

ESTABLISHING THE TRUTH ON FACTS: HAS THE CHINESE CIVIL PROCESS ACHIEVED THIS GOAL?

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I. INTRODUCTION

It is fair to state that the Chinese civil procedural system is designed primarily to ascertain the truth.¹ One of the fundamental tasks of the Law of Civil Procedure of the People's Republic of China (Law of Civil Procedure) is to ensure the courts establish the truth based on facts.² To achieve this end, Chinese law allows judges to play a more active role in adjudication than the U.S. Federal Court System permits. Unlike their American counterparts, Chinese judges do not share their power to determine cases because China

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1. See The Law of Civil Procedure of the People's Republic of China, art. 2. The Law of Civil Procedure of the People's Republic of China was adopted on April 9, 1991 at the Fourth Session of the Seventh National People's Congress.

2. *Id.* arts. 2, 7.

does not use a jury system. Thus, Chinese judges not only decide issues of law but also those of fact. Furthermore, as a trier of fact, Chinese judges are more intrusive than the trier of fact at common law — the jury. Chinese judges' determinations of facts are not restricted to the evidence presented at a hearing. Chinese judges may conduct an independent investigation, collect their own evidence, and even hold the hearing at the scene of the incident. Because of their increased discretion and involvement, Chinese judges are more vulnerable to disciplinary measures or other punishment when they make errors in their adjudication. Even the president of the court (roughly equivalent to a chief judge) will be vicariously liable for major errors. As a result, the Chinese system has an extensive supervisory mechanism to review judges' decisions.

While the Chinese system seems better designed to ascertain the truth, reality depicts a different picture. Judicial misconduct is still intolerably rampant among Chinese judges.³ It is undeniably accurate to state that no truth can be discovered whenever judicial misconduct is involved. In addition, "*zhi xing nan*" (the difficulty in execution and enforcement of judgments) has seen no sign of alleviation. Numerous reasons help explain this problem, yet it is mostly attributed to the poor quality of judicial work — which includes a failure to ascertain the truth. Further, the number of judgments found to be inappropriate, and subsequently corrected, remains unbelievably high.⁴ This clearly indicates the failure of the Chinese civil process to achieve its purported goal of ascertaining the truth.

This article explores the problems inherent in the Chinese system that have resulted in the failure to achieve its intended purpose of ascertaining the truth. Following this introduction, Part II provides an overview of the structure of Chinese courts. Part III examines the extensive powers of Chinese judges. Part IV analyzes the supervisory mechanism of the Chinese civil process. Part V addresses obstacles to ascertaining the truth, and Part VI concludes the article.

3. Shao Zongwei, *Disciplinary Measure to Weed Out Bad Judges*, CHINA DAILY, November 7, 2001. Statistics from the Supreme People's Court indicate that in 2000 more than 1,200 judges in China were disciplined for misusing judicial power for personal gain, in addition to another forty-six who were prosecuted for malpractice and illegal law enforcement. *Id.*

4. He Bing, *Fayuan De Anjian Weiji yu Duice* [Caseload Crisis and Its Countermeasures], FAZHI RIBAO [LEGAL DAILY], Nov. 26, 2000, available at <http://www.legaldaily.com.cn> (last visited June 1, 2003).

II. OVERVIEW OF THE CHINESE CIVIL PROCESS

A brief description of the structure of Chinese courts is helpful to an analysis of whether the Chinese civil process has achieved its intended purpose of ascertaining the truth. The Chinese court system is structured like a pyramid⁵ composed of four levels: one Supreme Court at the national level, thirty-two high courts at the provincial level, several hundred intermediate courts at the prefectural level, and over 3,000 basic courts at the county and city level (see Diagram I).⁶ While “[t]he Supreme People’s Court is the highest judicial organ” of the state,⁷ it may still hear cases of first instance.⁸ Also, China’s constitution empowers the Supreme Court to supervise adjudication by the local people’s courts at different levels.⁹ Basic courts hear all trial cases except for those the law requires other courts to hear.¹⁰ Intermediate courts and high courts are generally appellate courts, but they may also hear cases of first instance.¹¹ Thus, intermediate courts, high courts, and the Supreme Court each serve a dual function: they act as trial courts and appellate courts.¹² Within each Chinese court there are usually a

5. The structure of Chinese courts is established in accordance with China’s fundamental system of state that China is a unitary country rather than a federal one. The Preamble of the Constitution of the People’s Republic of China states that “[t]he People’s Republic of China is a unitary multi-national state created jointly by the people of all its nationalities.” XIANFA pmb. (1982); P.R.C. CONST. pmb. (1982) (For ease of understanding all Chinese legal documents will be cited initially with both the correct romanized Chinese name and the translated English name. After the initial citation, all further citations will use the English name only.) Therefore, China has only one single uniform court system. Conversely, in a federal country, there are normally two separate court systems, state and federal.

6. Chinese courts can be divided into two categories: courts of general jurisdiction and specialized courts. Specialized courts have jurisdiction over specific subject matters, such as maritime, military and railway transportation. In this paper, Chinese courts refer to courts of general jurisdiction unless otherwise indicated.

7. P.R.C. CONST. art. 127 (1982).

8. The Law of Civil Procedure of the People’s Republic of China, art. 21. The Supreme Court may hear cases of nationwide impact, and other cases it deems necessary. *Id.*

9. P.R.C. CONST. art. 127 (1982).

10. The Law of Civil Procedure of the People’s Republic of China, art. 18; *see also id.* arts. 19 and 20 (providing jurisdictional scope of high courts and intermediate courts). Basic court may refer major or important cases of first instance to a higher court if it regards it necessary for the higher court to hear these cases. Zhonghua Renmin Gongheguo Renmin Fayuan Zuzhi Fa, art 21; Organic Law of People’s Courts of the People’s Republic of China, art. 21.

11. The Law of Civil Procedure of the People’s Republic of China, art. 19. An intermediate court has jurisdiction over cases of first instance forwarded by basic courts. Organic Law of People’s Courts of the People’s Republic of China, art. 25 (2).

12. As an appellate court, an intermediate court may hear appeals against judgments or rulings made by basic courts. Organic Law of People’s Courts of the People’s Republic of China, art. 25(3). A high court may hear appeals against judgments or rulings made by intermediate courts. *Id.* art. 28(3). The Supreme Court may hear appeals against judgments or rulings made by high courts. *Id.* art. 32(2). This is different from the American system where appellate courts only have jurisdiction of appeals from all final decisions of the trial courts. *See* 28 U.S.C. § 1291 (2003).

few divisions, such as the civil, criminal, administrative, and enforcement divisions (see Diagrams II and III).

Like executive agencies, Chinese courts are internally organized according to a strict hierarchy of administrative ranking. Each Chinese court has one president who is at the top of the hierarchy.¹³ Next to the president are several vice-presidents, who are in charge of the respective divisions of the court.¹⁴ Chief judges and associate chief judges supervise individual divisions.¹⁵ Court presidents are elected by the People's Congress at the same level, but vice presidents, division chiefs, associate division chiefs and other senior judges are appointed by the corresponding People's Congress Standing Committee.¹⁶ Courts recruit junior judges and law clerks

13. Organic Law of People's Courts of the People's Republic of China, art. 19. "A basic people's court is composed of a president, vice-presidents and judges." *Id.* However, the intermediate, high and Supreme People's Court is composed of a president, vice-presidents, chief judges and associate chief judges of divisions, and judges. *See id.* arts. 24, 27 and 31.

14. *Id.* art. 19. The Supreme Court has one president, Xiao Yang, and seven vice presidents, Jiang Xingchang, Shen Deyong, Wan Exiang, Cao Jianming, Zhang Jun, Huang Songyou, Jiang Bixin, at http://news.xinhuanet.com/ziliao/2002-01/25/content_253690.htm (last visited June 1, 2003). *See also* Organic Law of People's Courts of the People's Republic of China, arts. 24, 27 and 31.

15. Organic Law of People's Courts of the People's Republic of China, arts. 19, 24, 27 and 31.

16. *Id.* art. 35. This article provides:

Presidents of local people's courts at various levels are elected by the local people's congresses at the corresponding levels, and their vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed and removed by the standing committees of the local people's congresses at the corresponding levels. Presidents of intermediate people's courts established in prefectures of provinces or in municipalities directly under the Central Government are elected by the people's congresses of the provinces and municipalities directly under the Central Government, and their vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed and removed by the standing committees of the people's congresses of the provinces and municipalities directly under the Central Government. Presidents of local people's courts at various levels established in national autonomous areas are elected by local people's congresses at the corresponding levels in these areas, and their vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed or removed by the standing committees of local people's congresses at the corresponding levels in these areas. The President of the Supreme People's Court is elected by the National People's Congress, and its vice-presidents, chief judges and associate chief judges of divisions, and judges are appointed or removed by the Standing Committee of the National People's Congress.

Id. The constitution of the People's Republic of China stipulates:

The National People's Congress has the power to remove from office the following persons:

- (1) the President and the Vice President of the People's Republic of China;
- (2) the Premier, Vice-Premiers, State Councillors, Ministers in charge of ministries or commissions, the Auditor-General and the Secretary-General of the State Council;

at their discretion.¹⁷ Unlike the western tradition where judges are normally elected or appointed from a body of experienced lawyers, few Chinese judges have had experience as a lawyer before being appointed.¹⁸ In addition to administrative ranking, judges are classified into four classes¹⁹ and twelve grades according to their professional title (see Diagram II).²⁰

Each Chinese court has an adjudication committee.²¹ All members of the adjudication committee are subject to appointment and removal by the standing committee of the local people's congress.²² The adjudication committee, the most authoritative body in the court, is authorized to discuss any major, complex, or difficult case, and correct any judgment errors.²³ The judge or the collegiate panel that heard the case must enter a particular verdict as directed by the adjudication committee.²⁴

Temporary collegiate panels, formed to hear particular cases, occupy the bottom of the hierarchy. Either judges or a mixture of judges and people's assessors selected from the populace compose a collegiate panel, which "must have an odd number of members."²⁵

(3) the Chairman of the Central Military Commission and other members of the Commission;

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

(5) the Procurator-General of the Supreme People's Procuratorate.

P.R.C. CONST. art. 63 (1982) (emphasis added). The Standing Committee of the National People's Congress has the power "to appoint or remove, at the recommendation of the President of the Supreme People's Court, the Vice-Presidents and Judges of the Supreme People's Court, members of its Judicial Committee and the President of the Military Court." *Id.* art. 67(11). "Local people's congresses at and above the county level elect, and have the power to recall, presidents of people's courts and chief procurators of people's procuratorates at the corresponding level." *Id.* art. 101.

17. Zhonghua renmin gongheguo faguan fa, art 11; Law on Judges of the People's Republic of China, art 11. See also Organic Laws of the People's Courts of the People's Republic of China, art. 37.

18. Georgory S. Kolton, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 450 (1996).

19. Zhonghua Renmin Gongheguo Faguan Dengji Zanxing Guize, art 1; Interim Regulation of Professional Ranking of Judges, art. 1. The four classes include chief grand judge, grand judges, senior judges and judges. *Id.*

20. *Id.* The title of chief grand judge is the highest grade, which is reserved to the president of the Supreme People's Court. *Id.* art. 2. Grand judges are further classified into grade one and grade two grand judges. *Id.* art. 3. Senior judges are ranked among grades one, two, three and four. *Id.* art. 4. There are five grades among judges and associate judges. *Id.* art. 5.

21. Organic Law of People's Courts of the People's Republic of China, art. 11.

22. *Id.*

23. *Id.* arts. 11, 14. Apart from discussing major cases, judicial committees also deal with a number of other adjudicative matters. See *id.* art. 11.

24. Organic Law of People's Courts of the People's Republic of China, art 11.

25. The Law of Civil Procedure of the People's Republic of China, art. 40. See also Organic Law of People's Courts of the People's Republic of China, art. 10 (adopting the collegial

A collegiate panel is normally formed to adjudicate more complex cases; a single judge can adjudicate simpler cases that do not require a collegiate panel.²⁶

In common law jurisdictions, formal legal training and experience as a lawyer are normally two prerequisites for a judicial candidate. However, for many years, China required neither a college education nor formal legal training to become a judge.²⁷ As a result, most Chinese judges fail to meet the minimum educational requirements.²⁸ Although “[a] new Judges Law passed in 1995 requires minimum judicial qualifications of a university degree and at least some prior legal experience,”²⁹ China has a long way to go before all judges meet these minimum educational requirements.³⁰ On one hand, the Chinese requirements for judges may be the most flexible in the world; on the other hand, Chinese courts have more judges than the courts in other countries.³¹

In China, a judgment of second instance by an appellate court is final; this is the so-called system of two trials, which concludes the

system).

26. See The Law of Civil Procedure of the People’s Republic of China, arts. 40, 41; Organic Law of People’s Courts of the People’s Republic of China, art. 10.

27. See Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT’L L. & BUS. 383, 397 (2000).

28. Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L L. 43, 65 (2001). “Only about one-fifth of all lawyers in China have law degrees, and an even lower percentage of judges have formally studied law at a university.” *Id.* In 1993, 33.4% of the judges had no college degrees. An even lower percentage of judges had received formal legal education. Lubman, *supra* note 27, at 397.

29. Orts, *supra* note 28, at 65.

30. *Id.*

31. According to 1994 statistics, China has “more than 3,000 courts across the country.” Ma Chenguang, *Court Eyes Lead Role in Reform*, CHINA DAILY, Dec. 29, 1994. Now, China has a total of approximately 220,000 judges, including one chief grand judge, forty-one grand judges, 30,000 senior judges and more than 180,000 judges. Shao Zongwei, *Judges Urged to Stick to Justice*, CHINA DAILY, Mar. 23, 2002. Thus, each court has an average number of seventy-two judges. To get a clearer picture, compare the number of judges in the New York State (NYS) Court of Appeals, NYS’ highest court, and its counterpart—the High Court of Hainan Province in China. The NYS Court of Appeals is composed of only seven judges (a Chief Judge and six Associate Judges). State of New York Court of Appeals (Official Website), at <http://www.courts.state.ny.us/ctapps/> (last visited on June 1, 2003). However, the High Court of Hainan Province in China has seventy-one judges. <http://www.hicourt.gov.cn/gjfy/hngy/hngy.htm> (last visited on June 1, 2003). Hainan Province has a total population of 7.62 million, less than that of New York City which has a population, as of 2000, of slightly more than 8 million. China in Brief: Administrative Division, at <http://www.china.org.cn/e-china/administrative/administrative.htm> (last visited on March 7, 2004); New York City Department of City Planning, at <http://www.ci.nyc.ny.us/html/dcp/html/census/popdiv.html> (last visited January 27, 2004). Hainan Province is one of the smallest, in terms of population, among thirty-two provincial administrative divisions (twenty-three provinces, five autonomous regions, four municipalities directly under the Central Government, excluding two special administrative regions) in China. China in Brief: Administrative Division, *supra*.

case.³² However, the Chinese rule of finality should be distinguished from the final judgment rule in the U.S. court system. In the United States, a judgment is final when a trial court has finally determined all the issues involved in a particular lawsuit.³³ This is the so-called final judgment rule that determines when an appeal can be taken.³⁴ However, in China, a final judgment means that the judgment has become effective because the case has been concluded by the two trials.³⁵ Pursuant to the Chinese system of the second trial being final, a judgment of second instance made by an *appellate court* is always final.³⁶ A judgment made by a trial court can only become final when the litigant fails to appeal within the prescribed time.³⁷ While the American final judgment rule determines when the aggrieved party can take an appeal, the Chinese rule of finality prescribes when a judgment becomes enforceable. Although both rules share the common goal of achieving judicial economy and efficiency, they achieve this goal in different ways. The American final judgment rule is “intended . . . to avoid ‘all the delays and expenses incident[tal] to a repeated revision’ of fragmented appeals of a single issue.”³⁸ The Chinese rule of finality prevents limitless trials of a single case.

