (Procedure) Act (1996)*, there is a presumption of innocence until proven otherwise. As a defence lawyer, it is not necessary to collect evidence or present arguments to prove innocence, only to present sufficient argument and evidence to fundamentally call into question the validity of the prosecution's case. However, this costs both considerable time and money, for which state appointed defence lawyers are not adequately remunerated.

Many defendants have to rely on either state-appointed defence lawyers, or possibly an unqualified friend, relative, associate, or even themselves – none of whom would have access to the necessary funds to build an adequate case for the defence. As a result, the arguments and evidence upon which most cases are decided comes almost entirely from the state prosecutor's Bill of Indictments. The debates which occur within the courtroom are usually defined only by the evidence provided by the PP. From this point of view, it is true that the PP is in a prime position to provide evidence for a case, with usually little or no evidence or arguments presented to the contrary from the defence. This is not because the PP has any real influence or control over the defence team; it is simply because most suspects are not able to afford the hiring of a private defence lawyer. However, an important factor to consider in China is that there would be widespread public opposition to the government using taxpayers' money to devote more funds to professional state-appointed defence lawyers for criminal suspects. The PP cannot 'force' a defence lawyer to accept the alleged facts set out in the Bill of Indictments as the truth. However, it is difficult for a defence lawyer to not accept the information in the Bill of Indictment. This is because the vast majority of defence lawyers have little or no financial resources to collect evidence to build a case for their clients.

Is there a potential influence of the PP towards defence lawyers? In accordance with Article 306 of the Criminal Code (1979) and Article 38 of the *Criminal Justice (Procedure) Act (1979)*, defence lawyers may face prosecution if they help criminals fabricate evidence or give state secrets to the public. Each year there are a very small number of defence lawyers that are imprisoned after being found guilty of this type of offence. In research conducted in 1997, 90% of defence lawyers who were prosecuted for this crime were found not guilty (Blue Book of Rule of Law, 2006, p.318). It seems as though the risks of being a defence lawyer are not significant, but there are not open cases to observe whether or not these types of cases are conducted based upon genuine reasons, or designed to punish certain individuals.

In fact, the greatest danger of being a defence lawyer is from the victims and their relatives. For example, in 2005, in Chongqing a female defence lawyer was slapped by a relative of the victim just outside the court building. Also in 2005, in Beijing a defence lawyer was beaten up by an unidentified group of people in which three of his ribs were broken (Blue Book of Rule of Law, 2006, p. 318). When I was working as a lawyer's assistant for a defence lawyer, before the trial even began, the victims and their families approached us inside the court (right outside the courtroom) to ask us how much we were being paid by the suspect, and expressing dissatisfaction with our role in the case. After informing them that this was a legal aid case they became somewhat placated. It seems there is a significant open question: How can we protect lawyers and present them as a neutral party to the general public?

Does the PP have significant influence over the decisions made by judges in the court? From the case, it is true that the judge did not accept any point made by the defence. However, this does not necessarily indicate that the PP held any sway over the judge or his decision-making process. In fact, there was very little time given to debate how much money was taken by the defendant. The PP gave two arguments as to why the money taken was over 700,000 RMB

rather than 140,000 RMB. Firstly, according to custom, people who lend money to others are far more likely to accurately remember how much money they lent than the people who borrowed the money from them. Secondly, the suspect blamed the incidents on his father; despite his father having already passed away, which would certainly incur the disdain of the presiding judge and his two jury members. Blaming one's father for a crime goes against traditional Chinese culture and customs, and is generally viewed as very shocking behaviour by most people. It is not surprising that the suspect received a long sentence. From this case, it appeared as though there was little or no connection between the judges and prosecutors. However, it is also true that from this one particular case, it is difficult to make a judgement over the overall extent of influence of the PP over the judiciary. Therefore, an interview with a local chief prosecutor took place after the trial. When I mentioned the CECC's criticism, his answer confirmed the CECC's statement, but he appeared satisfied with this observation. The interview with the local chief prosecutor gave a brief understanding of how the conviction rates of over 99% are achieved:

“A 99% conviction rate is normal. In fact, my success rate is 100%...In most cases, more than 90% of the suspects have pleaded guilty in the pre-trial... It is true that sometimes the defence lawyer provides new evidence which conflicts with our evidence; in this circumstance we will cancel the prosecution. In this country the public has a culture that does not allow the government to makes mistakes. I think this is a result of Confucian influence, which requires that government officials be well-qualified. Hence, we need a high [conviction] rate to show people our ability, help foster trust, and demonstrate our authority.”
- a Prosecutor (2007, interview with Yaliang)

The first reason for such a high conviction rate has been noted by both the defence lawyer and this prosecutor; both strongly believed that most suspects standing trial have already pleaded guilty. Both believe the figure is above 90%, but there is a lack of statistics for this. The second reason given by the prosecutor for the high conviction rate is the agreement between judges and prosecutors to abandon cases where a conviction looks unlikely. This behaviour appears to demonstrate some of the effects and influence of Confucian thought (as discussed in Chapter 3.1), from which there is a great effort to project an image of perfection and authority. Furthermore, recorded mistakes may cost judges or prosecutors the chance for further promotion.

“There is a promotion process, and if you make a mistake in your career, you have less chance to be promoted. Besides, the public can get very angry at failed prosecutions. The prosecutors and judges feel like close colleagues. During the trial, the principles are firstly to make sure no innocent man goes to jail, secondly; to ensure the statistics look good. If new evidence is brought forward which proves we have made a mistake, the case will be cancelled, compensation will be paid, apologies will be made, but the case will not be entered into the statistics...” – a Prosecutor (2007, interview with Yaliang)

In China, there is a lack of statistics on how many cases are actually rejected during the supervisory and decision-making process which precedes trials. There are also no statistics or details of what happened to these cases which have been rejected for trial. Some local branches of the PP have published statistics on the issue of cancelled cases. For example, the Shenzhen PP Research Office (2006) stated that:

“...In 3 years (2003 - 2005), the Shenzhen PP has relinquished 347 cases from the courts due to changed evidence (144 cases); lack of evidence (124 cases); rejection by the court (37 cases) or other reasons (42 cases)...209 relinquished cases were reinvestigated and taken to the courts again, and 138 cases dismissed...in 2003, the Police transferred 8,268 suspects to the PP and 7,572 of them were prosecuted in court, 127 of them were relinquished before the trial began...”

The above statistics provided by the Shenzhen local PP do not include figures for how many suspects already pleaded guilty. Nor do they answer the question of why 9% of cases from the police were discharged, or why 1.68% cases were relinquished. Furthermore, it does not give statistics relating to suspects who pleaded not guilty. However, from the statistics provided by the Shenzhen PP, we can still observe that in 2003, 823 suspects (8,268 minus 7,572, plus 127) were not prosecuted after case review by the PP. Therefore, it seems that the *de facto* conviction rate is just 90% in Shenzhen. Taking a 90% conviction rate at face value, it does not statistically prove that the Chinese criminal justice system is based on a presumption of guilt. In fact, if the statistics provided by the Shenzhen PP are applicable for all China, then there isn't statistical proof that the Chinese judicial system has an inherent nature to presume guilt. It seems that until nationwide statistics are published, the question of whether or not the Chinese criminal justice system makes a presumption of guilt remains an open question.

6.4 - The PP's judicial role as the state's legal supervisory agent

The PP exercises their power of appeal and supervises judicial decisions made by the court. In accordance with the *Criminal Justice (Procedure) Act (1997)*, there are two types of appeal that can be conducted by the PP:

- 1) Appeals against a decision made by the court at the first instance (for example, if the PP disagrees with a judgement made at the first instance, an appeal can take place within 14 days from the judgement being made).
- 2) Appeals against conviction (for example, if a suspect was found guilty and already sentenced to imprisonment, and new evidence subsequently appears to prove that the judgement was incorrect, the PP must appeal for the misjudged person to be freed).

Article 181 of the Chinese *Criminal Justice (Procedure) Act (1997)* states, "If a local People's Procuratorate - at any level - considers that there is some definite error in a judgement or order in the first instance made by a People's Court at the corresponding level, it shall present a protest to the People's Court at the next highest level." Notably, when the PP appeals against judges' verdicts or sentences, in Chinese legal language it is called 'protest (in Chinese: *Kangsu*)' rather than appeal (in Chinese: *Shangsu*). The purpose of this different term is to appear as though the PP is supervising the Courts and this appeal is different to that taken by individuals or non-governmental bodies. Case Eight (see Table 6.4.1) briefly illustrates the PP's appeal functions.

Table 6.4.1 - Case Eight: Beijing City PP vs. Mr Zhou (1997)⁵²

Mr Zhou was a taxi driver in Beijing. In March 1997, Zhou was prosecuted by the local PP as he was accused of acting as a driver for a group of burglars who stole electronic goods to the value of approximately RMB 4,500 from the local residential area. The stolen goods were discovered in Zhou's home. Zhou stated that he was hired by the burglars as a taxi driver. He stated that he knew these people were doing something bad, but he was not involved in any criminal activities, and some of the goods were given to him by the burglars as payment for the taxi fee. The first instance found that because none of the burglars had been found, the evidence prepared by the PP was not enough to found Zhou guilty. Zhou received an acquittal. The local PP believed that the stolen goods were discovered at Zhou's home and the evidence showed that Zhou had helped the burglars more than once, and this was sufficient to find Zhou guilty. The PP made an appeal to the higher level court. In the second instance, a statement was given by the court as follows:

“In 14th March 1997, the defendant Zhou, together with a group of burglars who have yet to be found, stole electric goods to the approximate value of RMB 4,500. While the burglaries were taking place, Zhou waited outside the victims' houses. After this, Zhou drove the burglars away in his taxi. The stolen goods were found at Zhou's house. According to the above facts, the verdict of the first instance is removed; Zhou is guilty of being an accessory to burglary.”

Finally Zhou received a one-year sentence and a RMB 1,000 fine.

⁵² Sources: (Cai, 2005)

This is a very simple case and the notable point is that the appeal was based upon a different point of view between the PP and the judge on the interpretation of the evidence presented in court. In this case, the PP won their appeal, which means that their interpretation of evidence was taken as being valid over the judge's. There are other cases in which the PP's appeal is not successful. This reflects the very important fact that there is no codified evidence law in China, and the judicial power of interpreting the validity of evidence is equally shared between the PP and the judges. Hence, there is a possibility that an argument between the PP and judges can occur over a point of law regarding sentencing. However, there is a lack of statistics as to how often such arguments occur and how they are resolved. The PP's appeal against the first instance decisions is constitutionally considered as a legal supervisory role over the judiciary. However, the PP rarely appeals. For example, between 1999 and 2001, appeals against first instance decisions did not occur very frequently. During this time, the courts in Beijing passed sentences for approximately 30,000 cases. The rate of appeal by the PP was approximately 0.3%. The rate of the judiciary altering their previous decisions was 19.8% of all appeal cases. 84.4% of appeal cases were against alleged short sentencing or an alleged incorrect acquittal, and 15.6% of the appeal cases were against the length of sentencing (Cai, 2005).

Compared with the appeals against first instance decisions, appeal against conviction occurs very infrequently throughout history since 1949. For example, in Beijing between 1999 and 2001, in all the levels of the PP (one high PP, two intermediate PP and 18 county levels PP), there have been appeals against conviction made in 146 cases involving 198 individual defendants. The upper-level PP has countermanded 72 cases which were appealed by the lower level of the PP, and 74 cases took place to protest the decision passed by judges. The original decisions of 24 cases (involving 32 individuals) were changed by the upper level courts, and 5 cases were retried by the original courts (other cases are still under processing

in 2003). Two people had their verdict changed from acquittal to guilty; 17 peoples' sentences were increased; five peoples' sentences were decreased and eight people had their convictions reclassified (Cai, 2005).

The purpose of the appeal against conviction is to help wrongly-convicted people to be freed. When there is a misjudgement, the victim has to rely on the PP. However, everyone who was suspected of being guilty was put on trial by the PP in the first place. It is reasonable to doubt the quality of this system in legal practice. In fact, it seems reasonable to presume that appeals against conviction should be undertaken by the defence lawyer rather than the PP.

In accordance with the constitution, a counterbalance of power exists whereby the judiciary and the PP are involved in and oversee each other's work. It is reasonable to presume therefore that occasionally disputes between these two parties can occur. The argument between the two branches will usually focus on either a verdict or sentencing decision. If arguments between the PP and the judiciary occur without self-negotiated resolution, they will be referred to the corresponding level of the CPLA of the local CPC. The CPLA will arbitrate between the two contesting interpretations of law, and determine which one is valid. When this occurs, the CPC effectively becomes the judge of the case in question, as the power to interpret law has been deferred outside of the court system to the Party. Whoever loses this dispute, whether it be the judge or the prosecutor, may receive a remunerative punishment, and their chance for promotion will be reduced. As such, it is unlikely that most disputes between the PP and the judiciary will reach this stage. Most of the time, it will be in both of their interests to resolve their arguments themselves through negotiation, rather than incur the aforementioned punishment levelled by the CPC. From this point, it is true that the decisions made by judges and prosecutors may often become unified, although this does not

indicate that the PP enjoys *control* over the judiciary. Unfortunately, there are no statistics to verify how often these disputes occur or how they are dealt with by the CPC.

