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The Future of Judicial Independence in China

by

LIN Feng

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LIN Feng*

I. INTRODUCTION

There already exist several dozens of academic writings in English discussing judicial independence in the People's Republic of China (China).[1] A reading of them will give any reader a good understanding of Chinese judiciary, different views on existence or non-existence of judicial independence, and various issues relating to judicial independence in China. Cohen observed in 1969 that '… judicial independence can hardly be deemed irrelevant to [China's] future development'.[2] Now almost 50 years later, that prediction has proven to be accurate. The Chinese Communist Party (CCP) has started several rounds of judicial reform with the intention to make the judiciary more independent.[3] Recently, China has started the third round of judicial reform since the CCP came into power.[4] It began in 2012 with the publication of the 'Whitepaper on Judicial Reform in China'.[5] In November 2013, the 3rd Plenary Session of the 18th Central Committee of the CCP adopted the 'Decision on Some Major Issues Concerning Comprehensively Deepening the Reform' (2013 Decision) of which Part Nine is on 'Promoting the Rule of Law'.[6] In October 2014, the 4th Plenary Session of the 18th Central Committee of the CCP adopted the 'Decision on Several Important Issues concerning Comprehensively Deepening Rule of Law' (2014 Decision).[7] Thereafter, the

* Professor of Law, Associate Dean, Director of Centre for Chinese and Comparative Law, School of Law, City University of Hong Kong; barrister, Hong Kong; member, Law Reform Commission of Hong Kong; Co-Editor-in-Chief, *Asia Pacific Law Review*. The author would also like to thank Ms Pinky Choy, research fellow at the Centre for Chinese and Comparative Law of the School of Law of City University of Hong Kong for her assistance in finalizing the footnotes of this paper.

[1] A series of literature starts with Professor Jerome Cohen's piece on 'The Chinese Communist Party and "Judicial Independence": 1949-1959' (March 1969) 82(5) Harvard Law Review 967.

[2] Ibid 1005.

[3] SPC, 'Whitepaper on Judicial Reform in China' (on 29 February 2016) <http://english.court.gov.cn/2016-03/03/content_23724636.htm> accessed 20 April 2016 [hereafter 'Whitepaper 2016'], Part I.

[4] According to Professor Tong Zhiwei, the first round of judicial reform happened in the 1980s during which the system for party committees at different levels to examine and approve cases was abolished, court trial was strengthened, open trial, advocacy by lawyers, and professionalization of judges were promoted. The second round of judicial reform happened from 2004 to 2012 during which the focus was on improvement of institutional setting of courts, proper allocation of authorities, promotion of fair trial, and enhancement of adjudication competence. Tong Zhiwei, 'The path leading to independent adjudication by Chinese courts' *Fenghuang Daxuewen* (China 27 January 2016) <http://dxw.ifeng.com/shilu/tongzhiwei/1.shtml> accessed 19 April 2016.

[5] State Council, 'Judicial Reform in China' (October 2012) <http://english.gov.cn/archive/white_paper/2014/08/23/content_281474983043170.htm> accessed 19 April 2016.

[6] CPC Central Committee, 'Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform' (Adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China on 12 November 2013) <http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm> accessed 19 April 2016. In Part Nine, there are three paragraphs on judiciary from para 32 to para 34.

[7] CPC Central Committee, 'Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to Law Forward' (Adopted at the Fourth Plenary Session of the 18th Central Committee of the Chinese Communist Party on 23 October 2014) <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/> accessed 19 April 2016. The Decision sets out the objective of the development of a socialist rule of law system with Chinese characteristics and a socialist rule of law country.

Supreme People's Court (SPC) adopted in February 2015 the 'Opinions on Comprehensively Deepening the Reform of the People's Courts' (SPC Opinions).[8] Recently the SPC has issued a new 'Whitepaper on Judicial Reform in China' (new Whitepaper).[9]

This paper has no intention to repeat all the discussions which have already been covered by the existing literature. Nor does it intend to discuss all the details of the recent judicial reform in China which is beyond the scope of this paper.[10] Instead, it will, on the basis of existing literature, discuss how the most recent round of judicial reform has advanced and will continue to advance judicial independence in China as well as the issues which still need to be addressed.

In existing literature, there exist mainly two different research approaches on judicial independence in China. One can be described as social-legal approach. As early as in 1969, Professor Cohen said the following:[11]

> Judicial Independence is not something that simply exists or does not exist. Each country's political-judicial accommodation must be located along a spectrum that only in theory ranges from a completely unfettered judiciary to one that is completely subservient. The actual situation in all countries lies somewhere in between.

This approach is also taken by the editor of the first English book on judicial independence in China and some other scholars.[12] They have challenged some conventional views through detailed analysis of Chinese courts' handling of specific categories of cases.[13] Peerenboom is of the view that one needs to disaggregate judicial independence into various subcomponents and examine each of them[14] in different kinds of cases[15] to find out the degree of judicial independence.

The other approach is more traditional and doctrinal. In discussing and measuring whether or not there is judicial independence in China, some scholars have referred to international standards on judicial independence as set out by the International Bar Association (IBA), the United Nations (UN), and various other inter-governmental organizations and NGOs.[16] Their analytical framework has grouped the minimum standards adopted by the IBA and the UN into

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[8] SPC, 'Opinion of the Supreme People's Court on Deepening Reform of the People's Courts Comprehensively: Outline of the Fourth Five-year Reform of the People's Courts (2014–2018)' (26 February 2015) <http://news.china.com.cn/txt/2015-02/26/content_34893543.htm> accessed 20 April 2016. The (unofficial) English translation is available at <http://chinalawtranslate.com/court-reform-plan/?lang=en> accessed 20 April 2016. The SPC Opinions was adopted on 4 February 2015 and is also called the 'Fourth Five-Year Reform Guidelines of the People's Courts', covering the period from 2014 to 2018.

[9] SPC, 'Whitepaper 2016' (n 3).

[10] The SPC Opinions has listed 65 action plans and it is impossible to discuss all of them in this paper.

[11] Cohen, 'The Chinese Communist Party' (n 1) 972.

[12] Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, New York 2010).

[13] My colleague Professor Xin He is another scholar in this group who has written quite a few papers on Chinese judiciary and one is collected in Peerenboom's book. Xin He, 'The Judiciary Pushes Back: Law, Power, and Politics in Chinese Courts', in Peerenboom (ed), *Judicial Independence in China*, ibid., 180.

[14] Randall Peerenboom, 'Judicial Independence in China: Common Myths and Unfounded Assumptions', in Peerenboom (ed), *Judicial Independence in China* (n 12) 70.

[15] Fu Yulin and Randall Peerenboom did this in their article: Fu Yulin and Randall Peerenboom, 'A New Analytic Framework for Understanding and Promoting Judicial Independence in China', in Peerenboom (ed), *Judicial Independence in China* (n 12) 95.

[16] Other relevant international documents on judicial independence include: Mt. Scopus Approved Revised International Standards of Judicial Independence; The Bangalore Principles of Judicial Conduct; and Beijing Statement of Principles of the Independence of the judiciary in the LAWASIA Region.

several different categories. For the minimum standards formulated by the IBA in 1982,[17] some scholars have divided them into four categories, including personal independence, substantive independence, internal independence, and collective independence.[18] For the Basic Principles on the Independence of the Judiciary endorsed by the 1985 General Assembly Resolution,[19] Li Yuwen has grouped them into three categories, including personal independence, institutional independence, and financial independence.[20]

Scholars have adopted both approaches to analyze judicial independence in China.[21] For the first approach, it looks at one particular aspect of Chinese judiciary in detail to analyze the extent to which Chinese judiciary enjoys independence. But Peerenboom also realizes that it is possible to assess whether or not Chinese judiciary enjoys independence in the four subcomponents of judicial independence.[22] That means there exist standards to be applied. The second approach starts, on the other hand, with standards. With the existence of various widely recognized standards,[23] it is difficult to argue that there does not exist certain consensus on some standards of judicial independence though people differ on the exact definition as well as specific standards for the subcomponents of the concept. The difference lies really in whether or not there is only a fixed set of best practices.[24] This paper will adopt a mixture of the above two approaches.