In a broader sense, the Chinese civil process also includes the system of people’s mediation conducted by People’s Conciliation Committees. People’s Conciliation Committees are mass organizations that reconcile civil disputes under the guidance of the local government and basic courts.³⁹ The committee mediates

32. The Law of Civil Procedure of the People’s Republic of China, art. 10. The Chinese rule of finality includes the following factors: (1) Any party who is not satisfied with the judgment or ruling of first instance of courts at various levels may file an appeal with the court at the next higher level. (2) If the party fails to file an appeal within the time limit, and there is no procuratorial protest, the judgment or the ruling of first instance becomes the one that has legal effect. (3) Any judgment or ruling of second instance made by intermediate courts, high courts or the Supreme Court is final—that is, has legal effect. Organic Law of People’s Courts of the People’s Republic of China, art. 12.

33. *St. Louis, Iron Mountain & S. R.R. Co. v. S. Express Co.*, 108 U.S. 24, 28-29 (1883) (holding that a judgment is final “when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined”).

34. *Lapidus v. Vann*, 112 F.3d 91, 94-95 (2d Cir. 1997).

35. Organic Law of People’s Courts of the People’s Republic of China, art. 12; *see also* The Law of Civil Procedure of the People’s Republic of China, art. 10.

36. Organic Law of People’s Courts of the People’s Republic of China, art. 12.

37. *Id.* The aggrieved party must take an appeal within fifteen days from the date when the judgment is served. The Law of Civil Procedure of the People’s Republic of China, art. 147.

38. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 728 (1993) (quoting *United States v. Bailey*, 32-33 U.S. (9 Pet.) 354, 355-56 (1835)).

39. The Law of Civil Procedure of the People’s Republic of China, art. 16.

disputes “in accordance with legal provisions and the principle of voluntariness.”⁴⁰ The parties to an agreement “shall execute the resolution reached through conciliation.”⁴¹ When one party refuses conciliation, retracts the agreement, or an agreement proves unsuccessful, legal proceedings may be initiated in a court.⁴² The system of people’s mediation is one of the most important features of China’s civil process. However, it is beyond the focus of this paper because of its extra-judicial nature.⁴³

III. ACTIVE AND POTENT CHINESE JUDGES

A. Powers of Chinese Judges

Although China’s recent reform of its judicial system has increased the burden of proof on the part of the parties and weakened the role of judges in discovering the truth,⁴⁴ the Chinese judicial system remains a system based upon the inquisitorial model.⁴⁵ The main feature of the inquisitorial system is that judges conduct “an active and independent inquiry into the merits of each case.”⁴⁶ The judge may also question and examine witnesses.⁴⁷ In contrast, judges outside of China, maintain a comparatively passive role in adjudicating a case under the adversary system. In jurisdictions where the adversary system is practiced, “the trial judge acts merely as an impartial umpire.”⁴⁸ It would be “improper for a judge to intervene in the presentation of evidence by asking extensive questions.”⁴⁹ Another difference between the Chinese judicial system and the adversary system is that the goal of the Chinese civil process is to seek “objective truth”⁵⁰ beyond any doubt;

40. *Id.*

41. *Id.*

42. *Id.*

43. For those who are interested in this system, see Vai Io Lo, *Resolution of Civil Disputes in China*, 18 UCLA PAC. BASIN L.J. 117 (2000).

44. Since the early 1990’s, China has been reforming its civil process with a focus on increasing the burden of proof on the part of the parties to a lawsuit and weakening the role of judges in discovering the truth. See Jiang Wei and Wu Zeyong, *Zhengjufa Ruogan Jiben Wenti de Fazhexue Fengxi* [Jurisprudential Analysis of Some Basic Issues Regarding the Law of Evidence], 2 ZHONGGUO FAXUE [CHINESE JURISPRUDENCE] 45-46 (2002).

45. The civil process of the former Soviet Union also influenced the Chinese system. In the former Soviet Union, the court not only controlled the litigation process, but also collected, investigated, and confirmed evidence. Hu Huajun, *Xiandai Minshi Susong Jiegou yu Jiancha Jiandu* [Modern Structure of Civil Litigation and Procuratorial Supervision], RENMIN FAYUAN BAO [PEOPLE’S COURT NEWSPAPER], Aug. 29, 2000, available at <http://jc.gov.cn/personal/ysxs/fnsx2/fnsx1269.htm>.

46. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 2 (3d. ed. 1999).

47. *Id.*

48. *Id.* at 478.

49. *See id.*

50. Chinese scholars use the term “objective truth” (*keguan zhenshi*) in contrast with the

that is, the truth ascertained by the court must be completely consistent with the fact.⁵¹ The court must ascertain all the facts relevant to the case, even those that are not claimed or undisputed. If any party cannot prove a specific fact, the court should investigate and collect the evidence to prove it.⁵²

Because China's civil process is fundamentally an inquisitorial system and its goal is to seek "objective" rather than "legal" truth, Chinese judges have more extensive powers than their U.S. counterparts. In common law jurisdictions, judges will only consider the issues raised, the objections mentioned, and the points made in the pleadings.⁵³ The issues that the parties do not raise are usually waived.⁵⁴ Therefore, the judge's determination is limited to the pleadings the parties have filed. As the judge "sits solely to decide" the dispute,⁵⁵ she will not make an independent inquiry into the merits of the case, let alone independent investigation. Under the Chinese system, however, a judge's adjudication is not limited to the pleadings and arguments, but focuses on actual investigation and study. The adjudication system and the style of work of Chinese courts are intended to be convenient to, maintain close ties with, and serve the masses.⁵⁶ Only after the court has discovered the whole truth of the case and collected sufficient evidence can it make its judgment.⁵⁷ Chinese courts have the power to acquire other evidence by conducting their own investigations of relevant organizations and individuals. Neither organizations nor individuals can refuse to cooperate,⁵⁸ and the court may impose fines on any party who refuses to cooperate with the court's

term "legal truth" (*falü zhenshi*). While "objective truth" refers to the truth which is completely consistent with the facts, "legal truth" indicates the legally assumed truth that the court has ascertained by complying with rules of evidence and requirements of proof. The legal truth may or may not be consistent with the facts. See Hu Huajun, *supra* note 45.

51. *Id.* However, in the U.S. court system, a party normally can prove his case in civil proceedings by a preponderance of the evidence. Under this doctrine, the evidence does not need "to free the mind wholly from all reasonable doubt." BLACK'S LAW DICTIONARY 1201 (7th ed. 1999). As long as the evidence has greater weight, it "is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Id.* The rule of preponderance of the evidence is the standard "of proof in a civil trial in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be." *Id.*

52. See Hu Huajun, *supra* note 45.

53. FRIEDENTHAL ET AL., *supra* note 46, at 2.

54. *Id.*

55. *Id.*

56. He Weifang, *Zhongguo Sifa Guanli Zhidu de Liangge Wenti* [Two Issues Regarding the System of Judicial Administration in China], 4 ZHONGGUO SHEHUI KEXUE [J. CHINESE SOC. STUD.], July 1997, at 120-24, available at <http://www.law-thinker.com/detail.asp?id=323>.

57. *Id.*

58. The Law of Civil Procedure of the People's Republic of China, art. 65.

investigation and acquisition of evidence.⁵⁹ Before litigation, judges must carefully check the materials for the litigation and collect necessary evidence through investigation.⁶⁰ The court may entrust another court with investigation within the latter's jurisdiction.⁶¹ The entrusted court is required to complete an investigation within thirty days.⁶² The court may dispatch itinerant tribunals to hear cases on the scene.⁶³ Even an appellate court may make its own investigation and question the witnesses.⁶⁴

A party may request a court to investigate and collect evidence in the event that the party cannot collect evidence by himself due to "objective reasons."⁶⁵ Also, a court "shall investigate and collect" evidence which the court deems necessary to the hearing.⁶⁶ If evidence is relevant to any fact that is likely to damage "the interest of the state, the public interest ... or the lawful" rights and interests of the individual, or relevant to procedural issues in joining third parties, suspending litigation, terminating litigation and recusal, such evidence is necessary to litigation and the court therefore can collect it by itself.⁶⁷ The court may also investigate and collect its own evidence if the evidence offered by the parties is conflicting and unascertainable, or in any other situations where the court believes it should collect evidence by itself.⁶⁸ An exception to the above evidence is that the court shall investigate and collect evidence only on a party's motion.⁶⁹ When the court investigates and collects evidence, such investigation shall be conducted by at least two judges.⁷⁰ The investigating judges, the person under investigation, and the stenographer shall sign the investigation report.⁷¹

59. *Id.* art. 103(1).

60. *Id.* art. 116.

61. *Id.* art. 118.

62. *Id.*

63. *Id.* art. 121.

64. *See id.* art. 152.

65. *Id.* art. 64. The Law of Civil Procedure of the People's Republic of China does not define "objective reasons." In the authors' opinion, objective reasons are those that the party has no control over. Pursuant to the Regulation Regarding Evidence in Civil Procedure, the following two types of evidence are those that the party cannot collect due to objective reasons: first, when evidence is "kept by relevant organs of the state and must be accessed by the people's court upon authority," such as archive files. Regulation Regarding Evidence in Civil Procedure, art. 17. Second, this is also an issue when evidence involves "state secrets, commercial secrets or personal privacy." *Id.*

66. *See* The Law of Civil Procedure of the People's Republic of China, art. 64.

67. Regulation Regarding Evidence in Civil Procedure, art. 15.

68. Opinion Concerning Application of the Law of Civil Procedure of the People's Republic of China, arts. 73(3)-(4) (For the sake of brevity, this source will be cited "Opinion Concerning the Law of Civil Procedure" for the remainder of the article).

69. Regulation Regarding Evidence in Civil Procedure, art. 16.

70. Opinion Concerning the Law of Civil Procedure, art. 70

71. *Id.*

Chinese judges may inspect the real evidence and the scene of the incident.⁷² The inspection report contains the time and place of the inspection, the process of inspection, and the results of the inspection.⁷³ The inspection report shall be signed or stamped by the inspector and persons present at the inspection.⁷⁴ The map of the scene should indicate the time and location of the drawing, and the identity of the artist.⁷⁵

Due to their extensive powers and active role, Chinese judges may be able to avoid some errors that might be acceptable in common law jurisdictions. As an illustrative example, consider *Brown v. Voss*, a seminal case in American property law.⁷⁶ (*Brown* involved an easement dispute where the plaintiffs lost their case largely because of their attorney's failure to present a correct map.⁷⁷) However, the inquisitorial system provides "no true opportunity for defense."⁷⁸ For instance, if the judge makes an independent investigation and collects his own evidence, can the parties challenge the validity of the evidence the judge offers? Is the evidence relevant? Is the evidence hearsay? Is the evidence covered by the exclusionary rule? If the answer to any of the above questions is yes, has the judge placed himself in the position of an "adversary"? Has the judge any interest which conflicts with those of the parties? Is the judge still an impartial umpire? A negative answer means the parties have an inadequate defense. Furthermore, even if the parties are allowed to challenge the evidence offered by the judge, do the parties feel as comfortable as when they challenge each other? Do they fear being accused of contempt of court? While the adversary system has no such problems, "[it] is not the only way to the truth."⁷⁹ In the inquisitorial system, the parties may have no adequate opportunity for defense, but because the judge is more active, the *Brown* error would have been avoided. The adversary system does provide more opportunity for defense, but it also creates more chances for the *Brown* error.

72. Regulation Regarding Evidence in Civil Procedure, art. 30.

73. *Id.*

74. *Id.*

75. *Id.*

76. 715 P.2d 514 (Wash. 1986). For a detailed and illuminating exploration of the litigation in this case, see Elizabeth J. Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 CARDOZO L. REV. 1445 (1995).

77. See generally *Brown*, 715 P.2d 524; see also *supra* note 76.

78. See FRIEDENTHAL ET AL., *supra* note 46, at 2 n.5.

79. *Id.*

B. Chinese Judges and People's Assessors

Chinese judges are more powerful than their common law counterparts because Chinese judges do not share the power to adjudicate with a jury. China does not have a jury system comparable to the system in the United States. While the Chinese civil process does allow laypersons to participate as people's assessors in adjudication of cases of first instance, people's assessors do not constitute a restriction on the power of Chinese judges and usually are regarded as "decorations" in the courtroom.⁸⁰ There are both striking similarities and considerable differences in the two distinct systems.

Both systems purport to facilitate judicial democracy. The jury resulted from mistrust of the judiciary. In seventeenth century England, the jury served "as political check on the judges of the Stuart monarchy."⁸¹ In colonial America, the jury became an extremely valuable instrument against oppression "by the British government and its appointed judges."⁸² Historically, the jury served as "an extremely valuable bulwark against government oppression."⁸³ In China, the participation in adjudication by people's assessors is also regarded as one form of a democratic participation in the political system.⁸⁴

In addition, both systems represent the values of the common people. In the United States, the jury represents an American viewpoint about the nature of justice. While the law often takes into consideration general principles and rules, the jury focuses more on "social judgments as to what is fair and equitable."⁸⁵ "[T]he jury's greatest value is that it applies the strict and sometimes harsh principles of law with the sense of justice of the 'man on the street.'"⁸⁶ Consistent with this view, the U.S. Supreme Court held that the jury is "the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases."⁸⁷ Like American jurors, people's assessors are primarily selected from the common people. They are familiar with the community and understand and represent the public opinion of the community.

80. Sun Jungong, *Renmin Peishenyuan Shi "Baishe" ma?* [Are People's Assessors "Decorations" in the Courtroom?], FAZHI RIBAO [LEGAL DAILY], Feb. 19, 2001, available at http://www.legaldaily.com.cn/gb/content/2001-02/19/content_13509.htm.

81. FRIEDENTHAL ET AL., *supra* note 46, at 492.

82. *Id.*

83. *Id.*

84. Sun Jungong, *supra* note 80.

85. FRIEDENTHAL ET AL., *supra* note 46, at 493.

86. *Id.* at 551.

87. *Dimick v. Schiedt*, 293 U.S. 474, 485-86, 493 (1935).

