

January 2007

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Recommended Citation

Jianli Song, *China's Judiciary: Current Issues*, 59 Me. L. Rev. 141 (2007).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol59/iss1/6>

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CHINA'S JUDICIARY: CURRENT ISSUES

Judge Jianli Song

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CHINA'S JUDICIARY: CURRENT ISSUES

*Judge Jianli Song**

I. INTRODUCTION

Since 1978, China has been engaged in a major reform program of economic modernization and growing openness to the outside world. The movement towards a market economy has resulted in impressive economic growth. It has also led to social change, including increasing pressure from segments of the population for greater participation in decision making and respect for human rights. The Chinese government is taking steps towards the rule of law. The legal reforms being carried out go beyond the economic sphere, and also gradually will affect the relationship between individuals and the state. Dialogue with the international community has broadened and deepened as well. In December 2001, China's accession to the World Trade Organization further stimulated China's reform of its legal systems and its interaction with international standards and norms.

In this climate of prudent, cautious openness, China is beginning to build the platform for a better judicial system to protect lawful rights and to improve people's confidence in social fairness and justice. Two elements are key to this objective: (1) movement toward a rule of law to codify and enforce rights, and (2) development of a civil society that provides checks and balances between citizens and government.

There are still some shortcomings in the Chinese judicial system, however. The problems for China here are immense. The fundamental challenge is to establish a fair social order with an independent judiciary and support for human rights and economic development.

Today, I shall focus on a brief review of characteristics of the traditional Chinese judicial system, the current Chinese judicial system and practice, current judicial reforms in China, and principal challenges to judicial independence and impartiality in China.

II. A BRIEF REVIEW OF THE CHARACTERISTICS OF THE TRADITIONAL CHINESE JUDICIAL SYSTEM

In traditional China, the government structure was divided into two levels: (1) the central government, and (2) the county governments. At the higher level, the emperor was always the paramount authority when legal disputes or other issues were involved.

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County officials were at the end of the power network by which the whole country was ruled. These county government officials were appointed by the central government, and they were responsible for collecting taxes, maintaining social stability and resolving disputes. The most distinctive characteristic of the structure of the traditional Chinese local governments was that there was no arrangement whatsoever for a separation of powers.

The concentration of powers was also obvious in the judicial process. The judges were not lawyers, and they usually did not specialize in legal studies. When they dealt with disputes and cases—mostly what we would label civil cases today—there was no predictability of law. What they were applying was a combination of law, moral requirements and community customs. Because of their background of knowledge, in order to support a certain decision in a case, the judges always relied on resources such as the teachings of Confucius or other historical works, which had no strict legal implications.

After the mid-eighteenth century, despite China's increasing contact with the West and the constant clashes with Western law during the process, the Chinese were not particularly interested in the legal system of Western nations. This was partly because the Chinese people were traditionally more interested in knowing about things they already had, and partly because the deeply held notion of the "Middle Kingdom" made it difficult to acknowledge any superiority of those considered by Chinese to be "barbarians." As a result, when the Western powers arrived with guns, the Chinese were equipped to confront them only with disdain and an underdeveloped social structure.

Nonetheless, under pressure from the outside, changes in China's legal system began. Without the pressure from the West, especially the tremendous pressure from the Western invasion of Beijing after the Boxers' Movement, the Qing Dynasty would not have made fundamental changes to its traditional legal and judicial systems, which had been in place for more than two thousand years. With Western influences, however, it became more evident that the traditional legal system was not effective enough to retain control in such a large country with such a growing population. Some progressive ideas were advanced to change the legal system in China. Indeed, it was believed that this was the only way for China to survive.

To sum up, when reviewing China's old government structure and the operations of its judicial system from the perspective of establishing a modern judicial system, the most significant impact of this traditional model of a highly centralized government is that it prevented the knowledge and development of judicial independence. It did not even provide the context for this principle. To some degree, the evolution of a modern judicial system in China was the outcome of both a collision and a fusion between traditions and foreign experience, which occurred in connection with changes in China's social structure and social life.