This paper starts with discussion of *de jure* judicial independence in China because of its importance as noted by Melton and Ginsburg. It argues that China only has minimum protection of judicial independence in its Constitution though more details are contained in the Judges Law.[25] Then in each of the following four sections, the paper will provide a summary of existing views and issues on each of the four aspects of judicial independence, to be followed by discussion of various reform measures in the current round and evaluation of whether the proposed reform measures can move China eventually towards genuine judicial independence. Thereafter, the paper discusses the relationship between courts and some other organizations including the CCP, people's congresses, media and so on to see how those organizations may affect judicial independence in China. In conclusion, the paper notes that many measures under current round of judicial reform will move Chinese judiciary closer to genuine judicial independence. Nevertheless, the current reform may have tipped too much towards public

[17] They are contained in the 'IBA Minimum Standards of Judicial Independence'.

[18] Whether this classification is appropriate is debatable as three (personal, substantive, and collective independence) were mentioned by the IBA and intended by it only against the Executive whereas the fourth one (internal independence) is against his judicial colleagues. Many other standards mentioned by the IBA were not related to either of the two above.

[19] United Nations, 'Basic Principles on the Independence of the Judiciary' (Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> accessed 19 April 2016.

[20] Li Yuwen, 'Judicial Independence in China: An Attainable Principle?' (Erasmus Law Lectures 27 at Erasmus University Rotterdam on 1 November 2012) 10 (on file with the author).

[21] Li Yuwen has used the second framework in the above article. Both Li and Peerenboom have used the first framework in their articles. See Li Yuwen, 'Judicial Independence: Applying International Minimum Standards to Chinese Law and Practice' (2001) 15 China Information 68; Peerenboom, 'Common Myths' (n 14) 70. Peerenboom prefers 'decisional independence' to 'substantive independence'. See p. 71 of his article 'Common Myths'.

[22] Peerenboom, 'Common Myths', ibid., 74-8.

[23] See n 16, above.

[24] Peerenboom, 'Common Myths' (n 14) 71.

[25] The Judges Law of China was enacted in 1995 and amended in 2001. The full text of the Judges Law is available at <http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383686.htm> accessed 20 April 2016.

interests. The paper argues that the existing Constitution should be amended to provide constitutional protection of all six elements of *de jure* judicial independence. Better salary package should be provided to quota judges to ensure that they can live a proper middle class life without any financial worry. Lifelong liability should be removed and replaced by a better-designed responsibility system so that quota judges can decide cases solely according to law and their conscience without any worry about possibility to bear liability.

II. *DE JURE* JUDICIAL INDEPENDENCE IN CHINA

Melton and Ginsburg have studied the relationship between *de jure* and *de facto* judicial independence.[26] While acknowledging judicial independence may not be the most important element, it is often 'an important component in many definitions of judicial quality'.[27] According to Melton and Ginsburg, constitutional provisions on judicial independence make 'the promise of judicial independence more credible'[28] for three reasons. First, they 'serve to insulate the judiciary from other actors by reducing the number of weapons at the disposal of the judiciary's potential enemies'.[29] Second, they raise 'the cost of interfering with judges, in part because it informs other actors about potential threats to the judiciary'.[30] Third, they increase 'the likelihood that other actors will coordinate to defend the judiciary's independence when it is threatened'.[31]

They have identified six components of *de jure* judicial independence, comprising: i) statement of judicial independence; ii) judicial tenure; iii) selection procedure; iv) removal procedure; v) limited removal conditions; and vi) salary insulation.[32] Through their research, Melton and Ginsburg have shown that 'rules governing the selection and removal of judges are the most important protections for judicial independence' and such rules are most effective 'in authoritarian regimes with checks and balances'.[33]

As noted by Li Yuwen, the independence of courts was first provided for in the 1954 Constitution, of which Article 78 provides that 'people's courts shall conduct adjudication independently and shall be subject only to the law'.[34] As to the reason for its incorporation, Cohen said the following in 1969:

> … its inclusion in the Constitution seems at least in part to have reflected the belief that acceptance as a legitimate sovereign, at home and abroad, required not merely that major sanctions be dispensed by courts, but also that the courts appear to be acting independently. As early as 1946 a Chinese Communist leader had recognized a connection between popular acceptance of the 'democratic' nature of the regime and the principle of independent adjudication.[35]

[26] James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence' (Fall 2014) 2(2) Journal of Law and Courts 187.
[27] Ibid., 190.
[28] Ibid., 191-2.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid., 195-6.
[33] Ibid., 209. They observe little effect in democratic regimes but some effect in new democracies.
[34] Li, 'An Attainable Principle' (n 20) 13.
[35] Cohen, 'The Communist Party' (n 1) 1003.

Article 78 of the 1954 Constitution was, however, abolished in the 1975 and 1978 Constitutions. In the 1982 Constitution, judicial independence has been incorporated into Article 126 which has been rephrased as follows: '[T]he people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals'.

Article 126 contains only one of the six components of *de jure* judicial independence as outlined by Melton and Ginsburg, i.e. statement of judicial independence. In addition, there are two points worthy of noting. First, Article 126 only states that adjudication cannot be interfered with by administrative organs, public organizations and individuals. It is silent on whether the CCP organs, the people's congresses,[36] and the procuracy can interfere with adjudication. It is implied that some other state organs can interfere with adjudication. This is confirmed by Li Yuwen's view that 'current Chinese laws demand only a limited respect for the principle of judicial independence' because 'the laws do not explicitly exclude interferences by the [CCP], from the legislative organs, or from higher courts'.[37] Second, a comparison of the constitutional provisions in the 1982 and 1954 Constitutions has led some Chinese constitutional scholars to the conclusion that the provision in the 1954 Constitution is better worded in the sense that judges are only accountable to the law in its independent adjudication.[38]

Tong Zhiwei has argued that compared with Article 78 of the 1954 Constitution, Article 126 is a regression rather than a progress and therefore should be amended.[39] According to him, Article 126 should be amended to be consistent with similar provisions in the Constitutions of many other countries as follows: 'judges shall conduct adjudication independently and shall be subject only to the law'.[40] In addition, he is of the view that more substantial guarantee should be provided with regard to judges' job security and living standards.[41] He has also argued that the original intention of the 1982 Constitution is to make Chinese courts independent so that they don't need to report to the people's congresses. Nor should they be questioned by the latter.[42]

From above discussion, we can see that there is *de jure* judicial independence in China because the existing Constitution contains a statement of judicial independence. It is, however, very basic and not comprehensive enough because it only contains a statement and doesn't cover the remaining five components of *de jure* judicial independence identified by Melton and Ginsburg. Though the Judges Law contains more details and many of the other five components,[43] they are not at constitutional level.