They are more likely to judge a case from the viewpoint of social and moral norms.⁸⁸

Both systems also have their critics. Even though the right to a jury is entrenched in the American legal system, there are detractors who believe among other things that jurors are “unskilled in the application of frequently particularized and difficult legal concepts,”⁸⁹ and that “the delays inherent in the jury process” increase the cost to the judicial system.⁹⁰ In addition, “there is no effective judicial supervision over the process by which juries render verdicts.”⁹¹ The jury treats similar cases unevenly, often applying its own standard of popular justice.⁹² In China, the system of people’s assessors is also the target of criticism. As some people’s assessors have served for a long time, they have become quasi judges and therefore can no longer effectively supervise adjudication. While people’s assessors supplement their own professional knowledge for the judge’s ignorance of some technical and professional knowledge and skills,⁹³ most of them lack legal knowledge. They are not qualified for the functions of a people’s assessor⁹⁴ because people’s assessors determine issues of both fact and law.⁹⁵

Despite the similar attacks on both institutions, there are many fundamental differences in the functions of people’s assessors and the American jury. In China, people’s assessors have the same “rights and obligations” as judges.⁹⁶ They may review the court records and participate in the investigation, adjudication, and deliberation.⁹⁷ They may also determine issues of law as well as issues of fact.⁹⁸ However, in American jury cases the judge normally decides questions of law and procedure only. The jury is charged with the responsibility to decide the questions of fact. Even when the jury is “deadlocked and cannot reach a verdict,” the judge should not exert any pressure on any juror to make a decision, let alone

88. Sun Jungong, *supra* note 80.

89. FRIEDENTHAL ET AL., *supra* note 46, at 491.

90. *Id.*

91. *Id.* at 492.

92. *Id.* at 497.

93. Sun Jungong, *supra* note 80. For instance, in a case involving scientific information, a people’s assessor with scientific background will be a great help in ascertaining the facts. Also, in juvenile cases, a people’s assessor selected from the school faculty might help educate and reform the juvenile defendants.

94. *Id.*

95. See The Law of Civil Procedure of the People’s Republic of China, art. 40.

96. *Id.*

97. Sun Jungong, *supra* note 80.

98. The Law of Civil Procedure of the People’s Republic of China, art. 40.

“order them to agree.”⁹⁹ The jury’s province is limited to “determining ... the facts germane to a given dispute, and deciding how the relevant law should apply to those facts.”¹⁰⁰ If the jury “consider[s] evidence obtained outside the courtroom, such as by visiting the scene of the accident,” it would constitute jury misconduct and consequently “be the basis for a challenge to the verdict either by motion for new trial or by appeal.”¹⁰¹

The system of people’s assessors is more similar to the earlier common law jury system. The jury’s origin came from the need for truth. Originally, fitness as a witness was the primary concern in selecting jurors. In addition, jurors were chosen from the neighborhood in which the case occurred so that the selected jurors could be in the best position to evaluate the evidence in light of their own background in the locale.¹⁰² Thus, the jurors acted as active “witness-adjudicators.”¹⁰³ They not only determined issues of fact but also determined issues of law.¹⁰⁴ The judge guided the “decision making process by comments on the witnesses and the evidence.”¹⁰⁵ Only after the jury transformed from “witness-adjudicator” to “impartial finder of fact” did the jury become more passive. Thus, the jury’s verdict increasingly turned on only the materials presented to it at trial.¹⁰⁶

Another functional difference is that people’s assessors are intended to supervise adjudication and facilitate judicial fairness.¹⁰⁷ China’s constitution states, “All power . . . belongs to the people.”¹⁰⁸ Judicial power also comes from the people. Therefore, the exercise of the judicial power must be subject to the supervision by the people. This supervision of adjudication is one of the most important functions of the people’s assessors.¹⁰⁹ Unlike people’s assessors, the American jury has no power to supervise adjudication of particular cases. While the jury system resulted from mistrust of the judiciary, the jury has never served as a supervisor of the adjudicative process.

Although the United States Constitution prescribes and protects the right to a jury,¹¹⁰ this right in civil cases has not been made

99. FRIEDENTHAL ET AL., *supra* note 46, at 481.

100. *Id.* at 495.

101. *Id.* at 581-82.

102. *Id.* at 494.

103. *Id.*

104. *Id.* at 496.

105. *Id.*

106. *See id.* at 494

107. Sun Jungong, *supra* note 80.

108. P.R.C. CONST. art. 2. (1982).

109. Sun Jungong, *supra* note 80.

110. U.S. CONST. art. III, § 2; amends. VI-VII.

binding on the states through the Due Process Clause of the Fourteenth Amendment.¹¹¹ In China, the trial by people's assessors is not mandated by the constitution and is therefore optional.¹¹²

The selection of people's assessors is different from jury selection. In China, the People's Congress elects people's assessors.¹¹³ The term of a people's assessor is five years, but he can renew his term without limitation.¹¹⁴ Some people's assessors have served for as many as seven terms.¹¹⁵ Once elected, a people's assessor can participate in the adjudication of multiple cases during his term.¹¹⁶ People's assessors have in fact become quasi judges. Of course this is a far cry from what occurs in United States federal courts, where a juror is selected on a random basis for a particular case only.¹¹⁷ When the case is concluded, the juror's duty is over.

Because people's assessors enjoy more extensive powers than American jurors people's assessors, in theory, should be in a better position to limit the judge's role in adjudication than the American jury. Reality presents the opposite picture — people's assessors rarely limit the judge's power in adjudication. First, a single judge handles all minor cases, which people's assessors cannot adjudicate. Second, when a case is so complex that a collegiate panel is necessary, the collegiate panel may or may not include a people's assessor.¹¹⁸ Third, even if a collegiate panel does consist of both judges and people's assessors, the people's assessor constitutes a minority on the panel and has only one vote.¹¹⁹ While the American jury can only determine issues of fact, they enjoy independent power to make such decisions. The jury's deliberation is not subject to judicial supervision.¹²⁰ Finally, people's assessors have no legal obligation to participate in adjudication. Thus, they may refuse to participate in adjudication for any reason, such as a conflict with their employment. Also, due to limited financial resources, some courts cannot afford the expenses incurred in having people's assessors participate in adjudication. For these reasons, people's assessors have participated in adjudication of only about eight percent of the cases.¹²¹ Despite the potential for people's assessors

111. *See, e.g., Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916).

112. *See P.R.C. CONST.* chap. 3, § 7 (1982).

113. Organic Law of the People's Courts of the People's Republic of China, art. 38.

114. *See generally*, Sun Jungong, *supra* note 80

115. *Id.*

116. *Id.*

117. 28 U.S.C. § 1861 (2003).

118. The Law of Civil Procedure of the People's Republic of China, art. 40.

119. Sun Jungong, *supra* note 80.

120. *See FRIEDENTHAL ET AL.*, *supra* note 46, at 584.

121. Sun Jungong, *supra* note 80.

to have a significant impact on the role of judges, in reality, their impact is much less than that of an American jury.

C. Who Controls the Litigation?

If “we think litigation is an inquiry into truth,” we are likely to want judges “rather than the adversaries to control the inquiry” because the personalized battle is less likely to yield the truth.¹²² Under the adversary system, however, the parties (normally via their attorneys) rather than the judge “control and shape the litigation. . . . [T]he ultimate responsibility for presenting the case remains with the attorneys. . . .”¹²³ The parties can exercise control over the litigation at almost all stages.

The parties’ domination over litigation commences with pleadings. Pleadings “set forth the parties’ contentions” and “guide the court as well as the parties throughout the pendency of the case.”¹²⁴ Pleadings have two functions: to shape the case and guide the litigation. To shape the case, pleadings permit the parties to eliminate irrelevant issues from consideration.¹²⁵ By eliminating the irrelevant issues, pleadings actually limit the judge’s scope of attention. Pleadings guide the litigation, serving as a means to delineate and control the direction of a case. Under certain circumstances, the pleadings constitute the sole basis for the judge’s decision. For instance, the judge makes his decision as to “a party’s demurrer . . . motion . . . solely upon the face of the pleadings.”¹²⁶

Chinese law has flexible rules regarding pleadings. If the plaintiff is illiterate, he may submit his complaint orally.¹²⁷ Additionally, because Chinese judges do not determine cases solely based upon the pleadings submitted by the parties, pleadings do not play as crucial a role in the Chinese civil process as they do in the American system. Judges have much more leeway to look beyond the pleadings and as a result, the parties cannot control litigation through pleadings in China.

Discovery refers to the act or process of “obtain[ing] and preserve[ing] information regarding the action.”¹²⁸ Since the adoption of the Federal Rules of Civil Procedure (FRCP) in 1938, discovery has been “a vital part of the litigation process.”¹²⁹ One of

122. STEPHEN C. YEAZELL, CIVIL PROCEDURE 306 (5th ed. 2002).

123. FRIEDENTHAL ET AL., *supra* note 46, at 2-3.

124. *Id.* at 244.

125. *Id.* at 246.

126. *Id.* at 451.

127. The Law of Civil Procedure of the People’s Republic of China, art. 109.

128. FRIEDENTHAL ET AL., *supra* note 46, at 386.

129. *Id.*

the main purposes of discovery is to “ascertain the issues that actually are in controversy between the parties.”¹³⁰ Discovery is a self-help device for the parties to ascertain the truth of the case. Strictly speaking, there is no system comparable to discovery in China. Chinese law does not allow the parties to discover any evidence from another party except for the pleadings, which have been submitted to the court.¹³¹ Although parties in recent years have been exchanging evidence, the law does not require such exchanges. Therefore, the parties cannot control the litigation through discovery and the exchange of evidence.

IV. SUPERVISION OF JUDGES’ ADJUDICATION

Powerful and active judges alone are not sufficient to ensure “objective truth.” In order to ensure that judges adjudicate cases correctly, the Chinese system has designed a comprehensive supervision procedure by which a purported final decision can be subjected to review. This procedure is available to virtually anyone who is interested in the litigation.

A. Internal Supervision

As previously stated, Chinese courts are composed of specialized divisions for different types of cases, including family, economic, intellectual property, and traffic divisions.¹³² In addition, all courts have an internal department of the Chinese Communist Party (Party)¹³³ along with a discipline and supervision department. The supervision department may rehear the cases which the “court’s special panel of senior judges have ruled unfair.”¹³⁴ To discover possible judicial misconduct, they also review cases that have been remanded for retrial due to a protest by the procuratorate, or cases whose judgments have been amended to discover whether any judicial misconduct occurred.¹³⁵

In November 1998, the Chinese Supreme Court “appointed 10 prestigious judges as superintendents to supervise the work of local courts and investigate cases of judicial corruption.”¹³⁶ The superintendents are composed of former presidents of local high

130. *Id.* at 387.

131. *See* The Law of Civil Procedure of the People’s Republic of China (Evidence Regulations), arts. 10, 14.

132. Shao Zongwei, *Civil Court System Changes*, CHINA DAILY, Dec. 8, 2000.

133. Laifan Lin, *Judicial Independence in Japan: A Re-investigation for China*, 13 COLUM. J. ASIAN L. 185, 198. (1999).

134. Shao Zongwei, *Civil Court System Changes*, *supra* note 132.

135. Shao Zongwei, *Court Rules Tightened*, CHINA DAILY, Jan. 6, 2001.

136. *Reform Brings New Supervisory Judges*, CHINA DAILY, Nov. 2, 1998.

courts and current justices of the Chinese Supreme Court.¹³⁷ The purpose of this appointment is to facilitate the “development of the trial system in China and safeguarding judicial justice.”¹³⁸ Their functions include: “offering advice in handling major, difficult, or misjudged cases;” investigating corruption practices involving judges; and handling “cases involving parties from different jurisdictions.”¹³⁹ They report the findings of their investigations to the Chinese Supreme Court and make suggestions for resolution of any problems.¹⁴⁰ There are a few problems arising from this appointment. What is the legal basis for the jurisdiction of these superintendents? The Law of Civil Procedure of the People’s Republic of China does not provide for any jurisdiction of such superintendents. Who will supervise these superintendents? The president of the Chinese Supreme Court cautioned the superintendents against being involved in corrupt practices.¹⁴¹

In China, a court at a higher level has the power and obligation to supervise all the courts below.¹⁴² The Chinese Supreme Court supervises all the courts in China.¹⁴³ Each high court supervises all basic and intermediate courts within its jurisdiction. By withdrawing from all basic courts and most intermediate courts the jurisdiction over foreign-related commercial cases, the Chinese Supreme Court also intended to better supervise adjudication of these types of cases.¹⁴⁴ Pursuant to Chinese law, a judgment of the court of second instance (or appeal) is final.¹⁴⁵ Thus, a judgment made by a basic court or an intermediate court can rarely reach the Chinese Supreme Court through the normal appeal process. The Chinese Supreme Court could rarely exercise direct supervision over adjudication of these types of cases if basic or intermediate courts adjudicate them.

The Chinese Supreme Court introduced a new disciplinary measure on November 6, 2001.¹⁴⁶ According to this regulation, the

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. P.R.C. CONST. art. 127 (1982) “The Supreme People’s Court supervises the administration of justice by the people’s courts at various local levels and by the special people’s courts. People’s courts at higher levels supervise the administration of justice by those at lower levels.” *Id.*

143. *Id.*

144. Xin Zhiming, *Judicial Reform Meets WTO Rules*, CHINA DAILY, Mar. 19, 2002.

145. The Law of Civil Procedure of the People’s Republic of China, art. 10.

146. *See generally* Difang Geji Remnin Fayuan Ji Zhuanmen Fayuan Yuanzhang Fuyuanzhang Yinjiu Cizhi de Guiding; Regulation on Resignation of Presidents and Vice Presidents of Local and Special Courts at Various Levels (For the sake of brevity, this source will be cited as “Resignation Regulation” for the remainder of the article.).

president and vice presidents must tender their resignations in certain situations in which they failed to perform their administrative duties or if judicial misconduct occurred within their courts.¹⁴⁷ In the event that the president or the vice president responsible for any of the above violations fails to resign, the regulation empowers the Party committee, in consultation with a court at a higher level, to propose that the People's Congress (or its Standing Committee) remove the president or the vice president.¹⁴⁸

China also established a system of liability for erroneous judgments in the late 1980's.¹⁴⁹ Those who are responsible for making erroneous judgments are subject to five forms of liability: criminal liability, civil liability (the court may hold the judge who made the erroneous judgment liable for the compensation paid by the court), administrative or Party disciplinary measures, economic penalties (such as fines or reduction in salary or bonus), and other forms of employment-related sanctions (such as suspension of promotion or removal from the judicial post).¹⁵⁰

Further, pursuant to Chinese law, the trial court will be liable for compensation if it has made an erroneous judgment that has damaged the interests of the parties to the lawsuit.¹⁵¹ This is the so-called system of state compensation.¹⁵² Erroneous judgments subject to state compensation include illegal coercive measures, wrongful execution on judgment, and other decisions which infringe upon the legal rights of citizens, legal entities, or other organizations.¹⁵³ After the court has paid the compensation to the

147. *Id.* art. 4. These situations include: (1) The judgment violated law, "causing heavy losses to State benefits, public benefits or lives and properties of the masses;" (2) failure to report or investigate serious violations of law or disciplines, "causing a serious consequence" or blatantly adverse impact; (3) failure to maintain proper administration has led to "a major accident or heavy economic losses." *Id.*

148. *Id.* art. 6. This provision also indicates the crucial role of the Party in matters regarding appointment and removal of judges. This is relevant to our discussion about the Party's intervention in judicial activity later in Part IV.