III. THE CURRENT JUDICIAL SYSTEM IN CHINA

The modern Chinese legal system is much closer in form to the legal systems of continental Europe than to the common law traditions of Great Britain and the United States. It is common knowledge that the activities of the judiciary and legal education almost entirely halted during the Cultural Revolution period from 1966 to 1976. The

judicial system currently in operation in China was reconstructed in 1976, and in reality, it has been normalized and enhanced since 1980 when the Organic Law of Courts began to be put into effect and the role of lawyers in litigation was defined by new legislation.¹

There are four levels of courts in China: the Supreme Court of China at the center, the higher courts at the provincial level, and the intermediate courts and basic courts further down at the local level.² The collegial panel is the basic format for Chinese courts.³ Collegial panels consist of at least three judges hearing civil and criminal cases.⁴ Generally, all cases are tried by a collegial panel, except for those simple cases in which a sole judge is sufficient.⁵ Second-hearing, re-examined cases and death penalty verification cases are always handled by the collegial panel, while a sole judge court may try first-hearing simple civil cases and minor criminal cases.⁶

Additionally, according to the Organic Law of Courts, courts at all levels set up a judicial committee, the members of which are nominated by the president of the court for appointment by the Congress at the corresponding governmental level.⁷ The judicial committee is presided over by the president of the court and its responsibilities include deliberating on major, complicated cases, summarizing judicial practices, and discussing other judicial issues.⁸

IV. THE FUNDAMENTALS OF CHINA'S JUDICIAL SYSTEM

Open Trials. The Chinese Constitution provides for open trials, which means that all trials should be conducted openly unless otherwise provided for by the law.⁹ Only a few types of cases are closed to the public, including cases involving state secrets, cases involving personal privacy, and cases involving crimes committed by minors.¹⁰ In addition, in accordance with provisions of civil procedure law, cases involving divorce or trade secrets may, upon request by litigants, not be open to the public.¹¹

Defense System. The Constitution and the Organic Law of Courts provide that the accused is entitled to have a proper defense.¹² The Law on Criminal Procedure further provides that the courts have the obligation to ensure that the accused is allowed a defense.¹³

1. Organic Law of the People's Courts (adopted by the 5th Nat'l People's Cong., July 1, 1979, and revised by the 6th Nat'l People's Cong., Sept. 2, 1983) CHINALAWINFO, available at <http://www.lexis.com>, PRCLEG 44 [hereinafter Law of Courts].

2. *Id.* art. 2.

3. *Id.* art. 10.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* art. 11.

8. *Id.*

9. XIANFA art. 125 (2004) (P.R.C.), available at <http://www.lexis.com>, PRCLEG 3437. See also Law of Courts, *supra* note 1, art. 7.

10. Civil Procedure Law art. 120 (adopted by the 7th Nat'l People's Cong., Apr. 9, 1991) CHINALAWINFO, available at <http://www.lexis.com>, PRCLEG 19.

11. *Id.*

12. XIANFA, *supra* note 9, art. 125; Law of Courts, *supra* note 1, art. 8.

13. Criminal Procedure Law pt. 1, ch. 4 (adopted by the 5th Nat'l People's Cong., July 1, 1979, effective Jan. 1, 1980) CHINALAWINFO, available at <http://www.lexis.com>, PRCLEG 4.

Second-Instance Being Final. The courts have to try cases with the second instance being the final judgment.¹⁴ This means a case is closed after two levels of trial.¹⁵ Although there is a four-level court system, the second instance is the final judgment.¹⁶ In the first instance, jurisdiction depends on the nature and complexity of the case.¹⁷ Should the litigant not agree with the judgment of the first instance, he or she may, within a specified period of time, appeal to the next higher court.¹⁸ If, within the specified time, the litigant fails to appeal, then the first-instance judgment stands as the legally binding judgment.¹⁹ If a higher court, after reviewing the appealed case in accordance with second-instance procedures, issues a judgment, then that is the final judgment.²⁰ Except for cases involving the death penalty, all other judgments take legal effect immediately upon announcement.²¹