III. PERSONAL INDEPENDENCE

Personal independence means 'that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control'.[44] More specifically:

[36] They are legislatures in China at both national and local levels.
[37] Li, 'An Attainable Principle' (n 20) 15.
[38] See Tong Zhiwei, 'Perfecting the Constitutional Provision on Independent Adjudication and Ancillary Reform' (2005) Issue 6 of 2005 Jianghai Academic Journal [Jianghai Xuekan] 109.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid., 110.
[43] Judges Law (n 25).
[44] IBA Minimum Standards of Judicial Independence, Standard 1(b),

> their terms of office be reasonably secure; appointments and promotions should be relatively depoliticized; judges should be provided an adequate salary and should not be dismissed or have their salaries reduced as long as they are performing adequately; transfers and promotions should be fair and according to pre-established rules; and judges should be assigned cases in an impartial manner.[45]

In Chinese tradition and history, there is no such concept as personal independence of individual judges. Nor is the concept mentioned in any Chinese Constitutions. As noted by Li Yuwen, there is a 'new development' under the Judges Law,[46] of which some provisions can be said to protect personal independence of judges. For example, Article 8 sets out the rights of Chinese judges, including: (1) to have the power and working conditions which are essential to the performance of functions and duties of judges; (2) to brook no interference from administrative organs, public organizations or individuals in trying cases according to law; (3) to be not removed or demoted from the post or dismissed, and to be not given a sanction, without statutory basis and without going through statutory procedures; and (4) to be remunerated for work and to enjoy insurance and welfare benefits, and so on. If any of their rights are infringed, Articles 45-47 provide for the procedure for handling such infringement and also the penalty if the infringement is substantiated.[47] Peerenboom concurs that personal independence of Chinese judges has increased with the adoption of the Judges Law.[48] He also notes that some Chinese local courts 'have created an extensive incentive structure for judges' which may 'impinge unduly on the autonomy of judges'.[49] However, since judicial independence is a means to a just and efficient judiciary rather than a goal in itself, he advocates that such infringement may be justifiable if it fosters 'a more efficient, professional, honest, and just judiciary'.[50]

Improvement concerning appointment and promotion in the last two rounds of judicial reform can be summarized as follows. First, courts at higher levels play a greater role and it is more merit-based. Second, new appointees need to work their up by beginning with lower courts. Third, courts at higher level including the SPC, select best judges from lower courts, senior academics and experienced lawyers.[51] As to problems, Peerenboom points out that 'the criteria for becoming a judge and for being promoted' should be made public and 'the selection and promotion process' be made either 'transparent or subject to public monitoring'.[52]

The current round of reform has confirmed previous achievements. In addition, more measures have been taken. First, a professional judge selection committee will be established at provincial level to be responsible for selection of judges for the whole province. It will consist of representatives from all relevant governmental organs, plus academics and legal professionals. Shanghai is one of the six local governments chosen to experiment judicial reform in this round and also the first to establish its judge selection committee.[53] That committee consists of 15 persons of which seven are representatives from the relevant

[45] Peerenboom, 'Common Myths' (n 14) 71.
[46] Li, 'Applying International Minimum Standards' (n 21) 76.
[47] Ibid.
[48] Peerenboom, 'Common Myths' (n 14) 76.
[49] Ibid., 77.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] The judge selection committee in Shanghai was officially established in 2014.

government organs and eight are legal professionals.[54] Other provinces have followed its lead.[55] Since the judge selection committee will only be established at provincial level, at least in theory, the objective of de-politicization can be achieved to a certain extent.[56]

Second, it is provided as a principle to improve job security of judges.[57] More specifically, as stated in the SPC Opinions, one specific objective is to professionalize the judiciary. One specific measure is to establish the quota system for judges. The quota set by the Central Political Legal Committee (PLC)[58] is that maximum 39 per cent of court personnel can be quota judges.[59] But each province is given some flexibility to adjust the quota within its jurisdiction in order to allocate more quota to those courts which have more cases to handle. In Shanghai, the number of quota judges has been set at 33 per cent of court personnel[60]. In Beijing for example, the quota judges for each court is allocated according to the number of cases it handles in comparison with other courts.[61] In Guangdong, similar principle has been followed and some courts such as the Guangzhou Intermediate People's Court can keep more or less all existing judges as quota judges after reform.[62] But those courts in less developed areas in Guangdong will have less quota judges.[63] This measure can greatly enhance the status of Chinese judges.

Third, a separate salary system will be established for judges corresponding to the separate post order for judges under the Judges Law.[64] The purpose is to de-link judges from the

[54] Wei Jianping, 'Selection (Discipline) Committee for Judges and Procurators in Shanghai was Established' *People's Court Daily* [Renmin Fayuan Bao] (China 14 December 2014) <http://www.chinacourt.org/article/detail/2014/12/id/1506380.shtml> accessed 19 April 2016. Among the 15 persons being appointed, seven were heads of the following organs at the city level: 1) political-legal committee; 2) organization committee; 3) disciplinary committee; 4) internal and judicial affairs committee of the city people's congress; 5) civil service management bureau; 6) higher people's court; and 7) procuratorate. For the rest if the eight members, they were prominent legal scholars, professionals of the relevant fields, and lawyers.

[55] For example, the composition of the judge selection committee in Yunnan Province is exactly the same as in Shanghai: Seven members were representatives of the following provincial organs: 1) disciplinary committee; 2) organization committee; 3) political-legal committee; 4) provincial people's congress; 5) Chinese People's Political Consultative Conference at provincial level; 6) people's court at provincial level; and 7) procuratorate at provincial level. The rest of the eight members were legal scholars and experienced legal professionals who possess high professional legal qualities and some other people from different sectors of the society. See, Wang Yan, 'Yunnan established selection committee for judges and procurators, only 2 out of 15 members come from the judiciary and the procuracy' Xinhua News (Kunming 20 August 2015) <http://news.xinhuanet.com/2015-08/20/c_1116322806.htm> accessed 19 April 2016.

[56] He Fan, 'Five keywords of the Judge Selection Committee' *People's Court Daily* [Renmin Fayuan Bao] (Beijing 27 June 2014) <http://rmfyb.chinacourt.org/paper/html/2014-06/27/content_83901.htm?div=-1> accessed 20 April 2016.

[57] See paragraph 32 of 'Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform' (Adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China on 12 November 2013) <http://www.china.org.cn/chinese/2014-01/17/content_31226494.htm> accessed 19 April 2016.

[58] It is the highest committee within the CCP in charge of coordination of legal matters of courts, procuracy, and public security.

[59] 'SPC: Quota for judges under judicial reform cannot be exceeded' *Southern Metropolis Daily* [Nanfang Dushi Bao] (Shenzhen 5 July 2015) <http://nandu.media.baidu.com/article/8736847202530566044> accessed 20 April 2106.

[60] Chen Zhiyun etc (ed), *Studies on the Allocation of Judicial Posts* (Faguan Yuane Wenti Yanjiu), (China Democracy and Legal System Press (Zhongguo Minzhu Fazhi Chubanshe), Beijing, 2016) 10.

[61] This is information provided to me by the President of a Beijing District Court.

[62] This is information provided to me by a senior judge of the Guangdong Intermediate People's Court. See also *Studies on the Allocation of Judicial Posts* (n 60), p. 11.

[63] SPC Opinions (n 8) para. 49; SPC, 'Whitepaper 2016' (n 3) Part VIII.

