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Judicial Independence in China: A Comparative Perspective

Abstract. As a general assumption, the presence of an independent, honest and competent judiciary in the so-called rule-of-law countries benefits both the protection of citizens' rights and economic growth. This essay aims to give a definition of the judicial independence principle in the People's Republic of China. To this end the author describes the general understanding of the principle within the Western legal tradition, stressing the importance of different guarantees embraced within given societies. Due consideration is given to judicial tenure and the appointment and salaries of judges.

After an historical introduction this understanding is used as a yardstick to gauge the Chinese system. Not surprisingly, the Chinese judiciary cannot be yet considered independent, notwithstanding the undeniable progress made in the last decades. The subsequent explanation of the achievements of the Chinese judicial reforms are therefore instrumental in explaining that, in the Chinese context, it would be more appropriate to refer to judicial impartiality than to judicial independence. Without political reform, the Chinese judiciary will always be dependent on the legislative, in accordance with Chinese traditions and the country's political structure. In conclusion, even if it is still not possible to use the term "judicial independence", as understood in the West, judges' professionalism appears to be a suitable tool for achieving a more reliable and impartial judiciary.

Keywords: judicial independence, judicial impartiality, People's Republic of China

I. The general understanding of judicial independence

The principle of judicial independence has shifted from being a feature of the separation of powers doctrine to become one of the characteristics of the rule-of-law concept. Even though this principle is now enshrined in modern constitutions and the international treaties on the establishment of international courts, it has never been fully defined without controversy.

Notwithstanding the concrete difficulties of finding a general definition able to cover different national and international legal experiences, Professor Keith Henderson, one of the leading Western experts on the subject, tried to encapsulate the main meaning of the principle in one of his comparative studies on this topic:

“[Judicial independence] means that judiciary and individual judges are *relatively* free from *undue* interference in the decision-making process and that justice is the norm, not the exception.”¹ (emphasis added)

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¹ Henderson, K. E.: *Global Lessons and Best Practices: Corruption and Judicial Independence*. In: Canivet, G. et al.: *Independence, Accountability, and the Judiciary*, London, 2006. 439 ff., at 445. Among his studies on the topic: *Guidance for promoting Judicial Independence and Impartiality* (USAID/2002); *The Rule of Law and Judicial Corruption in China: Half-Way Over the Great Wall* (Transparency International's Global Corruption Report/2007).

The merit and, at the same time, the weakness of this definition is the inevitable presence of such vague qualifications as *relatively* and *undue*. It is possibly worth asking to what extent a judge should be free to take his own decisions according to law. And what should be considered undue interference? The answers to these questions will vary, dependent on different legal traditions in general and different countries in particular. Therefore, when talking about such principles, we need to specifically think about the scope of the principle itself, or in other words, about the function the judiciary should fulfil within a given society. It is generally accepted that the function of the judiciary is to protect individual rights by striking a balance between public interest and collective rights. To this end, it is commonly assumed that an independent judiciary is therefore needed. Scholars, especially within the Western legal tradition, have so far focused their attention on how to reach such independence, which is considered intimately connected to the well-functioning of judicial decision-making and the court system as a whole.

Aware that the judicial independence principle stems from the Montesquieu separation of powers doctrine, it is not difficult to understand that “undue interference” can easily be exercised by state powers other from the judiciary, i.e. the legislative and the executive. Acceptance of the principle is reflected in so-called “institutional or external independence”, meaning that members of the executive and legislative have a particular responsibility to refrain from giving instructions or seeking to influence the judiciary or the judicial process outside the procedural context where their intervention is provided for.² Hamilton, one of the authors of the United States Constitution, wrote an article in 1788 based on Montesquieu’s reflections, which was to become no. 78 of *The Federalist Papers*. This stated the following:

“For I agree, that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.”³

In other words, a judiciary independent of the executive and legislative was seen as a precondition for liberty. Judicial independence seems to be considered more a principle in the interest of the community, allowing citizens to rely on justice and courts, than a privilege guaranteed in the interest of the judges themselves.⁴

² Andenas, M.–Fairgrieve, D.: *Judicial Independence and Accountability: National Traditions and International Standards*. In: Canivet, G.–Andenas, M.–Fairgrieve, D. (eds): *Judicial Independence and Accountability*. London, 2006. 1–34, 23–24.

³ Available at <http://www.constitution.org/fed/federa78.htm>. Last accessed December 13, 2012.

⁴ Report to the Sub-Commission in 1985 (E/CN.4/Sub.2/1985/18 and Add. 1–6.) as reported in the Report of the Special Rapporteur on Independence of Judges and Lawyers, E/CN.4/1995/39 February 1995, available at <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>. Last accessed December 13, 2012.

Interference from other state powers is not the only way of compromising the role of the judiciary. Judicial independence has two aspects: external (or institutional independence) and internal (or functional independence). The former, as already partly pointed out, is meant to protect the judiciary from undue interference from other public bodies, while the latter refers mainly to the obligations of individual judges and the internal organisation of the court system as a whole.⁵

The main guarantees enshrined in Western systems to protect the judiciary from undue interference concern the system of appointing judges, their tenure and the conditions under which they work (including their salary and pension system).⁶ Selection practices can vary a lot. The civil law tradition is usually known for selecting judges by a competitive exam under a bureaucratic system open to young law graduates. The choice of becoming a judge is often a choice for life. Though different rules and conditions exist for career development, a civil law judge is usually young, selected as a civil servant on the basis of his/her ability and competence. In the common law world the situation is different, with no an immediate choice to head in this direction soon after graduating from university. In most cases, judges are selected from the best lawyers, with a position in the judiciary marking the apex of their careers. The choice may sometimes be a political choice, though different systems have developed different methods in an attempt to avoid arbitrary choices. For instance US federal judges are nominated by the US president “with the advice and consent” of the Senate.⁷

Nevertheless, a common point may be found in the fact that both the civil and common law traditions have deep roots as far as the legal profession is concerned. For instance, in England (where the common law tradition is rooted) attorneys started to be needed because of the growing complexity of the law in the XIV century. Since then, judges have been selected from among the best barristers. The common law approach is very much a practical one based on learning by doing and indeed the starting point of the legal and judicial profession involved young attorneys going to court and learning from older experts. By contrast, the civil law tradition, rooted in Roman law, goes back to the 11th century and the birth of the first universities. Jurists were scholars first, then law professionals (working practically with the law).