149. Chen Xiangjun, *Ren Renmin Fayuan Cuoan Zeren Zhuijiu Zhi* [On System of Liability for Erroneous Judgments], Zhengyi Luntan [Justice Forum], at <http://www.jc.gov.cn/personal/ysxs/fnsx3/fnsx2980.htm> (last visited January 5, 2004).

150. *Id.*

151. Law of the People's Republic of China on State Compensation, art. 31.

152. Law of the People's Republic of China on State Compensation formally introduced the system of state compensation on May 12, 1994.

153. Interpretation of the Supreme People's Court on Certain Issues concerning Judicial Compensation in Civil and Administrative Litigations, art. 1 (P.R.C.) (For the sake of brevity, this source will be cited as "Interpretation on State Compensation" for the remainder of the article.). "If the People's court has taken coercive measures against the activities of disturbing litigation or preservation measures illegally, or made wrongful execution on judgment, decision or other valid legal document which has infringed the legal rights of citizens, legal entities or other organizations and caused damages, then the State shall be responsible for compensation." *Id.*

victim, it may seek indemnity from the judge if the judge was involved in illegal conduct or judicial corruption.¹⁵⁴ This has placed judges in a risky situation.¹⁵⁵

China has a code of judicial conduct that is similar to that of the United States. A judge cannot allow various social relationships to influence the judge's conduct or judgment.¹⁵⁶ In China, a judge, theoretically, cannot have *ex parte* meetings with either of the parties or their attorneys.¹⁵⁷ A judge cannot directly or indirectly use the prestige of the judicial office to advance the private interests of the judge, his relatives or others.¹⁵⁸ A judge must perform judicial duties impartially and fairly.¹⁵⁹ A judge must recuse himself or herself from a proceeding if the judge's participation in the proceeding will cast reasonable doubt on the judge's impartiality.¹⁶⁰

There is, however, a fundamental difference between the Chinese code of judicial conduct and the American system. In the United States, a judge cannot act as a leader or hold any office in a political organization, make a speech for a political organization, or attend political gatherings.¹⁶¹ However, a Chinese judge need not refrain from, but must take part in, all these political activities as his routine duties. A Party committee is established in every court, with the court president functioning as secretary, or political leader, of the committee. A Chinese judge's *ex parte* meetings with the

154. Law of the People's Republic of China on State Compensation, art. 24.

155. Judge Zhou Liewei's story is an interesting case involving a judge's liability for state compensation. Judge Zhou Liewei adjudicated an economic dispute in 1996. Upon motion made by the plaintiff, Judge Zhou Liewei ordered to foreclose the property of the defendant which was worth RMB \$ 230,100.00 (roughly equal to US \$ 30,000). The defendant applied to a higher court for state compensation for wrongful enclosure. The appellate court confirmed that the enclosure was illegal because it lasted too long, affected more property than necessary and the enclosed property was not in appropriate custody. Therefore, the State Compensation Committee of the appellate court ordered the trial court to pay damages of RMB \$ 103,675.30 to the defendant. The trial court decided that Judge Zhou Liewei should be liable for the damages. Lawyer Group, *at* <http://www.lawyer-group.com/law-case/xz/2014.htm> (last visited June 1, 2003). The report did not indicate whether Judge Zhou Liewei had been involved in illegal conduct or judicial corruption. This case demonstrates that the Chinese judiciary might be the most perilous one in the world. *See id.*

156. ABA CODE OF JUDICIAL CONDUCT Canon 2B (1990); Zhonghua Renmin Gongheguo Fayuan Zhiye Daode Jiben Zhuze, art 4; Basic Ethic Norms for Judges of the People's Republic of China, art. 4.

157. ABA CODE OF JUDICIAL CONDUCT Canon 3A(4) (1990); Basic Ethic Norms for Judges of the People's Republic of China, art. 8.

158. ABA CODE OF JUDICIAL CONDUCT Canon 3C (1990); Basic Ethic Norms for Judges of the People's Republic of China, arts. 23 and 26.

159. ABA CODE OF JUDICIAL CONDUCT Canon 3 (1990); Basic Ethic Norms for Judges of the People's Republic of China, art. 1.

160. ABA CODE OF JUDICIAL CONDUCT Canon 3C(1) (1990); Basic Ethic Norms for Judges of the People's Republic of China, art. 3.

161. ABA CODE OF JUDICIAL CONDUCT Canon 5B (1990).

parties are inevitable because Chinese law requires Chinese judges to conduct independent investigations. Meeting with the parties constitutes an essential part of such investigations.

B. External Supervision

1. Supervision by the People's Congress

According to the Chinese constitution, one of the major functions of the people's congresses, and their standing committees, is to supervise the work of the courts.¹⁶² The president of the Chinese Supreme Court promised that the Court would invite some members of the National People's Congress (NPC) and the Chinese People's Political Consultative Conference to be special consultants strengthening supervision of judicial work.¹⁶³ The Chinese Supreme Court set up a special liaison office to communicate with the NPC.¹⁶⁴ The President of the Chinese Supreme Court also required local courts to set up similar offices and "invite members of local people's congresses to inspect and evaluate their work."¹⁶⁵ Because the people's congresses are constitutionally empowered to oversee the work of courts, why do members of people's congresses have to be invited to supervise? Can the invited members of the people's congresses exercise effective supervision given the potential conflict of interest? While such an arrangement may indicate the intention of the Chinese judiciary to improve judicial work, it also demonstrates the difficulty the people's congresses have in fulfilling their constitutional mandate of supervising the judiciary.

The NPC supervision also includes supervision of law enforcement. Under the Chinese Constitution, the NPC and its Standing Committee are responsible for supervising the work of the Chinese Supreme Court and Supreme Procuratorate.¹⁶⁶ On a smaller scale, local courts, local people's congresses have similar powers vis a vis local courts.¹⁶⁷ However, Chinese law does not define "the actual scope and form of supervision by the People's Congress[es]. . . some local People's Congresses have adopted various methods such as appraisal, suggestion and even inquiry" into adjudication of a particular case.¹⁶⁸ Another commonly used way to supervise enforcement of law is to send out inspection

162. P.R.C. CONST. arts. 62(2), 67(1), 67(6), 128 (1982).

163. *People's Congresses to Monitor Court Work*, CHINA DAILY, Sept. 28, 1998.

164. *Id.*

165. *Id.*

166. P.R.C. CONST. art. 128 (1982).

167. *Id.*

168. Laifan Lin, *supra* note 133, at 198-99.

teams.¹⁶⁹ No scope or form of supervision has been defined, which makes it more difficult for the people's congresses to exercise effective supervision. This uncertainty also provides potential for impermissible intervention by the people's congresses into judicial work.

2. *Supervision by the Party*

From the viewpoint of the text of the Chinese constitution, the Chinese judiciary appears to have the authority to exercise its judicial power independently, and therefore, is not subject to interference by any administrative departments, public organizations, or individuals.¹⁷⁰ This provision seems to indicate that the Chinese judiciary is independent from any other state organs. In reality, however, the Chinese judiciary does not enjoy such independence. It is vulnerable to outside interference, particularly from the Party. Although the Party is China's major decision maker in state affairs, the Constitution mentions little about the Party.¹⁷¹ As China's governing political organization since the establishment of the PRC in 1949, the Party plays a leading role in all levels of government established by the Chinese Constitution.¹⁷² On the one hand, the Chinese Constitution provides that all organizations, including the Party and other political parties, are subject to the law.¹⁷³ On the other hand, the Chinese Constitution heralds the Party's leadership of the country,¹⁷⁴ elevating the Party to a privileged constitutional position over the law.¹⁷⁵

While the Party has loosened the reigns on the economy, it still retains the final control of all powers.¹⁷⁶ As far as judicial power is concerned, the Party exerts its pervasive influence and control over the judiciary through the Political and Legal Committee (PLC).¹⁷⁷

169. *NPC Aims to Supervise Law Enforcement Better*, CHINA DAILY, Mar. 3, 1998. For instance, the NPC sent out an inspection team in 1996 to examine enforcement of 21 laws and regulations in various jurisdictions. The team, headed by a Vice-Chairman of the NPC, listened to reports made by 11 ministries concerning enforcement of the above laws. *Id.*

170. P.R.C. CONST. art. 126 (1982).

171. *See* P.R.C. CONST. pmbl. (1982). The Constitution only confirms in its preamble the leading role the Party played in the long-term struggle for China's independence and its continued leading role in the socialist cause. *Id.*

172. *Id.*

173. *Id.* art. 5.

174. *Id.* at pmbl.

175. *See* Orts, *supra* note 28, at 69.

176. Robert C. Berring, *Chinese Law, Trade and the New Century*, 20 Nw. J. INT'L L. & BUS. 425, 442 (2000).

177. While many people who are familiar with the Chinese legal system have no difficulty in recognizing the role of the PLC, few of them can provide much documentary evidence

The PLC is normally chaired by the police chief (head of the Public Security Bureau) and joined by the president of the court and the heads of governmental law enforcement agencies. While the PLC does not directly hear cases, it may discuss and make decisions about cases that it considers politically sensitive and legally complex.¹⁷⁸ As the Chinese judiciary is subject to the control of the Party (through the PLC), it is unable to enjoy real independence. “Especially in highly charged political cases . . . the duty of judges is subservient to decisions of the Party.”¹⁷⁹ While the Chinese judiciary enjoys more independence in the area of civil litigation, the Party remains an “invisible but decisive hand” hidden in the legal machine.¹⁸⁰ The Party’s “brazen interference’ with judicial decisions has continued,” particularly when the outcome of a case “conflict[s] with the Party’s authority and interests.”¹⁸¹ One Chinese law professor wrote that the court “often reports . . . to the local Party committee and solicits opinions for solution . . . and if contradictions arise among different judicial organs, the Party’s political-legal committee often steps forward to coordinate.”¹⁸²

In addition to interference with court adjudication, the Party has control over appointment and removal of judges.¹⁸³ Pursuant to the Constitution, presidents and vice-presidents of courts are elected (or appointed) and removed by the People’s Congress (the Chinese equivalent to a legislature) or its Standing Committee at various levels.¹⁸⁴ However, the process of election, appointment, and removal is under the complete control of the Party.¹⁸⁵ Further, the Chinese judiciary is financially dependent upon the Party-dominated government. This dependence makes it extremely difficult, if not impossible, to escape the outside influence of the

showing the importance of the PLC in the Chinese legal system. One of the reasons is that most documents involving the role of the PLC are not readily available to the public.

178. Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China*, 13 COLUM. J. ASIAN L. 35, 89 (1999).

179. Orts, *supra* note 28, at 66-67.

180. Nanping Liu, *supra* note 178, at 88.

181. Orts, *supra* note 28, at 67 (quoting Sherry Liu, *Coming Home*, in CHINA REMEMBERS 286, 290 (Zhang Lijia & Calum MacLeod eds., 1999)).

182. Lubman, *supra* note 27, at 395 (quoting He Weifang, *Tongguo Sifa Shixian Shehui Zhengyi: Dui Zhongguo Faguan Xianzhuang de Yige Toushi* [The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges], in ZOU XIANG QUANLI DE SHIDAI: ZHONGGUO GONGMIN QUANLI FAZHAN YANJIU [TOWARD A TIME OF RIGHTS: A PERSPECTIVE OF THE CIVIL RIGHTS DEVELOPMENT IN CHINA] 209, 249 (Xia Yong ed., 1995)).

183. Resignation Regulation, art. 6. Not much documentary evidence exists to demonstrate this observation because Chinese law seldom defines the powers of the Party and its organs.

184. P.R.C. CONST. arts. 62(7), 67(11), 101 (1982).

185. Normally, the organizational department of the Party is responsible for major appointments and removals. See Resignation Regulation, art. 6.

Party. This dependence renders the constitutional guarantee for independently adjudicating cases meaningless.

Judicial independence is not compatible with China's fundamental political system, under which the leadership of the Party cannot be challenged. Judicial independence is based upon the idea of separation of powers among the branches of government. As far as judicial power is concerned, the separation of powers doctrine prohibits the legislative and the executive branches from interfering with the courts' final judgments. However, as China has never adopted the doctrine of separation of powers, this interference is constitutionally authorized.¹⁸⁶

3. *Supervision by Any Citizen*

Before the Law of Civil Procedure was revised in 1992, Chinese civil procedure allowed any citizen to make a complaint about a legally effective but allegedly erroneous judgment.¹⁸⁷ The 1992 revision of the Law of Civil Procedure abolished this right.¹⁸⁸ However, under the Chinese constitution, making a complaint about a decision is one of the democratic rights of all citizens.¹⁸⁹ There is no time limit or standing requirement for making a complaint about a court decision.¹⁹⁰ The most common form of making a complaint is to visit or write to the court for help.¹⁹¹

C. *Formal Procedures for Correcting Errors in Judgments*

1. *The Trial Court's Power to Correct its Own Errors*

Because the Chinese civil process does not tolerate erroneous judgments, trial courts in China have more flexible powers and are encouraged to correct their own errors.¹⁹² Thus, the Chinese system provides more grounds for a motion for a new trial. A Chinese court must conduct a new trial if the litigant establishes any of the following: (1) that there is newly-found evidence sufficient for the court to reverse the judgment or ruling; (2) that there was not

186. P.R.C. CONST. art. 128 (1982).

187. Nanping Liu, *supra* note 178, at n.181.

188. *Id.*

189. *Id.*; P.R.C. CONST. art. 41 (1982).

190. Nanping Liu, *supra* note 178, at 83.

191. For instance, during the period between 1998 and 2002, Chinese courts throughout the country received and handled 42,240,000 complaints made by citizens in the form of a visit or letter. The Work Report of the President of the Chinese Supreme Court to the National People's Congress in March 2003 (For the sake of brevity, this source will be cited as "2003 Work Report" for the remainder of the article.).

192. The Law of Civil Procedure of the People's Republic of China, arts. 177 (on its own initiative); 178 (by motion).

sufficient evidentiary proof of the facts ascertained by the trial court; (3) that the court wrongfully applied the law in its judgment or ruling;¹⁹³ (4) that the court violated the legal procedure which prejudicially influenced the judgment or ruling; or (5) that the judge was bribed or committed other judicial misconduct.¹⁹⁴

In China, there are several ways to initiate a new trial. First, a party to the lawsuit may move for a new trial.¹⁹⁵ A party who believes that there is a definite error in a legally effective judgment or ruling may move to the trial court or a court at a higher level to conduct a new trial.¹⁹⁶ In addition, a trial court may also conduct a new trial on its own initiative.¹⁹⁷ Where the president of a court at any level has found any “definite error in a legally effective judgment or order of his court and deems it necessary” to retry the case, he submits the erroneous judgment to the adjudication committee for discussion and determination.¹⁹⁸ While a litigant must submit his motion for a new trial within two years,¹⁹⁹ “there is no time limit for the court to conduct a new trial” on its own initiative.²⁰⁰ Further, if a court at a higher level has found a definite error in a legally effective judgment rendered by a lower court, the higher court may conduct a new trial of the case or instruct the trial court to conduct a new trial.²⁰¹

2. Appeal

To achieve the goal of ascertaining the truth, appellate courts in China are also designed to be more powerful and active than their counterparts in common law jurisdictions.

a. Chinese Assumptions Regarding the Role of Trial Courts

One cannot fully understand the Chinese appellate process without knowing the difference between Chinese and U.S. assumptions about the role of the trial court. In the United States, it is assumed that trial courts are in the best position to seek the truth because they are present when all evidence is offered and both

193. See Zhang Weiping, *Brief Exploration of New Trials in Civil Process*, PEOPLE'S COURT NEWSPAPER, Mar. 2, 2001, at 107, available at <http://www.civillaw.com.cn/weizhang/default.asp?id=10526>.