[64] SPC Opinions, ibid., para. 53.

administrative ranks. Some pilot plans intend to increase the salary level of judges by a relatively large percentage, i.e. 50 per cent.[65] But in reality, the actual increase of salary is around 20 per cent in Shenzhen where quota system for judges has already been implemented in some courts.[66] In some other provinces, the actual increase of salary may be less than ten per cent of a judge's actual income.[67]

The actual effect of these reform is hard to predict at this stage for a couple of reasons. First, the number of quota judges will definitely be less than the number of incumbent judges in most courts. But the number of cases handled by courts is increasing year by year.[68] The consequence is that less judges will handle more cases and quota judges will bear much heavier workload. Second, though the intention is to give substantial increment of salary to quota judges, the actual increment may turn out to be much less. It remains doubtful whether such small increment will be attractive enough to keep good judges within the judiciary. In 2015, about ten experienced judges from the SPC have left.[69] The President of one district court in Guangdong told me what worries her the most is that she doesn't know which judge will come to her office to submit his resignation letter tomorrow.[70]

One particular issue still remains about appointment of senior judges, especially presidents and vice presidents of all courts. While there are strict requirements on the qualifications for appointment as judges, there are no clear requirements for appointment as presidents or vice presidents of courts at all levels. As a result, people who have never received formal legal training have been appointed as either presidents and/or vice presidents of people's courts, including the SPC. The former Chief Justice Wang Shengjun is such an example. At the moment of writing this paper, there are several presidents of provincial higher people's courts who have not received proper legal education.[71]

Judging from what the former Chief Justice Wang had done during his term, it is widely recognized among scholars and judges in China that there was a serious regression as far as rule of law and judicial independence were concerned.[72] So the author is of the view that it

[65] Wang Feng, 'News of Judicial Reform March 2016: Judges in China may have salary increment' *21st Century Business Herald* [Ershiyi Shiji Jingji Daobao] (9 April 2016) <http://m.21jingji.com/article/20160409/herald/f0b2181f8b4c63216c3664aab48cf34f_baidunews.html> accessed 20 April 2016.

[66] This is information given to me by a judge in Shenzhen District Court.

[67] One judge in Jiangsu told me that his current annual salary is RMB 170,000, of which RMB 50,000 is subsidy provided by his local government. After the reform, the 50% increment is based on his basic salary (RMB 120,000), and there will be no more subsidy from local government. As a result, after the 50% increment, his actual annual income will be RMB 180,000, which is merely RMB 10,000 more than previous actual annual income.

[68] According to one report, in 2014 Jiangsu province had 10,000 judges and all the courts in the province received a total number of near 1.4 million cases, which represented that each judge handled 140 cases in that year; from January to October of 2015, the courts in Jiangsu province had already received over 1.6 million cases, which represented that each judge had to handle 160 cases. So, it was expected that the number of cases handled by each judge would increase to 230 cases per year after the implementation of the quota judge systems in the province. Jin Hao, '"Quota judge system" may lead to "more case but fewer people", experts propose "solutions"' *Shanghai Law Journal* [Shanghai Fazhi Bao] (Shanghai 1 December 2015) <http://www.shzfzz.net/node2/zzb/shzfzz2013/yw/u1ai936111.html> accessed 20 April 2016.

[69] This information is provided to me by a former judge of the SPC.

[70] This information is provided to me by the President of that court.

[71] Henan and Guangxi are two such examples.

[72] Zhang Jieping, 'Serious retrogression in the rule of law in China, campaign-style law enforcement re-emerge' *Yazhou Zhoukan* (Hong Kong 15 August 2010)

remains to be a serious flaw in the existing legal system and has not been addressed in the current round of judicial reform. While the present Chief Justice Zhou Qiang is very committed to rule of law and judicial independence, if his successor will be a person like former Chief Justice Wang, there is a risk that rule of law and judicial independence might suffer a regression again in the future.

In addition, personal independence also requires non-interference of adjudication by any other organizations and/or individuals. Hence it is also closely related to the relationship between the courts and other organizations, which will be discussed in section VII of this paper.

IV. INTERNAL INDEPENDENCE

Internal independence means '[i]n the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters'.[73]

One criticism of Chinese judiciary is that the judges who hear the case do not decide whereas those who decide do not hear the case.[74] It is because a judgment could only be issued after obtaining approval from the chief judge of a particular division, and the vice president in charge, or the president, and may also need to be discussed at the adjudicative committee.[75] That is why Peerenboom has noted that 'a contentious issue has been the independence and authority of the judges hearing the case to issue a final decision without approval from the adjudicative committee or senior judges on the court'.[76] This issue has been debated for a long time. Critics are of the view that such practice infringes judges' personal freedom because 'the judges who do hear the case feel they have little power'.[77] On the other hand, there are also supporters for such practice. According to them, first, 'review by more senior judges is necessary' because some junior judges are not competent enough; second, review and approval by the adjudicative committee can reduce corruption; third, it can enhance judicial independence because the adjudicative committee is in a better position 'to resist outside influences than junior judges'.[78]

The SPC has realized this problem and made an effort to promote internal independence. According to Li Yuwen, 'the most remarkable manifestation is the release of the Code of Conduct for the Judiciary'.[79] In particular she mentions three articles thereof, i.e. Articles 2, 11 and 13. She opines that these articles 'are similar to the standards of internal independence of the judiciary'.[80] Article 13 is the most relevant one which requires that a judge 'respect other judges' right to adjudicate cases independently by not commenting on pending cases in the hands of others, not questioning or interfering in cases handled by lower courts and not requiring relevant information on cases handled by other judges'.[81]

<http://www.yzzk.com/cfm/content_archive.cfm?id=1364910371015&docissue=2010-32> accessed 20 April 2016.

[73] IBA Minimum Standards of Judicial Independence, Standard 46.

[74] For a discussion of this problem, see for example, 'De-administerization' of the judiciary: Let the person who adjudicate the case to decide the case' *The Beijing News* [Xin Jing Bao] (Beijing 30 December 2013) <http://epaper.bjnews.com.cn/html/2013-12/30/content_487366.htm?div=-1> accessed 20 April 2016.

[75] The adjudicative committee consists of the president and other high-ranking party members within the court.

[76] Peerenboom, 'Common Myths' (n 14) 77.

[77] Ibid., 78.

[78] Ibid.

[79] Li, 'An Attainable Principle' (n 20) 18. The Code of Conduct for Judges were issued for trial implementation in 2005 and formally issued after amendments in December 2010 for immediate implementation.

[80] Li, 'An Attainable Principle', ibid., 18.

[81] Ibid.

Moreover, some specific reforms have been implemented. The first is the selection of presiding judges on merit through a competitive process to ensure they are really good and will be given more authority. The second is 'to have the adjudicative committee hear directly major or difficult cases or those with general applicability'. The third is 'to have the court president or head of the division join the collegial panel'. The fourth is 'to create separate committees for civil and criminal cases'.[82] Further, local courts at various places have implemented additional reforms.[83]

Under current reform, one specific objective is to 'improve the functional mechanism of adjudicative power'.[84] Several specific measures have been adopted. First, lower courts shall have a relatively fixed adjudication team consisting of judges, their assistants, and supporting staff. Second, the signature mechanism of judgments shall be reformed. Except for the cases discussed and decided by the adjudicative committee, the president, vice presidents and divisional chiefs shall not approve, verify, sign or issue judgments for cases that they are not directly involved in.[85] Third, all adjudicative committee members including the president and vice presidents, are required to try cases. They 'shall directly form a panel to hear major, difficult and complicated cases'.[86] Fourth, courts shall establish specialized judges' councils to provide advisory opinions to the panels so that they can 'correctly understand and apply laws for the reference of the panels'.[87] This is questionable because of lack of statutory basis and it could affect independence of individual judges. Fifth, the supervisory power of the president, vice presidents and divisional chiefs will be restricted so that they may neither express their opinions on a case that they don't hear nor directly deny the opinions of a sole judge or a panel.[88] Sixth, the adjudicative committee will be further reformed so that it will mainly discuss 'the law application issues of major, difficult and complicated cases' except for 'major and complicated cases concerning national diplomacy, security and social stability and those required by law'.[89] After these reform, interference from judges in the same court can be greatly reduced.