Generally speaking, those century-old roots have generated a feeling of respect for lawyers and judges.⁸

⁵ Bartole, S.: Voce Indipendenza del giudice. *Enciclopedia giuridica*. vol. XVIII, Roma, 1990. 1.

⁶ Andenas–Fairgrieve: Judicial Independence and Accountability: National Traditions and International Standards. *op. cit.* 8.

⁷ For a comparative analysis on the judiciary in Europe see Guarnieri, C.–Pederzoli, P.: *The Power of Judges, a comparative study of Courts and Democracy* (English editor C. A. Thomas). Oxford, 2002. 4 ff. As far as the US legal system is concerned see Article 3 of the US Constitution. The selection of judges in England changed recently. The Lord Chancellor, who used to be a member of the judiciary but also the Speaker of the House of Lords and who previously had sole responsibility for selecting judges, saw his role dramatically reduced in 2006. A more independent commission (the JAC) is now in charge of selection when vacancies arise, for more detail see the Constitutional Reform Act 2005, art. 61.

⁸ History naturally teaches us that, at times, legal professions can be seen negatively. The most obvious example is the prejudice against French judges that led to an attempt to limit their creative role in interpreting the law (also for the future) by only allowing them to apply the law. An assumption inevitably dismissed in the coming years.

Nevertheless, judges are expected to be impartial and, to that end, the Western legal tradition instituted a range of guarantees able to make them feel independent. Security of tenure for example means that neither their place of work nor their functions can be changed without their approval. Life tenure is therefore one of the most important features of Western judiciaries. Clearly established in the Act of Settlement for English judges in 1701, it remains a fundamental principle. In addition to establishing that judges can keep their positions “*quamdiu se bene gesserint*” (as long as they behave properly) the same Act goes on to stipulate that they should be well paid.⁹ Security of tenure or fixed terms of office of sufficient duration help guarantee personal independence. Similarly, pensions and salary levels play a decisive role with regard to dignity and resistance to corruption.¹⁰

More recently, global experience seems to show that an independent judiciary also plays a key role in establishing the rule of law,¹¹ protecting human and civil rights (property rights in particular), and correspondingly promoting economic growth.

It has always been assumed that the right to a fair trial is a core principle in a so-called rule of law countries, with an independent judge being considered the best guarantee for a fair trial, as independence is apparently perceived as a prerequisite for an impartial decision. Is this really the case?

Coming back to Keith Henderson’s ideas, it could be of interest to point out that his definition of the judicial independence principle continues by saying that “Impartiality with the justice system is the end goal”.¹² Though judicial impartiality is linked with independence, it is still something different. Historical events in the West contributed to shaping the idea that an independent body is more likely to be impartial, but *a contrario* a dependent body it is not necessarily partial.

II. Judicial Independence in China

Though common ground can be found when developing judicial independence theories, it is obviously dominated by Western doctrine. It is therefore interesting to look at the development of the principle of judicial independence in China, where the legal culture has developed in a quite different way.

⁹ The same principles can again be found in Article 3 of the US Constitution. This states that “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office”, as in many other Western countries.

¹⁰ There are several international legal documents dealing with this topic. These include: *The European Convention on Human Rights* (1950); *UN Basic Principles on the Independence of the Judiciary* (1985); *Syracuse Principles* (1981); *Universal Charter of the Judge* (1999); *Beijing Principles* (1995), *The International Bar Association Minimum Standards of Judicial Independence* (1982), etc.

¹¹ Bingham, T.: *The Rule of Law*. London, 2010. 85.

¹² Henderson: *Global Lessons and Best Practices: Corruption and Judicial Independence*. *op. cit.* 445.

1. *Judicial function in traditional China*

Considering that the Chinese Empire collapsed in 1911, it is necessary to take into account the fact that the separation of powers doctrine was never seen as a feature of the Chinese legal system.¹³ In fact, ever since the Chinese Empire became a centralised Empire (Qin Dynasty 221 B.C.) it has been characterised by the absence of a clear distinction between judicial and administrative functions. Put in other words, the system was run by the Emperor, with the different administrative levels in the hands of Imperial magistrates, who, despite their name, had several functions, one of which was being responsible for the decision-making process. In smaller clans or groups of people this was a function exercised by old and wiser persons. Communities were divided into smaller groups ranging from a family to a wider clan, with a village as the basic unit. Individuals were only important in the context of a group.¹⁴

When referring to Chinese traditional law, scholars are accustomed to talk about two elements, namely the *li* (禮) and the *fa* (法). The Chinese character *li* is usually translated as a “rite”, in reference to Confucian orthodoxy according to which social order and harmony are achieved through polite secular and religious behaviour. The validity of the *li* as a behavioural rule is to be found in certain broad moral principles intrinsically embodied in the rites. In a narrower sense “[*li*] denotes the correct performance of all kinds of religious ritual: sacrificing to the ancestors at the right time and place and with the proper deportment and attitude is *li*”.¹⁵ If the rites represent the material side of moral and virtuous principles, a lack of respect for these rites entails a lack of respect for the rule of virtue, possibly bringing about social disorder. As a consequence the *fa*, the written laws, are necessary to stop disrespectful behavior.

“Lead the people by regulations, keep them in order by punishment, and they will flee from you and lose all self-respect. But lead them by virtue and keep them in order by established morality (*li*), and they will keep their self-respect and come to you.”¹⁶

In other words, repressive laws were considered “a necessary evil” to maintain social order and harmony.¹⁷ Interestingly, this conception of socio-legal order was the result of two different schools of thought, with the rites stemming from Confucian ideology, while the *fa* is derived from the former and antagonistic Legalist school of thought.¹⁸

By and large, the Confucian concept of *li* is based on a highly hierarchical society, with different behaviour patterns prescribed dependent on the age or rank of an individual

¹³ In 1912 Sun Yat Sen attempted to modernise the country in line with Western principles, bringing the Montesquieu doctrine into the Chinese context. However, his efforts never fully penetrated the Chinese context.

¹⁴ MacCormack, G.: *The Spirit of Traditional Chinese Law*. Athens–London, 1996.

¹⁵ Bodde, D.: Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China. *Proceedings of the American Philosophical Society*, 107 (1963) 5, 375–398, 382–383.

¹⁶ *Ibid.* 384.

¹⁷ *Ibid.* 382.