6.5 – Conclusion

The beginning of this chapter quoted the CECC in order to highlight one of the chief criticisms of the Chinese judicial system; that more than 99% of criminal suspects are found guilty. Clearly, it is true that the PP and the judiciary always intend to unify their decisions before the trial even begins. It is also true that the PP can use their right of appeal to interfere with judges' decisions. Furthermore, for most trials court debates are based entirely on the evidence provided by the PP. However, these are not the main reasons for the high conviction rate. The reasons for the conviction rate usually being so high can be attributed to the following factors:

- 1) More than 90% of suspects already plead guilty at the pre-trial conducted by the police force pre-trial office.
- 2) There is a pre-trial case review by the PP to oversee the work done by the police. If the PP does not think that the evidence collected by the Police is enough to convict the suspect then the case will not proceed.
- 3) There is an 'Indictment Review' by the Court to oversee the work done in the case review. If the Court does not think the evidence collected by the PP is enough to build a case then the trial will be abandoned.
- 4) If new evidence appears at the first instance which can evidentially prove that the PP's evidence is insufficient for a conviction, then normally the prosecution will be cancelled without any record.
- 5) If an appeal is conducted by the PP against a court judgement to the higher level court or the local Communist Party's Committee of Legislative and Political Affairs, the party which loses the dispute (be it the judge or the prosecutor) may receive remunerative punishment, and their chance for promotion will be reduced. Therefore,

most of the time, self-negotiation between the two bodies is used in order to resolve their disputes.

As analysed in this chapter, the 99% conviction rate is not accurate. A sample of Shenzhen city shows the conviction rate is a little over 90%. Therefore, it seems that using the 99% statistic to presume the Chinese criminal justice system is heavily based upon the presumption of guilt is not accurate and therefore, cannot be accepted. There should be an effort to obtain more accurate data in China.

As the legal supervisory body *and* the state prosecution service, the PP enjoys extensive power throughout the criminal trial process. The main characteristic of the People's Procuratorates is that it is involved in both executive and judicial branches, overseeing the police force, the courts and its own work. However, at the same time the judiciary is also overseeing the PP's work. This is one of the core characteristics of the Chinese criminal justice system – a counterbalance of powers rather than a separation of powers. Throughout many nations, especially Western countries, a separation of state powers exists, and China has been criticised for lacking this type of constitutional design for a long time. However, there isn't conclusive proof to show that a separation of powers is 'better' than a counterbalance of powers. In simply words, China is different, but not wrong.

The power of legal enforcement in China is complex, and counterbalanced between the police, PP and judiciary. The 'Indictment Review' forms a counterbalancing means of the judiciary supervising the prosecutor; and the appeal from the PP against a court decision is means of supervision from the prosecutor over the judiciary. Therefore, we can say that the constitution intentionally structures the relationship between the judiciary and the state prosecutor in order to ensure that their respective power is equally counterbalanced. As a consequence, a

criminal lawsuit in China involves a very complex process, where different agents spend a great amount of time and energy, often duplicating work.

The whole criminal lawsuit process appears to be an exact repetition of the same questions for the suspect, three times over (pre-trial, case review and first instance trial). It appears that the purpose of this repetition is focused on obtaining a conviction for every case which goes to trial. To me, this is an apparently unnecessary waste of time for the criminal process. Clearly it is a major contributing factor to the lack of manpower in the judicial system in China, not to mention one of the reasons behind judges only presiding over an average of around 50 cases per year in 2008 (Chief Justice Wang, 2009). It seems that the most obvious drawback of China's criminal justice system is that its procedures are too complex. My research appears to show that a fair, efficient and effective criminal justice system will not simply be achieved by repetitive hard work conducted by the various state agents. Perhaps it would be better if the procedures are simplified and made more specific and clear, so that the criminal justice system can be easily accessed and utilised at all levels and across all areas of China.

CHAPTER SEVEN

Judges and the Party: the influence of the CPC over the judiciary

7.1 – Introduction

This is one of the core chapters of this dissertation, concerned with the relationship between the Communist Party and the judiciary, making it the most sensitive part of all the research conducted. In a Communist state, can any public bodies be independent from the Communist Party's political influence? The answer is perhaps no. The CPC is known as the 'sole ruling party of China' (Yang, 2004, p. 6) and has the duty to "maintain the People's Democratic Dictatorship and socialist system... [and] improve the socialist legal system..."(Preamble Section, the *Constitution of the PRC 1982*). Therefore, in this environment the CPC and officials who directly represent the CPC are effectively superior to judges.

As a result of these concerns, the research questionnaire was purposefully designed to avoid direct questions concerning the Communist Party, although these were broached during follow-up questions. Surprisingly some judges were happy to make clear their concerns over the Communist Party's relationship with the judiciary. In the interviews, a total of thirteen judges expressed the view that despite recent changes, the CPC requires that judges demonstrate both loyalty to the party, and independence when dealing with cases. Judges did not oppose or argue against the legitimacy of the CPC's involvement in judicial work. Their concern was that there is a potential for the CPC to further develop its role to become much more systematic and interventionist.

The relationship between the CPC and the judiciary is very complex. Becoming a Party member in China is considered to be an honour and a significant achievement in life. Any citizen can apply to become a member of the CPC, regardless of their occupation and family background. Hence, it is common for judges – particularly senior judges or judges with high reputation – to also be members of the CPC. Therefore, the large number of judges who are Party members are not only answerable to parliamentary acts, but also subject to Party policy

and discipline. In fact, as noted below, many judges perhaps place greater importance on their Party membership than their judicial posts.

“The corresponding and higher level standing committee of the CPC are my superiors and deserve my loyalty. The courts are not answerable to them, but I am...I am a judge and also a CPC member...I think I am a CPC member first...I have two positions, and I don't think they contradict one another. To me, the Party's leadership means that I have to respect their disciplinary rules. If you read the disciplinary rules you may see that is perhaps the best weapon to ensure judges' integrity.” - Pilot Judge 5 (2006, interview with Yaliang)

“I understand your research on such a topic is significant. To my knowledge, there is not any research which particularly examines the relationship between the Party and judges. I think it is important to conduct this research, but please bear in mind that you shouldn't use Western ideology to measure Chinese success. I noticed some Westernised scholars have criticised the Party's leadership over the judges. However, I am a judge and I fully support the Party's leadership. Please understand that the Communist Party demands we [judges] are impartial and independent when dealing with cases. The Party has established disciplinary rules, which demand that Party members should serve the public honestly.” - Judge 23 (2006, interview with Yaliang)

“You can never avoid the CPC's role in China, regardless of which field you are in. If someone says the judiciary exercises judicial power completely independently from the CPC's influence, that is not true. However, if you think that every judicial decision is completely influenced or controlled by the CPC, you are also wrong. There is a relationship between them; a link, but such links are very complex and indirect, and it is difficult to find

statistics to observe how strong the influences are. Moreover, this is a sensitive topic, and there is very little literature concerning such issues. There are two established bodies that you may need to analyse, they are the Court's Adjudicative Committee and the Court's Party Leadership Group.” – Judge 1 (2006, interview with Yaliang)

Do the judges above clearly define the role of the Party and leadership of the judiciary? The Party's leadership and disciplinary rules are a significant element within judges' professional lives. However, judges are also concerned that there is currently very limited research on this topic in China. During the interviews, judges highlighted two legitimate and established committees that are generally considered to be important aspects that relate to constitutional concerns over the Party's relationship with the judiciary; these two bodies are the CAC and the Court's Party Leadership Group (CPLG).

The CAC is a judicial body, established in each court by the *Courts' Organisation Act (1979)*, responsible for judicial decision making in “important and difficult cases”. Decisions made by a CAC must be unconditionally accepted by the judges of the corresponding court. According to the *Constitution of the People's Republic of China (1982) – known as the State Constitution* - the CAC must exercise its power independently.

The CPLG is a party organ, commissioned by the *Constitution of the Communist Party of China (1982) – known as the Party Constitution* – and is answerable to the Party. As a Party body, a CPLG is responsible for carrying out the Party's policy and discipline over Party members in a court, and there are a vast number of Party bodies that can legally influence or supervise the CPLG. A CPLG does not have any authority to be involved in the decision-making process of the judiciary.

This chapter aims to help understand the respective roles of the CAC and the CPLG; how they are organised, and the processes they have for carrying out their decisions. The chapter firstly looks at the functions of the CAC, and the procedure of the CAC's decision-making process. Secondly, the chapter illustrates the organisation of the CPLG and its constitutional function inside the Communist Party. Thirdly, the constitution of the CPC, the Party discipline enforcement body and the potential Party influence over the judiciary are analysed.

7.2 - The Court's Adjudicative Committee

A CAC is established by each court in accordance with Article 11 of the *Courts Organization Act (1979)*. The duty of a CAC is to analyse and draw conclusions from cases, discuss important or difficult cases, and oversee other matters relevant to judicial work. In one of my interviews, a senior judge gave a brief introduction of the historical background of establishing the CAC and its fundamental role over the past three decades.

“The CAC system was established in 1979. The justification for the CAC’s creation was to supervise judges within the court, as all courts had been destroyed by the Red Guard and all law school education had been abolished during the Cultural Revolution (1966-1976). In 1976, when the Communist Party tried to rebuild the judicial system, it was clear that there was a severe lack of qualified people to staff the new judiciary. Hence, the CAC system was brought in to provide a means of supervising the decisions made by the military veterans who made up the majority of judges at the time. Today, a CAC has effectively become the core of a court...In my view, each court is represented by a CAC in the matter of judicial decision-making in important cases. When an important case appears, the CAC may override the presiding judge and pass decisions regarding the case. The judge who undertakes the case must unconditionally accept the decision made by the CAC...The CAC operates in accordance with the principle of democratic centralism, which means that the decision is made according to a vote conducted amongst the members of the CAC.” – Judge 3 (2006, interview with Yaliang)

From the above comments made by Judge 3, it is clear that a CAC is a judicial decision-maker, focusing on important and difficult cases, and voting on decisions. Such decisions must be accepted by the judges who are presiding over the case. Clearly, the CAC as a whole has very strong influence over individual judges at the same court. Hence, it is necessary to illustrate what type of cases the CAC can be responsible for, and the process of how their decisions are made.

According to the *Courts Organisation Act (1979)*, a CAC in each court is only responsible for “important and difficult cases”. In practice, each court makes their own rules about how their CAC should operate. For example, the operation of a CAC in two counties will differ slightly, but the rules and processes are always open to the public. This Chapter uses one of the most recent examples, adopted in 2004 by Lijiang Intermediate Court; *The Rules of the Court’s Adjudicative Committee of the Lijiang Intermediate People’s Court, Yunnan Province (2004)*, hereafter referred to as *Lijiang CAC Rules 2004*. In accordance with Article 14 of the *Lijiang CAC Rules 2004*, the nature of “important and difficult cases” is given as follows (see Table 7.2.1):

Table 7.2.1 - Article 14 of the *Lijiang CAC Rules 2004*

- 1) Difficult, complex, new or important cases
- 2) Any cases related to large-scale foreign investment
- 3) Any cases which have been referred to the court by appeal from the corresponding or lower-level of the People's Procuratorates
- 4) Any high-profile cases which are closely followed by the public
- 5) Any appeal cases where the original sentence may have been changed by the judge or judges undertaking the case
- 6) Any cases with a split decision between the presiding judge and other judges/magistrates sitting on the same case
- 7) A case in which the criminal suspect may face the death penalty
- 8) Cases in which the criminal suspect may receive a not guilty verdict
- 9) Cases in which a retrial was requested by the provincial high court
- 10) Any cases in which the outcome of a retrial or appeal would cause considerable public outcry
- 11) Cases in which the enforcement agent believes that the verdict or sentence was incorrect during the course of enforcing sentencing
- 12) Cases related to requesting compensation from the court
- 13) Any other cases that may be considered important by the president of the court

If any cases are considered to have met any of the above points, then the CAC will make judicial decisions on that case. According to Article 19 of the *Lijiang CAC Rules 2004*, the judge undertaking an “important or difficult” case must present a report before the CAC and also answer any possible questions from the CAC members. The report must include the opinions from both parties, the evidence they have given, and the point of law that the presiding judge is concerned with (Article 20, *CAC Rule of Lijiang IPC 2004*). After the CAC has reviewed and discussed the report, a vote is held by the members of the CAC to pass verdict (and/or sentence) on the case (Article 5, *CAC Rule of Lijiang IPC 2004*). The presiding judge must unconditionally accept the decision given by the CAC and sign their own name in the judgement, whether the judgement corresponds to the presiding judge's own decision or not (*CAC Rule of Lijiang IPC (2004) Article 25*). Normally, a CAC is made up of between ten and sixteen ordinary members, who are typically individuals holding administrative positions such as vice-president of the court or head of the division, or higher-ranking judges. The committee is chaired by the President of the Court (Article 11, *Criminal Justice Procedure Act 1979*), and the corresponding level of the local chief Prosecutor is permitted to be invited by the judiciary to the CAC meetings as a non-voting observer (Article 11, *Courts Organization Act 1983*).

From the above provision, clearly, the CAC is the principle body to make judicial decisions; it has the power to override all judges' decisions. In a centralised democracy such as China, this type of operation is not surprising. The *Court Organisation Act (1979)* requires that the CAC as a whole must remain independent from outside sources and only be answerable to the law. However, such a system gives the President of the Court and CAC members significant power to influence judges who are not CAC members in the same court. As a result of this, if the CAC is influenced by any outside source, then this influence would in turn affect the presiding judge. Therefore, it is important to consider how the CAC can

become independent from outside sources, and also how the relationship between the CAC and the presiding judge can be structured to prevent personal interests of CAC members from filtering down into presiding judges' decisions. In relation to the above concerns, there are three considerable issues.