A particular aspect of internal independence is non-interference from higher level courts. In normal circumstances, higher courts do not constitute a threat to judicial independence of lower courts. But they may if they 'exert undue influence on lower courts outside the normal channels of appeal'.[90] In China, as noted by Peerenboom, 'higher courts often engage in a longstanding practice of responding to inquiries from lower courts for advice regarding legal issues in

[82] Peerenboom, 'Common Myths' (n 14) 78.
[83] 'Judicial reform pilot provinces achieved remarkable preliminary outcomes in two years, four important reform items are implementing steadily' *Website of the Political-Legal Committee of Guangdong Province* [Guangdong Zhengfa Wang] (Guangdong 22 January 2016) <http://www.gdzf.org.cn/zwgd/201601/t20160122_746557.htm> accessed 20 April 2016.
[84] SPC, 'Whitepaper 2016' (n 3) Part IV.
[85] Ibid. As stated in the new Whitepaper: 'The percentage of cases that have been adjudicated directly by a sole judge or a panel in the pilot courts of Shanghai reaches 99.9% and there is only 0.1% submitted to the discussion by the adjudication committee'.
[86] Ibid. As stated in the new Whitepaper: 'All of 873 presidents and presiding judges from Beijing courts at three levels appeared in court to handle cases, and the number of cases handled by them accounts for 15.5% of the cases closed by all the judges from Beijing courts in 2015'.
[87] Ibid. As stated in the new Whitepaper, there will be 'specialized judges' councils consisting of civil, criminal and administrative judges'.
[88] Ibid.
[89] Ibid. In addition, proper records will be kept for the deliberation of the adjudication committee and signatures of those members participating in the deliberation and voting.
[90] Peerenboom, 'Common Myths' (n 14) 84.

particular cases currently before the lower court. Lower court judges may request advice formally in writing or less formally by phone'.[91] I have argued elsewhere that such practice has deprived litigants of their right to appeal and makes appeal meaningless.[92] Peerenboom opines that it is getting less and less frequent for lower courts to seek instructions from higher level courts,[93] and further, the SPC in its 'Second Five-Year Agenda' recommended lower courts to 'submit cases involving generally applicable legal issues to the higher court directly for hearing rather than seeking advice'.[94] If the recommendations were properly implemented, it would resolve the problem and hence 'would also preserve the integrity of the appeal process'.[95]

The SPC Opinions have mentioned the necessity to ensure that each level of court will be independent.[96] But no specific measures are proposed on how to achieve that objective. In reality, the practice of seeking instructions still exists widely when this paper is completed. It is because each judge's performance will be assessed annually and that assessment will affect his year-end bonus as well as promotion. One of the assessment criteria is the percentage of cases he has decided which have been overruled by the higher level court. In order to reduce such percentage, judges at lower levels often request advice either formally or informally from courts at higher levels.[97] It means there is an incentive in the existing performance assessment of judges for them to request advice from higher level courts.

V. COLLECTIVE INDEPENDENCE

Collective independence means '[the] Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive'.[98] Since this definition is limited to collective independence from the executive only, this section will discuss whether Chinese courts are independent from the executive while leaving its independence from some other organs to section VII of this paper.

Existence of local protectionism is common knowledge in China. 'Local government officials may pressure a court to decide a case in favor of the local party, deny an outsider's application for enforcement, or just drag out the enforcement process … . Local protectionism is therefore a matter of degree: it may impede or be an absolute bar to recovery'.[99] Many factors contribute to its existence. The main causes are, according to Peerenboom, 'the way courts have been funded and judges appointed'.[100]

Li Yuwen has observed the existence of a general perception that Chinese courts are inferior to the executive and need to 'look up the faces' of the executive because their finance depends largely on the executive at the same level. For a local government, its achievement 'is largely evaluated by the success of the local economy'. When a conflict exists between justice and its

[91] Ibid.
[92] See Lin Feng, *Constitutional Law in China* (Sweet & Maxwell Asia, Hong Kong, 2000) 220-221.
[93] Peerenboom, 'Common Myths' (n 14) 84.
[94] Peerenboom, 'Common Myths', ibid., 84-5.
[95] Ibid.
[96] SPC Opinions (n 8), preface to Part III (3).
[97] Zhao Lei, 'Petition of lower courts unveil problems, outcry for the abolition of asking for advice starts again' *Southern Weekend* [Nanfang Zhoumo] (Shenzhen 24 May 2009) <http://dailynews.sina.com/bg/chn/chnpolitics/sinacn/20090524/2219294205.html> accessed 20 April 2016.
[98] IBA Minimum Standards of Judicial Independence, Standard 2.
[99] Peerenboom, 'Common Myths' (n 14) 82-3.
[100] Ibid., 83.

economic achievement, a local government often imposes pressure upon courts, "which indefensibly results in local judicial protectionism'.[101]

The Chinese Central Government, including the SPC, has realized the serious threat local judicial protectionism may cause to the integrity and authority of the judiciary.[102] They have proposed various measures to address the problem, mainly 'to change the way courts are funded and judges are appointed …'.[103] First, Chinese Government has increased funding for the judiciary. In December 2008, the State Council decided that funding of the courts would be centralized though no details were given.[104] Second, in order to 'increase efficiency and curtail corruption, the functions of accepting, hearing, supervising, and enforcing cases have been separated'.[105] Third, it has been demonstrated by 'the high rate of administrative litigation cases where courts quash administrative agency decisions or a case is withdrawn after the agency changes its decision' that courts' authority has increased in China.[106] Fourth, '[t]he growing independence and authority of the court is also evident in the public's increased reliance on the courts for dispute settlement'.[107] '[C]ourts are exerting their authority and protecting their turf and reputation by resisting attempts to channel controversial socioeconomic disputes into the court'.[108] That is why Peerenboom has argued that 'the collective independence of the Chinese courts has been strengthened through increased budgets, more streamlined and efficient processes, and efforts to increase the authority of the courts'.[109]

While agreeing that collective independence of courts have improved, its reliance on and accordingly influence by the executive at the same level of government is undeniable. That is why one of the primary objectives of the current round of judicial reform is to remove the administerization of the judiciary.[110]

Under the current reform, one major reform is to change both the funding mechanism as well as the appointment mechanism for judges. As noted in the new Whitepaper, a key reform is to 'push forward the unified management of personnel, funds and properties of local courts below the provincial level' to evidence that judicial power belongs to the Central Government.[111] There are some specific measures. First, the organizational establishment of courts will be administered by respective provincial organization departments in coordination with the high people's courts.[112] Second, the personnel of courts will be managed in a unified way, under which 'the judges in local courts below the provincial level shall be nominated, managed, appointed and removed according to statutory procedures by the provincial authority'. New

[101] Li, 'An Attainable Principle' (n 20) 22.
[102] Ibid.
[103] Peerenboom, 'Common Myths' (n 14) 83.
[104] Ibid., 74-5.
[105] Peerenboom, 'Common Myths', ibid., 75.
[106] Ibid. Li Yuwen has expressed different view for two reasons, one is that 'the rate of increase of administrative suits has remained low', the other is among all administrative cases, there are more cases brought by the executive to courts to enforce administrative decisions than cases brought by private parties 'against illegal or arbitrary administrative actions'. See Li, 'An Attainable Principle' (n 20) 23.
[107] Peerenboom, 'Common Myths' (n 14) 76.
[108] Ibid. These cases are difficult to resolve because they are fundamentally economic in nature and the state lacks the resources and institutions to provide an effective remedy.
[109] Peerenboom, 'Common Myths', ibid., 74.
[110] SPC, 'Whitepaper 2016' (n 3) Part II.
[111] Ibid.
[112] The organization departments at city and county levels are no longer responsible for the organizational establishment of courts.