¹⁸ *Ibid.* 382.

within his/her family or his/her role within society.¹⁹ This means that the hierarchical structure results not only in different behavior patterns but also in different privileges, i.e. each individual had different rights and duties depending on his/her role, meaning that *fa* should be equally applied to all people infringing the prescribed rules. By the time *li* and *fa* became the main features of traditional Chinese law (the values of *li* had been incorporated into the written *fa*), “[...] the ordinary man’s awareness and acceptance of such norms was shaped far more by the pervasive influence of custom than by any formally enacted system of law”.²⁰ The relationship between those two elements resulted in the so-called “confucianisation of the law”,²¹ with the spirit and sometimes the actual provisions of the Confucian *li* being incorporated into Imperial legislation. This process allowed the rules prescribed by *li* to attain official status in the form of positive law. On the whole, traditional Chinese law was imbued with Confucian values, not only visible in written law, but in every corner of the administration and Chinese society. For instance, the value of moral Confucian principles was considered so important that the imperial examination for recruiting Imperial administrators was based on the study of Confucian texts, i.e. the civil service examination system used during the Empire to select government personnel used intellect rather than birth as a yardstick.²² This in turn allowed an impartial administration (and therefore judicial administration), even if it was under the strict rule of the Emperor. By and large, the Emperor was in charge of maintaining harmony within the country in accordance with Confucian orthodoxy. The Chinese character 王 (*wang*) makes this concept even clearer: the three horizontal strokes represent the Heaven (the highest stroke), mankind (the stroke in the middle), and the earth (the stroke at the bottom), while the king/Emperor is represented by the vertical stroke, maintaining balance between the three aforementioned components.²³

In order to maintain such a balance throughout the Empire, *wang* was used to select, through the very difficult imperial examinations, magistrates based on merit and the study of Confucian texts. Generally speaking, law developed as a way of maintaining social order and not to protect and define people’s rights against another individual or group. Protection against state acts was not even considered.²⁴

The impartiality of imperial magistrates was therefore important, and their wisdom guaranteed their impartiality.

2. The first appearance of judicial independence: From Sun Yat-Sen to Mao Zedong

A different concept of the administration of justice found its way into China on the arrival of the Western powers in the mid-19th century. Historical events in the Opium Wars period (1839–1842 and 1856–1860) led to a collision of Chinese culture with the legal principles

¹⁹ “The five major relationships of Confucianism—father and son, ruler and subject, husband and wife, elder and younger brother, friend and friend—are instinctive to man and essential for a stable social order.” *Ibid.* 383–384.

²⁰ *Ibid.* 376.

²¹ *Ibid.* 386.

²² *Ibid.* 387.

²³ Szto, M.: Strengthening the Rule of Virtue and Finding Chinese Law in “Other” Places: Gods, Kin, Guilds, and Gifts. *Suffolk Transnational Law Review*, 35 (2012) 1, 1 ff. 7.

²⁴ Bodde: *ibid.* 375–398, 375.

of the Western powers. The Opium Wars were ended by the so-called “Unequal Treaties” with their extraterritoriality clauses such as the following one found in the Chinese-American treaty signed at Wang-hea in 1844:

“Subjects of China who may be guilty of any criminal act towards citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China, and citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul or other public functionary of the United States authorized according to the laws of the United States; and in order to the prevention of all controversy and dissatisfaction justice shall be equitably and impartially administered on both sides.”²⁵

The same applied to any infringement of property or personal rights when one of the parties was a United States citizen.²⁶

This all showed that the Chinese administration of justice was considered inadequate and weak, if not non-existent, and for this reason needed to be aligned with the Western systems. These were the conditions under which the judicial independence principles (司法独立 *sifaduli*) entered the Chinese legal system.

The Unequal Treaties and their extraterritoriality clauses were maintained until the end of the Second World War even though, in the aftermath of the fall of the Empire (1912), the last Qing Emperor and the Nationalist Party (Kuomintang) changed their approach and started looking at the different legal solutions used in the different Western countries with the aim of transplanting into China the ones best suited for modernising the traditional Chinese legal system.²⁷ The major efforts started before the collapse of the Empire and continued under the Republic of China founded by Sun Yat-Sen in 1912 saw Chinese scholars being sent to the West to study Western laws and constitutions. These resulted in a certain amount of progress within the country. Indeed, it was under the leadership of Sun Yat-Sen that the separation of powers doctrine was taken over from Europe and the U.S. and adapted to the Chinese context. Nevertheless, this principle along with other Western laws never really gained a firm footing within Chinese society. The efforts of the Kuomintang, founded in 1926 by Sun but led by his successor Chiang-Kai-Shek, continued, taking a much more worthwhile path in Taiwan where the Nationalists took refuge after the Communist rise. However, even though the so-called “six laws”,²⁸ based mainly on German law, were elaborated as effective legal documents or drafts (that never came into force),

²⁵ Denby, C: Extraterritoriality in China. *American Journal of International Law*, 18 (1924) 4, 670–671.

²⁶ *Ibid.* 671.

²⁷ A Commission for Legal Reform was established in 1903. Among its members Shen Jiaben was considered a leading expert in Western law. For a general introduction of the topic, see Choi, C.: East Asia Encounters with Western Law and the Emergence of East Asian Jurisprudence. In: Tomasek, M.–Muhlemann, G. (eds): *Interpretation of Law in China – Roots and Perspectives*. Prague, 2011. 97.

²⁸ From 1928 to 1947 the Republic of China went through a major legal reform based on the Western model. The “Six Laws or codes” refer to a Constitution, a civil and penal code, a civil procedural code, a penal procedural code and a law on the administration of justice.

they never truly penetrated society.²⁹ Though implementation was weak, the Nationalists' legal efforts left their stamp on the People's Republic of China, founded on 1 October 1949. Nevertheless, the Communist Party under Mao Zedong's leadership took a different approach. Previous laws were considered *bourgeois* and therefore abolished. Without a comprehensive set of laws, Chinese Communist Party (CCP) decisions gained legal status. Nevertheless, the Communist Party accepted, in the first stage of socialism, the instrumentality of law as a way of achieving communism. A court system moulded on the German model was inherited, studied and implemented. It reflected the country's administrative geography: a basic level of courts at local/district level, an intermediate/superior system of courts in each municipality and province, and a Supreme Court at central level.