Firstly, the definition of 'difficult and important cases' is extremely vague and rhetorical. For example, points 1 and 4 of Table 7.2.1 can be applied in any cases, and therefore it would seem responsible to further develop the meanings given in these two points. Point 13 gives a vast amount of latitude to the leader of the court to take over any cases they may choose. Notably, point 8 proves that if a defendant is going to receive an acquittal, then it will be considered an abnormality (see Chapter 6). Secondly, it seems as though the CAC's operation can be considered to be a 'special trial' – because they are effectively passing judgements – yet the whole process does not include an open debate between the two parties. Despite this, the decision of the CAC is only made in light of the report provided by the presiding judge, which can be considered as a trial on paper. Another issue to consider is that the local chief prosecutor can attend CAC meetings as an observer. Given this, it seems as though the PP has the most obvious potential to influence CAC decisions. Whilst a PP representative cannot vote, there are no specific rules on whether or not they can offer their opinion on cases.

It seems as though there are many potential problems related to the CAC system. Legal scholars have debated for decades about whether or not to continue to develop the CAC system or abolish it (see Chapter 1.2). However, a comprehensive study of the CAC has not been conducted on a nationwide scale. Nevertheless, research conducted by the Research Office of the Qingzhou People's Intermediate Court (see Table 7.2.2) provides some useful data which helps to understand the CACs practical operation.

Table 7.2.2 – Practical operation of the CAC, Qingzhou IPC⁵³

In November 2004, the CAC of the Qingzhou IPC had seventeen members. All members of the CAC hold senior positions in the court, including the president, vice-presidents and heads of the divisions. One of the vice-president has the duty of selecting important and difficult cases. The CAC meetings take place twice a month, typically on a Friday. The corresponding Chief Prosecutor is never invited to attend the meeting. The meetings are mainly focused on legal application (a point of law). The members of the CAC will sign off their civil, family and administration judgements, but not any judgements from criminal cases.

In 2002, the CAC discussed 11 criminal cases, which was 5.1% of the total criminal cases heard that year. Likewise, of the 15 civil cases (including family), 0.3% of these cases were subject to the CAC, and from 7 administrative cases, 2.2% were subject to the CAC.

In 2003, the CAC discussed 16 criminal cases (4.85% of all criminal cases dealt with by the court), 18 civil cases (including family cases and making up 0.31% of all civil cases dealt with by the court), and 8 administrative cases (2.06% of all administrative cases dealt with by the court).

In 2004, the CAC discussed 9 criminal cases (3.2% of all criminal cases dealt with by the court), 13 civil cases (including family cases and making up 0.33% of all civil cases dealt with by the court), and 6 administrative cases (2.31% of all administrative cases dealt with by the court).

⁵³ Sources: Wang X. , 2005

The above statistics show that the local chief prosecutor was never invited to the CAC meetings, which seems as though the influence of the PP is largely excluded from the CAC decision-making process. However, there are over 3000 courts in China, and the operation of each court may vary slightly or significantly. The above statistics do not necessarily represent a nationwide trend of the PP being uninvolved in CAC meetings. Unfortunately, national statistics of this nature are not available. Furthermore, the CAC was not involved in a great number of cases in this example. It seems that the CAC's role is not very significant.. In my interviews, the judges generally noted that the most critical problem of the CAC system is the vague definition of 'important cases'. 'Important cases' is a term which is interpreted by the court leaders, and this gives them a significant capacity to influence presiding judges in particular cases. However, Judge 33 argued that although the definition is vague, it is important to note the follow:

“When the court leaders call for a CAC meeting on a given case, there is no particular rule to limit their power, although they do need to give a reason for initiating a CAC. Such reasons must be communicated to the prosecution and defence (in criminal cases) or any lawsuit parties (in civil cases) by the presiding judge. When the CAC decides to take on a particular case, their justification must be based upon a logical and common understanding of the establishing characteristics of *important or difficult cases*” – Judge 33 (2006, Interview with Yaliang)

As stated above by Judge 33, the CAC plays an important role in defining ‘important or difficult cases’ in quite a flexible manner, due to the vague definition set out in law. Such a view may illustrate that it is possible for the CAC (or members within the CAC) to attempt to supervise a case that has a particular personal interest. If this occurs, the reason given by the CAC will be no more than an excuse. However, it is always important to bear in mind that the excuse can only be valid if it satisfies common sense and does not contradict culture in the eyes of the parties involved in the case. It seems as though there should be little need to fear the vague nature of ‘important or difficult cases’. However, an experienced judge commented on the problems caused by this vague definition:

“When I contact a lawsuit party to advise that his case has been referred to the CAC, the first thing I will mention is that it is the law that requires me to do so. However, the vague definitions given in law make my job difficult sometimes. It can lead to lawsuit parties finding it very difficult to understand law, and they may even presume that it is not law that has brought the case before the CAC, but some form of outside influence. If the lawsuit party argues with me, I find it difficult to convince them that I am being truthful. In fact, as a judge, I will always act with integrity to follow the law and serve the people. However, from my experience, whether people believe me or not does not depend on how hard I try, it depends on how specific the law is. Therefore, the crucial problem is not the vague definition of important cases permitting CAC members to abuse their power, but that the public may *presume* power is being abused, even when it is not. ” – Judge 22 (2006, interview with Yaliang)

It seems that the CAC system is a considerable problem with regard to judicial independence. However, in my interview, most judges generally believed that the CAC on its own cannot override judges' power, and if any of the CAC members abuse their power to favour themselves or their associates, there are numerous channels for presiding judges or any lawsuit parties to complain or appeal to a higher level of court, congress, the PP, or the Party. However, there is a significant link between the CAC and a Party organ inside the court known as the CPLG.

7.3 - The Court's Party Leadership Group

The Party Constitution (1982) commissions the local CPC committees to designate between six and nine CPC members, who are normally already working at the court, to form a Court's Party Leadership Group (Article 46, the CPC Constitution). For instance, members of a CPLG of an intermediate court are selected and appointed by the CPC Committee of the City where the intermediate court is located. The CPLG meeting is presided over by the Secretary of the CPLG. According to Article 47 of the CPC Constitution 1982 - as a Party organ - members of the CPLG are answerable to and under the supervision of the CPC Committees which selected them. Similar to the CAC rules, there is not a unified act regarding how a CPLG exercises its power. Instead, each court's CPLG establishes its own rules of operation.

An example of the principal role of a CPLG within a court can be understood from the *Lijiang IPC Party Leadership Group Rule* (2004) (Lijiang CPLG rule 2004). The CPLG is duty-bound to ensure, "maintenance of the courts system, to make future development plans, to oversee management of the court's personnel, including judges' promotions, and ensuring all party members act under the guidance of the CPC's policy" (Articles 6, 7, 8, 9 and 10, *Lijiang CPLG rule 2004*). As a party body, the CPLG does not have any involvement with judicial discretion or the decision-making process, and the CPLG does not have any authority to become involved in the training of the judiciary. The CPLG rules also do not give the CPLG any authority to influence the CAC's decision-making process. However, in a court, the members of the CPLG are also commonly members of the CAC. According to the CPC Constitution 1982, the CPLG meeting is presided over by the secretary of the CPLG, who is selected and appointed by the Standing Committee ('Stantee') of the local CPC. The secretary of the CPLG is also almost always the President of the court. The other members of the CPLG are those who hold administrative titles such as vice-president of the court and the

heads of division. This can be understood from Table 7.3.1, using research carried out in 2007 by Peking University Law School.

Table 7.3.1 - Research on a CAC, by Peking University Law School in 2007⁵⁴

Year	Number of members in the CAC	Breakdown of post holders within the CAC			
		Senior justices only involved in the CAC	President and vice-presidents [CPLG members]	Other members	Ordinary judges
2004	14	6	5	3 A member of the Party discipline body The Director of the Court's Political Office An extra member of the CPLG	0
2005	16	6	6	4 A member of the Party discipline body The Director of the Court's Political Office A extra member of the CPLG An ex-vice-president, A Senior justices	1
2006	20	6	6	5 A member of the Party discipline body The Director of the Court's Political Office A extra member of the CPLG An ex-vice-president A Senior justices A head of a division	3

As the above table shows, CPLG members are widely involved in the CAC. Furthermore, A CPLG normally consists of between six to 10 people; all holding high administrative positions within the court (see Table 7.3.2).

⁵⁴ Sources: Justice Liao, 2007

Table 7.3.2 – Summary of CPLG members in Lijiang IPC⁵⁵

	Party post	Judicial post
1	Member of the City CPC Committee, Secretary of the CPLG	President of the court Chairman of the CAC
2	Member of the CPLG	Vice- President Member of the CAC
3	Member of the CPLG	Vice- President Member of the CAC
4	Member of the CPLG	Vice- President Member of the CAC
5	Member of the City CDI, member of the CPLG, Head of the Court's Discipline and Investigation Group, see next section of this chapter)	Member of the CAC
6	Member of the CPLG, Director of the Political Office	Member of the CAC

From the table above it can be observed that there is a mix of positions held by higher-ranking judges across the CAC and CPLG. There are over 3000 courts in China, and correspondingly there are over 3000 CACs and 3000 CPLGs. National statistics to show how

⁵⁵ Source: Lijiang Intermediate Court, 2006

these bodies operate are not available. As a socialist state, it is normal in China for the civil service officers or staff to hold positions in both the Party and the state. In the court, the president of the court usually holds the following titles:

- 1) Member of the local CPC committee (this is a party position, elected by the local Party conferences under the guidance and management of both the upper-level CPC committee and the corresponding CPC Stantee)
- 2) Secretary of the Courts Party Leadership Group (this is a party position, selected and appointed by the corresponding CPC Stantee)
- 3) President of the People's Court (this is a judicial position, elected by the corresponding people's congress)
- 4) Chairman of the Court's Adjudicative Committee (this is a judicial position, held by the courts President automatically)

Therefore, a president of a court has two distinct responsibilities: on one hand, they are responsible for leading the CPLG in exercising the court's administrative power, and are answerable to the Stantee. On another hand, they preside over the CAC to independently exercise the courts' judicial power, and are answerable to the corresponding level of Congress and the law. These two duties appear to be contradictory, since they require a President of a Court to be answerable to the Stantee, loyal to the CPC, and independent from outside sources. Moreover, members of the CPLG are also commonly members of the CAC. Whether or not these members who are involved in both the CPLG and CAC can truly manage their two jobs completely separately from one another is highly questionable. However, it is clear that there is a strong connection between the Stantee and the local courts. Can the CPC's role within the court be maintained as a legitimate influence? Some of the

judges interviewed in this research observed that the role of the CPC is focused on the area of administration and management of personnel issues:

“The CPLG is involved in the administration of many things, especially important things relating to Party affairs and personnel, such as the judges’ discipline, promotions, integrity training and so on... [Members of the CPLG] will never be directly involved in judicial decision-making as this is not permitted by law. You may ask whether someone who holds two separate posts can conduct their duties separately from one another. Judges are well aware of this issue however, and will make every effort to justify their decisions openly so that people know they are not acting in self-interest. Of course, the two roles may overlap, but when a court leader argues that someone has broken the disciplinary rules, it is dependent on what the disciplinary rules actually mean. The Party disciplinary rules do not say a member should unconditionally accept a court leader's order if it is not based on law. On another hand, it is shameful but true that judges do not often hold great public confidence, so disciplinary rules are more than necessary. In my personal view, a CPLG is much more helpful than a CAC. ” – Judge 14 (2006, interview with Yaliang)

Judge 14 reflected that the CPLG members overlap with CAC members, and the potential and capability exists for the CPLG to punish judges. However, when this occurs, satisfactory reasons must be given, and importantly when decisions are made by court leaders, these decisions should at least be considered by ordinary judges to have been made according to relevant rules. Another judge noted that the CPLG is established by and answerable to the local CPC. Taking this point, it is true that the local CPC is the leader of the court. However,

the following judge's statement illustrates a preference for supervision on personnel issues, particularly regarding personal integrity, rather than full control of decision-making:

“There are many elements that influence judicial independence [in China]. I don't think this is because we are a socialist country, but it is a result of Confucian cultural influence. China has had a strong supervisory culture for over two thousand years. The courts' personnel and administration is under the supervision of both the local CPC committee and the upper-level court. In my view, the local CPC committee is more involved. However, according to law and the current situation, I don't think there is anything wrong with this. The President of our court has roles in both the judicial decision-making and managing Party affairs. He is doing a lot of work, and his Party post is effectively like a personnel manager for the court. To me, the CPC ensures our integrity and sometimes their concern over a particular case pressures us, and may even result in influence. The way this influence comes across is very subtle and sometimes inadvertent, yet it is clearly felt by the judges and affects their decision-making. However, most of the time the Party's role is mainly focused on ensuring judges' integrity; if a judge has confidence in his integrity, then he shouldn't feel any pressure from the Party.” – Judge 19 (2006, interview with Yaliang)

Judge 19 suggested above that if there is obvious influence from the Party over judges' decisions, even unintentionally, such influence can be considerable. However, the numerous Party disciplinary rules shouldn't be considered as a threat to judges. In fact, it seems to judges that such rules are used to ensure their integrity and not purely intended to be a means of political control. They may only be applied against judges who have broken the rules. A

judge noted that the Party's own rules are partly focused on combating corruption and effectively applied to all judges regardless of whether they are party members or not.