194. The Law of Civil Procedure of the People's Republic of China, art. 179.

195. *Id.* art. 178.

196. *Id.*

197. *Id.* art. 177.

198. *Id.*

199. *Id.* art. 182.

200. Nanping Liu, *supra* note 178, at 76.

201. The Law of Civil Procedure of the People's Republic of China, art. 177.

parties argue the case.²⁰² However, in China, it is assumed that trial courts are not necessarily in the best position to seek the truth because the quality of trial judges is presumably lower than that of appellate judges. The Chinese assumption of lower quality of trial judges is evidenced by the recent withdrawal of the jurisdiction of basic courts and most intermediate courts over foreign-related commercial cases.²⁰³ According to a document recently issued by the Chinese Supreme Court, only high courts and intermediate courts located in provincial capitals; special economic zones, and economic, technological development areas have jurisdiction over foreign-related commercial cases.²⁰⁴ In 1991, China amended its civil procedural law and as a result, intermediate courts have jurisdiction over *major cases* involving foreign parties.²⁰⁵ The amendment actually extended to all basic courts the jurisdiction over foreign-related commercial cases because basic courts were allowed to hear non-major cases involving foreign parties.²⁰⁶

This new arrangement was intended to comply with the WTO principles of “non-discrimination”²⁰⁷ because judges of courts at higher levels are of higher professional quality, thereby “ensur[ing] judicial justice and protect[ing] the legitimate interests of foreign individuals and enterprises.”²⁰⁸ According to one justice of the Chinese Supreme Court, judges of basic courts are not competent to hear foreign-related commercial cases because such cases involve complicated international trade issues.²⁰⁹ Better adjudication of

202. See *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (“When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court’s findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”). For insightful commentary, see Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1095 (1991).

When a jury rather than a judge has found the fact in question, the appellate court will grant even more deference because of constitutional requirements. The Seventh Amendment of the U.S. Constitution states, “no fact, tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” The Supreme Court of the United States has held that the Seventh Amendment permits trial court scrutiny of jury verdicts via Rules 50 and 59 motions. *Gasperini v. Ctr. for the Humanities, Inc.*, 518 U.S. 415, 426 (1996). However, the Court has also suggested that the same reexamination by an appellate court, because it has not been historically sanctioned, is at least doubtful. See *id.*

However, trial court conclusions of law are not entitled to any deference. The Supreme Court of the United States has held that “a court of appeal should review de novo a district court’s determination of state law.” *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

203. See generally, Xin Zhiming, *supra* note 144.

204. *Id.*

205. The Law of Civil Procedure of the People’s Republic of China, art. 19.

206. See *id.* arts. 18, 19.

207. Xin Zhiming, *supra* note 144.

208. *Id.*

209. *Id.*

these types of cases requires basic knowledge of international trade law, judicial procedure and foreign languages. But “few judges [of basic courts] can meet these requirements.”²¹⁰ This argument is not persuasive because very few judges in courts at higher levels can meet these requirements. Even if this assumption is correct, it is ironic that this reform is intended to comply with the WTO’s non-discrimination principles. In fact, it has created discrimination against Chinese individuals and companies because Chinese individuals and companies cannot enjoy the work of “high quality” judges of higher courts.

b. Scope of Review

The supervisory function of Chinese appellate courts is also evidenced by the extensive scope of appellate review. The wide scope of appellate review in China is more evident when compared with that in the United States. First, it is commonly accepted in the United States that “[t]rials will not be error-free; nevertheless, appellate review will not be available to remedy all the mistakes.”²¹¹ However, the Chinese civil process is designed to be an error-free system, and accordingly, any error must be corrected through appellate review. Second, American appellate courts are “*not to supervise the conduct of each trial to ensure that the judge adhered to all the rules of procedure and evidence that were applicable.*”²¹² However, appellate courts in China are constitutionally mandated supervisors of courts below.²¹³ Also, the power of American appellate courts is considerably restricted by the jury system. Thus, an American appellate court may not inquire into what transpired during the deliberation process because such inquiry would threaten the entire jury system.²¹⁴ As China has no jury system, there is no such limitation on the power of appellate courts. Further, American trial judges enjoy great discretion in determining cases. “[A]ny rulings that are within the discretion of the trial judge will be reviewed under an abuse of discretion standard.”²¹⁵ As Chinese trial judges have virtually no discretion in adjudication,²¹⁶ Chinese appellate courts do not need to honor the discretion of trial judges.²¹⁷ Finally, an American appellate court “does not independently search

210. *Id.*

211. FRIEDENTHAL ET AL., *supra* note 46, at 618.

212. *Id.* (emphasis added).

213. P.R.C. CONST. art. 127 (1982).

214. FRIEDENTHAL ET AL., *supra* note 46, at 584-85.

215. *Id.* at 625.

216. The Law of Civil Procedure of the People’s Republic of China, art. 7.

217. Opinion Concerning the Law of Civil Procedure, art. 180.

the record for errors below, but leaves the decision of what needs review to the litigants.”²¹⁸ In China, an appellate court may request the lower court’s record for review.²¹⁹

Apart from these general differences, there are even more specific distinctions between the Chinese appellate process and the American appellate system. In the United States, an appellate court will not review an error unless the “aggrieved party . . . objected promptly to the allegedly erroneous ruling in the trial court.”²²⁰ The Chinese system does not impose such a requirement upon the aggrieved party. An American appellate court will not set aside findings of fact unless clearly erroneous.²²¹ Even if an American appellate court determines that the trial court committed an error, it will not necessarily reverse it. In fact, the American system forbids federal courts from reversing a judgment for “errors or defects which do not affect the substantial rights of the parties.”²²² Only after the appellate court has found that the error was harmful will it reverse the judgment. Thus, it is not unusual that flawed judgments are made and executed without review since the trial judge “cannot always be confident that he ‘knows’ what happened” and he can only make the decision based upon the facts that he believes are “more likely to be true than not.”²²³ However, the Chinese civil process is designed to “apply laws correctly.”²²⁴ Therefore, any error may constitute a ground for reversal in a Chinese appellate court.²²⁵ A Chinese judge cannot make the decision based upon the facts that he believes are more likely to be true than not; he must exhaust all means to make sure that the fact is true.²²⁶

An American appellate court will review “only those issues that are presented in the parties’ briefs and the relevant portion of the trial-court record that is brought to the appellate court’s attention.”²²⁷ A Chinese appellate court is authorized to review any issue appealed, no matter whether the trial court has decided it on the merits or not.²²⁸ In China, “any incorrectly decided issues or cases, the so-called unjust, feigned, or mistaken decisions . . . may,

218. FRIEDENTHAL ET AL., *supra* note 46, at 620.

219. The Law of Civil Procedure of the People’s Republic of China, art 152.

220. *Id.* at 618.

221. FED. R. CIV. P. 52(a).

222. 28 U.S.C. § 2111 (2002).

223. *Anderson v. Bessemer City*, 470 U.S. 564, 580 (1985).

224. The Law of Civil Procedure of the People’s Republic of China, art. 2.

225. *See id.* art. 153.

226. *See id.*

227. FRIEDENTHAL ET AL., *supra* note 46, at 620.

228. Nanping Liu, *supra* note 178, at 50.

in principle, be reopened or redecided, no matter when, where or how the error was discovered.”²²⁹ The appellate court may even correct an error that the appellate court has found, despite the party’s failure to appeal the judgment of the trial court.²³⁰ The reason is simple: any error should be avoided and corrected if it has occurred and been discovered in the Chinese civil process.

An American “appellate court cannot act as a trial court and receive new evidence concerning the facts.”²³¹ “[T]aking of new evidence would be an intrusion on jury trial rights.”²³² The litigants may present new evidence before a Chinese appellate court.²³³ While this provision is found in Chapter 12, which deals with trial court proceedings, it is equally applicable to the appellate proceeding. According to the LCP, a Chinese appellate court should observe the provision in Chapter 14 dealing with appellate proceedings as well as those provisions prescribed in Chapter 12 regarding new evidence.²³⁴ Furthermore, the litigants may request a new investigation or inspection.²³⁵ A Chinese appellate court must form a collegiate panel to hear an appellate case.²³⁶ The appellate court may question the parties, make additional investigation, and consult the record of the trial court proceeding.²³⁷ A Chinese appellate court may hear the case in its own courtroom, on the scene of the event, or the courtroom of the trial court.²³⁸ Finally, the appellate court may review all facts and law relevant to the appeal.²³⁹ As Chinese appellate courts act as the supervisor of trial courts, Chinese appellate courts have virtually no limitation on the scope of their review.

c. Protests by Procuratorate

In the U.S. court system, the prosecution has no power to supervise the courts. In China, however, the primary function of the procuratorate is a supervisory organ for application of laws.²⁴⁰

229. *Id.* at 53.

230. Opinion Concerning the Law of Civil Procedure, art. 180.

231. FRIEDENTHAL ET AL., *supra* note 46, at 619.

232. *Id.* at 620.

233. The Law of Civil Procedure of the People’s Republic of China, art. 125.

234. *Id.* art. 157.

235. *Id.* art. 125.

236. *Id.* art. 152.

237. *Id.*

238. *Id.*

239. *Id.* art. 151.

240. P.R.C. CONST. art. 129 (1982); *see also* The Law of Civil Procedure of the People’s Republic of China, art. 14. The procuratorate is also responsible for investigating cases involving corruption, bribery, and dereliction of duty, and for prosecuting criminal cases on behalf of the State. Yang Lixin, *Brief Study of Forms of Procuratorial Supervision over Civil*

The procuratorate normally supervises adjudicative activities of courts by making procuratorial protests against erroneous civil, administrative and criminal judgments.²⁴¹ Generally, the Chinese Supreme Procuratorate may protest against a legally effective judgment or ruling rendered by a court at any level.²⁴² The procuratorate at a higher level may protest against a judgment rendered by a court at a lower level.²⁴³ The circumstances that trigger a protest by the procuratorate are the same as those that allow a litigant to make a motion for a new trial.²⁴⁴ Where a court conducts a new trial of the case protested by the procuratorate, the court must give a notice to the procuratorate so that the latter can appear at the hearing.²⁴⁵

The system of procuratorial protest was transplanted from the former Soviet system of civil process, whereby the chief procurator might make protest against unlawful or unjustified judgments regardless of whether he participated in adjudication of the case.²⁴⁶ While China now has a completely different social and political system from the former Soviet system, China retains the system of the procuratorial protest. Thus, once the procuratorate has made a protest, the court has to conduct a new trial.²⁴⁷ Further, while the LCP requires the litigant to apply for a new trial within two years after the judgment or ruling becomes effective,²⁴⁸ the LCP does not provide for any time limit for the procuratorial protest.²⁴⁹ Therefore, the procuratorate can make a protest against an effective judgment any time it pleases.²⁵⁰ As a result, litigation potentially never comes

and *Administrative Litigation*, <http://jc.gov.cn/personal/ysxs/fnsx2/fnsx1438.htm> (last visited June 1, 2003).

241. P.R.C. CONST. art. 129 (1982); *see also* The Law of Civil Procedure of the People's Republic of China, art. 14.

242. The Law of Civil Procedure of the People's Republic of China, art. 185.

243. *Id.*

244. *See* arts. 179, 185.

245. *Id.* art. 188.

246. Yang Lixin, *supra* note 240.

247. *Id.*

248. The Law of Civil Procedure of the People's Republic of China, art. 182.

249. *See id.* art. 185

250. Here is a rarely published case involving a protest by the procuratorate.

The Shenzhen People's Procuratorate lodged a protest in April [1998] against a decision of Futian District People's Court made three years ago against Workers' Daily, a Beijing-based national newspaper. . . . Futian People's District Court decided in January 1995 that Workers' Daily and two guest correspondents had defamed Liu Xingzhong, general manager of the Shenzhen Car Industry Trading Company (SCITC), by publishing a news story a year before accusing him of corruption and presumption. . . . The Futian Court ruled that the [allegations] were groundless and ordered the three defendants to pay [the plaintiff] \$50,000 yuan (US \$6000) in [damages and] . . . publish an apology.

to an end. If litigation can never be concluded, it is unlikely that the court can ever discover the truth.

The procuratorial protest can be initiated by submitting a petition to the procuratorate by the party to the lawsuit or other interested persons.²⁵¹ The rules do not define “other interested persons.”²⁵² The procuratorate received 432,000 visits by petitioners in 2002.²⁵³ In addition, the people’s congress and other institutions may transfer petitions to the procuratorate for a procuratorial protest.²⁵⁴ Here, the rules again fail to characterize “other institutions.” Generally, Party committees, youth organizations, women’s organizations and media are frequent originators of petitions. A higher procuratorate may direct a lower procuratorate to make a procuratorial protest.²⁵⁵ Further, the procuratorate may make the protest on its own initiative when it discovers an erroneous judgment.²⁵⁶

The procuratorate can make a protest only against a judgment or ruling that has taken effect.²⁵⁷ Thus, if a judgment or ruling has not become effective, the procuratorate cannot protest against it.²⁵⁸ In addition, the procuratorate cannot protest against a judgment if the court has agreed to conduct a retrial.²⁵⁹ Further, the procuratorial protest does not apply to a termination of marriage or adoption.²⁶⁰ Finally, the procuratorate will not accept a petition for a judgment as to which the procuratorate has decided not to protest the judgment.²⁶¹

Libel Cases Cause Media Concern, CHINA DAILY, Aug. 18, 1998 (internal quotations omitted). After the court decision, the defendants submitted a petition with the Supreme Procuratorate, which sent several procurators to Shenzhen to investigate the case. Then the Supreme Procuratorate directed the Provincial Procuratorate of Guangdong to lodge the protest in June 1995. The Provincial Procuratorate of Guangdong delegated the protest to the Shenzhen Procuratorate. The protest stated that the ruling of the Futian District Court was erroneous in both determining the facts and applying the law.

Id.

251. Rules of the People’s Procuratorate Regarding Protesting Civil and Administrative Judgments, art. 4 (For brevity, this source will be cited as “Procuratorial Protest Rules” for the remainder of the article).

252. *See id.*

253. *See generally*, Procuratorial Work Report.