Notwithstanding the existence of this court system, trials were often held in public, serving as public political/educational lectures. Cadres and activists with the right political attitudes were appointed within the court system.³⁰ Strangely enough, the 1954 Constitution, the first People's Republic of China Constitution, stated that: "[i]n administering justice the people's courts are independent and subject only to the law".³¹ In his 1968 article, Professor Cohen, a leading expert on Chinese law, tried to give an interpretation and some explanation on why the principle was so clearly established in such a different political era—an era in which China lacked the political system necessary in Western eyes for an independent judiciary: above all the separation of powers doctrine. Even if Mao repressive policies during the 1950s were not that clear and strong,³² in light of what happened subsequently, the more plausible interpretation is that when the law is the will of the people and the Party and when article 78 of the 1954 Chinese Constitution states that People's courts shall be subject only to the law, it means that the administration of law shall be subject to the Party as well. Further explanations can be based on the fact that the Party is the only body able to give an up-to-date interpretation of legal rules in accordance with the profound stratification of the huge country and taking account of changing conditions.³³

Such explanations soon put paid to the notion of the so-called "rightist movement",³⁴ which was looking for greater professionalism as a way of enabling the judiciary to gain more independence from the Party. Nevertheless, courts were weak and, especially in serious criminal cases, judges referred cases to their local Party committee for open trials, where decisions were taken according to Party loyalty and policies more than in accordance with legal provisions.

In the main, the guiding role of the party and China's democratic centralism tend to be two major pillars upon which the Chinese legal system has been built.

²⁹ Ajani, G.—Timoteo, M.—Serafino, A.: *Diritto dell'Asia orientale* (East Asian Law). Milano, 2007. 183.

³⁰ Lubman, S. B.: *Bird in a Cage*. Stanford, 1999. 48 and 73.

³¹ The 1954 Chinese Constitution is available at <http://e-chaupak.net/database/chicon/1954/1954ae.pdf>, last accessed December 13, 2012.

³² The Hundred Flowers movement for example made some people think of a society more open to criticism.

³³ Cohen, J. A.: The Chinese Communist Party and "Judicial Independence": 1949–1959. *Harvard Law Review*, 82 (1968–1969), 967, 989.

³⁴ The "Rightist movement" (1954–1957) represents a trend toward professionalism and against judicial erosion through Party control. For a closer examination of the topic see Cohen: *op. cit.* 989.

The subsequent anti-rightist movement was in line with what happened during the Great (or Cultural) Revolution (1966–1976).³⁵

Hostility to the judicial independence principle was so strong that all Chinese administrators and professors who had received their legal education within the Western-style law school founded during the leadership of the Kuomintang were removed from office in an attempt to stop universities talking of a judiciary independent of the Party. Cultural Revolution achievements are listed in the second Chinese Constitution of 1975. In it the judicial function is relegated to one single article which explicitly declares that:

“The Supreme People’s Court, local people’s courts at various levels and special people’s courts exercise judicial authority. The people’s courts are responsible and accountable to the people’s congresses and their permanent organs at the corresponding levels. The presidents of the people’s courts are appointed and subject to removal by the permanent organs of the people’s congresses at the corresponding levels. The functions and powers of procuratorial organs are exercised by the organs of public security at various levels. The mass line must be applied in procuratorial work and in trying cases. In major counter-revolutionary criminal cases the masses should be mobilised for discussion and criticism.”³⁶

The whole court system, almost entirely closed down during the Cultural Revolution,³⁷ was covered by just one article in the 1975 Constitution. The supremacy of the will of the people expressed through people’s congresses at central and local levels, as a corollary to democratic centralism and the leading role of the Party, was thus reaffirmed. Soon after Mao’s death in 1976, the principle of judicial independence acquired a more cogent meaning. Within the articles of the 1978 Constitution the role of the courts was reinstated (Art. 41), though without any direct reference to their independence:

“The Supreme People’s Court, local people’s courts at various levels and special people’s courts exercise judicial authority. The people’s courts are formed as prescribed by law. In accordance with law, the people’s courts apply the system whereby representatives of the masses participate as assessors in administering justice. With regard to major counter-revolutionary or criminal cases, the masses should be drawn in for discussion and suggestions. All cases in the people’s courts are heard in public except those involving special circumstances as prescribed by law. The accused has the right to defense.”³⁸

³⁵ The so-called Cultural Revolution was a 10-year campaign with the aim of establishing Communism. Law was to be removed, but also law schools and the Ministry of Justice. Labour rehabilitation was the tool for removing bourgeois and capitalistic disparities. See Lubman: *op. cit.* 80.

³⁶ See http://www.leggicinesi.it/view_doc.asp?docID=586. Last accessed December 21, 2012.

³⁷ For the purpose of this paper “closed down” means that law schools were closed in the literal sense of the word, as it was seen as the aim of Communist society aims to avoid the use of the law. Moreover, the urban-rural gap, i.e. the disparity in living standards between Chinese people living in the cities and those on the land, convinced Mao of the necessity to send professionals, especially law professors, out into the countryside. As a consequence, the judicial work of the courts was seriously impaired, in many cases making such institution have to close their doors.

³⁸ The English translation of the 1978 Constitution is available at <http://e-chaupak.net/database/chicon/1978/1978e.pdf>. Last accessed December 21, 2012.

3. *Judicial independence in the current Chinese Legal System*

The principle of judicial independence was revived one year after the adoption of the 1978 Constitution, being enshrined in the Organic Law on People's Courts (1979). This set forth that people's courts should conduct adjudication independently and should be subject only to the law.³⁹

In the meantime the court system had been re-established after being closed down during the Cultural Revolution. Generally speaking, China reinstated its four-level system of "independent courts" in line with the country's administrative set-up. At the top of the court hierarchy is the Supreme People's Court (最高人民法院 *zuigao renmin fayuan*) in Beijing, with offshoots at provincial level and in each of the four Chinese centrally-governed metropolises and in the autonomous regions).⁴⁰ Below the Supreme People's Court come the Higher People's Courts (高级人民法院 *gaoji renmin fayuan*). The next lower level are the Intermediate People's Courts (中级人民法院 *zhongji renmin fayuan*) found in rural towns and urban districts, while the lowest level is represented by the Basic People's Courts (基层人民法院 *jiceng renmin fayuan*) at county level. In light of China's huge size and the difficulty to move from one part to another, a further option involves establishing People's Tribunals (人民法庭 *renmin fating*). Their jurisdiction and the validity of their judgments are on a par with those of the Basic People's Courts, meaning that any appeal is heard before an Intermediate People's court.