System for Verification of Death Penalty Cases. The Criminal Procedure Law provides that all death penalty cases, unless originally handled by the Supreme Court, are reported to the Supreme Court for verification and approval.²² Death penalty cases ruled on by intermediate courts are first verified and approved by higher courts before being submitted to the Supreme Court for verification and approval.²³ If the higher court disagrees with the death penalty verdict, it may hear the case or refer it back for re-examination.²⁴

System for Judicial Supervision. Judges are supervised through a re-examination system, a special arrangement for the court to re-examine judgments and rulings that have already taken effect.²⁵ If a definite error is found, a new trial may be granted by the re-examining court.²⁶ This system actually represents a remedy to the doctrine of the second instance being final.²⁷

The Qualifications; Appointment and Removal of Judges. Professional qualifications are provided for judges by the Judges Law, which was first adopted in 1995 and revised in 2001.²⁸ These qualifications, particularly the requirements of an academic degree and work experiences, have been raised in the new Judges Law.²⁹ In addition, entry-level judges will now be selected from those who not only meet the basic requirements, but also have passed the National Judicial Examination.³⁰ This examination is extremely difficult. In March 2002, when the examination, which

14. Law of Courts, *supra* note 1, art. 12.

15. *Id.*

16. *Id.*

17. *See id.* ch. 2 (describing the subject-matter jurisdiction of each level of court).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*; *but see id.* art. 13 (requiring review of death sentences by the Supreme Court).

22. Criminal Procedure Law, *supra* note 13, art. 144.

23. *Id.* art. 145.

24. *Id.*

25. *Id.* art. 149.

26. *Id.*

27. *Id.* art. 150.

28. Judges Law (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1995, revised June 30, 2001) CHINALAWINFO, available at <http://www.lexis.com>, PRCLEG 1861.

29. *Id.* art. 9.

30. *Id.* art. 12.

combines the national bar examination and other qualification tests, was given for the first time, 360,000 people sat for the exam; it was reported in May 2002 that among them only 24,000 passed. In other words, the pass rate was only 7%, lower than the pass rate of 10% for the national bar examination in earlier years.

According to the Constitution and the Organic Law of the Courts, the President of the Supreme Court is elected and subject to recall by the National Congress.³¹ The vice presidents, chief judges and associate chief judges of divisions, as well as judges of the court are appointed or removed by the Standing Committee of the National Congress upon submission of the President of the Supreme Court.³²

The Court Caseload. During the last twenty years, courts heard altogether more than sixty-two million criminal, civil, and administrative cases. Among these, the number of civil cases has increased at a continuously accelerated pace. It is easy to imagine that the burden on China's courts is very heavy.

Current Judicial Reforms in China. Chinese judicial reform needed to meet the demands of China's economic and social development. In China's shift to a market economy, the social and economic relationships are changing greatly, societal patterns are being adjusted significantly, the contradictions between the past and the present are getting more and more serious, and the number of new types of cases skyrockets and the difficulty of handling these cases increases. Only through further reform of the judicial system can the courts become more effective and maintain the sound development of China's market economy. Chinese judicial reform is the keen expectation for the mass of people and various social levels. People are inclined to protect their lawful rights through justice.

In October 1999, the Supreme Court of China announced a Five-Year Program for Judicial Reform. This plan aimed to heighten the fairness and efficiency of trial proceedings, and to resolve problems such as the lack of judicial resources, the lack of qualified judges, and the lack of safeguards on the independence of adjudication from interference by political bodies and local protectionism. After five years of judicial reform, China had made important achievements on both the establishment of modern judicial philosophy and the construction of specific modern judicial systems. For instance, judicial capabilities and judicial images have generally been improved; the professionalism of judges has achieved an initial success.

In October 2005, the Supreme Court of China launched the second Five-Year Judicial Reform Program. As a whole, it demonstrates the importance of bringing greater professionalism, independence, transparency and integrity to the judiciary, and mainly aims to promote judicial independence. Simply speaking, judicial independence is the ability of a judge to decide a matter free from pressures. Additionally, the institution of the judiciary as a whole must also be independent by being separate from government and other concentrations of power. The principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law.