254. Procuratorial Protest Rules, art. 4.

255. *See generally* Procuratorial Protest Rules.

256. *Id.*

257. *Id.* art. 5(1).

258. *Id.* art. 6(1).

259. *Id.* art. 6(3).

260. *Id.* art. 6(2).

261. *Id.* art. 6(4).

The judgment or the ruling must be erroneous for the procuratorate to make a protest. A judgment or a ruling is erroneous if based upon insufficient evidence, incorrect application of law, or violation of procedure.²⁶² The insufficient evidence standard can be satisfied in the following situations: (1) where the facts ascertained in the ruling are not supported by any evidence; (2) where the ruling failed to establish a fact despite sufficient evidence proving it; (3) where the ruling adopted false evidence as the basis for its factual determination; (4) where the judge failed to conduct a necessary investigation, resulting in prejudice to a party because that party was unable, for objective reasons,²⁶³ to collect evidence; (5) where both parties produced conflicting evidence but the judge failed to conduct an investigation or collect evidence when he should have done so; (6) where the ruling adopted an appraisal made in violation of law or by an unqualified appraiser; or (7) where the judge failed to make his own appraisal when he was required to do so.²⁶⁴

Incorrect application of law can occur when the judge fails to correctly characterize the nature or the subject matter of the legal relationship involved in the case. Incorrect application of law can also involve erroneous ascertainment of the owner of the rights, burden of liability, or division of liability. If the judgment or the ruling imposes liability on the defendant by omitting claims or exceeding the claims, it is an incorrect application of law. A final example of an incorrect application of law is where the judgment or the ruling fails to sustain a claim that has not exceeded the statute of limitations or maintains a claim that exceeds the statute of limitations.²⁶⁵

Violation of legal procedure refers to the failure to observe the rules of recusal, i.e., the interested judge or clerk failed to recuse himself. Also, if the trial is held and the judgment or the ruling was made after the trial was closed, it clearly constitutes violation of procedure.²⁶⁶ Further, if the judge made a judgment or ruling on default without serving a subpoena on the party who failed to appear in court, a violation occurs.²⁶⁷ In addition, an obviously unfair judgment may also be characterized as “erroneous.”²⁶⁸

While the judgment for which the procuratorate makes a protest must be erroneous, not all erroneous judgments will be subject to

262. *Id.* art. 12.

263. *See supra* note 65.

264. Procuratorial Protest Rules, art. 33.

265. *Id.* art. 34.

266. *Id.* at art. 35

267. *Id.*

268. *See generally*, 2003 Work Report, *supra* note 192.

the procuratorial protest. The procuratorate will decide not to make a protest if the petitioner fails to meet the burden of proof during the trial.²⁶⁹ The petitioner cannot apply for a procuratorial protest if the evidence admitted at trial is not sufficient to prove that the judgment or the ruling is erroneous or violates the law.²⁷⁰ This limitation distinguishes the petition for a procuratorial protest from the motion for a new trial. The LCP allows the aggrieved party to apply for a new trial if he can produce new evidence that is sufficient to prove that the judgment is erroneous.²⁷¹ The procuratorate will also refuse to make a protest if there is an error in the judgment with respect to ascertainment of facts or application of law, but its result does not substantially affect the interests of the state, the public, or the parties to the lawsuit.²⁷² If the court violated legal proceedings, but its violation did not affect the making of the judgment or the ruling, the procuratorate will also refuse to make a protest.²⁷³

The procuratorate may request the record for consultation from the court.²⁷⁴ Upon receipt of the court record, the procuratorate must conclude its review within three months.²⁷⁵ After the procuratorate accepts a petition, it will check whether the petition has satisfied the requirements imposed by the LCP.²⁷⁶ While the procuratorate will review the case primarily based on the court record,²⁷⁷ it may conduct its own investigation if the court failed to conduct a necessary investigation or collect evidence as required by law.²⁷⁸ The procuratorate may also conduct an investigation when it suspects that judicial corruption has probably occurred or the major evidence upon which the court ascertained the fact was

269. Procuratorial Protest Rules, art. 26(11).

270. *Id.* art. 26(2).

271. The Law of Civil Procedure of the People's Republic of China, art. 179(1).

272. Procuratorial Protest Rules, art. 26(4).

273. *Id.* art. 26(5).

274. *Id.* art. 14.

275. *Id.*

276. *See* The Law of Civil Procedure of the People's Republic of China, art. 185. According to Article 185, the petition for a procuratorial protest must meet at least one of the following requirements:

the main evidence ascertaining the facts in the previous judgment or order was insufficient;

there was error in the application of the law in the previous judgment or order;

a violation of the legal procedure may have affected the correctness of the judgment or order;

the judicial personnel committed embezzlement, accepted bribes, or [otherwise manipulated the result for personal gain].

Id.

277. Procuratorial Protest Rules, art. 17.

278. *Id.* art. 18.

probably false.²⁷⁹ It is commonplace for the aggrieved party to turn directly to the procuratorial petition process and disregard the right to appeal.²⁸⁰ The procuratorate may also require the petitioner to produce evidence in support of his petition.²⁸¹ If the petitioner fails to produce evidence as required, he will be deemed to have withdrawn his petition.²⁸² After the procuratorate's review is concluded, the procuratorate will decide whether it will lodge a protest with the court.²⁸³

Apart from the procuratorial protest, the procuratorate may also exercise its supervisory power by making procuratorial suggestions.²⁸⁴ Compared with the procuratorial protest, procuratorial suggestions have some advantages in that they do not trigger the complex procedure for the procuratorial protest,²⁸⁵ the erroneous judgment can be corrected in a more timely way, and they help maintain a good relationship between the procuratorate and the court.²⁸⁶ Finally, they have a wider scope of application and may be applied to correct any errors that occurred in the course of adjudication or in the judgment.²⁸⁷

V. OBSTACLES TO ASCERTAINMENT OF THE TRUTH

No system can ensure a perfect result in every case, and the Chinese system is no exception. Although China has an extensive supervisory system to ensure that the truth is discovered, the actual result is stunningly unsatisfactory. First, the number of judges who have been punished for judicial misconduct is still quite high. In 1998, 2,500 judicial officers were duly punished because of their misconduct.²⁸⁸ In addition, some 1,454 cases that were "mishandled or not tried in strict accordance with law have been discovered, of which 1,255 have already been corrected."²⁸⁹ In June 1998, the Chinese Supreme Court released statistics indicating that more than 10,000 judgments, from among 15 local courts alone, were found inappropriate and were later corrected.²⁹⁰ Further,

279. *Id.*

280. Wang Peizhong, *Tantan Sifa Jiandu de Ruogan Wenti* [Several Issues Involving Judicial Supervision], JURISPRUDENCE, Feb. 2000, at 152, at <http://www.jc.gov.cn/personal/ysxs/fnsx2/fnsx1956.htm>.

281. Procuratorial Protest Rules, art. 19.

282. *Id.*

283. *Id.* art. 25.

284. See Yang Lixin, *supra* note 240.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Top Judge Elaborates Courts' Focus of Work*, CHINA DAILY, Mar. 12, 1999.

289. *Judges Honored for Services to Justice*, CHINA DAILY, Oct. 21, 1998.

290. *Commentary*, CHINA DAILY, Aug. 13, 1998.

preliminary statistics suggest that, in the first eight months of 1998, “local people’s courts returned 8.27 million yuan (US\$996,300) of overcharged fines.”²⁹¹ These statistics indicate that the Chinese civil process frequently fails to realize its purported goal of seeking the truth. There are a number of problems inherent in the Chinese system that are attributable to the failure of the Chinese civil process to achieve its purported purpose. The following issues account for most of the problems of the Chinese civil system.

A. The Traditional Combination of the Judicial and the Administrative (Executive) Functions

It is generally understood that the extensive powers of Chinese judges are derived from the civil law tradition — the inquisitorial system. The Chinese legal system is influenced more by the civil law system than by the common law system. China began to import western legal systems in the early twentieth century.²⁹² Based upon some European legal codes, the Nationalist Government (which ruled from 1912 to 1949) enacted six basic substantive and procedural codes covering commercial, civil, and criminal law.²⁹³ After the Chinese Communist Party seized power in 1949, China turned to the Soviet Union for a model for its legal institutions.²⁹⁴ However, the current system is derived primarily from a unique tradition.

Traditionally, there was no distinction between the judiciary and the executive in China. A single local official, called the county magistrate, performed the functions of the head of the local government as well as that of the judge.²⁹⁵ His primary task was to foster “the overall welfare of the Emperor’s charges living within his district.”²⁹⁶ Therefore, he took on “a range of investigatory, prosecutorial, adjudicatory, and other responsibilities.”²⁹⁷ In order to discharge his responsibility to ascertain the truth, the county magistrate had the authority to “ask any questions he wished, personally view the scene of the crime, assign staff to investigate and to produce all evidence and witnesses, apply torture . . . and admonish the accused.”²⁹⁸ The myriad of duties of a county

291. *People’s Congresses to Monitor Court Work*, *supra* note 151.

292. Robb M. LaKritz, *Taming a 5,000 Year-old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT’L L. REV. 237, 248-49 (1997).

293. *Id.* at 249.

294. *Id.* at 250.

295. William P. Alford, *On the Limits of “Grand Theory” in Comparative Law*, 61 WASH. L. REV. 945, 952 (1986).

296. *Id.*

297. *Id.*

298. *Id.*

magistrate also included providing advice on functions such as “assessing and collecting taxes, regulating the local militia, maintaining a healthy fiscal administration, promoting the public welfare, overseeing the administration of justice, and fulfilling the Confucian ritual obligations of the position.”²⁹⁹ The county magistrates were not judicial officers in the sense of the common law system. They were “the ‘father and mother of the people,’ [standing] in the place of the Emperor, enforcing the Emperor’s commands. There could be no checks upon such power. . . . The magistrate *was* the state.”³⁰⁰ “The courts of traditional China . . . served not only as judicial centers of dispute settlement, but also as the local outposts of the civil service administration. The county magistrate . . . supervised the gamut of civil services” in his county.³⁰¹

After the establishment of the PRC, military officials gradually filled many judicial posts.³⁰² These new judges lacked legal knowledge and skills, “bringing a new approach to the law. . . . [T]hey argued that the law should be simple, free of technicalities, and easy for one to understand. The “new cadres” stressed simplicity, in part to rationalize their own lack of legal expertise.”³⁰³ “The primary task of the [judicial] officials was to educate the people to behave properly.”³⁰⁴ Chinese courts became forums for dispute resolution, education, and governance. As Professor William Jones, a prestigious expert in Chinese legal tradition concluded, “courts in contemporary China, unlike those in the West, are not central institutional constituents of the formal legal system, but are instead of only marginal significance.”³⁰⁵

Chinese practice, however, indicates that active judges are not necessarily in a better position to seek the truth than their U.S. counterparts. About 50% of trial court judgments in 1999 were appealed.³⁰⁶ Among these judgments, only 26.6% of judgments were

299. Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19, 38-39 (1996).

300. Berring, *supra* note 176, at 440.

301. Justice Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 385 (1987).

302. *See id.* at 388.

303. *Id.* at 389.

304. Bobby K. Y. Wong, *Chinese Law: Traditional Chinese Philosophy and Dispute Resolution*, 30 HONG KONG L.J. 304, 307 (2000). “During the Cultural Revolution, the Chinese court system was decimated and became effectually non-functional.” James Hugo Friend, *Foreword: The Rocky Road Toward the Rule of Law in China: 1979-2000*, 20 NW. J. INT’L L. & BUS. 369, 374 (2000).

305. Janet E. Ainsworth, *On Seeing Chinese Law from the Chinese Point of View: An Appreciative Look at the Scholarly Career of Professor William Jones*, 74 WASH. U. L.Q. 547, 556 (1996) (citing William Jones, *Some Questions Regarding the Significance of General Provisions of Civil Law of the People’s Republic of China*, 28 HARV. INT’L L.J. 309, 324 (1987)).

306. *See* He Bing, *supra* note 4.

sustained.³⁰⁷ The low rate of sustained judgments indicates that appellate courts have strengthened their supervision of trial courts, but also demonstrates the poor quality of adjudication of trial courts,³⁰⁸ even though trial judges have extensive powers to investigate cases. Furthermore, active judges may obstruct or inhibit the truth seeking process. For instance, a court should conduct a new trial if the litigant has produced new evidence that is sufficient to reverse the judgment or the ruling.³⁰⁹ However, the LCP does not define the scope of “new evidence.”³¹⁰ Examples of “new evidence” include three types of evidence: first, where the litigant failed to produce the evidence because he did not discover it at the time of litigation; second, where the litigant believed pertinent evidence existed but was unable to collect it, or he informed the court of this belief but the court failed to collect the evidence; third, the litigant had the evidence but, for some reason, failed to produce it.³¹¹ Under these circumstances, the judgment will likely be erroneous due to a lack of crucial evidence.

B. Extensive Supervision Leads to Excessive Intervention

While extensive supervision may facilitate fair adjudication, it also provides illegitimate opportunities for external influence, consequently abridging judicial independence. Judicial independence requires that the judicial power be separate from the legislative and executive powers.³¹²

In recent years, local protectionism — in American terms, “hometown justice” — is “the strongest and most insidious type of extra judicial influence on the outcomes of disputes.”³¹³ Chinese judicial reform, initiated in the late 1970’s, has led to the “decline in the power and role of the central government in the creation, implementation and enforcement of law and policy.”³¹⁴ This reform, however, is not proceeding in accordance with a detailed master plan.³¹⁵ There is a great deal of experimentation at the local level. Such local experimentation gradually extended the authority of local

307. *Id.*

308. *Id.*

309. The Law of Civil Procedure of the People’s Republic of China, art. 179(1).

310. *See id.*

311. Zhang Weiping, *supra* note 193.

312. Laifan Lin, *supra* note 133, at 187.

313. Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, in CHINESE LAW AND LEGAL THEORY, 289-380 (Perry Keller ed., Dartmouth Publishing Company Limited 2001).

314. Friend, *supra* note 304, at 374.

315. *See id.*

governments to make their own decisions.³¹⁶ Today, local governments have much more authority to make decisions in local affairs. While this decentralization effectuated China's economic reform goals, it also produced local protectionism. Local protectionism favors locals over outsiders in adjudications and in enforcement of judgments. If an outsider does achieve a judgment in his favor, "the enforceability of that judgment by a local Chinese court is extremely difficult, unnecessarily time consuming, and often ultimately unsuccessful."³¹⁷

"[L]ocal Party subunits like Political-Legal Committees place significant external pressure on judicial dispute resolution. Local cadres also exercise control through their ability to make formal judicial appointments and dismissals."³¹⁸ While Chinese law requires that court presidents be elected by the people's congress, the organizational department of the local Party committee determines appointment of court presidents.³¹⁹

While in theory local [officials] regulate court behavior by general policy making and local legislation, in practice they remain watchful of judicial behavior. . . .

. . . .