The diagram below shows the hierarchy. Each court is generally internally divided into several divisions (庭 *ting*): the civil, criminal and administrative divisions.⁴¹ Moreover, there are several specialised courts such as the Maritime Court, the Railway Transportation Court, the Forest Affairs Court or the Military Court of the People's Liberation Army.⁴²

Not surprisingly there is no Constitutional Court in China, as assessing conformity with constitutional provisions is in the hands of the Standing Committee of the National People's Congress, the permanent legislative body. Considering the (very) close link between the Standing Committee (the controller) and the NPC (the controlled), such power has so far only been exercised very rarely.⁴³

In 1982 a new Constitution was adopted, Article 126 of which refers to judicial independence, though in different terms:

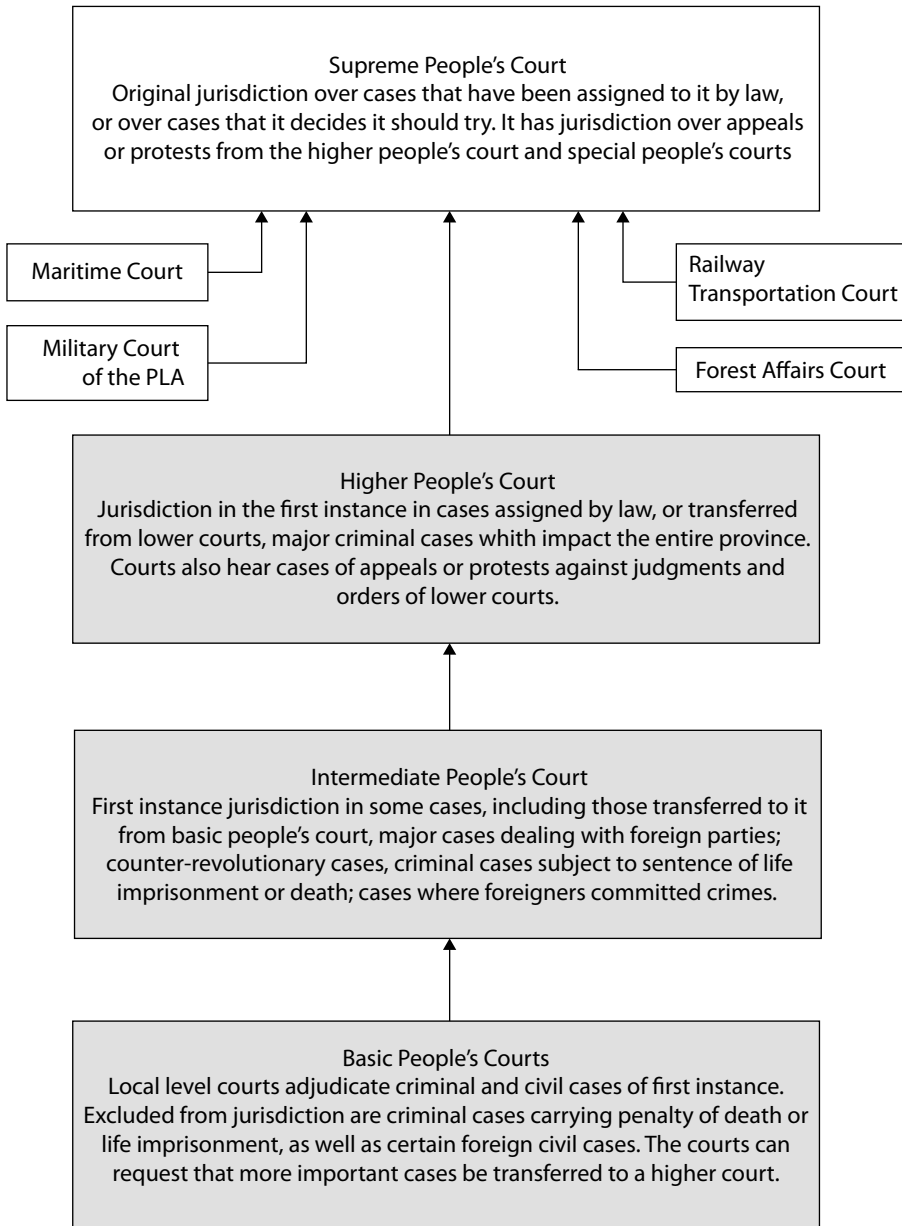
³⁹ Seong-hak, K. M.: *A distant premise: Judicial Independence in the People' Republic of China. Korean Journal of Comparative Law*, 24 (1996), 17., 26.

⁴⁰ The four Chinese metropolises directly under the central control are Beijing, Shanghai, Tianjing and Chongqing; the autonomous regions are: Xinjiang or Inner Mongolia, Xizang or Tibet, Guanxi Zhuang, Ningxia.

⁴¹ Recently many other divisions have been created within the courts of the richest and important Chinese metropolises. For instance the IPR division of the Supreme People's Court is one of the most efficient and popular.

⁴² Picture taken from <http://www.lawinfochina.com/Legal/index.shtm>, last accessed December 21, 2012.

⁴³ See article 67(1) of the actual Chinese Constitution available at <http://www.lawinfochina.com/display.aspx?id=3437&lib=law&SearchKeyword=constitution&SearchKeyword=>. Last accessed December 21, 2012.



“The people’s courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual”.⁴⁴

⁴⁴ Art 126 of the 1982 Constitution of the People’s Republic of China.

In comparison with the article in the 1979 Organic Law on People's Courts, the scope of the article in the 1982 constitution was more moderate. Specifying that people's courts were not subject to interference from any administrative organ, public organization or individual instead left room for interpretation and for such questions as whether the CCP could be considered a public organization? For the sake of consistency between the law and the Constitution, in 1983 the Standing Committee was quick to change the wording, with Article 4 of the Organic Law of People's Courts becoming a copy of Article 126 of the Constitution.⁴⁵

Notwithstanding the wording used in the Constitution and the law, the meaning given to judicial independence in China differed from the Western legal tradition. The first point is that, literally speaking, the Constitution (and the Organic Law of People's Courts as amended in 1983) speaks only of independence of the courts, without specifically referring to any independence of the individual judges. This circumstance has two roots.