“I think the Party's role inside the court is a type of supervision and it is focused on personnel issues. The Party's disciplinary rules exist to prevent corruption and are applied to all judges, whether they are Party members or not. I have to accept the fact that judicial corruption has occasionally occurred in the past few decades, and as such judges face a problem of lacking public trust. There is a clear need for supervision, but the current method is too complex, not very efficient, and has much room for improvement. In my view, the Party's supervisory power over judges should be developed in a much more specific and systematic manner. This will be the core development of judicial reform in the future. A qualified judge may not need to be supervised any more. However, the difficulty now is how to increase judges' public credibility. Until this happens, the Party's supervision will be necessary. Have a look at the Party's laws relevant to supervising government officials and you will be able to understand more. ” – Judge 57 (2006, interview with Yaliang)

The judge above seems to think that the Party's supervision may be necessary for the immediate future. The existence of the Party's supervision towards the judges, particularly in personnel issues, has the potential to develop into a form of control. However, to simply suggest that all supervision should be abolished would have little public support, and would not even be supported by many judges. The important issue is whether or not the CPC's supervision and involvement in state affairs is based upon a universal systematic method which avoids any individual higher-ranking Party member from exercising power for

personal reasons. Therefore, at this point it is necessary to understand the principle operation of the CPC; what type of *rules* have been adopted by them to influence judges, what type of influence is it, and which other party organs have a strong connection and potential influence with the CPLG? Will any influence result in the CAC altering their decision-making process?

7.4 - The organisation of the CPC and its role in the state

The Communist Party is an organisation consisting of 60 million members. In order to organise and operate such a vast body, the CPC makes its own laws and establishes its own enforcement bodies to apply their laws upon their members. In accordance with the *CPC Temporary Legislation Procedure Act (1990)*, the CPC is responsible for making policies, disciplinary rules and internal Party laws. These affect all party members and also the election process of higher officials and the organisation of Party institutes. The fundamental principle of party legislation, in accordance with the Communist Constitution, is to ensure that members of the party remain loyal (Article 10, the *CPC Constitution 1982*). There is a very systematic and well-developed system for the party to exercise its authority. The law of the CPC is structured like a pyramid; law is made at the top (Annual CPC National Conference), and is applied downwards (towards province, city and county levels). The Party is represented by a vast number of committees at each level, and Party conferences at lower levels also make additional rules which are effective over every level below.

The Central Committee of the CPC represents the Party at a national level (point 3 of Article 10 of the *CPC Constitution 1982*). The Political Bureau (Politburo) and its standing committee exercise the power of the CPC Central Committee when the central committee is not in session (Article 20, the *CPC Constitution 1982*). The Politburo is formed by some of the 30 most senior Party members, who together make important decisions and interpret previous decisions on a national level. A local CPC Committee is established in each province, city and county. Each committee represents the Party at the corresponding location. The Stantee exercises the power of the local CPC Committee when the local committee is not in session (Article 26, the *CPC Constitution 1982*). One of the most notable functions of a Stantee is to make decisions on important matters pertinent to the region for which they are

responsible. (Article 5, *The CPC Local Stantee Act 1996*). Hence, judges are firstly loyal to the Politburo, and secondly to each Stantee relevant to their region. Judges must respect the policies made by the Stantee regarding the operation of the Party. As such, the type of people that could be involved in the local Stantee is of significant interest. A notable issue with this is that the president of the local court will very likely be a member of the local Communist Committee, but normally not also a member of the Stantee.

Party law primarily focuses on two particular areas; firstly, on the policies related to economic development, and secondly, to maintain the discipline of all CPC members. In addition, there is a link between the CPC Laws and state Acts - the Stantee has to follow the legislative process in order to make Party policy become state law (Article 5, *the CPC local Standtee Act 1996*). At this point, the local Stantee is the effectively the highest body proposing bills of law. Hence, the members of the Stantee have significant influence in local legislative processes. There is no particular CPC code to ensure what type of people can become members of the Stantee, nor how many members it should have. Normally, a Provincial Stantee has 13 members, and a city-level Stantee commonly has 11 members⁵⁶. From 2002 to 2006, in 17 (out of 32) provinces, the head of the Stantee also held the post of Speaker of the provincial congress, and in 3 (out of 32) provinces, the head of the Stantee also held the post of governor. In order to fully understand the formation of the Stantee, two examples are offered as follows (see Table 7.4.1 and Table 7.4.2):

⁵⁶

Sources: Xinhua News, 2006

Table 7.4.1 - Formation of the Stantee of Fangshan District of Beijing Metropolitan Area⁵⁷

Rank	Post in the party	Post in the state
1	Secretary of the Stantee	None
2	First Vice-secretary of the Stantee, Secretary of the Government's Party Leadership Group	Mayor of the City Government
3	Second Vice-secretary of the Stantee, Principal of the City school of CPC studies	None
4	Member of the Stantee	Vice- Mayor of the City Government
5	Member of the Stantee, Secretary of Committee of Political and Legislative Affairs	None
6	Member of the Stantee, Secretary of Commission for Discipline Inspection	Leader of a district
7	Member of the Stantee, Secretary of Publicity Department	None
8	Member of the Stantee, Secretary of State Organs Work Committee	Leader of a district
9	Member of the Stantee	Head of local armed forces
10	Member of the Stantee, Secretary of Institutional Department	None
11	Member of the Stantee	Vice- Mayor of the City Government

⁵⁷

Source: Fangshan Government, 2007

The above is a common example for understanding the formation of a city-level Stantee. It is very obvious that the city government of executive branches holds most seats inside the Stantee. Hence, it is clear that inside the Communist Party structure, people who hold posts in the executive branch have an indisputable advantage over those people who hold posts in the judicial branch. In some cities, the CEO of a nationalized industry may also hold a post as a member of the Stantee.

Table 7.4.2 - The formation of the Stantee of Huainan city of Anhui Province⁵⁸

Rank	Party post	State post
1	Secretary of the Stantee	None
2	First Vice-secretary of the Stantee, Secretary of the Government's Party Leadership Group	Mayor of the City Government
3	Second Vice-secretary of the Stantee, Principal of the City school of CPC studies Secretary of institution department	None
4	Member of the Stantee, Secretary of Commission for Discipline Inspection	Vice- Mayor of the City Government
5	Member of the Stantee, Secretary of Committee of Political and Legislative Affairs	None
6	Member of the Stantee	Vice-Mayor of the City Government
7	Member of the Stantee, Secretary of Publicity Department	None
8	Member of the Stantee	Head of the Local Armed Forces

⁵⁸ Source: Huainan Government, 2007

9	Member of the Stantee	Vice-Mayor of the City Government
10	Member of the Stantee, Secretary of the office of the CPC committee	None
11	Member of the Stantee, Secretary of the Party Leadership Group of the Huainan National Mining Corporation	CEO of the Huainan National Mining Corporation

Example two rarely occurs in China. However, a CEO of a state company involved in the highest local authority could be involved in passing a law which favours their company, especially if the president of the court is subject to this Stantee. If this were the case, it is hard to believe that the local court would be able to remain impartial in dealing with cases related to a state company in the same local area. The two examples reflect judges' relatively low status within the Party. However, judges acknowledge and understand such a situation occurs due mainly to widespread public support

“I support the party’s leadership and the current constitution. However, judges hold positions which are too low. The local head of the government will definitely become the second most important person in the Stantee. This is what makes the courts essentially just a part of the government. I think it is true that currently the public seems satisfied with the current design of the Party structure. Those who are in charge of government or state-controlled businesses are considered by the public as having helped China a great deal over the past three decades. However, the judges are not held in the same high esteem by the public. China has been too poor for too long. The public would be happy to see the Communist Party focus much of their energy on developing the economy. However, I also acknowledge that in recent years, the public has developed a large concern over justice and social problems. Such concerns

have often resulted in a poor image for judges. I don't see why the Party should place judges inside the Stantee if the judiciary continues to have such little public trust.” – Judge 2 (2006, interview with Yaliang)

Our country is a centralised democracy. Before we do anything, there is a democratic process. When a decision has been reached after a democratic process, everybody must carry out the decision. However, during democratic deliberation, the government has a majority of seats inside the local Party committee, and as a result of this it may appear as though the judiciary is not given equal or greater status than the government. For example, the local police department are always voted to be given a proportionally higher budget than we are. However, despite such unfairness, the public may not support the judiciary having more seats inside the Party committee, and all this has resulted in judges' low public credibility. To the public, the Party may be very equal to the government, and if you ask the public who do they prefer to rely on, the government or the judiciary, of course they will say the government.” – Judge 52 (2006, interview with Yaliang)

It seems that judges' low public credibility has become a considerable problem, which has resulted in judges having a low status within the Party as well. With such low credibility, judicial supervision from the local CPC is legitimate by law and supported by the public. Therefore, a CPLG is formed by the local Stantee as a means of overseeing judicial personnel and ensuring their integrity. Clearly, the Stantee has great contact with the courts' higher-ranking officials. Such contact may seem to be a type of control, yet it is important to note that the Party cannot influence the judicial decision-making process directly.

The Party can only punish judges who break disciplinary rules or can be evidentially proven to be corrupt. According to Party disciplinary rules, senior Party members are not allowed to influence judicial decision-making in favour of their own interests. If this type of influence occurs, there is another professional Party body which is responsible for enforcing party-wide discipline, known as the CDI. However, it is also important to know that such a complex relationship between the Party and judiciary has resulted in judges fearing the Stantee. The local CPC clearly has the potential to influence the judiciary. What matters is whether or not the local CPC leaders will use their potential influence for their personal interests. If they do this, can the CDI effectively wield its authority to punish them?

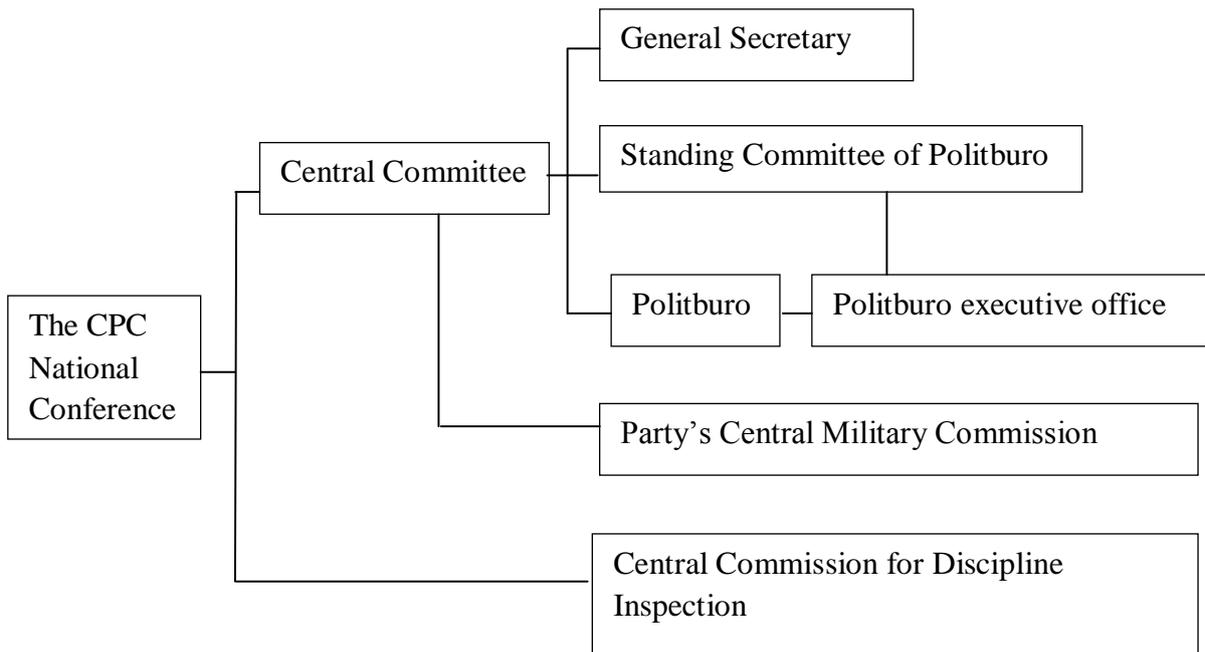
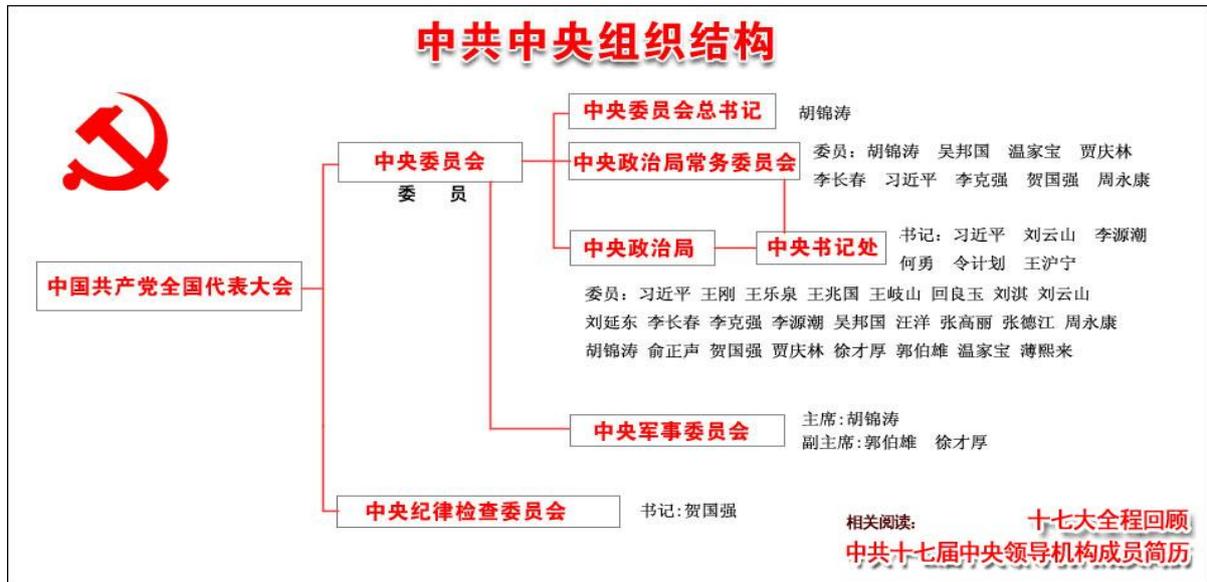
7.5 - The Enforcement agent of CPC Discipline & the Court's Discipline Inspection

Group

The CPC makes laws which affect all government officials. Judges are government officials who are subject to Party discipline and law. However, this does not mean that the Party will simply use its law to control judges. Judges may only be punished if they evidentially break the Party's law or disciplinary rules. Inside the CPC there is an established procedure and a body to enforce the law and responsible for investigation.