judges shall 'be selected by judge selection committee at the provincial level …, and will be appointed and removed according to statutory procedures upon nomination by the provincial authority'.[113] Third, 'the funds of courts will be managed in a unified way. Necessary funds of the local courts below the provincial level will be fully guaranteed by the Central Government and the provincial governments within the budgets'. 'The relevant budget funds will be appropriated by the centralized payment system of the national treasury'.[114]

The second major reform is to establish a system to separate courts' jurisdiction from local administrative regions, which includes two specific measures.[115] One is to establish cross-administrative-region courts.[116] Beijing Fourth Intermediate People's Court and Shanghai Third Intermediate People's Court have been established in order to remove 'the vulnerability of cross-administrative-region cases to local influence'.[117] Their jurisdiction covers the following:

> [C]ross-region administrative cases, major civil & commercial cases, major environment and resources protection cases, major food and drug safety cases and some major criminal cases, with the aim to ensure the impartial treatment of cases relating to local interests and explore the new litigation structure that the ordinary cases would be heard in the administrative division courts while extraordinary cases would be heard in the cross-administrative division courts.[118]

The other is to 'explore centralized jurisdiction of the administrative cases beyond administrative divisions'.[119] It aims to solve the long-lasting 'difficulties of accepting, trying and enforcing administrative cases'.[120] The SPC 'has authorized the high people's courts to designate several people's courts to hear cross-administrative-region administrative cases based on the situations of their adjudication work'.[121]

The above discussion shows clearly the good intention of the Central Government to solve both causes of local protectionism. The new initiative on courts' jurisdiction will further separate courts' jurisdiction from local administrative regions. But as far as local courts are concerned, some of them have raised two concerns. One is whether the funding from provincial government will be enough. At the moment, they can always ask local governments for additional funding if necessary and very often they will get it. Another one is interference by high people's court in local courts' adjudication. Some intermediate court judges have mentioned to me that they don't really worry about interference from local government as local officials don't know anything about law and dare not interfere too much. But interference from higher level courts is difficult to oppose.

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[113] SPC, 'Whitepaper 2016' (n 3) Part II.
[114] Ibid. The provincial fiscal departments manage the funds of local courts below the provincial level. The courts at provincial, municipal and county levels are all first-class budget units of the fiscal departments of the provincial governments, and will submit their budgets to the provincial fiscal departments.
[115] SPC Opinions (n 8) para. 62.
[116] SPC Opinions (n 8) para. 2.
[117] They were set up in December 2014 with the approval of the Standing Committee of the NPC. See, SPC, 'Whitepaper 2016' (n 3) Part I.
[118] Ibid.
[119] Ibid. This is the fourth specific measure suggested in the SPC Opinions. See SPC Opinions (n 8) para. 1.
[120] Ibid.
[121] Ibid. According to the new Whitepaper, the SPC has promulgated the 'Guiding Opinions on the Cross-Administrative-Division Centralized Jurisdiction of Administrative Cases of the People's Courts' for this purpose.

VI. SUBSTANTIVE INDEPENDENCE

Substantive independence means that 'in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience'.[122] As noted by Peerenboom, 'one prerequisite for decisional independence is that judges enjoy personal independence'.[123] There should not be undue, inappropriate, or illegal interference from other parties or entities.[124]

As discussed above, personal freedom of Chinese judges has not been fully recognized. As a result, their substantive independence will be affected correspondingly because they cannot decide a case solely according to the law and commands of his conscience. There are many other factors he needs to consider, of which the likelihood of overruling of his case by the higher level court is one.[125] The CCP and State policies are another one.[126]

Substantive independence is also closely related to *de jure* judicial independence in China. Given the minimal approach taken by the 1982 Constitution, substantive independence of Chinese judges has its constitutional limits, which is impossible to remove without a constitutional amendment to: (i) enhance the scope of *de jure* judicial independence; (ii) change the existing constitutional structure; and (iii) reduce the CCP's substantive role.[127]

Under current reform, one particular issue relating to substantive independence and worthy of discussion is the emphasis on lifelong responsibility for judges who have delivered wrong judgments.[128] There are, however, no clear criteria to determine whether a judgment is correct or wrong according to the 2013 and 2014 Decisions, and SPC Opinions.[129] Details are provided by separate SPC Regulations which can be summarized as follows: First, a judge will only be held liable if he either 'intentionally violates the laws during adjudicative procedure or renders erroneous ruling by gross negligence which causes serious consequences'. Second, a judge shall 'assume full liabilities for the fact finding and the law application of the cases'. Third, a judge will be exempt from liabilities: (1) when 'there are discrepancies of understanding and knowledge of the specific provisions of the laws, regulations, rules and judicial interpretations, reasonable explanation could be given within the scope of professional knowledge'; (2) when 'there are disputes or doubts on the fact finding of the cases, reasonable explanation could be given according to the rules of evidence'; and (3) when 'the party concerned waives his claims'.[130]

It is clear from the above that the SPC has made a great effort to ensure that judges will only be liable when he either intentionally or with gross negligence decided a case wrongly. That may be the good intention of the SPC. In reality, however, a judge or even a clerk may be held liable regardless of lack of intention or gross negligence. In the case of Huugjilt in Inner

[122] IBA Minimum Standards of Judicial Independence, Standard 1(c).
[123] Peerenboom, 'Common Myths' (n 14) 71.
[124] Ibid.
[125] See section IV of this paper above.
[126] See section VII (1) of this paper below.
[127] The CCP's role will be discussed in more detail later in section VII of this paper below.
[128] 'CCP Political-Legal Committee issued the first guided opinion on preventing wrongful cases' *Legal Daily* [Fazhi Ribao] (Beijing 6 September 2013) <http://www.legaldaily.com.cn/index_article/content/2013-09/06/content_4828592.htm> accessed 20 April 2016.
[129] The SPC Opinions only set out general principles in paragraph 28. See, SPC Opinions (n 8) para. 28.
[130] SPC, 'Whitepaper 2016' (n 3) Part IV.

Mongolia,[131] for example, all judges including clerks have been held liable to certain extent.[132] Arguably the clerk did nothing wrong as he just accurately recorded court proceedings and did nothing wrong either intentionally or with gross negligence. Judges in the case, according to a former SPC judge, has no choice but to decide the case the way it had been decided due to the evidence put before them by the public security and procuracy.

In addition, substantive independence requires non-interference of adjudication by any other organizations and/or individuals. Hence it is also closely related to the relationship between the courts and other organizations, which will be discussed in the next section.

VII. RELATIONSHIP BETWEEN COURTS AND OTHER ORGANIZATIONS

The relationship between courts and other organizations has been described by Peerenboom as 'external independence' of courts.[133] This section will examine the relationship between courts and three other kinds of organizations, namely: (i) the CCP; (ii) the people's congresses; and (iii) the media and other social pressure groups.