First, from a political point of view, the independence of the whole court system is consistent with the democratic centralism view. Secondly, the lack of professionalism led to distrust in judges or, to be more precise, adjudicators. In fact, the Chinese characters used to refer to judges are the following: 审判员 *shenpanyuan*, which literally mean "official of the decision".

Despite the enactment of many Western-oriented laws and several changes in legislation, the court system remains neither independent nor completely trustworthy.

People's congresses remain in charge of appointments at all levels. Combined reading of Article 11 of the Judges Law and Articles 62 (7), 63 (4), and 67 (11) of the Chinese Constitution reveals that the president of each court is chosen and removed by the people's congress at the corresponding administrative level, whereas vice-presidents, members of the judicial committees, chief judges, associate chief judges of divisions and ordinary judges are appointed and removed by the standing committees of the people's congresses at the corresponding levels upon the recommendation of the presidents of those courts. At central level the National People's Congress (NPC) has the power to elect and remove the President of the Supreme People's Court (SPC), while the officials below him (see above) are appointed or removed by the Standing Committee of the National People's Congress in accordance with the SPC president's recommendations. Not surprisingly, court presidents and higher ranking judges were for the most part Party members and, more often than not, the list of potential candidates was provided by the Party itself.⁴⁶ On the other hand, the lack of professionalism allows external and internal factors to have a major influence. For instance, the SPC has to submit an annual report on its work to the NPC, with inferior courts compiling similar reports for the corresponding Local People's Congress to which they are responsible. Probably, the strongest influence over courts is the supervision of their decisions by the respective people's congresses (so-called legislative supervision).⁴⁷ The lack of professionalism has also helped develop the role of the so-called judicial committees (or adjudicative committees, *shenpanweiyuanhui* 审判委员会). In accordance with Article

⁴⁵ Seong-hak, K. M.: *op. cit.* 17, 26. The Organic Law of People's Courts is available at <http://www.lawinfochina.com/display.aspx?id=5623&lib=law&SearchKeyword=people's%20courts&SearchCKeyword=>. Last accessed December 21, 2012.

⁴⁶ Van Rooij, B.: Appendix II China's System of Public Administration. In: Chen, J.-Li, Yuwen-Otto, J. M. (ed): *Implementation of Law in the People's Republic of China*. London, 2002. 323, 331.

⁴⁷ Article 126 of the Constitution.

11 of the Organic Law of People's Courts, these are set up at all levels of people's courts in application of democratic centralism to "sum up judicial experience and discuss important or difficult cases and other issues relating to judicial work".⁴⁸ Several reasons lead to this body being considered a threat for the judicial independence principle.

First, the committee, despite the wording of the legislation, decides cases without any close examination of the relevant facts. Secondly, it is made up of the court president, vice-presidents, presidents of different divisions and the respective vice-presidents; if required, law professors and experts can also take part in the committee. As a consequence, the committee could be considered one of the more professionalised bodies within each court. However, its members seem to act and decide cases in the background and their names and legal reasoning are hardly ever traceable. Even greater fear and a sense of inadequacy is engendered by the annual (random) appraisal within each court. Again, professionalism and a well-established appointment system do not seem the major yardsticks to measure the independence of the judiciary (in contrast to the Western situation), with political loyalty again seeming to be the dominant factor. In the same way, long-term or life tenure is not apparently seen as a guarantee of independence. The Constitution does not provide any clue as far as judges' tenure is concerned. Article 124 only states that "The term of office of the President of the Supreme People's Court is the same as that of the National People's Congress. The President shall serve no more than two consecutive terms", i.e. no more than 10 years.

Even if the aforementioned mechanisms appear to be an obvious violation of judicial independence, they are prescribed by law and their effects have also been positive. The external supervision by the legislative organs and the internal control exercised by the judicial committees have often played a role in stopping or at least influencing illegal behaviour on the part of corrupt or unprofessional judges.

This brings me to the so-called non-systemic external influences such as local protectionism, corruption and 关系 *guanxi*. Local protectionism is amplified in China due to the country's deep stratification and huge size.⁴⁹ *Guanxi* is a typical Chinese word which means "relationship" and can result in a partial decision in favour of a friend or family members. *Guanxi* is a sometimes misleading term, as it can also be used to refer to a socio/personal relationship involving a (perfectly legal) "exchange of favours", especially between businessmen.⁵⁰

Such behaviour can also lead to corruption. The widespread judicial corruption in China is primarily due to a lack of protection, security of tenure and respect for the judiciary, especially in the poorer provinces in the west of the country. This is also due to the fact that during, but also after the Mao era, the "administrators of decisions" (i.e. judges), were often mere civil servants, lacking legal education (often retired Party cadres or retired soldiers). Moreover, the local administration controls not only the appointment and removal of

⁴⁸ See article 11 of the Organic Law of People's Court (last amended 2006).

⁴⁹ The first book in English on this topic is Peerenboom, R. (ed.): *Judicial Independence in China. Lessons for Global Rule of Law Promotion*. Cambridge, 2010.

⁵⁰ Ling, L.: Lost in Translation. "Rule of *guanxi*" an Alternative to the Rule of Law? In: Tomasek, M.–Muhlemann, G: *Interpretation of Law in China—Roots and Perspectives*. Prague, 2011. 163–174.

judges, but also their funding, with wages generally low or in line with those of civil servants.⁵¹

Finally, such a weak and controlled judiciary has often found itself unable to face up to public pressure exerted by the mass media.⁵² Instead of defending its decisions, it is liable to adapt them to take account of public opinion, thereby underlining its subservience. This is obviously no basis for Chinese courts to gain (international) recognition or respect as independent judicial institutions.