31. Law of Courts, *supra* note 1, art. 35.

32. *Id.*

V. PRINCIPAL CHALLENGES TO JUDICIAL INDEPENDENCE AND IMPARTIALITY IN CHINA

Despite the significant progress noted above, two main problems continue to impair the development of a fully independent judiciary: an insufficient commitment to a culture based on the rule of law, and insufficient institutional independence and material support for the judiciary.

A. Insufficient Commitment to a Culture Based on the Rule of Law

The analysis of traditional China's government structure and the operations of its judicial system reveals one critical characteristic: the judiciary was traditionally subordinated to the executive and political authority. In a governmental system based on the unity of power, the subordination of judges to politicians and of law to politics extended to the core of judicial decision-making. Judges were viewed as simple agents of the central power, and therefore it was difficult to imagine that a judge might issue a decision fundamentally at odds with the official political position. There was also a widespread perception that corruption—another symptom of a weak legal system—was endemic in traditional China; and that corruption among judges and administrative staff was particularly acute. Certainly, perceptions of corruption further reduced confidence in the courts.

Some of these perceptions continue to exist today; some politicians and some citizens still assume that the judicial process should bow to current political priorities. These perceptions contribute to popular distrust of the judiciary, despite the gradual emergence of a constitutional government in China. To some extent, these characteristics might be a potential impediment to the achievement of true judicial independence. The continuing effects of past experience on public and political ideas about the judiciary, and the judges' view of their own role, should not be underestimated.

B. Insufficient Institutional Independence and Material Support for the Judiciary

Meaningful judicial independence rests not only on grand principles and social attitudes, but also on careful attention to the effects of the administrative structures for regulating the judiciary. The problem of insufficient institutional independence is especially acute in China. Courts at all levels are totally dependent on budgets adopted by governmental entities including both the central government and local governments. As there currently is insufficient institutional independence in China for the judiciary, the robust institutional guarantees needed for the impartiality of procedures and adjudications cannot be implemented. Other major difficulties, such as local protectionism, lack of the professionalism among some judges, and the lack of the financial support to raise judges' salaries, also persist.

VI. CONCLUSION

Every legal system has its own characteristics, as well as its own unique history of legal culture and development. Moreover, it is usually impossible to separate judicial reform from broader political, administrative, or economic reform. There are, however, also generalized and common needs that may be related indirectly to judicial independence across virtually all legal systems. Generalized needs include

improvements in the incentive structures and performance standards for judges, effective case management, clear systems of accountability, greater transparency, better professional training and continuing education, and improved human and financial resources. U.S. Judge Cynthia Hall observed:

We don't try to get any other country to use our system for those very reasons. We go in to help them establish an independent judiciary under their system. But we can tell them what has worked in the United States. . . . We have found that judicial independence can be better safeguarded if the courts are a separate branch of government and have control of their own budget and staff. We have achieved that in the U.S., but it took many years to fully realize it.³³

In this transitional period, the judicial reform in China has achieved positive results. It is still a constantly developing process bringing forth new ideas and new systems. Only continuous judicial reform can bring courts with relatively low judicial capabilities to satisfy the ever-increasing judicial needs of the public. In future judicial reform, it will be necessary, not only to sum up lessons from Chinese experience, but also to get experiences from other countries, for instance the United States, European countries and so on.

As you know, since China opened its door to the world, Chinese judges have gone abroad to study other legal and judicial systems. Today, I am in the United States as a visiting scholar, and I am very interested in learning more about American jurisprudence and the Constitution. I strongly believe that exposure to the American legal system can lead to useful contributions to the Chinese legal reforms.

Finally, I would like to invite you all to come to China and see China's profound changes. There is an old Chinese saying that understanding would benefit two, conflict would hurt two. Let's have more communication to understand each other. This world needs peace and development through mutual understanding and communication.

33. David Pitts, *Protecting Judicial Independence: A Global Effort*, Interview with Judge Cynthia Hall, ISSUES OF DEMOCRACY (USIA ELECTRONIC JOURNALS), Dec. 1996, available at <http://usinfo.state.gov/journals/itdhr/1296/ijde/toc.htm> (last visited Nov. 26, 2006). Judge Cynthia Hall sits on the U.S. Court of Appeals for the Ninth Circuit and is a Chair of the Committee on International Judicial Relations.