A. *Relationship between Courts and the CCP*

This is one of, if not the most discussed issues challenging independence of courts in China. Cohen explained the CCP's mixed feelings towards the judiciary in 1969 as follows:

> It is difficult for any new elite to accept limitations upon its freedom of action when it seeks radically to transform the traditional culture. … So too, during the earliest years of the regime, when Chinese Communist political authorities were striving to define and establish a revolutionary consensus for reshaping old China, they refused to be shackled by judicial constraints. Moreover, the enormous utility of courts, not only as instruments for coercing opponents of the regime but also as instruments for educating society at large, made ability to manipulate the judiciary a major asset in the regime's program for inculcating the new values.[134]

The relationship between the CCP and courts is also complex. Cohen opined that:

> … one must not interpret Party-judicial relations solely in terms of tensions between judges who were in the Party and those who were not, and tensions between the Party

[131] This case was mentioned in Part III the new Whitepaper, and it is a good example on point. In this case, Huugjilt was convicted of raping and murdering a woman in 1996, and was sentenced to death as a result. Two months after the decision was handed down, he was executed. However, nine years later in 2015, the police found the real rapist and murder who was subsequently convicted and sentenced to death. Since Huugjilt was dead, the only remedy available for his parents was state compensation in the amount of RMB 2.06 million. See, Adam Withnall, 'Parents of teenager 'tortured' and wrongfully executed for rape and murder watch in court as another man is convicted of the crime' *Independent* (London 9 February 2015) <http://www.independent.co.uk/news/world/asia/parents-of-teenager-tortured-and-wrongfully-executed-for-rape-and-murder-watch-in-court-as-another-10033809.html> accessed 20 April 2016.

[132] "The wrongful case of Huugjilt: 27 persons in Inner Mongolia were sanctioned, parents disappointed' *BBC Chinese* (1 February 2016) <http://www.bbc.com/zhongwen/simp/china/2016/02/160201_china_wrongful_execution> accessed 20 April 2016.

[133] Peerenboom, 'Common Myths' (n 14) 78.

[134] Cohen, 'The Chinese Communist Party' (n 1) 1005.

> bureaucracy and the judicial bureaucracy Party bureaucrats themselves appear to have been ambivalent and divided about the desirability of Party interference in individual cases.[135]

Three different views exist on the CCP's impact upon judicial independence in China. The first is that the CCP has a negative influence upon judicial independence. As noted by Peerenboom, the CCP 'influences the courts in various ways and through various channels'. It 'exerts influence in ideology, policy, and personnel matters, although it sometimes is involved in deciding the outcome of particular cases'.[136] The most worrisome is the CCP's direct interference 'in the courts' handling of specific cases' through the PLC. Li Yuwen opined that the PLC 'is the most powerful actor in the criminal justice system' even though it is not mentioned in any statutes.[137]

The second is a more balanced view, of which Peerenboom is a representative. He opines that the CCP's negative 'impact on judicial independence is generally overstated and assumed … to be pernicious'.[138] While acknowledging that the CCP exercises some influence over the courts, he argues that Chinese courts are by no means simply the CCP's organs or that the CCP 'controls every action of the courts or determines the outcome of all or even most cases'.[139] On the contrary, some CCP policies actually 'enhance the independence and authority of the court vis-a-vis other actors' though some others 'may impede judicial independence to achieve other important social goals'.[140] 'Some of these policies aim to limit access to courts and steer disputes to other channels'. In particular, the CCP will allow 'limited independence of the courts when it comes to politically sensitive cases …'.[141] Further, he suggests that 'the CCP has a significant stake in cases that threaten socio-political stability and more specifically its right to rule. The courts' ability to decide such cases independently is severely restricted at best …'.[142] Nevertheless, he opines that the CCP's 'main interest in the outcome of most cases, whether commercial, criminal or administrative, is that the result be perceived as fair by the parties and the people'.[143]

The third view is more positive as represented by Zhu Suli. He has done an extensive study of the relationship between the CCP and courts. He argues that the CCP is 'the major force mobilizing, promoting, and implementing reform within the judiciary' even though some of its policies have been clear mistakes and 'have hindered the development of an independent judiciary'.[144] Nevertheless, 'the CCP's oversight has discouraged at least to some extent judicial corruption and judicial arrogance …'.[145]

The current round of judicial reform has been initiated by the CCP.[146] According to the new Whitepaper, the CCP Committee on Deepening Reform has held altogether 19 meetings in

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[135] Ibid., 988.
[136] Peerenboom, 'Common Myths' (n 14) 79.
[137] Li, 'An Attainable Principle' (n 20) 27-8.
[138] Peerenboom, 'Common Myths' (n 14) 78.
[139] Ibid., 79.
[140] Ibid.
[141] Ibid. Prohibition of suits by Falun Gong disciples is one example.
[142] Ibid., 81.
[143] Ibid., 80.
[144] Zhu Suli, 'The Party and the Courts', in Peerenboom (ed), *Judicial Independence in China* (n 12) 53.
[145] Ibid., 64. Judicial corruption and judicial arrogance are two common by-products of the judiciary's ongoing transformation and the global trend toward judicialization of all disputes.
[146] See the introduction in section I of this paper above.

2014 and 2015 on judicial reform.[147] The CCP is masterminding the current round of judicial reform. The SPC Opinions are adopted to implement the policies decided by the CCP Committee on Deepening Reform.

Cohen made the following prediction in 1969: [148]

> … if [China] succeeds in establishing its own political consensus and in raising the level of China's socio-economic achievement, its leaders may gradually acquire a deeper appreciation of the virtues of functional specialization, professionalization, and judicial autonomy than they displayed in the mid-1950's. Even in these circumstances, however, it will not be easy to fulfill the promise of independent adjudication in China, which, unlike many post-colonial countries, lacks any tradition of judicial independence.

The swift implementation of this round of judicial reform proves Cohen's wisdom, and also the CCP's commitment to this round of judicial reform and rule of law in China. Chinese leaders have appreciated the importance and necessity to make courts more professional and independent.

On the other hand, however, the 2013 Decision, 2014 Decision, as well as SPC Opinions have all stated clearly the insistence on the leadership of the CCP. So for the foreseeable future, the leadership of the CCP is and will continue to be the propelling force for judicial reform in China. The CCP has realized the necessity to implement rule of law in China and to give greater independence to Chinese courts so long as they don't challenge its leadership. The firm decision to carry out current reform indicates that the CCP is of the view that relatively independent courts will make a positive contribution to consolidating its leadership and governance legitimacy in China.

B. *Relationship between Courts and People's Congresses*

The relationship between courts and people's congresses has been summarized by Li Yuwen into two respects: 'people's congresses appoint and dismiss presidents and judges of courts at the corresponding level; and they supervise the implementation of law by courts'.[149] The authority of the people's congresses to appoint and dismiss judges are more or less nominal because such decisions are made based on recommendations made by the relevant courts.[150]

Supervisory authority of the people's congresses is controversial to some extent. The National People's Congress (NPC), the highest organ of state power in China, has the authority to supervise the judiciary including the SPC.[151] It may influence 'the judiciary through its role in the appointment and approval process' and exercise 'various forms of supervision'.[152] The SPC is required to 'submit a work report to the NPC for review' once every year.[153] Under the Supervision Law, '[p]eople's congresses may also address inquiries to the courts regarding

[147] SPC, 'Whitepaper 2016' (n 3) Part I.
[148] Cohen, 'The Chinese Communist Party' (n 1) 1006.
[149] Li, 'An Attainable Principle' (n 20) 24.
[150] Judges Law (n 25) Article 11.
[151] Constitution of the People's Republic of China, Articles 67 and 128.
[152] Peerenboom, 'Common Myths' (n 14) 81.
[153] Ibid.

general issues, although they seldom do'.[154] Even with people's congress' supervision, 'the court in theory has always retained the right to decide the case'.[155]

What's controversial is 'whether supervisory power of a people's congress can extend to interfering with individual cases handled by courts'.[156] While such interference was serious during a specific period in history, it is 'a practice which has now fallen into disfavor with the passage of the Supervision Law'.[157]

Li Yuwen has interpreted the famous seed case as an example of emergence in practice of 'independence from external intervention'.[158] The reason she said so is because though the trial judge was punished by the local court in Luoyang City, 'as a result of media pressure and support from the [SPC], she was later cleared'. The SPC stated in a Reply that 'a judge has the right to choose which law should be applied in deciding a case'.[159] Different views exist, however, on this case. It is because strictly according to Chinese law, a Chinese judge does not have the authority to repeal a lower source of law which is in violation of a national law. What she can do is, as the SPC has stated in its Reply, to choose the applicable law instead of repealing the contradictory lower level source of law.