In accordance with both the *Temporary CPC Internal Party Supervision Act (2004)* and the *Party Discipline Punishment Act (2004)* adopted by the Central CDI, if Party members reject the decisions made by the CPC they will receive punishment from the Party (the *CPC Discipline Punishment Act*, Article 50). According to the CPC Constitution, the discipline enforcement body - the CDI - is established by every level of the Communist Committee. The CDI exercises the power of investigation in order to uncover the existence of any party or government officials, especially higher ranking officials, who have broken the CPC Discipline Act. Once enough evidence has been gathered in any particular case, the CDI will present a report before the Stantee, which is responsible for passing judgments. This can be seen as a key characteristic of the Party constitution. Following, is a 'constitutional map' of the CPC (see Fig 7.5.1).

Fig 7.5.1 - Constitutional map of the CPC⁵⁹



⁵⁹ Source: Communist Party of China, n.d.

According to the above structure, there is a micro-criminal justice system inside the CPC; judges that are party members do not hold judicial power in this constitution, but the CDI does (Article 6 and 32, *the CPC Discipline Act 2004*). It is true that both the Stantee and the CDI are elected and answerable to the corresponding CPC committee (Article 25, *the CPC Constitution 1982*). This may seem as though the CDI is exercising their 'internal party judicial power' independently from the corresponding Stantee. However, the secretary of the CDI will also be a member of the local Stantee. As a result of this, the CDI in turn is strongly connected with the Stantee and it is even arguable to say that the CDI is part of the Stantee.

Effectively, the Party constitution establishes the CDI as an internal police force and prosecutor for use within the Communist Party. In this system, the local Stantee and upper-level Communist Party committee act as 'judges' inside the Party. Generally speaking, these quasi-judges are not made up of professional legal experts. However, the quasi-judges only enforce the Party's law, not the state law. As such, they are made up by a selection of people who have extensive Party knowledge, often being senior Party members. In this structure, judges who are also party members may hold positions in the CDI. For example, normally a vice-president of the court is also usually a member of the CDI. However, as analysed before, the Stantee members are generally government executive officers at the corresponding level of government. Effectively therefore, a judge is a judge of the state, but within the Party he or she is just an ordinary member, yet a government official can be a judge within the Party.

Obviously, if a Party member judge never commits any infractions against Party law, then he will have no reason to fear the local Stantee. However, this would only be so if the Party trial system and discipline code was specific enough to limit abuse of power and miscarriages of justice, and only if the Stantee members could exercise their 'Party judicial power' fairly and impartially. If this does not exist, then state judges are likely to feel there is the potential for

influence from the local government. Another notable issue is that in accordance with relevant acts, the local CDI sends a group of their members into the court, who then form the Court's Discipline Inspection Group (CDIG), with the purpose of discipline and supervision (Article 17 *the CDI Act 1994*; Article 8, *the CPC Internal Supervision Act 2004*). In reality, judges who are already working in the court and are members of the local CDI will normally be chosen to form the CDIG. The secretary of the CDIG also holds office as:

- 1) A member of the local CDI;
- 2) A member of the Court's Party Leadership Group;
- 3) A vice-president of the court;
- 4) A member of the Court's Adjudicative Committee (on occasion).

After the formation of the CDIG, the head of the discipline supervisory body is accountable to both the head of the court and the leader of the local CDI. In accordance with the *CPC Discipline Act (2004)*, it is the duty of the CDI to police all party members including the members of the Stantee, members of the CDI, government officials and judges who are party members to ensure that they are all acting within the rules and are free from corruption. In the interview, judges were mainly concerned that the CDI will only monitor the activities of higher-level government officials and that the procedure of the CDI investigation is also established by Party law.

It is clear that there is a well-organized, complex and systematic legal enforcement system inside the Communist Party. Such a system is intended to ensure Party members adhere to Party law, and do not become involved in corruption. Nevertheless, as judges in the interview repeatedly argued, the Party's disciplinary rules are not purely focused on or aimed to control judges. The party laws are not specific enough, and sometimes contradict state law over similar issues. Effectively, the sum total of the two sets of law is debatable and often

questionable. In a way, the Party's law subjects judges to government executive officers and requires that judges are loyal and answerable to them. However, the state law requires that judges are equal to executive officers, and should be independent from them. On the surface, these two separate sets of law appear to contradict each other, and this is perhaps the most crucial criticism of the current legal system in China.

It is generally believed that the Party's law and the state law are separate and should remain so. The state law affects the nation, and the Party law affects the Party, but in reality it is too common for one person to hold posts in both the state and the Party. Therefore, it seems very difficult to separate the Party and state law. Am I the first person to argue that in a single party state it is not necessary to separate these two types of law? It seems therefore that the Party should give more careful consideration on how to develop such a Party legal system, and how Party law and state law can be more tightly unified. Such issues are particularly important to the question of the Party managing court personnel.

7.6 - Party Management of Courts' Personnel

Considering 'power' in its wider definition, which could be understood as, "a capacity [or potential] to control [or influence] the decision-making process" (William & Howard, 1961, p132), the CPC directly exercises its power over the court personnel, particularly with regards to judges' promotion. In the interviews, many judges believed the Party's role in the promotions process reflects the leadership of the Party.

“[The] Party’s leadership is important. It fits the current circumstances of China. I support judicial independence however; such an issue may not be widely supported by the public. In this country, the public believes that without the party’s supervision, the problem of judicial corruption would become worse. Therefore, the Party directly exercises its power in higher-ranking government official promotion processes to try to ensure that people lacking integrity and morals are not able to take positions of power and responsibility. ” – Judge 51 (2006, interview with Yaliang)

One of the principal functions of the CPC is to supervise all state and party officials (Article 2, *Party and State Higher Ranking Officials/Candidates Selection Act 1995*), and this is considered by judges to be one of the most significant aspects of the Chinese constitution.

“The CPC is involved in appointment issues, recommending officials to the state political bodies, and supervising them. The courts personnel are under the direct management of the local CPC. During the elections of court leaders, the president, vice-presidents and heads of the divisions are all nominated by the local CPC to the congress, and the congress usually approves these nominations for appointment... such a promotion procedure creates real potential for the local CPC leaders to influence the judges who want to be promoted. The genuine concern is whether or not the local CPC leaders will use this influence in return for personal benefit. I do not think that the local CPC will even try to influence judges to break a point of law. However we judges have judicial discretion, and if you have noted, our judges' judicial discretion is extensive. Is it possible for such vast power to be influenced? I don't know, but it is true that in extremely important cases, the courts may present a report to the local CPC. You must understand that the public support this; in fact if we do not do this, then the public may not feel very confident in the outcome of such cases. We have centralised democracy in this country, and it is part of our culture for people to do important things together.” – Judge 6 (2006, interview with Yaliang)

“Historically China entered significant eras of difficulty due to bad leadership. Therefore, the Communist Party involve themselves in the promotion procedure to make sure unqualified people are not able to become leaders. There is an established and systematic procedure for measuring individuals as to their suitability. Once candidates have been selected for nomination by the Party to congress, they will stand for election.” – Judge 19 (2006, interview with Yaliang)

The Party organs have played an important role in the various personnel management in state bodies (Government, Procuratorates and Courts). The Party directly manages the personnel that work for the state. The party is responsible for recommending individuals who are considered by the party to be ‘good civil servants’ to hold office in the future. For the courts, two Party organs are directly involved in this personnel management are the corresponding levels of the CPC Committee (and its Stantee), and the CPLG (Article 10, *Party and State Higher Officials Selection and Appointment Act 1995*)

“A judge who wants to be promoted must first be accepted by the Court's Party Leadership Group and then the local Stantee. The CPLG is the leader of all judges and in turn the Stantee is the leader of the CPLG ...One of the constitutional principles is that the nation should be ruled according to the law. What is the law? The law is the party's policy, which is based upon the people's interests. Have a look at some of the party's policies relevant to the personnel issues. You can simply find them on the official Xinhua news website.” – Judge 16 (2005, interview with Yaliang)

The CPLG has very strong influence relating to matters of judges' promotion. It is the duty of the CPLG to select one or more candidates from within the court. Those selected will enter a process as instructed by the *Party and State Higher Officials Selection Act (1995)*⁶⁰. After which, one of the selected candidates will then become a potential future member of the Local Communist Party Committee. A vote will then be held in the CPC Conference to decide whether this potential future member will pass or fail. After becoming a member, The Local Communist Party Committee will suggest this candidate as the sole candidate for the

⁶⁰ adopted by the Central Committee of the Communist Party Institution Department

position of President of the corresponding People's Court. In accordance with both the *Election Act (2006)* and the *Party and State Higher Ranking Officials Selection Act (1995)*, the local congress will hold a vote to decide whether or not this selected candidate will become President of the Local People's Court.

Considering all the committees together, the members of the CPLG are commonly also members of the CAC and are answerable to the local CPC committee. In addition, the members of the CPLG are supervised by the CDI, which is a body answerable to the Local Stantee. Furthermore, all party member judges are overseen by the CDIG, which is a body accountable to both the CPLG and local CDI. Therefore, there is a strong affiliation between the CAC and the CPLG, the Courts and the Local Stantee, and the state laws and the Party laws. Such complex relationships may strengthen the connection between the CAC and the government. However, whether or not such connections become a means for legitimate judicial influence remains an unanswered question.

As analysed above, the Stantee has key influence over judges' promotions. The Stantee is mostly constituted by local government executive officials. Therefore, it is not surprising that judges may try to avoid confrontation with these individuals, as it could be detrimental to their career prospects. Such influence may naturally lead the court to favour the government if there is a dispute between government and individuals. More importantly, even if the courts do not favour the government, it is still difficult for the public to believe that such a case can be heard independently and impartially.

If an individual takes the local government to court, according to the state constitution, the judiciary must deal with the case impartially. The judiciary must consider the local government and the individual as equal elements before the law, and interpret law based upon the evidence. However, the head of the local government is usually superior within the CPC

to the corresponding judge of the court. As such, the head of the government could use the Party's legal system to order the local chief judge to bring the case to the CAC. The CAC could then make a decision which would override any decision made by the judge. Furthermore, senior Party member government executive officers hold strong potential influence over judges' promotion prospects; if any presiding judge makes decisions which contradict the will of the local government, then the judge may lose the chance for future promotion. Though such a case may not happen frequently, it can happen. Therefore, there is a need to balance the power between the local government and judges, as it currently heavily favours the local government. However, it is always important to bear in mind that 'could' does not mean 'will'. Having the potential to influence the judiciary does not necessarily mean this capacity will be used. Of particular importance is whether the public consider people with such power to represent an illegitimate influence, or a defender of judicial integrity.

7.7 - Conclusion

The nature of a judge's duty is to always follow the law, but it seems that in a Communist state such as China, the term 'law', in its wider sense, is considered to be both the state law and the Party law. There is a significant relationship between these two types of law. If we only consider the state law as the law of China, then it would be arguably valid to say that the law would not be worth much more than the paper it was written on. This is due to the fact that the legal system and codes have become too disparate from their real-life application. However, the combination of the Communist Party's Law and the state Law seems to make more sense as being the overall law of China.

Moreover, if the CPC law is separate from the state law, and if the CPC law enforcement body is separate from the state judicial body, then the country will appear to have two types of law and two different judiciaries. If the two types of law contradict each other, then there will always be conflict over which one takes precedence. If the Party law enforcement body and the judiciary are not equal to each other, then whoever has an obvious advantage over the other is effectively a 'judge of judges'. In China, the Communist Party and its own laws have effectively made the country's rule of law process a very complex issue. Without any choice, judges in China must demonstrate respect for the Party's law, regardless of whether or not they are party members, in order to gain support, trust and nominations from the Communist Party. It is effectively a necessity for judges if they wish to be promoted. As such, the judicial reform program towards greater independence must consider the Communist Party's constitution, rules and laws. However, to presume the Party's law is designed to serve the Party's selfish aims or deliver extra privileges is not true. Party law is focused on guideline policies to develop China's economy and prevent officials from being involved in corruption. Notably, the Party enjoys far greater public trust than the judiciary in China.

It seems that the most critical problem in China is that the Party and state laws are generally considered as completely different elements. Furthermore, there are occasionally some contradictory points if we take both sets of laws at face value. Hence the public and even judges can be confused by these contradictions - which one should take precedence? Therefore, judicial reform in China must address this most sensitive issue of how to organise the relationship between the Party law and state law; between the Party's discipline enforcement bodies, and the judiciary. The fundamental point is that there must be no contradiction between Party and state law.

In theory, judicial independence means judges must be independent from political parties. A party's policy and private rules should not apply for judges. However, in a Communist state such as China, it seems that the Communist Party is not quite like a privately established and organised party. The CPC is a political party which effectively created the modern-day country, and the state constitution was adopted in the first place to protect the victory of the Communist revolution. Furthermore, the Communist Party of China is a huge organisation, with 60 million members. Naturally such a huge body must adopt rules and systems of organisation and governance, and judges who are Party members must obey these party rules. It seems that judicial reform in China is a complex situation that no Western legal scholars have ever faced before.

