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## The Application of Law as a Key to Understanding Judicial Independence

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# THE APPLICATION OF LAW AS A KEY TO UNDERSTANDING JUDICIAL INDEPENDENCE

Tahirih V. Lee\*

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## I. INTRODUCTION

Judges across China recently declined to apply a law that the National People’s Congress had newly brought into effect. In this article, I describe this startling finding and explore the significance of it. I conclude that it represents an exercise of judicial independence. Using a thickly descriptive approach that focuses on textual analysis and institutional context, I demonstrate that judges in China have no legal duty to apply law and that it is professionally risky for them to apply law; that judges there operate within a professional culture that encourages restraint; and that the court system has developed a strong set of internal rules that encourage reference to judge-made rules rather than to external rules such as those enacted by legislative or executive bodies. I further argue that the topic of judicial independence is important not just for countries outside the United States, but for the United States as well, and that a framework developed from a broadly comparative perspective is the best approach for understanding judicial independence in China, and, likewise, in the United States.

Understanding judicial independence in China is important for myriad reasons. It is a gauge of the robustness of the rule of law in China. It is an important proving-ground for judicial independence as a universal

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phenomenon. It adds perspectives from China to the comparative law literature on judges. It is a bell-weather of the kind of decentralization of authority that famously marks China's post-Mao government. There is no question that the courts of China were enlisted to play a role in the larger governmental initiatives of the past century. Its courts garnered respect for the People's Republic of China's legal system, which in turn helped China participate as an equal in the international legal order, as well as the international economic system.

With judicial independence, there is no escaping the fact that to understand it is to measure it. This is because it would be false and misleading to believe that either you have it or you don't. Each country's, each county's, each judge's independence is affected by a complex of circumstances around it that vary over time. Some of these circumstances are institutional, some are cultural, and some are the products of chance and human agency.

Care is needed when framing the measuring project. If we choose to view the degree of judicial independence as arraying itself along a spectrum, then we need to avoid falling into the trap of assuming that every country is making progress along a trajectory toward complete judicial independence. To make such a sweeping conclusion as this requires information so complete that it defies our current abilities to gather it, and its helpfulness is obscured by the false and unproven assumption of progress. Always lurking is the problem of "independence from what?" The more complete our recognition of the types of constraints on judges, the better our understanding of how they are independent from any of them. This is a tall order indeed.

We are better off accepting that snapshots of a particular moment give us glimpses into the ways in which judges evade the constraints placed upon them. As minimal as this sounds, we should not dismiss it as of little value. Clifford Geertz's famous admonition to aim for "thick description"<sup>1</sup> fits with this snapshot approach. At the same time, meaningful snapshots should not be facilely linked together into a broader picture that ignores the many gaps with which it is riddled.

While no universally accepted definition of, or framework for, judicial independence emerges from the comparative law literature on courts,<sup>2</sup> the

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<sup>1</sup> See CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 310, 310 (1973). A number of preeminent legal comparativists have used this method of Geertz as their lodestar. See William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 947 (1986); Elizabeth Fisher, *Through "Thick" and "Thin": Comparison in Administrative Law and Regulatory Studies Scholarship*, in *OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW* 616, 624–25 (Peter Cane et al. eds., 2021).

<sup>2</sup> Zhu Suli, the then Dean of the Peking Law School, wrote in 2010 that "there is no universal framework of reference for evaluating when judicial independence exists or for evaluating whether and when such independence is beneficial or costly. . . ." Zhu Suli, *The Party and the Courts*, in *JUDICIAL INDEPENDENCE IN CHINA* 52–68 (2010).

notion of judicial independence is widely studied. In this literature, judicial independence is portrayed as a prerequisite to the enforcement of constitutional and civil rights.<sup>3</sup> During the past several decades, comparative law scholars have noticed a growing intervention by courts into their societies.<sup>4</sup>

Also emphasized in the literature is how judicial independence attracts investors, because they aim to minimize the risk of loss of capital by having third party neutrals enforce their agreements. The idea here is that judges enjoy enough autonomy to be able to decide cases on their merits. Although positive law binds their decisions, and that positive law at least in theory imposes a kind of uniformity on the outcome of lawsuits, independent judges have the freedom to interpret and apply the law as they see fit in light of the particular circumstances of the instant case. Even just the appearance of independence boosts the legitimacy of the courts.<sup>5</sup>

This study of the courts of the People's Republic China aims to understand one recent sign of judicial independence from influence by governmental branches outside the judiciary. By combing through judicial opinions and focusing on how those courts applied law, I uncovered a lag in the application of a then newly enacted national statute to cases that the legislature had intended to be subject to the statute. This lag cannot be explained by regulations or procedures that permitted the judiciary at that time to ignore laws that had recently come into force. Another explanation, however, which credits the internal logic of the judiciary's own institutional practices, cannot be ruled out.