As noted by Peerenboom, '[i]n all legal systems, there is a tension between judicial independence and judicial accountability, and the two goals must be balanced. Given the current circumstances in China, particularly in some lower courts, the need for supervision is greater than in some other countries'.[160] In China, given that its Constitution endorses the people's congress system, the people's congresses at different levels have a constitutional role to play in the balance of judicial independence and judicial accountability. The issue is whether it can strike the proper balance.

What is worthy of noting under the current reform is how little role the people's congresses, especially the NPC and its Standing Committee, have played. It is fair to say that they are almost out of the picture.[161] They have hardly made any decisions or orders regarding the current round of judicial reform. On the one hand, it is rather abnormal because the NPC is the highest organ of state power and the national legislature, any judicial reform should arguably obtain its blessing. On the other, it shows that the NPC is in reality of less importance in Chinese constitutional structure. The organs in command of actual power are still the CCP organs. Governance in China is not really according to the Constitution but rather according to the decisions of the CCP.

Another issue is about appointment and/or removal of judges. The current reform as discussed above is for the selection of judges by the judge selection committee established at provincial level. But according to the Constitution, the authority to appoint and/or remove judges is with the people's congress at the corresponding level.[162] If the current reform on appointment of

[154] Ibid.
[155] Ibid., 82.
[156] Li, 'An Attainable Principle' (n 20) 25.
[157] Peerenboom, 'Common Myths' (n 14) 81.
[158] Li, 'An Attainable Principle' (n 20) 18.
[159] Ibid., 19. It was stated in its 'Reply to the Request Concerning the Contract Dispute Case of the Seed Company in Luoyang County and the Seed Company in Yichuang County in Henan Province'.
[160] Peerenboom, 'Common Myths' (n 14) 82.
[161] The only decision it has made is about the establishment of two cross-administrative-division courts in Beijing and Shanghai respectively in 2014. See n 116, above.
[162] Constitution of the People's Republic of China (n 151) Articles 62, 63 and 101.

judges will be genuine, the authority of the people's congresses will diminish. Further if the authority will really concentrate in the hands of the judge selection committee, the people's congress system may need to be reformed through constitutional amendment.

C. *Relationship between Courts and Media and Other Social Pressure Groups*

An Asian Development Bank report once made the following observation:[163]

> The country-level findings demonstrate that there is no single preferred model of the relationship between judicial independence and the media, organized interest groups, and civil organizations, or with other sources and mechanisms of external influence and control. Instead, they may present challenges and threats to, no less than support structures for, judicial independence.

Media's influence upon judicial independence in China has been mixed. On the one hand, there are examples of positive influence. As Li Yuwen has noted, media has played a positive supervisory role by reporting 'some instances of outrageous injustice in criminal cases' and mobilizing 'the reform of the criminal justice system'.[164] On the other, 'the emergence of investigative journalism and active use of web portals to expose and discuss pending cases 'constitutes a new challenge to the judiciary' and courts are sometimes pressured to decide or alter judgments in response to a public outcry.[165] *Wu Ying Case* and *Liu Yong Case* are two such examples.[166] 'Media coverage of legal cases has also been controversial … In China, judges complain that the media, often paid off by one side to the dispute, presents a skewed picture of the facts and legal issues'.[167]

As far as public opinions are concerned, Liebman has argued that:

> public opinion may affect court decisions in some cases, particularly high-profile criminal cases. However, the influence of the public is in most cases limited given the difficulty of mobilizing the public, differences of opinion among the public and the fact that public opinion is frequently ill-informed about the legal issues.[168]

Li Yuwen observed that 'the situation can become more complicated when public views are politicized in the sense that they are used by the government to compel courts to judge cases by catering to popular view. This certainly undermines judicial independence'.[169]

In addition, other social pressures upon the courts also exist in China. As noted by Peerenboom:

> Social pressure from relatives, friends, and acquaintances is a major source of outside interference. In a society that places a premium on *guanxi* and *renqing*, judges often

[163] Cited in Peerenboom, 'Common Myths' (n 14) 86. Originally, Asian Development Bank, "Judicial Independence", p. 9.
[164] Li, 'An Attainable Principle' (n 20) 25-6.
[165] Ibid., 25.
[166] Ibid., 25-6.
[167] Peerenboom, 'Common Myths' (n 14) 85.
[168] Benjamin Liebman, 'Watchdog or Demagogue? The Media in the Chinese Legal System' (January 2005) 105(1) Columbia Law Review 1. See also, Benjamin Liebman 'A Populist Threat to China's Courts?' in Margaret Y.K. Woo and Mary E. Gallagher (eds), *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge University Press, New York, 2011) 269.
[169] Li, 'An Attainable Principle' (n 20) 27.

> find themselves besieged by intermediaries seeking to intervene on behalf of a criminal suspect or one of the parties in a commercial dispute.[170]

He has called upon Chinese judges to 'resist social pressures to render a fair verdict in accordance with law' and said that 'there are limits to empathy and personal connections'.[171]

VIII. Conclusion

This paper has discussed the development of judicial independence in China from the four aspects identified by the IBA. It is quite obvious to see that the CCP has played and is still playing the leading role in the current round of judicial reform. The CCP's commitment to judicial independence and rule of law as the ruling political party in an authoritarian state has made it possible for the current round of judicial reform to move forward very speedily in China. Its downside is that it lacks sufficient constitutional support. If there is sudden change of policy within the CCP, judicial reform and certain aspects of judicial independence will be seriously affected. The NPC and its Standing Committee should play a more significant and prominent role through vetting, reviewing, and approving judicial reform proposals such as the CCP's Decisions and the SPC Opinions. In so doing, proper institutional and constitutional support will be obtained for the current round of judicial reform. It will also make the results of judicial reform more resilient to change even if there will be a sudden change of the CCP's policy on judicial reform in the future.

As far as the reform measures relating to the four components of judicial independence are concerned, most of them can contribute positively to personal independence, substantive independence, internal independence, and collective independence. With their implementation, Chinese courts will move closer to genuine judicial independence.

Whether the current round of judicial reform will be a big success remains uncertain. As has been discussed above, the introduction of quota judges will enhance the social status of quota judges and the new appointment and removal system will give quota judges more job security. However, the actual increment of salary may not be attractive enough to retain experienced incumbent judges. Further, quota judges will face heavier workload and be required to bear lifelong liability for cases decided wrongly. Resignation of experienced judges from the SPC and other lower courts in China during the current round of judicial reform raises the concern that the current reform has tipped too much towards public interest and has not taken enough care of quota judges' personal interests, particularly sufficient financial security, and peaceful mind to decide cases solely according to law and their conscience.

Ideally, the existing Constitution should be amended to provide constitutional protection of all six elements of *de jure* judicial independence. Better salary package should be provided to quota judges to ensure that they can live a proper middle class life without any financial worry. Lifelong liability should be removed and replaced by a better-designed responsibility system so that quota judges can decide cases solely according to law and their conscience without any worry about possibility to bear liability.

[170] Peerenboom, 'Common Myths' (n 14) 85.
[171] Ibid.