The situation in China is clear – the Party has the right to demand loyalty from all of their members, including judges who are Party members. Court leaders are generally Party member. According to the State Constitution (1982), these Party-member judges have a responsibility for maintaining the court's independence, and ensuring that no outside sources can ever interfere in the judicial decision-making processes. However, the key question is whether or not the Communist Party is considered to be an outside source by the judiciary.

For the public, the answer is perhaps no. Despite the mistakes made in Mao's era, since 1978 the Communist Party – through an authoritarian method of governance – brought hundreds of millions of people out of poverty. Today, China's hundreds of modern cities are symbols of the Party's hard work and effort, and the majority of the public are willing to give their continued support to its leadership. For the majority of the public, there is a willingness to continue to see judges supervised by the Party. Secondly, as highlighted in Chapter 3 – China has thousands of years of Confucian influence, and as such the people respect individuals who hold great power. Senior Party members are considered by the public to have a right to exert their authority and supervise judges in China. Therefore, for the Chinese public, Party supervision of judicial officers is accepted and supported. Furthermore, Party law is intended – amongst other things - to enforce discipline amongst its members, which includes ensuring that judges maintain their integrity, and are free from corruption.

The Party is well-organised, and the strong links between the state and Party are no secret – they are quite openly observable, as are the laws which establish these links. However, there are also obvious problems with the Chinese constitution. Firstly, the links between Party and state are not very certain – the laws related to how the Party and state links are very vague, particularly on the issue of high-level Party and state official promotions processes. It seems that the senior Party leaders play an important role in the process, but their action is not enforced by any independent legal enforcement agents, but their superiors are often busy administering their own locations. Secondly, there are some contradictory points between Party and state law. How these two types of laws can be made to perfectly complement one another is one of the most important issues to consider within the field of judicial reform.

For a long time, legal scholars in China have stressed that the state law *is* law, but Party law is just an internal discipline policy. This would assume that the state law is the law applied

throughout all China for all citizens, and the Party's law is only law applicable to its own members. However, my research seems to illustrate that in fact, in a Communist state, the Party is the de facto and unchallenged sovereign of the country, and as such the Party can involve itself in anything it sees fit. The party's law plays as much of an important role as the state law, if not more. Another important point is that all too often; the law in China is considered to be worth little more than the paper it is written on. If we only consider the existing state law, then this seems to be true. However, if we take party law and state law together, and consider both to form the sum total of law (despite the contradictory points between the two elements) then it is possible to gain a greater level of understanding of the social reality in China.

Therefore, it is recommended that in a Communist state, it is better for the Party and state to marry together, and to link their two sets of laws together to build a universal judiciary which enforces both Party and state law.

CHAPTER EIGHT

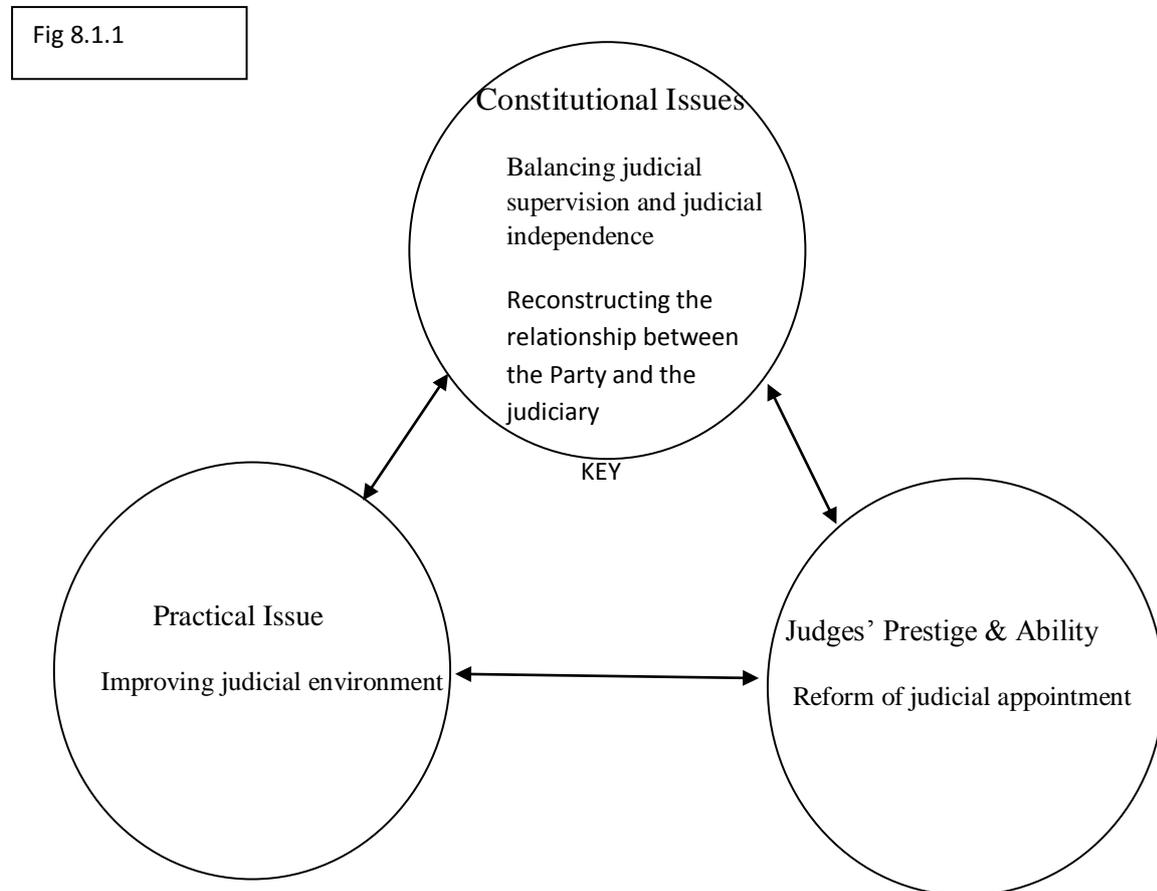
Finding a Chinese road to judicial reform

8.1 – Introduction

The object of this concluding chapter is to bring together the findings from my research and suggest a possible idea for judicial reform. As the research has indicated so far, judicial reform in China engages with complex cultural and ideological issues as well as important contemporary economic and political realities. It is clear that legal reforms have made significant progress still falls short of developing an independent judiciary.

This final chapter begins with an overview of the findings of this research. Following this, the chapter looks at three interdependent and interactional issues (see Fig 8.1.1) that the Chinese government must confront if it is to promote the status and financing of the judiciary and the rule of law. The key issue is constitutional reform, in order to balance the two opposing concepts of judicial supervision and judicial independence. This topic includes the most sensitive concern of this research - how can the relationship between the CPC and the judiciary be reordered? Furthermore, there is a need for reform in order to improve the judicial environment, which includes the issue of the courts' administrative work, funding and judges' remuneration. The final issue concerns the reform of the judicial appointment system to select professional, skilled judges, who command public confidence and respect.

Fig 8.1.1- Three issues relating to judicial reform in China



8.2 - Overview of the findings

The research set out to answer the two following research questions:

- 1) Research Question One - What are the 'Chinese characteristics' with regard to judicial reform?
- 2) Research Question Two - What factors currently limit judicial independence?

For the first research question, the most recent policy guideline, 'The Three Supremacies', states that judicial reform towards rule of law in China must be compatible with three factors. These are: Chinese legal traditions, current political principles and contemporary economic conditions. Confucianism and Marxism dominate most aspects of Chinese legal ideology. The two theories share some very similar characteristics. Both theories perceive law as a negative concept and define it as a set of punishments or tools for the purpose of social domination. Both theories unequivocally share the view that government equates to justice and represents the social values and interests of 'the people'. As a result of the Communist revolution of 1949, the core contemporary political principle in China is the CPC's leadership. The CPC is the dominant and sole legitimate political party in China, and the constitutional role of the Party is to supervise and manage all government officials, including judges. China is still a developing country with a GDP PPP per capita only 5,000 USD, which according to the World Bank, makes it a lower-middle income country. Unlike developed countries which spend billions of dollars a year on their judicial systems, there is a clear financial limit to judicial reform in China. As such, reform proposals in China must be realistically affordable.

For the second research question, I found that there are three interdependent and interactional issues regarding judicial independence, which were:

- 1) Constitutional issues
- 2) Practical Issue: Improving judicial environment
- 3) Issue of judicial appointment

There are over 200,000 judges in China, yet a judge is not a highly sought after position. Judges in China are classed as lower-ranking government officials. Their remuneration is mainly dependent on the wealth of the local government, and is generally considered very low. Moreover, judges enjoy very little administrative support from the government. It is the judge's responsibility to schedule cases, and manage the court's funding and logistics. Hence, higher-ranking judges normally do not hear cases; instead, they partly focus on 'public relations', as they attempt to secure and manage funding for their courts from the local government.

The minimum age to become a judge is 23 years old, and the retirement age is 60, yet these lower and upper age limits are criticised as being too early. Judges do not have to be law graduates as long as they can pass the NJE, which does not test knowledge relevant to analyse legal principles but focuses on testing candidates' ability in remember facts. In addition, sometimes, judges are heavily criticised by academics and the media, and this criticism has a detrimental effect on judges' prestige and public credibility. This can lead the public to presume that judges have low quality training and integrity.

The core concern regarding the lack of judicial independence focuses on the design of the constitution. In China, judges' judicial power - even the power to interpret law in individual cases - is constitutionally designed to be supervised by non-legal public bodies, particularly the Congress, prosecutors and Communist Party. These non-legal organisations can – through

different procedures – alter judges' decisions. Although altered judgements rarely occur, when they do occur it is important to understand that they are completely legitimate according to law, and widely supported by the majority of the public. As the judges told me in the interviews, these non-legal bodies which can intervene in judicial decision-making processes are widely considered by lawmakers, the public and reformers to be engaging in judicial supervision. Therefore, the most significant issue for judicial reform revolves around judicial supervision versus judicial independence - which approach is more likely to ensure rule of law and promote justice?

8.3 - Judicial supervision, judicial independence, judges' public credibility, specificity of law and the role of law

The concept of judicial supervision is an important element of current political ideology in China, and as such the current judicial institutional design is not compatible with the concept of judicial independence.

Judges in my interview has identified that judicial supervision is preferred and supported by the majority of the public rather than judicial independence. This reflects one of the most difficult factors that Chinese judges face - despite the fact that throughout the interviews I conducted, they came across as being very knowledgeable, well-qualified and wise - judges in China have low credibility amongst the public and legal scholars. As such, it is difficult for the reformers to adopt the principle of judicial independence as part of future legal reform. Therefore, the path of reform which leads to greater judicial independence must firstly deal with the issue of judges' public credibility.

There are several key reasons why the public have low confidence in judges. One of the most popular views held amongst the CPC, SPC and legal scholars, is that Chinese judges' relatively low qualifications and judicial ability are the principle reasons for low public confidence in the judiciary. Before the *Judges Act (1995)* came into force, the majority of judges were former military veterans. Another popular view given by some Chinese legal scholars is the incidence of judicial corruption; "The public dread of judicial corruption, which currently still occurs despite widespread supervision; if given more independence, judges could abuse their power more easily and judicial corruption may be more frequent" (Ma H. , 2004). Some active supporters of judicial independence actually attribute judges' low public credibility to their relatively low level of independence; "As long as the judiciary is not independent, judges are indeed subservient to some local government officials. The

judiciary will never be able to gain any real authority or respect under such a situation.” (He, 2008)

The thesis has addressed the fact that increasing judges' public credibility has been one of the fundamental goals of judicial reform in the past three decades (see Chapter 1.3). Reforms such as establishing examinations before judicial appointments and implementing tough means of punishing corrupt judges have been widely taken up across China. Notably, reformers in Beijing did not take account of the suggestions for greater judicial independence with a view to increasing public confidence in judges. Perhaps they were deterred by the risk of giving unpopular judges more independence in case it resulted in increased corruption. In fact, the relationship between judicial independence and public respect for judges can be understood in terms of the age-old 'chicken and egg syndrome' – which comes first? However, do such efforts that have been implemented over the past few decades effectively increase judges' public credibility? My research challenges the relationship that has been presumed to exist for a long time in China: 'better qualifications + no corruption + more independence = high public credibility'. I am challenging this assumption because firstly, the judges I interviewed appeared to have a great amount of experience in the legal field and understanding of legal principles. Secondly, the evidence collected from the SPC shows corrupted judges make up less than 0.1% of the total number of judges (Chief Justice Wang, 2009). Finally, as the judges told me in the interviews, when they exercise their judicial power, it may only be influenced by other public bodies if there appears to be a very obvious and satisfactory reason to do so.

Therefore, based upon the evidence collected in my research, I presume Chinese judges' low public credibility is not simply a result of either low qualifications or a lack of judicial independence. As this research has described (see Chapter Four), there are 200,000 judges in

China, but there are still serious manpower shortages. During the research I witnessed firsthand how Chinese judges deal with relatively simple matters in criminal cases (see Case Seven, Chapter 6.2). The judges work with great dedication, care, and consistency, taking great amounts of time to write judgement papers to fully explain cases, the points of view from both parties and the relevant points of law. However, will such efforts alter the often widespread public disrespect of judges in China? – perhaps not.

It seems that the public is not especially concerned of what judges' qualifications are, or how hard they work. The public is not as naive as some of the designers of the NJE presume them to be. The public will not be easily satisfied with decisions made by an 'apparent elite' who has simply passed a so-called 'judicial examination'. A lesson can be learned from China's experience in developing judicial independence. In the interview, some judges noted that the Chinese public are likely to express a desire for equity and fairness. It is more likely for judges to be respected by the public if they can demonstrate to them that no matter who stands in the dock, the judgement is made fairly and in accordance with law and nothing more. For this reason, a judge exercising judicial power only in accordance with the law is not enough; he/she must also be perceived to be doing so by the public.