The leading role of the Chinese Communist Party, affirmed in the Preamble of the current Constitution, still creates uncertainty as far as its interference in the judiciary is concerned. In many cases, Party cadres are corrupt and behave out of personal interest, though at other times the Party intervenes to push through its policies where local protectionism or illegal conduct are out of line with national policies. With the Judges Act adopted in 1995, the “administrators of decisions” acquired an upgraded status and, overall, a minimum standard of professionalism became mandatory. In particular the law now referred to 法官 *faguan* and no longer to *shenpanyuan*, meaning that judges were no longer “administrators of decisions” but now “officials of the law”. The aim of the new Act was “to enhance the quality of judges, and to realize the scientific administration of judges”.⁵³

Chapter IV of the Judges Act set forth minimum qualifications for judicial personnel to be appointed as judges.⁵⁴

Even if a minimum standard of professionalism was prescribed, judges were treated within each court in the same way as civil servants. In accordance with Chapter VII of the Judges Act, judges are similarly divided into twelve grades.⁵⁵ Generally speaking, those transferring in from non-legal positions would start at a rank commensurate with their seniority. Promotion up the ranks then occurred based on years worked and correct “political attitude”—to the evident detriment of any meritocratic system in favour of professional, honest, and competent judges.⁵⁶ The courts thus have a strict inner hierarchy which is reflected at each court level. There are twelve ranks of judges divided into four categories, each in turn consisting of different divisions needing to be passed through to reach the

⁵¹ Hawes, C.: Improving the Quality of the Judiciary in China: Recent Reforms to the Procedures for Appointing, Promoting, and Discharging Judges. In: Russell, P. H.–Malleon, K.: *Appointing Judges in an Age of Judicial Power: Critical Perspective from Around the World*. Toronto, 2006. 395–419, 413–414.

⁵² Liebman, B.: Watchdog or Demagogue? The Media in the Chinese Legal System. *Columbia Law Review*, 105 (2005), 1.

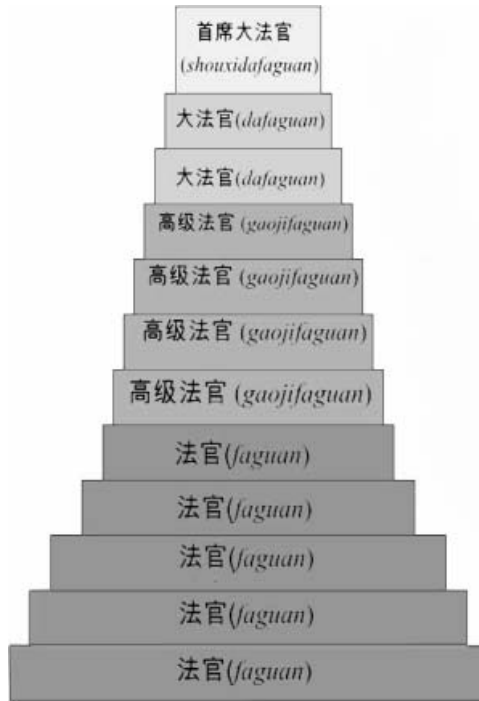
⁵³ Article 1 of the Judges Act of the People’s Republic of China as originally adopted in 1995.

⁵⁴ Article 9(6) Judges Act. Under it, a judge must:
 “...have worked in law for at least two years in the case of graduates from a four-year course in the law specialty of an institution of higher education or a graduate from a four-year course in a non-law specialty of such an institution who possesses the professional knowledge of law, and to have worked in law for at least three years in the case of the said graduate to be appointed judge of Higher People’s Court or the Supreme People’s Court; to have worked in law for at least one year in the case of a person holding a Master of Law degree or Doctor of Law Degree; or a person holding a master’s degree or doctor’s degree of non-Law specialty who possesses the professional knowledge of law, and to have worked in law for at least two years in the case of the said person to be appointed judge of a Higher People’s Court or the Supreme People’s Court.”

⁵⁵ Article 18 Judges Act.

⁵⁶ Hawes, C.: Improving the Quality of the Judiciary in China: Recent Reforms to the Procedures for Appointing, Promoting, and Discharging Judges. In: Russell–Malleon: *op. cit.* 398.

upper level. The four categories are: the ordinary judges (法官 *faguan*) at the bottom of the pyramid, the higher judges (高级法官 *gaojifaguan*), the grand judges (大法官 *dafaguan*) and finally the 首席大法官 *shouxidafaguan* or chief judge.



Interestingly, the composition of each court is not homogeneous, with the upper courts made up of judges picked from the higher ranks, while the basic courts are composed of lower judges. Generally speaking the higher the rank, the higher the professionalism should be, i.e. the degree of professionalism differs between the lower courts and tribunals and the upper courts.⁵⁷

As a consequence, lower courts are usually keen to follow upper court recommendations and advice. In some parts of China it is still quite frequent for lower courts to ask upper courts how to deal with a legal matter, thereby undermining the appeal function.

All these are inevitable consequences of a socialist system ruled by democratic centralism, though the roots lie in China's history as a centrally-run Empire.

4. The inevitable judicial reform

In the mid-1990s the need for a more sophisticated legal system able to deal with complicated issues was strongly perceived by Chinese leadership, especially as the country's modernisation was apparently following the Western path and economic interests were

⁵⁷ The hierarchy is illustrated on a Chinese document (*zhonghua renmin gongheguo faguan dengji zanxingguiding*) issued on December 12, 1997 by the CCP, the Ministry of Human affairs and the Supreme People's Court.

involved. Legal reforms in line with the rule-of-law principles were required not only out of an expectation for more democratic policies, but also to allow the People's Republic of China to become a member of the World Trade Organisation (WTO).

The country was quick to follow its international obligations and the tangible move resulted in the third Constitutional amendment in 1999, introducing into the Chinese context the "socialist rule of law" (法治 *fazhi*).⁵⁸ This "constitutional promise"⁵⁹ allowed on the one hand the admission of the PRC into the WTO, while on the other hand stimulating further legal and judicial reform.

In 1999 the Supreme People's Court issued the first five-year judicial reform plan for the period 1999–2003. This document, as well as the following ones (the second program (2004–2008) and the third one (2009–2013)) is useful for understanding the weaknesses of the Chinese legal system.⁶⁰

By and large, the focus of the reforms was much more on improving the professionalism and status of the judiciary than on changes in policy or the political relationship between the different state functions.

As a consequence of the first plan, the Judges Act was amended for the purpose of introducing a national judicial examination (国家司法考试 *guojiasifakaoshi*) for all candidate judges. Article 12 of the amended Judges Act now stipulates:

"Persons to be appointed judges for the first time shall be selected, through strict examination and appraisal, from among those who have passed the uniform national judicial examination and who are the best qualified for the post, in conformity with the standards of having both ability and political integrity."⁶¹

Moreover, as a way of facilitating more meritocratic career development, sub-section 2 of the same article states that "Persons to be appointed presidents or vice-presidents of People's Courts shall be selected from among the best judges and other people who are best qualified for the post".