In this article, first I will show that, to their detriment, the frameworks we have for understanding the independence of judges by and large leave out the application of law. Next, I will trace judicial independence in China, including practices in the application of law, during the last century, in order

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<sup>3</sup> See, e.g., David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L. J. 319, 319 (2010); Mark Tushnet, *Institutions Supporting Constitutional Democracy: Some Thoughts About Anti-Corruption (and Other) Agencies*, SING. J. LEGAL STUD. 440, 442 (2019); CHARLES M. FOMBAD, *CONSTITUTIONAL ADJUDICATION IN AFRICA* (2017); ASIA-PACIFIC JUDICIARIES: INDEPENDENCE, IMPARTIALITY AND INTEGRITY, (Hoong Phun (H. P.) Lee & Marilyn Pittard eds., 2018).

<sup>4</sup> See MAURO CAPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 4 (1989) ("today the room for judicial law-making (or in Bethamite terminology, for judiciary law) has greatly expanded notwithstanding the expansion—indeed, in part, precisely because of the expansion—of statutory law."); Laura Bingham, *Trying for a Just Result? The Hissène Habré Affair and Judicial Independence in Senegal*, 23 TEMP. INT'L & COMP. L. J. 77, 99 (2009). See also MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* (2002); *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjörn Vallinder eds., 1995).

<sup>5</sup> See generally SHAPIRO, *supra* note 4; SHAPIRO & STONE SWEET, *supra* note 4; *THE GLOBAL EXPANSION OF JUDICIAL POWER*, *supra* note 4.

to make the point that any sign of the judiciary in China applying law in a way that runs contrary to the mandates of other parts of government is new. Third, I will display a snapshot of judicial refusal to apply law that suggests an institutionally rooted exercise of independence from China's central legislature, the National People's Congress (NPC), and, by extension, from the political apparatus that attaches to it, that occurred in the first decade of the twenty-first century. This snapshot presents results from a textual analysis of 499 judicial opinions which reveal an event in 2010 that may reflect a measure of courts' institutional independence. The conclusion of this paper will draw together several points of significance of this snapshot.

## II. FRAMEWORKS FOR UNDERSTANDING JUDICIAL INDEPENDENCE UNDER-EMPHASIZE THE APPLICATION OF LAW

It is difficult to arrive at a conceptual framework for judicial independence that is truly universal. Scholars who specialize in domestic jurisprudence approach the problem steeped in the issues and culture of the judiciaries close to home, and usually the top-most courts of those judiciaries. Scholars who study judges both inside and outside their native countries are captives of the limited sources available, sources that are normally shaped by the particular agenda of that government.

For example, Yuwen Li relies upon publicly stated goals for the judiciary announced by China's government officials to draw conclusions about the likelihood of making the judiciary more independent from other parts of the government.<sup>6</sup> Fu Yulin and Randall Peerenboom provide an example of adopting into a framework the terminology and concerns of the government. The framework they offer as universally applicable assumes a strong state power, pits judicial independence against "judicial accountability," which is enforced through "review mechanisms,"<sup>7</sup> and further assumes that judges "are unlikely to decide a case in a way that is manifestly at odds with the law."<sup>8</sup> This framework extends to "protectionism," classifying it as a form of "nonsystemic" intervention,<sup>9</sup> and yields the assuring view that it is "more severe in lower level courts and in

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6 YUWEN LI, JUDICIAL INDEPENDENCE IN CHINA: AN ATTAINABLE PRINCIPLE? 20–21 (2013).

7 Fu Yulin & Randall Peerenboom, *A New Analytic Framework for Understanding and Promoting Judicial Independence in China*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 95, 97 (Randall Peerenboom ed., 2010) [hereinafter JUDICIAL INDEPENDENCE: LESSONS].

8 *Id.* at 101.