. . . [J]udges seemed more like extensions of state administration, checking abuses of power by local cadres to protect economic policies of central planners, than rational Western adjudicators applying law to serve justice among disputants.³²⁰

Judges are financially and institutionally dependent upon local governments in the jurisdictions in which they serve.³²¹ As the financing of the courts still depends on the governments at various levels, judges do not have any financial independence.³²² While the Chinese Supreme Court supervises the adjudicative work of all

316. *Id.*

317. *Id.* at 380.

318. LaKritz, *supra* note 292, at 260.

319. He Weifang, *Two Issues Regarding the System of Judicial Administration in China*, *supra* note 56.

320. LaKritz, *supra* note 292, at 260-61.

321. Laifan Lin, *supra* note 133, at 198.

322. *Id.*

other courts, it has no power over their individual budgets.³²³ Decisions in these matters are in the hands of local governments. This system contributes greatly to conversion of local protectionism to “local judicial protectionism,” in that local courts use their judicial power in favor of local parties. “Judges are dependent on local government personnel for their wages, promotions, and bonuses, and are therefore discouraged from draining local government resources by deciding in favor of nonlocal [sic] contract parties.”³²⁴

In order to protect local interests, local officials often interfere with adjudication in pending litigation. This influence “creates pressures on the courts to persuade complaining parties to withdraw suits, to issue judgments not in accord with law and facts, and to punish judges who try to be impartial with transfers.”³²⁵ It is not surprising that local governments and local people’s congresses intervene in the execution of judgments.³²⁶ The local police and procuratorate are also involved in resisting the execution of judgments against local businesses.³²⁷ In extreme cases, they even resist the enforcement of judgments from other jurisdictions by force or by taking away goods confiscated by the court.³²⁸ More than 50 such cases have been reported to the Supreme Court since 1992.³²⁹ Local protectionism is one of the reasons that the Chinese Supreme Court withdrew jurisdiction over foreign-related commercial cases from all basic and some intermediate courts.³³⁰

Some Chinese scholars show great sympathy for Chinese judges. They argue that when leaders (whether from a local government, Party Committee or People’s Congress) believe the case should be decided in favor of a local litigant, the court president should not resist this influence because all benefits and financial resources are in the hands of these leaders.³³¹ Chinese courts depend largely upon

323. P.R.C. CONST. art. 127 (1982).

324. LaKritz, *supra* note 292, at 262.

325. Lubman, *supra* note 27, at 395. State-owned enterprises, those companies affiliated with the army and local authorities, are often the most difficult to collect outstanding debts from. For instance, Chongqing Special Steel Corp. (CSSC), the largest steel company in China, owed 700 million yuan (US \$84 million) to its creditors. When the court executed the judgment against CSSC, the Chongqing Government refused to let CSSC be treated like a bankrupt business. *Courts Face Hurdles in Backlog*, CHINA DAILY, Nov. 30, 1998.

326. *Courts Face Hurdles in Backlog*, *supra* note 325. Jilin Provincial Government announced that ninety-four major enterprises within its province would have “special protection” — free from any liability in debt collection actions. *Id.* There are likely more protective enterprises at the prefectural and county levels.

327. *Id.*

328. *Id.*

329. *Id.*

330. Xin Zhiming, *supra* note 144.

331. He Weifang, *Two Issues Regarding the System of Judicial Administration in China*, *supra* note 56.

local government and Party authorities on such matters as appointment, removal, and promotion.³³² In addition, financial sources come entirely from the appropriation made by the local government.³³³ The budgetary funds of local governments primarily come from the taxes paid by local businesses.³³⁴

Supervision by the people's congress is also problematic as it damages the finality of judicial power. The people's congress lacks procedural safeguard for its supervision.³³⁵ The Chinese constitution empowers the people's congress to supervise adjudication of the courts, but it does not provide for any procedure for such supervision.³³⁶ A decision made by the people's congress without any formal procedures is hardly more just than a judgment by a judge through formal legal procedures. Furthermore, some people's deputies may have a stake in a particular lawsuit. There are nearly 3,000 deputies to the national people's congress.³³⁷ The number of deputies in local people's congresses at various levels far exceeds this number.³³⁸ Given the great number of people's deputies, it is hard to believe that none of them are involved in lawsuits; accordingly, their impartiality is reasonably doubtful.³³⁹

Due to extensive supervision, a judge may feel some hesitation in making his decision if the case seems complex or involves some political elites. In this situation, a judge may seek instructions from a higher court, making that court (appellate court) the actual trial court.³⁴⁰ When the instructions from the higher court prove wrong (which is not unusual because the higher court did not hear the case), the higher court will often decline to correct its own error even if the case is appealed to it.³⁴¹ As the normal appellate process fails to perform the function of correcting erroneous judgments, the aggrieved party has to resort to other means to obtain justice, thereby encouraging resort to external influence.

332. *Id.*

333. *Id.*

334. Yantian District People's Procuratorate of Shenzhen Municipality, *The Current Situation of Our Adjudicative System*, available at <http://www.jc.gov.cn/> (last visited Jan. 5, 2004).

335. See P.R.C. Const. art. 128 (1982).

336. Wang Peizhong, *supra* note 280, at 152.

337. Statistics available at <http://www.chinadaily.com>.

338. P.R.C. CONST. art. 128 (1982).

339. Wang Peizhong, *supra* note 280, at 153.

340. P.R.C. CONST. art. 152 (1982).

341. *Id.*

C. *Preference of Substantive Truth over Procedural Value*

Supervision, even unnecessarily extensive supervision, by itself is not the root of interference and intervention. The problem lies in China's preference of substantive truth over procedural values.

As previously suggested in this article,³⁴² in order to seek the truth, the county magistrate had authority to use any conceivable means to adjudicate a case.³⁴³ No formal procedures existed to restrain the county magistrates' authority to adjudicate cases, although some informal procedural rules might have existed.³⁴⁴ Mao's instrumentalist approach to legal institutions further intensified the Chinese preference of substantive truth over procedural values.³⁴⁵ Mao's approach to procedure was the so-called "mass line," which included administration of justice by the people rather than by a group of elite professionals.³⁴⁶ The mass line approach to administration of justice soared to prominence during the Cultural Revolution (1966-1976), which led to the overthrow of all formal legal institutions and everyone associated with them, including judges, lawyers, and procurators.³⁴⁷ The most often-used mass line technique was the mass campaign. "The mass campaign [was] designed to mobilize popular awareness of and support for current government priorities and goals Launched by a central government directive defining its objectives and scope, a mass campaign [was] pursued by local government, mass organizations, the mass media" and many other entities.³⁴⁸

After more than 20 years of reform, the mass line approach has lost its domination of the administration of justice in China. But it is still an important supplement to formal legal institutions. For instance, campaigns are excellent devices by which Chinese courts can crack down corruption. The Chinese Supreme Court launched a nationwide campaign to promote ethical conduct and punish corruption among judges in 1998.³⁴⁹ Three years later, the President of the Chinese Supreme Court announced the launching of a new campaign addressing ethical education and disciplinary action in order to ameliorate increasingly widespread judicial corruption.³⁵⁰ The launching of a new campaign indicates that the

342. *See infra* Part V.

343. *See* Alford, *supra* note 295, at 952.

344. Ainsworth, *supra* note 280, at 39.

345. *See* Lakritz, *supra* note 292, at 250.

346. Utter, *supra* note 301, at 390.

347. *Id.*

348. Ainsworth, *supra* note 322, at 557 n.46.

349. Shao Zongwei, *Judge Calls for Judicial Clean-up*, CHINA DAILY, Jan. 4, 2001.

350. Shao Zongwei, *Court Rules Tightened*, CHINA DAILY, Jan. 6, 2001.

previous campaign failed to achieve its purpose of coping with corruption.

In civil proceedings, the LCP requires that courts base their judgments on fact “and take the law as the criterion.”³⁵¹ In reality, however, the law is not the only criterion. The courts must accept the leadership of the Party and the guidance of the Party’s ideology.³⁵² While Chinese judges are more professional now than at any other time in China’s history, it is still not uncommon for a judge to “use ‘ideological discretion’ to achieve a ‘correct’ ideological result which is consistent with the [Party] policy. This is not only legal in China, but is actually mandated by the 1982 Constitution.”³⁵³ Thus, civil process becomes a tool to articulate and apply the Party’s ideological principles, values, and programs and helps to mobilize people to increase their commitment to the Party’s policies and goals. Among the qualifications required of a good judge, ideological purity and political dependability are most critical.³⁵⁴ One of the primary tasks for courts is to educate judges in the Party’s ideology.³⁵⁵ This practice of Chinese courts of putting politics first raises a number of questions. First, what is the Party’s ideology? Nobody can provide an accurate answer to this question because the Party’s ideology is ever changing — and extremely simple and broadly worded. If there is no definitive answer to this question, then how can judges adjudicate cases under the guidance of the Party’s ideology? Additionally, the Party’s current ideology is in conflict with Marxist orthodox theories, even though the Party still claims Marxism-Leninism as its guiding principle. When the Party’s ideology is not consistent with itself, which is commonly the case, who interprets the conflicting doctrines? For instance, can a judge use as guidance a Marxist theory which conflicts with the Party’s current policy? Finally, and most importantly, there is no procedure under which the Party’s ideology directs adjudication. The vagueness of the Party’s ideology, conflicting policies, and lack of procedure provide Party officials many opportunities to interfere with judicial work. Thus, in reality, the Party and its officials influence judicial ideology. As a result, China’s legal discourse repeatedly asks, “[W]hat matters more: official rank or the law?”³⁵⁶ One Party secretary provided a definite answer to this question:

351. The Law of Civil Procedure of the People’s Republic of China, art. 7.

352. 2003 Work Report, *supra* note 192.

353. Friend, *supra* note 304, at 375.

354. 2003 Work Report, *supra* note 194.

355. *Id.*

356. Donald C. Clarke, *Dispute Resolution in China*, 5 J. Chinese L. 245, 265 (1991) (quoting Gaishan Zhifa de Keguan Tiaojian [Improve the Objective Conditions for the Implementation of Law], FAZHI RIBAO, Apr. 13, 1989, at 16).

“Law is made by man; without man, how could there be law? Without man how could law matter at all? That’s why I say rank matters more.”³⁵⁷ Although now no Party official would openly make such a statement (indicating China’s progress towards the rule of law), the reality remains basically unchanged.

Party ideology is not the only problematic aspect of the Chinese legal system. Some scholars also point to a number of problems with the adjudication committee, a body that violates the principles of litigation.³⁵⁸ First, the committee separates the power to determine the case from the body that hears the case.³⁵⁹ When the adjudication committee gets involved in a case, the ones who hear the case (judge or collegiate panel) are not the ones who have the power to decide the case.³⁶⁰ Second, the committee deprives parties of the right to request the withdrawal of a judge who is prejudiced against them.³⁶¹ There is no right to request the withdrawal of any member of the adjudication committee, even if that member has a stake in the outcome of the litigation.³⁶² Third, the committee’s involvement in a case makes it difficult to determine the liability for erroneous judgments.³⁶³ When the adjudication committee decides a case without participating in any of the court proceedings, it is not clear who should be responsible if the judgment turns out to be erroneous. In practice, the collegiate panel is held liable for any error in ascertaining the facts, while the adjudication committee is responsible only for any incorrect application of law if it determines the case.³⁶⁴ But it is not always clear whether it is wrongful ascertainment of facts or incorrect application of law. The members of the adjudication committee know little about the cases on which they are going to deliberate before the adjudication committee is convened.³⁶⁵ Although the LCP recognizes the fundamental principle of open trials,³⁶⁶ the adjudication committee’s deliberations violate this principle because they are completely closed to the public.³⁶⁷

357. *Id.*

358. Shi Weibing, *Shenpan Weiyuanhui Zhidu Gaige Chutan* [Brief Exploration of Reform of the System of the Adjudication Committee], LEGAL DAILY, available at <http://www.jc.gov.cn/> (Feb. 27, 2000).

359. *Id.*

360. *Id.*

361. *Id.*

362. Shi Weibing, *supra* note 381.

363. *Id.*

364. *Id.*

365. *See Id.*

366. The Law of Civil Procedure of the People’s Republic of China, art. 10.

367. He Weifang, *Zouxian Sifa Gongzheng de Bage Zhidu Yaojian* [Eight Elements of Judicial Fairness], at <http://mylaw.myrice.com/> (last visited Jan. 5, 2004).

Even where formal adjudicatory procedures exist, it is quite common for Chinese courts to only loosely follow the procedures. For example, a higher court may equally offer instructions to a lower court without request when the higher court believes the case is one of "important impact."³⁶⁸ While the LCP does not authorize such a practice, one senior judicial officer suggests that such a practice would prevent an error from occurring at the outset, and accordingly facilitate judicial economy.³⁶⁹ He further argues that a higher court has an obligation to supervise lower courts in their adjudication.³⁷⁰ If a higher court failed to provide guidance in a timely way and allowed the error to occur, the higher court breached its duty of supervision.³⁷¹ This practice, however, is not consistent with the relevant statute, which requires basic courts and intermediate courts to refer important and major cases to a higher court, but does not allow instructions in advance.³⁷²

Formal procedure is often perfunctorily applied. Because the judge conducts an extensive investigation and collects evidence before he hears the case, he has an understanding of the likely result of the litigation before adjudication commences. In some instances, the judge will make a decision about the outcome of a case before hearing any argument, making the trial essentially a "show trial." Further, in the course of investigation, the judge inevitably has frequent, often *ex parte*, contacts with both litigants. All of these extra-evidentiary influences on judgments are problematic. Frequent contacts between the judge and litigants facilitate judicial corruption because they are not subject to any procedural requirements.

a. Inconsistency in Laws

In China, both the legislative body and the executive branch share the rule-making power. The legislative, law-making body is the National People's Congress (NPC) and its Standing Committee.³⁷³ The executive branch is headed by the State Council, which has authority to make administrative regulations.³⁷⁴ The

368. He Weifang, *Two Issues Regarding the System of Judicial Administration in China*, *supra* note 56.

369. *Id.*

370. *Id.*

371. He Weifang, *Two Issues Regarding the System of Judicial Administration in China*, *supra* note 56.

372. See Organic Law of People's Courts of the People's Republic of China, arts. 21 and 25.

373. P.R.C. CONST. arts. 62(3), 67(2) (1982); see also The Law on Legislation of the People's Republic of China, art. 7.

374. P.R.C. CONST. arts. 85, 89(1) (1982); see also The Law on Legislation of the People's Republic of China, art. 56.

executive agencies may enact departmental rules.³⁷⁵ Apart from the diversity of rule-making power, the power to interpret the law is also fragmented. The legislative body, the executive branch, and the Chinese Supreme Court all possess the power to interpret laws.³⁷⁶ The consequence of this fragmentary power to make and interpret the law is widespread inconsistency both in enacted law and in the interpretation of law. Not only do courts have difficulty applying these conflicting rules and interpretations, but the conflicting rules also provide opportunities for judges to arbitrarily apply the law, particularly when they are motivated by personal interest or external pressures. Chinese laws are usually expressed in simple, broad language.³⁷⁷ “Standard drafting techniques include the use of general principles, undefined terms, broadly worded discretion, omissions, and general catch-all phrases.”³⁷⁸ Vague and conflicting provisions in Chinese law may lead to arbitrary application by courts of these rules in particular cases. Fragmentation of the power to make and interpret rules provides other institutions with opportunities to impermissibly interfere with courts’ adjudication.³⁷⁹

Another less formal, but more important, category of Chinese law is the “policy law,” which takes the form of policy statements, meetings, notices, instructions, and speeches.³⁸⁰ As a result, the Chinese legal system amounts to “a bewildering and inconsistent array of laws, regulations, provisions, measures, directives, notices, decisions, explanations, and so forth, all claiming to be normatively binding.”³⁸¹ Complicating this legal uncertainty is the fact that China does not adopt the doctrine of precedent; Chinese courts “have been more concerned with substantive justice than with

375. P.R.C. CONST. art. 90 (1982); *see also* The Law on Legislation of the People’s Republic of China, arts. 71 and 72.

376. P.R.C. CONST. art. 67(4) (1982); The Law on Legislation of the People’s Republic of China, arts. 85, 86.

377. Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 749-52 (1994).