However, this research elucidates upon the fact that judges may never be able to demonstrate to the public that law has been followed to the letter, mainly due to the uncertainty of law itself in China. There is currently very vague statutory law and almost no common law or case precedents in China. Clearly there are huge gaps within law, and there is no type of established system to 'plug the gaps'.

My research has highlighted that there seems to be a significant relationship between judges' public credibility and the specific nature of law itself. We already know that scholars and lawyers in China have criticised the problems of vague law for a long time. They have often

noted that vague law has bestowed judges with too much discretionary power. However, my research has also shown that vague laws have given the public significant scope to draw their own understandings and interpretations of law. This makes it difficult for presiding judges to convincingly declare that law has - and is - being followed. Statutory law inevitably provides only a generalised guide to behaviour; it is not supplemented by a tradition of case precedents or common law that is standardised through the hierarchy of the court appeal system. In this context, and given the low level of training and guidance, it is reasonable for the public and reformers to assume that Chinese judges' judicial discretion will result in wide-ranging and inconsistent interpretation of the law to such an extent that law does not provide a guide as to what is considered legal behaviour. It seems that judicial supervision – from the perspective of the public and the reformers – is partly intended to limit judges' discretionary choice and therefore to maintain the certainty of law. If judicial supervision is abolished, Chinese judges would wield extensive discretionary power over cases, but this should be based solely on judicial principles and not on political or economic factors.

On matters of sentencing, a Basic Court judge's discretionary choice for indictable offences could be between less than three years imprisonment to a life sentence. However, there is still little systematic guidance on the law of evidence and sentencing; and an absence of case and common law in China. This gives the public too much room to presume that judges with 'few qualifications' are likely to misinterpret law on individual cases; to presume that 'poor' judges may use their power in exchange for personal income; and to presume that judges with 'little power' may interpret law unequally in favour of more powerful or influential people over normal individuals. Therefore, without clear guidance for legal interpretation, it is difficult for the public to believe that law is undoubtedly interpreted in individual cases by judges in a fair manner that seeks to avoid disparities.

Judicial independence can be considered as an ingredient judicial for ensuring the rule of law and justice, promoting economic growth and social stability. Yet as commented upon by judges in the interviews, judicial independence may only be realised if the public have confidence in the integrity and ability of judges. Therefore, it is important for judges to show the public that their discretionary choice is only made in accordance with law, which is equally interpreted in all cases. In simple terms, judges have to show people that law itself is the 'ruler', rather than the judges themselves. This requires that the law itself operates as a set of rules that are specific and free of contradiction.

In the case of China, law is clearly far from being able to operate as a set of rules, and as such judges are unable to demonstrate this to the public. Within this context, it is understandable that the public feels there is a significant risk for judges - who have considerable discretionary decision-making power coupled with minimal training and occasional incidences of corruption - to hold positions that are fully independent from any potential supervision. Clearly, there is an obvious risk coupled with increasing judicial independence in the current legal environment in China.

Judicial supervision from non-legal bodies may be said to be legitimate, and results from the uncertainty of law and low public confidence in judges. Nonetheless, under the current institutional design judges are supervised to ensure some consistency in decisions on sentencing and interpretation of law. Yet at the same time, judicial supervision creates a channel which transfers judges' power to other, non-legal public bodies. However, under the current supervision system, it appears that judges are reluctant to exercise independent thought. Furthermore, the research has demonstrated that the outcome of judicial supervision sometimes appears uncertain.

Supervision can result in judges' decisions being overturned. Sometimes it is because the judge has made an error of law or misunderstood the evidence. In this case, the supervisory bodies (particularly the congress or the CPC) act as an additional appeal court. Why would lawsuit parties go to appeal their dispute to the congress or the Party, rather than an actual appeal court? It is mainly because these non-legal bodies are apparently more effective in the public's eye. However, judicial supervision also creates the potential for those who are involved in the supervisory process to influence judicial decisions. Most of the time, the judicial supervisory bodies alter the previous decisions made by judges due to different interpretations over a specific point(s) of law. Yet law in China still lacks specific legislation in many areas, such as the lack of evidence law. Hence, when there is a different point of view on evidence, neither the Party, MPs nor judges can clearly interpret the point of law. However, such a supervisory system brings forth a further question – if there is a necessity for a supervisory body for judges, which *other* body will hold responsibility for supervising the *first* supervisory body?

It seems that judicial supervision and judicial independence are both dependent on how specific law itself can be. The specificity of law limits judges' arbitrary discretion within reasonable boundaries, and as such judges are effectively supervised by these set boundaries (for example, cases precedents). Hence, it seems that a policy of making law more specific – especially in the area of evidence and guidance for sentencing - is perhaps one of the most critically-needed tasks to be undertaken by the Chinese legislators and/or the judiciary. This can be achieved by either making statute law more specific - if the legislators have the ability to do so - or establishing type of case law throughout the court appeal system.

Therefore, judicial reform with a view to balancing supervision and independence would require an increase of judicial independence and a decrease of judicial supervision - such reform should go hand-in-hand. A key issue of reform is dependent on how specific law can be made, how well the courts can develop themselves and increase their credibility in the eyes of the public, and at the same time, how much independence the reformers are prepared to grant the judiciary. It is important for the court to engender belief amongst the public that justice prevails. Hence, more systematic and specific law in the area of guidance for evidence and sentencing is one of the most important issues. Over time, as methodical and comprehensive guidance is established, the judicial supervisory infrastructures provided by non-legal agents will naturally become unnecessary, as judges will become supervised by law itself.

From the experience of China's legal development over the past decade, it seems that the rule of law requires more than just a group of independent judges who possess respectable qualifications and integrity. Judges must hold public respect. However, the public do not know law, and they do not know whether or not judges have good qualifications or integrity. It is important for judges to show the public that law will be interpreted impartially in all cases, and in a fair and equal way that has a real and concrete impact on their lives.

In fact, judicial independence is not absolute and unfettered. It is constrained by statutory law and common law, together with a system of judicial authority and principles. However, China currently faces a complex situation, where statutory law tends to be very vague, there is no formal common law, and judges have very low public credibility. These are considerable concerns, and the reform question thus requires not only an answer as to how a degree of judicial independence would be possible, but also as to how independent judges' discretionary choice can be supervised to a definable limit. How can China create specific

law? This can be difficult, yet if case law is considered, then all that needs to be done is to allow senior judges – through an established procedure – to collate their judicial experience of cases and respective outcomes to form a coherent body of case law. It took hundreds of years for some jurisdictions, such as England and Wales, to form a certain quantity of case law. It may not take so long for China to do the same, since the retirement age of judges in China is currently very young (retirement age is 60 years for men, and 55 for women). There are tens of thousands of retired judges in China, and it seems as though their knowledge is wasted.

China's experience illustrates that there appears to be a crucial precondition before judicial independence can take place; judges must hold respect in the eyes of the public, and law must be able to act as a set of rules by itself.

8.4 - Reconstructing the relationship between the Party and the judiciary

As part of the required constitutional reform, the relationship between the Party and the judiciary is perhaps the most sensitive issue. This is because one of the core theoretical elements of judicial independence is for judges to be free from the control or influence of political parties. The current relationship between the Party and the judiciary is one in which the Party leads and supervises judicial officials. This may give people a natural perception that there is a control over judges from the Party. However, it is important to note that from my research it appears that in a Marxist state, the Communist Party should not be considered simply as a 'political party' (see Chapters 3.2 and 7). The Communist Party in a communist state can be understood to have a very special constitutional status.

In China, the CPC is more like a 'delegator' of the sovereignty of the state and people rather than a simple political party. This research demonstrates that there are some significant links between the Party and the judiciary. The CPC's fundamental role within state organs is to supervise officials. The CPC - after consulting with other political parties and independent public delegators - nominates their qualified members to the NPC for election to hold state posts. This system also appears in the judicial promotion process, which gives the CPC significant influence over the appointments process of higher-ranking judges. The CPC has very direct influence within the CAC. Furthermore, the CPC systematically make policies relating to the judiciary, and operates their supervisory power in certain areas such as investigation in judicial corruption cases, making arbitration amongst law enforcement bodies and ensuring judges' behave in accordance with judicial integrity, and educating judges in Party policy. Such influence may sometimes be considered a means of political control. However, it is important to note that the CPC's role in judicial operation and supervision is not free from rules.

The development of the Communist Party of China has also been significant after the Cultural Revolution. There are over 10,000 national or local-level party laws which have been passed by the Party Conference and enforced by the CDI to ensure the Party acts in accordance with established rules. It is true that the local CPC authorities - and particularly their leaders - have played an important role in promoting party policy in the judicial field. Furthermore, judges are enforced by professional bodies (such as the CDI, CPLG and CDIG) to behave in accordance with the Party's policy, and according to disciplinary guidelines.

Therefore, to presume that the Party's supervision over the judiciary is based purely upon political control, and hence to suppose that the CPC is an outlaw regime or privileged authority over law, is somewhat arbitrary. If the Party's control over the judiciary seems partial and unjustified, then it will produce nothing, legitimise nothing, contribute nothing, protect nothing, nor privilege anyone in the CPC's favour. In fact, as judges told me in the interviews, the CPC will not normally voluntarily involve itself in the judicial supervision process unless it is requested by a lawsuit party or member of the public in certain circumstances.

My research indicates that the Communist Party of China enjoys far more public trust than judges; possibly a continuation of Confucian tradition which prefers the use of the most powerful public bodies to resolve problems and disputes (see Chapter 3.1). In fact, to me, one of the key aspects of Confucianism is that the theory strongly argues that powerful men have a duty to 'look after' the public. Such a view held amongst the public gives rise to the belief that if they have a problem; they should take this problem to 'powerful men' to be resolved. Judges may feel dejected when a considerable number of people circumvent the judiciary and go directly to the local Communist Party to arbitrate their disputes. In accordance with contemporary Chinese social characteristics however, there is perhaps no better way until

judges' public credibility can be dramatically increased. As such, it appears that a Chinese style of rule of law – at least in the foreseeable future – should not and cannot exist without the Party's leadership.

However, a considerable area which must be addressed and taken into account in further reform is how to ensure that the Party's role in the judicial field always follows systematic rules, even such rules made by the CPC itself. A further issue to consider is how to ensure that the nature of the relationship between the CPC and the judiciary does not appear to resemble political control. Therefore, it seems that China's ongoing judicial reform towards greater rule of law not only depends on the reform of the judiciary, but also to a great extent on the evolution of the Communist Party itself. It seems that judicial reform in China requires some reform of the operation of the CPC's decision-making process relating to the judicial field. Therefore, several questions arise regarding constitutional reform; how can the CPC evolve to allow judicial power to become more separate from other public powers? At the same time, how can such an evolution continue to permit the Party to maintain its position of leadership over the judiciary? How can this be done in such a way that promotes an environment of judicial independence rather than one of supervision and political control? Of the course the key to answer such questions is to consider how to develop the constitutional links between the Party and judges.

The research has illustrated that economic development has advanced far more than the development of rule of law over the past three decades (see Chapter 1.1 & 3.3). It seems that over this time, judicial reform policies have not been as clearly or decisively implemented as economic reform policies (for example, the limited implementation of the change from presumption of guilt to the presumption of innocence in 1996). My research indicates that such an unbalanced development of economy and judiciary is no accident. This can be

observed from the formation of the Politburo.

The Politburo of the CPC is the *de facto* ‘Ruler’ of China. The Politburo is comprised of people who are both the most senior party members and also holders of important posts in state organs. Together, these people make decisions on how to develop China in broad terms, and their decisions affect all aspects of life in China. In the past decades, the members of the Politburo are normally a group of senior members who are legislative or executive officials or nationalised industry CEOs. Such a configuration seems to prove that the Politburo has placed most of their efforts in developing political and economic principles in order to improve government efficiency and social welfare. No judicial officials have been involved in the Politburo in the last two decades. Hence, it is no surprise that development towards rule of law lags far behind economic development in China. It seems that developing judicial principles have not been considered as important as developing economic and political principles by the CPC leadership. In addition, even if the Politburo included judicial officials, judicial power would still be highly mixed with other non-judicial powers.

Therefore, in order to reveal the determination of the CPC in developing justice and promoting judicial reform, perhaps the Party should establish a ‘Legalburo’ that is separate from the Politburo. The ‘Legalburo’ should be formed of experienced Party member legal professionals⁶¹ in technical, non-management roles, together with members of the Standing Committee of the Politburo⁶², and it should be chaired and managed by the Secretary-General of the CPC.

The fundamental roles of the ‘Legalburo’ would be to operate as the highest judicial authority, supervise all judicial officials and establish judicial principles. More importantly, the ‘Legalburo’ shall be the only party body which exercises ‘leadership’ over the judiciary,

⁶¹ i.e. SPC senior justices who are also experienced Party members

⁶² ideally not involving any ordinary members of the Politburo or lower committees

and the method of implementing such leadership should be undertaken by making common legal principles that hold widespread approval. Furthermore, these legal principles must not resemble a form of political control.

If the “leadership of the Party” refers to the Party’s Constitution, acts, discipline and policies, then the Party’s laws should be considered by judges to have the same authority as state law (laws adopted by the NPC). Consequently, it is particularly important that the Party-made law or policies do not contradict state laws, and vice-versa. If there appears to be a contradiction between state law and the Party’s law and policies, then judges reach an impasse. Simply, it is not be permitted for judges to circumvent the authority of the Party’s law and policies, just as it would not be permissible for judges to break a point of state law.