In 2001 a code of conduct was issued by the SPC with the aim of stopping judges behaving unprofessionally, for instance meeting parties and lawyers outside the courtroom, behaving rudely or dressing improperly. The gravity and persistence of such behaviour led to the SPC compiling a new code of conduct which came into effect on June 2010.⁶² The Chinese judiciary needs to become more aware of its status and role within the society, even if such change will not take place overnight.

⁵⁸ Article 5 as amended in 1999 now establishes *inter alia* that "The People's Republic of China governs the country according to law and makes it a socialist country under the rule of law".

⁵⁹ Ajani, G.: *La Rule of Law in Cina (The Rule of Law in China)*. In: *Mondo Cinese*, (2006) 126, available at http://www.tuttocina.it/mondo_cinese/126/126_ajan.htm. Last accessed December 21, 2012.

⁶⁰ The first two 5-year plans are available in Chinese at www.lawinfochina.com the third one in available also in English. Last accessed December 21, 2012.

⁶¹ Article 12 of the Judges Law available at <http://www.lawinfochina.com/display.aspx?id=1861&lib=law&SearchKeyword=judges&SearchCKeyword=>. Last accessed December 21, 2012.

⁶² Code of Conduct for Judges, issued on 12/06/2010 available at <http://www.lawinfochina.com/display.aspx?id=8609&lib=law&SearchKeyword=code%20of%20conduct%20for%20judges&SearchCKeyword=>. Last accessed December 21, 2012.

Other relevant reforms can be pointed to. Recently a joint Notice issued by the Organization Department for the Central Committee of the Communist Party of China and other institutions (among them the Supreme People's Court and the Supreme People's Procuratorate) established that no judge or prosecuting attorney who has not reached retirement age shall be forced to take early retirement and depart from the position.⁶³

Such a conception of tenure appears to be seen more as a tool promoting the efficiency of the system as a whole rather than as a guarantee of independence. Moreover, in 2011 the so-called "guiding case mechanism" was formally established to "unify the application of law, serve as guidance for the adjudicative work of lower courts, enrich and develop legal theory".⁶⁴

Several other reforms are currently being introduced to improve the judiciary's professionalism, aimed at impartial decisions being achieved throughout the huge and stratified country. These can hardly be discussed in just one paper.

III. Concluding remarks

Discourse on judicial independence in China started in the West, in expectancy of major political changes within the country. Though we have seen China changing some of its legal and economic rules, it has still managed to achieve its unprecedented economic growth without an independent court system and without a well-established system of property rights.

There can be no doubt that there is a certain inconsistency in China between "law on paper" and "law in action". The PRC remains a one-Party state dominated by principles such as democratic centralism and the leading role of the Chinese Communist Party. Inevitably, the concept of judicial independence appears to be an oxymoron in such a country, but if the point of observation shifts from general considerations to more concrete situations, it is possible to argue that a certain degree of impartiality exists. Not surprisingly, this is found in cases which are not politically sensitive. Nevertheless, it does happen and is a circumstance which must be taken into account.

Such impartiality occurs in a context of lacking judicial independence, at least from a Western perception. For instance there is no specific legal provision providing judges with a guaranteed income and thus ensuring their dignity and making them less susceptible to corruption or public opinion. This important issue has however recently been considered, and the possibility of centralising court funding instead of leaving it up to local administrations has been discussed. Similarly, judges have no judicial review power to challenge Chinese legislation for breaching constitutional principles. A mere glance at the court structure diagram shows that the People's Republic of China has no Constitutional Court. Judicial functioning is openly declared to be subordinate to the legislative even if the

⁶³ Notice of the Organization Department for the Central Committee of the Communist Party of China, Supreme People's Court, Supreme People's Procuratorate, and Ministry of Human Resources and Social Security Regarding effective Resolution of Early Departure from the Position and Resignation from the Job by the Judges and Prosecuting Attorney, promulgated 05/12/2010, available at www.westlawchina.com.

⁶⁴ Gazette of the SPC, Issue 12, 2005 as quoted by Zhenbao, J.: Judicial Interpretation and the Envisaged Guiding Case Mechanism in Mainland China. In: Tomasek, M.–Muhlemann, G. (eds): *op. cit.* 143 s.

Court system is supposed to be independent of all administrative organs, public organizations and individuals.

In other words, though the term *independence* leaves room for a variety of interpretations and questions, it would perhaps be better to focus on the final aim, as pointed out by Keith Henderson, that ‘impartiality with the justice system is the final goal’.⁶⁵ Looking therefore at decisional impartiality rather seeking an independent system of courts could be a better result-oriented approach. In the author’s view this would allow a better dialogue between central-local policies and legal culture. As was the case during the Empire, a study of Confucian textbooks proved the best guarantee for appointing worthy administrators through the imperial examination system. Similarly, a legal culture deserving its name would be the best guarantee for enhancing the administration of justice. The recent attention paid to judges’ professionalism appears to be in line with this aim. The recent political rhetoric does not seem to be shifting in the direction of Western-style judicial independent principles, instead requiring courts to follow the “three supremacies”: that of the CCP, that of the interests of the people, and that of the Constitution.⁶⁶ Focusing on impartiality rather than on independence would allow a more pragmatic approach, immediately correcting such non-systemic problems as local protectionism, corruption, media influence, and *guanxi*.

As far as tenure is concerned, in the absence of any specific provision considering life tenure as an irrefutable guarantee for strengthening the status of the judiciary, the central government is continuing its search for a stable and more consistent legal system. It nevertheless realises that too much flexibility and mobility, while in line with the flexible solutions of the system itself, will not help boost people’s trust in the judiciary and promote a continuous, consistent, and rational development of the court system itself.

Nevertheless, impartial judges and impartial decisions are now needed to make the system reliable. The Chinese approach seems cautious, but over all in line with Chinese traditions.

For this reason, people in the West should, instead of waiting for political reforms (which for the time being appear to be out of the question), try to understand that “ritual lies in law and law in ritual”.⁶⁷ A dialogue on judicial independence in the Western sense of the term is in my view impossible at the moment. It is probably much more useful to talk about professionalism among judges. In my view, intellectual professionalism could pave the way towards impartial justice and eventually, over time, lead to a different discourse.

⁶⁵ Henderson: *op. cit.* 439.

⁶⁶ Liebman, B.: China’s Courts: Restricted Reform. *China Quarterly*, (2007) 191, 620.

⁶⁷ Szto, M.: *op. cit.* 29.