378. Lubman, *supra* note 27, at 391.

379. On Nov. 30, 1998, China’s Ministry of Public Security (MPS) issued to all public security bodies throughout the nation the Notice on the Scope of Application of Reeducation through Labor (RTL). This notice is intended only to be a document directing the work of public security bodies because MPS is an executive agency. However, the notice also tells courts what to do by clearly stating, “When reviewing the administrative decisions as to application of RTL, courts should take into full consideration the actual situation in rural areas, treat them with great care and should not readily turn down the decisions made by the relevant authorities which approved application of RTL.” *Id.* (emphasis added).

380. *Id.*

381. Orts, *supra* note 28, at 68 (quoting Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 CULTURAL DYNAMICS 315, 333 (1999)).

ensuring uniformity of results.”³⁸² Because the Chinese legal system is not consistent in terms of its laws and result, Chinese judges have greater latitude to arbitrarily adjudicate cases. This inconsistency also encourages external influence on judicial decisions. “The complexity of the interaction among these different levels of law and their administration opens the door for political policy decisions to replace legal rules in deciding particular cases.”³⁸³

D. Quality of Judges

One commentator suggests that Chinese judges are “ordinary civil servants rather than special officials independent of political authority.”³⁸⁴ Thus, they do not share the same values that typical common law judges have. As stated earlier, most Chinese judges fail to meet the minimum educational requirements. One of the reasons so many judges lack formal education is that, during the upheaval of the Cultural Revolution (from 1967 to 1978), law schools were closed, and China’s judicial system was virtually wiped out.³⁸⁵ When courts were reestablished in the late 1970’s, courts and procuratorate offices “had to hire non-professionals with limited understanding of the law and then provided them with training in the 1980s.”³⁸⁶

Now, China has increased its entry requirements for judges. Only those who have passed National Judicial Examination, which replaced the separate examinations for judges, procurators and lawyers, can become judges.³⁸⁷ But even under the Judges Law, formal law school education is not a requirement.³⁸⁸ Because a great number of judges lack formal education, China must spend a lot of money on training programs. For instance, from 1997 through 2002, more than 200,000 judges received professional training.³⁸⁹ In recent years, China has adopted “ambitious plans to send top judges to study abroad” so that they will be more qualified to adjudicate foreign-related cases.³⁹⁰

382. Friend, *supra* note 304, at 375 (quoting Margaret Y. K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 163, 170 (Karen Turner et al. eds., 2000)).

383. Orts, *supra* note 28, at 67.

384. Alford, *supra* note 295, at 949 (quoting Jerome A. Cohen, *Due Process?*, in *THE CHINA DIFFERENCE* 237 (R. Terrill ed. 1979)).

385. Shao Zongwei, *Exam to Improve Legal Professionals*, CHINA DAILY, Apr. 1, 2002; Lubman, *supra* note 27, at 388-89.

386. Shao Zongwei, *Exam to Improve Legal Professionals*, *supra* note 387.

387. Shao Zongwei, *Exam to Improve Legal Professionals*, *supra* note 387.

388. Law on Judges, art. 45.

389. Shao Zongwei, *Court to Guarantee Fair Trials*, CHINA DAILY, Dec. 25, 2002.

390. Shao Zongwei, *Courts Trained for Fairness and Efficiency*, CHINA DAILY, Jan. 17, 2002.

Another issue that plagues the Chinese judicial system is the difficulty courts and law enforcement personnel have in executing judgments. As of September 1998, nearly one million cases with a combined value of more than twenty-two billion dollars were pending in China,³⁹¹ a fact which makes judgments little more than pieces of paper. The trials of a number of the cases pending likely occurred more than 50 years ago during the early period of the founding of the PRC in 1949.³⁹²

The national incidence of unexecuted cases now stands at 30 percent per year. In some courts, the backlog of adjudicated but unresolved cases has risen to a stunning 60-70 percent of the annual caseload. . . . [M]ore than 30 incidents have been reported in Fujian Province in which 30 law enforcers were injured during their attempts to resolve cases. "The violence against law enforcement officers has become an increasingly serious problem," says Zhang [Fuqi, director of the Enforcement Division of the Supreme People's Court]. "Four court police officers have been killed during the process of execution in the past three years."³⁹³

Although Chinese courts have used a variety of methods in efforts to alleviate this problem, the outcome is far from satisfactory. Some Chinese courts even "publish the names of those who refused to implement judgments against them."³⁹⁴ The reasons for execution difficulty may be varied, but the quality of the judicial work is one of the major causes. He Weifang, a law professor at Peking University School of Law, stresses the necessity of improving trials.³⁹⁵ If the trials strictly follow legal procedures, courts might be able to convince the litigants that the process is fair, thereby increasing the perceived legitimacy of their judgments.³⁹⁶ He Weifang also argues that, instead of carrying out the execution of judgments themselves, courts should delegate enforcement to the police.³⁹⁷ He suggests that courts "should concentrate on trials while leaving execution of their rulings to others."³⁹⁸

VI. CONCLUSION

Although the Chinese civil process has been designed to achieve the goal of seeking the truth, it does not necessarily mean that the

391. *Courts Face Hurdles in Backlog*, *supra* note 325.

392. *Id.*

393. *Courts Face Hurdles in Backlog*, *supra* note 325.

394. *Courts Call for Local Enforcement of Rulings*, CHINA DAILY, Aug. 20, 1999.

395. *Courts Face Hurdles in Backlog*, *supra* note 325.

396. *Id.*

397. *Id.*

398. *Id.*

Chinese system is an error-free system as it is intended to be. It is clear that the Chinese civil process has not facilitated to ascertain but rather twisted the truth. Due to the problems inherent in the system itself, corrupt practices, abuses of the judicial power, and other judicial misconduct remain rampant in China. This judicial misconduct has considerably restrained Chinese courts from seeking the truth in civil process.

The Chinese system has not only failed to achieve its primary purpose of ascertaining the truth but has also proved to be inefficient and ineffective. Extensive formal and informal supervisory devices are highly costly and time-consuming. A case may literally never come to an end, leaving the truth to never be ascertained. The Chinese Supreme Court dealt with 4,673 cases in 1998; local courts dealt with 5.41 million cases in 1998.³⁹⁹ No system can ensure 100% correct judgments. “No one would assert that the trial process is a scientific one or that a just result may be achieved only if no errors are made.”⁴⁰⁰ “We bring some disputes to an end not because we’re sure we’re right, but because we’re sure there has to be an end to the disputes so people can move on with their lives.”⁴⁰¹ The Chinese civil system needs to strike a balance between ascertainment of truth and efficiency.

In fact, the Chinese Supreme Court has become aware of the importance of judicial efficiency. At a national conference held in early January 2001, Xiao Yang, the president of the Chinese Supreme Court, stated that judicial fairness and efficiency had been top priorities on the agenda of Chinese courts.⁴⁰² At the end of the same year, the Chinese Supreme Court set justice and efficiency as the goals all courts should pursue in their work in the new century.⁴⁰³ At the end of 2001, the Chinese Supreme Court issued a judicial interpretation on the evidence of civil lawsuits—judges can refuse to consider evidence offered after the time limits have elapsed and failure to offer evidence within these time limits would be considered a renunciation of the right.⁴⁰⁴ Delay in producing evidence has been one of the major obstacles to efficiency in the adjudication of cases in Chinese courts.⁴⁰⁵

As the forgoing pages indicate, Chinese courts are subject to supervision of external institutions such as the procuratorates, people’s congresses, and the Party. The term “external supervision”

399. *Top Judge Elaborates Courts’ Focus of Work*, CHINA DAILY, Mar. 12, 1999.

400. FRIEDENTHAL ET AL., *supra* note 46, at 574.

401. YEAZELL, *supra* note 122, at 886.

402. Shao Zongwei, *Judge Calls for Judicial Clean-Up*, CHINA DAILY, Jan. 4, 2001.

403. Shao Zongwei, *Judges Urged to Stick to Justice*, CHINA DAILY, Dec. 12, 2001.

404. Regulation Regarding Evidence in Civil Procedure, art. 34.

405. Shao Zongwei, *Courts Trained for Fairness and Efficiency*, CHINA DAILY, Jan. 17, 2002.

conveys an inaccurate message that such external supervision is independent. It is true that these external institutions are independent from courts. However, all branches of government in China are under the unified leadership of the Party.⁴⁰⁶ As a result, like judicial work in general, supervision of adjudication must also accept the leadership and guidance of the Party. Since both the supervisors (people's congresses and the procuratorates) and the supervised (courts) are vulnerable to the command of the same boss (the Party), no real independent supervision exists in the Chinese civil process. When supervision lacks independence, it may not only fail to achieve its functions, but also becomes a further obstacle to effective adjudication. It is true that more than twenty years of reform has loosened the Party control of the Chinese society to a noticeable extent. But the reality is that the Party is still the sole and ultimate source of all powers.

For a long time, the decisions made by the collegiate panels were subject to approval first by the division chief and then by the vice-president or the president.⁴⁰⁷ The Chinese Supreme Court has determined to gradually reform the approval practice to enhance quality and efficiency.⁴⁰⁸ According to a new law, the judge or the collegiate panel is not required to obtain approval from division chiefs or president.⁴⁰⁹ But it is still the common practice that the division chief or the president steps in and directs the adjudication.⁴¹⁰ Therefore, the division chief or the president remains the ultimate arbitrator of all major cases. Since the approval system has been abolished, why does the judge or the collegiate panel defer to the opinions of the division chief or the president? The answer is simple. The division chief and the court president have the final say in the matters regarding performance evaluation, promotion, housing, participation in training, and joining the Party.⁴¹¹ Therefore, if a judge holds on to his own views, he will find himself in a disfavored position, or even risk ruining his career as a judge.⁴¹² Further, Chinese law still allows the president or division chiefs to examine the conclusion of deliberation of the collegiate panel or written verdicts.⁴¹³ Although the president or the

406. P.R.C. Const. prml. (1982).

407. 2003 Work Report, *supra* note 192.

408. *Id.*

409. Yantian District People's Procuratorate of Shenzhen Municipality, The Current Situation of Our Adjudicative System, *available at* <http://www.jc.gov.cn/> (last visited Jan. 5, 2004) [hereinafter Our Adjudicative Situation].

410. *See Id.*

411. *See Id.*

412. Our Adjudicative Situation, *supra* note 448.

413. Some Provisions of the Supreme People's Court Concerning the Work of the Collegiate

division chief can no longer change the deliberation result of the collegiate panel, they may provide their written opinions on the ruling with which they disagree and the reasons for their disagreement.⁴¹⁴ They may also suggest that the collegiate panel reconsider it.⁴¹⁵ If the collegiate panel still will not change its decision, the division chief may refer the decision to the court president for review, who may further forward it to the adjudication committee for final decision.⁴¹⁶ These provisions indicate that the opinions of the division chief and the president are still decisive—the judge or the collegiate panel appears not to have any choice but follow their opinions.

The distinction of judges by their administrative ranks is incongruous with the nature and function of the administration of justice because judges cannot make independent decisions. Because of the increasing administrative nature of Chinese courts, not only are these courts less independent from other political institutions, but the judges are less independent as well. The higher rank of a judge means he is treated better both politically and economically, and indicates his dominant position in relation to those lower rank judges and represents his superior quality as a judge.⁴¹⁷ The adjudication committee, presidential and division chief approval system and the ranking of judges have combined to injure judges' pride and sense of responsibility and honor.⁴¹⁸ As a result, judges would be unlikely to commit themselves to performing their mission of seeking the truth. This is one of the crucial factors in the high rate of erroneous judgments. This also constitutes a starting point in a vicious circle. As the quality of judges is so poor, it is necessary to intensify supervision. Extensive supervision in turn has diluted judges' power and functions and consequently adversely affected judges' performance. Again, poor performance of judges is cited as justification of more supervision. Real judicial independence requires independence of courts but also independence of judges.

In order to tackle the problems with China's civil process, China has worked upon reform toward the adversary system and the Evidence Regulation is one of the results of such reform. Every legal system has formed, evolved, and improved by using the experience of other legal systems. In fact, since the reform was initiated in late 1970s in China, China has never stopped drawing

Panel of the People's Courts, art. 16.

414. *Id.* arts. 16 and 17.

415. *Id.* art. 17.

416. *Id.*

417. He Weifang, *Two Issues Regarding the System of Judicial Administration in China*, *supra* note 56.

418. He Weifang, *Eight Elements of Judicial Fairness*, *supra* note 369.

on the experience of other legal systems. In recent years, China's efforts to join the World Trade Organization (WTO)⁴¹⁹ further sustained China's interest in learning from other countries. In early 2001, the Chinese Supreme Court began to identify those judicial interpretations that are not consistent with the WTO regime.⁴²⁰ The Chinese Supreme Court also pledged that Chinese courts would give priority to WTO rules in cases where domestic laws and regulations are in conflict with the WTO regime.⁴²¹ In order to honor the WTO principle of transparency, China would publish foreign-trade laws, regulations and policies as well as judicial rulings.⁴²²

While it is important to make use of the experience of another system, law is "local knowledge"⁴²³ in the sense that a legal system is "a unique and finely tuned product of the overall cultural context in which it is embedded."⁴²⁴ China cannot and should not substantially reform its judicial system by copying indiscriminately the experience of other systems, including the American system. As part of a legal order, a judicial system does not exist in a vacuum but in the combination of "political arrangements, social relations, interpersonal practices, economic processes, cultural categorizations, normative beliefs, psychological habits, philosophical perspectives, and ideological values."⁴²⁵ A lesson we should draw from China's experience in reforming its legal institutions is that China has not cherished those positive aspects in its own culture, including its legal tradition.

419. See generally Greg Mastal, *China and the World Trade Organization: Moving Forward without Sliding Backward*, 31 LAW & POL'Y INT'L BUS 981-87 (2000).

420. Shao Zongwei, *Supreme Court Gets Ready for WTO Entry*, China Daily, Feb. 22, 2001.

421. *Id.*

422. *Id.*

423. Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 215 (1983).

424. Ainsworth, *supra* note 280, at 28.

425. *Id.*