Furthermore, every procedure law concerning public decision-making or actions should specify the actual role of the CPC. Giving the Party, judges and public a clear picture of how the Party is permitted to ‘supervise’ the judiciary, and what the procedures of such supervision are. This may still seem to resemble political influence over the judiciary, but for the transitional Chinese culture, it may appear perfectly acceptable. What is of prime importance is how the CPC can really illustrate to the public that political interests are not taken into account in judicial supervision.

My findings in Chapter Seven show that in a single party state, it is not necessary to separate the ruling party’s law, policies, and disciplinary functions from the state laws and local parliamentary acts. In fact, it is better to set them together, in order to build a non-contradictory and specific integrated body of rules. Therefore, it is of significant importance for the CPC and the NPC to merge their Acts together to create a universal and codified set of laws, which would go a great way towards establishing a greater authority of law in China. In fact this can be achieved by describing the law in clear and straightforward terms, and in

accordance with established reality. By doing so, this may also help China develop a greater public respect for law itself – the public are never likely to hold a great respect for law if it is too far-fetched from reality.

The CPC, unsurprisingly, is the key agent in engaging China's legal reform. The research illustrates that in a single party state, the Party should not simply be considered as a political party, but the *de facto* sovereign. Hence, the Party should come under constitutional law and be a part of law. Law in a single-party state should clearly describe the role of the Party in every public function and ensure that there are not any contradictory points within the law. The judiciary shall only be supervised by and answerable to such law. Furthermore, the judiciary should enforce the Party's behaviour within the limits of the law, even if such law originates from the party itself. In addition, the Party shall only supervise the judiciary via establishing legal principles, rather than overseeing and intervening in the day-to-day operation of the judiciary.

8.5 - Improving the judicial environment (courts' administration, management, funding and judges' remuneration)

If constitutional reform takes place, it will naturally require reform to change the current judicial environment. In addition, without improving the judicial environment, it is hard for constitutional reform to take place. Currently in China, the judiciary is effectively operates in the same way as any other government department. As a result, the court leaders who are normally experienced senior judges, have to spend a great amount of time dealing with bureaucratic matters. As such, they are often unlikely to hear cases, and this seems to be a significant waste of human resources within the court system. It seems that the current judicial environment has diverted experienced judges' work away from judicial roles towards administrative duties. As judges told me in the interviews, work such as managing the courts finances, logistics or performing administrative functions detracts from judges performing their genuine judicial duties. The judiciary may find it difficult to find time for self-improvement.

Furthermore, funding of the courts is highly sourced from the local governments, and this has resulted in an uneven development of courts in different parts of the country. Moreover, court leaders are more likely to attempt to maintain a good relationship with the local government in order to gain more funding. Local governments commonly use local state-owned companies to raise revenue, and therefore the local courts, government and state-owned companies are all financially linked together. Such links can easily result in 'local protectionism', whereby the courts, government and state-owned companies cooperate over a great number of issues. This is unlikely to engender further economic development. There is the potential for an uncompetitive and unfair commercial environment, simply because local state owned companies are effectively indirect paymasters of the court. Furthermore, if a

lawsuit is brought against the government, there is the chance the result will not be entirely fair and just, due to the unintentional yet inherent bias within the court in favour of its paymaster, the local government. In fact, even if the court is impartial, it may still be difficult for the public to believe it is so.

Therefore, reform intended to improve the judicial environment should be concerned with what judges' duties actually are, and who should take responsibility for supporting judicial administration and other bureaucratic matters. Most importantly, how can judges gain fiscal independence? Perhaps it will be better if the highest judicial authority (such as the SPC) could directly exercise power vertically downwards over all of the courts' financing, including the remuneration of judges. However, the SPC would perhaps not possess the human or fiscal resources to exercise such direct control over so many courts. My research expressed such a concern, and it seems that within a short time, the SPC should attempt to secure enough funding and resources to exercise financial control over all presiding judges' remuneration at the very least. This is because the presiding judges have the principle role in making judicial decisions⁶³. There are over 200,000 judges in China, but the number of presiding judges is significantly less than this. It is possible for the Supreme Court to adopt direct responsibility for all of these presiding judges' remuneration, if nothing else.

Therefore, increasing judges' judicial competence should involve the separation of the principal judicial offices (presiding judges, and those judges sitting on the CAC), from the other court managers and staff (those responsible for administration & finance). The principal judicial officers would be solely concerned with dealing with cases, allowing them to maximise their time and priorities on judicial duties. Their remuneration would be set and paid directly by the SPC, the central government, or the Central CPC Committee, but it must

⁶³ It is arguable that presiding judges are the real justices in China

be ensured that the local government would have no bearing on the setting of judges' remuneration.

Conversely, court managers and officers would be solely concerned with non-judicial administrative and bureaucratic matters, such as financing, logistics, administration, security and so forth. They would form the basis of what would be a 'Court Service', responsible for providing everything about the court service except the judges themselves. This type of reform should not affect the current operation of the SPC. The SPC would continue to focus on development of policy, manage the principal judicial officers, conclude high-profile cases, and if necessary involve itself in legal education.

Judges' remuneration seems too low when put in context with their significant responsibilities that come with office. It seems that it is very reasonable for judges to be able to earn at least a comparable salary to that of lawyers. This is an important factor to serve judicial independence. However, this may be difficult for the Chinese government to arrange as the financial resources are perhaps not yet available. Furthermore, judges' status is currently no different from any other government official, and if the Communist Party arranged to pay judges more, this could potentially lead to all government officials asking for higher salaries. One possible solution to these problems could be to allow senior judges to involve themselves in law school education, and therefore have access to other legitimate sources of income. If constitutional reform takes place, then the 'Legalburo' will be the highest judicial authority, and all principle judicial officers, judicial training, financing, discipline and promotion shall be organized, supervised and managed solely by the 'Legalburo'.

8.6 - Reforming the system of judicial appointments

Whether or not constitutional reform takes place, the current judicial appointment system requires reform in order to increase judges' ability. The current system requires candidates to be at least 23 years old, with no legal experience as long as they have passed the NJE. The NJE was created in 2002, and for a long time was considered by many Chinese legal scholars as a great leap forward in judicial reform, and a significant success in developing legal professionalism. However, my research shows that after six years of practice (2002 - 2008), the exam has suffered many difficulties in functioning as a key stage for judicial appointment. Perhaps it is too critical to compare the NJE with the Imperial Examination of Confucian China (see Chapter 3.1). However, as the evidence collected in this research shows, the NJE is an examination that does not really test relevant knowledge and skills. The NJE is open to every Chinese citizen, and is characterized as being more 'eccentric' than difficult. The content of the NJE does not really test a candidates' ability to analyse legal principles but their ability to recall facts. Furthermore, it seems that the knowledge tested by the NJE differs greatly from what is taught in law schools. Combined with the judiciary and legal establishments facing an increasing lack of manpower (see chapter 4.2), law school graduates are unlikely to enter employment as legal professionals. By the end of 2006, China had over 900,000 law students. However, the chance for law graduate students to pass the NJE has been little over 10% since 2002. In addition, law school graduates have no obvious advantages over applicants who graduated in other subjects. As such, it seems that the NJE does very little to develop legal professionalism in China.

As we have seen, legal scholars have argued over the need to reform the NJE for years (see Chapter 4.3). The first difficulty with the NJE is that the number of legal professionals in China is woefully inadequate. There are only 8 lawyers for every 100,000 people. Perhaps

becoming lawyer should be made more of an attainable professional aspiration. This can be achieved if that the content of the NJE and the education of law school teaching is married together. Law school graduates should then find that passing the NJE would become far more within their grasp. The NJE need not be open only to law school graduates, but it should test knowledge which bears fundamental similarities with legal school education. The content of the test should not consist of such wide and far-reaching knowledge as it currently does. The test should focus on one's ability to understand and analyse legal principles.

The second difficulty is that current judicial appointments rely heavily on the NJE, and do not benefit from an established system of vocational training. Applicants who have passed the NJE only do very short and informal training in the real legal world. In fact, compared with the old appointment system⁶⁴, one of the greatest drawbacks of the current NJE appointment system is that it actually reduces the demand for aspiring judges to demonstrate experience in the real world. It seems that there should be a long period of practical experience before appointment. Over the past decade, legal scholars have criticised the fact that former military officers could become judges, stating that it is a very unprofessional means of appointment. However, since most of the former military officers have been working in the courts for more than ten years before they were even appointed as presiding judges, these criticisms are unfair and unjust. As I have stated many times, in the interviews, judges – and particularly the senior judges – appear more than sufficiently qualified to me. They are not law graduates, but no law schools existed when they studied. They do not speak English, but why should they? They do not know much about Western or Chinese legal theories and philosophy, but are these things important when dealing with most cases? What they do have is a great and unmatched experience in understanding the principles of law, its application, and dealing

⁶⁴ retired military officers → experience as court staff for more than ten years → interview with senior judges → judicial training inside the court → president of the court nominates individuals for election as a judge

with court cases. Clearly, practical experience within the legal system is one of the most important aspects of developing a professional and capable judge.

Hence, I would like to suggest that some of the previous incarnations of the appointment system are worth bringing back into use. A formal probationary period should be established, replacing the important role currently held by the NJE, during which there should be a systematic oversight from senior judges to measure aspiring judges' judicial abilities. There is still a necessity for an exam within the appointment process, but it should no longer be the sole means of testing one's ability to become a judge. Therefore, perhaps it would be better that people who successfully pass the NJE must practise as clerks, judge's assistants or as a trainee judges for a reasonable amount of time. During this, CAC members and other presiding judges would also assess the individuals' judicial ability. This would be undertaken by a detailed, systematic and open procedure. Candidates must pass the assessments in order to become fully-qualified and operational judges.

A further difficulty is that the NJE has a better pass rate amongst younger people, and the current judicial appointment requires a minimum age of only 23. However, China has a cultural respect for wisdom with age, and decisions made by young judges may not be easily accepted or respected by lawsuit parties. In addition, dealing with cases is likely to require judges to have extensive life experience in order to understand and relate to difficult issues in many cases. Therefore, every judicial applicant should have a considerable number of years experience as a legal professional in the Chinese justice system before they can successfully apply.

It seems that China's experience in developing legal professionalism has illustrated the fact that judges' professional skills cannot simply be measured through an exam. Judges do not necessarily require a great memory and knowledge of the widest areas of legal and historical

facts. The most important knowledge that judges really need to possess is a clear understanding and capability in analysing legal principles. If constitutional reform takes place, when the Party's law and State law is amalgamated, judicial exams should test a considerable amount of knowledge relating to the Party's law, as well as state law. Judges must understand and answer to legal principles that consist of both Party and state law.

8.7 - Conclusion

It seems that China is still in a very early stage of developing the idea of rule of law. China's experience suggests that for judges to simply pass a difficult examination, spending great amounts of effort dealing with individual cases and following the law is not enough. It is important that when judges deal with cases, they should be perceived by the public as having correctly followed law.

Without such conditions, it is more likely that judges will lose public credibility, and without public confidence, judicial supervision appears necessary. Therefore, a vast channel for non-legal authorities to engage in judicial supervision has been established to ensure that there is a strict supervision of judges in order to ensure that if they do not follow the law, they will be punished. The purpose of this is to engender public confidence in the justice system. However, at the same time, judicial supervision also creates the perception amongst the public that judges are highly subject to outside influence from a variety of extra-judicial sources. There is a great need to consider how judicial supervision and judicial independence can be better balanced in China. It seems that a far more effective way to supervise judges would be to do so with very specific law and authority of the court appeal system.

Therefore, law itself must act as a set of rules, forcing judges to always follow specific points of law, and limit judges' judicial discretion to a reasonable degree. However, it is difficult for law to act as a set of rules. For many people, it seems that law is worth little more than the paper it is written on. If law is written with the emphasis placed on the use of beautiful and eloquent language, vaguely and idealistically describing what the world should be, then law itself will seem too distant from reality for most people. As such, law loses public respect and obedience. Law should be made to be specific and systematic, describing exactly what the limits and rules are in all relevant aspects of society.

China currently faces a long and complex journey towards greater rule of law. Moreover, in the strive for greater judicial independence, China can look towards very few contemporary examples in other countries to see how to establish greater judicial independence in a socialist state. However, there are many beneficial reasons for China to develop rule of law. China is already part of the global village and plays a major economic role. The goals of further developing the economy, increasing good governance, controlling corruption, reducing social instability and furthering social harmony provide more than adequate justification. It seems that China has no choice but to strive for greater rule of law in the future.

China's rapid economic growth has illustrated that a market economy can thrive in a single-party state. Therefore, this research presumes that achieving greater rule of law without a Western-style democracy within a single-party state is also possible. Western history demonstrates that a certain level of peaceful evolution, in which society transforms from an absolute monarchy to a constitutional monarchy, can occur. Therefore, there is a good chance that China can evolve from a revolutionary Marxist state to a constitutional Communist state. In fact, in many aspects of society, China is already well on the way towards this transformation (for example, the adoption of individual property rights in 2007). Obviously however, this will take a very long time to complete. My research demonstrates that as long as China maintains stability and continues economic development, a greater level of rule of law can certainly be achieved. For the foreseeable future, the CPC will be the key constitutional agency of China, and they must be subject to *'the Chinese law'* that consists of both Party laws and state laws. It is important that both Party law and state law are married together, free from contradictions and set out in specific detail. Furthermore, judges shall answer to and be supervised by *'the Chinese Law'* and nothing more. Of course, this cannot be achieved over night, and will inevitably take a long time to implement.

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