9 *Id.* at 100.

poorer areas.”<sup>10</sup> The framework distinguishes between “economic” and “noneconomic” and “new economic cases” tried in courts, the latter “result[ing] from the transition to a market economy.”<sup>11</sup> All of these issues have been of interest for decades to Sinofiles, China’s government, and international businesses, and the terminology is widely used in official discourse in China, and so, the framework seems designed with China in mind rather than for a broadly comparative purpose. For Yulin and Peerenboom, this framework does not help to identify a particular practice of independence, but instead yields a conclusion that judges throughout China rarely decide cases as a direct result of interference.

Some studies of China’s judiciary incorporate a notion of progress, asserting that efforts are being made to make judges more independent and that these efforts bear fruit in an incremental way over time. Yuwen Li “recognize[s] the notable progress achieved over the past decades in China relevant to strengthening judicial independence”<sup>12</sup> and puts forth an aberration—the famous “‘seed case,’” in which the trial judge was punished for basing her decision on national law rather than a contradicting provincial law—as a marker of that progress.<sup>13</sup> A trajectory of ineluctable progress can be seen in Yulin’s and Peerenboom’s statement that “the general trend in securities litigation and bankruptcy proceedings has been to provide a more rule-based system that strengthens the hand of private actors . . . [T]here is a greater role in economic matters for commercial and administrative litigation . . . and a greater role for nonstate state actors. . . .”<sup>14</sup> Elsewhere, Peerenboom concluded a quarter century into China’s legal reforms that there was no doubt that progress toward the rule of law had been made there.<sup>15</sup>

Broad trends, of course, are important to reveal, but this requires exhaustive research that accounts for countervailing trends and counterexamples that pinpoint places and times. Zeroing in on what particular judges or courts are doing is necessary in order to evaluate their degree and type of resistance to interference. Without that painstaking work, our studies of courts will result in a desultory nod to trajectories or empty theories.<sup>16</sup>

Nicholas Howson focused on early twenty-first century Shanghai, from whose courts he culled over 200 judicial decisions in cases relevant to

<sup>10</sup> *Id.* at 101.

<sup>11</sup> *Id.* at 118–19.

<sup>12</sup> Li, *supra* note 6, at 21.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> Yulin & Peerenboom, *supra* note 7, at 120–21.

<sup>15</sup> See RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 6–8 (2002).

<sup>16</sup> For a prescient warning about this, see Alford, *supra* note 1.

China's company law.<sup>17</sup> He noticed a pattern after a new Company law was enacted nationwide of judges in Shanghai dismissing shareholder petitions for dissolution of companies, even when the new law required their adjudication. He believed that judges were guided by an unpublished contrary policy of the government.<sup>18</sup> The pattern Howson noticed is limited to Shanghai and to the period of about 2003 to 2006, and so, although he does not give the exact number of decisions that followed this pattern compared to those that did not, it is like a snapshot, or a series of snapshots. In other words, he is showing us something gleaned from examining several hundred cases. This approach yields insights and therefore is a promising methodology that should be a part of a framework for studying judicial independence.

Xin He also identified a specific example in Guangdong Province during the period of roughly 2000 to 2006 in which courts refused to take on certain types of disputes, although in that case, not in conformity with, but in resistance to, pressure from governmental policy.<sup>19</sup> His research provides a glimpse into an example of judicial independence that was exercised through established institutional mechanisms that were designed to control the judiciary. The level of detail helps illuminate some specific ways that judges in twenty-first century China were opportunistic in their attempts to exercise some independence from non-judicial areas of the government. Clearly, however, despite the high degree of ingenuity displayed by these judges, the judges did not enjoy complete autonomy from institutions outside the judiciary, nor was it a sign that they were on their way there. And yet, it stands as a significant attempt to decide cases using internal judicial criteria.

His collaboration with Kwai Hang Ng on a more recent reflection on his field work in Guangdong's courts places such judicial inertia within the context of a strong preference across society for preserving the status quo.<sup>20</sup> This preference, though it manifests itself in specific instances differently in different locales, by and large overcomes new local political and social pressures for change.<sup>21</sup>

If it is not all or nothing, should we then include in the framework a spectrum of independence from minimum to maximum? This approach comes with its own problems. One of them is figuring out what the two

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<sup>17</sup> Nicholas Calcina Howson, *Judicial Independence and the Company in Shanghai Courts*, in JUDICIAL INDEPENDENCE: LESSONS, *supra* note 7, at 134–35.

<sup>18</sup> *Id.* at 142–49.

<sup>19</sup> See Xin He, *The Judiciary Pushes Back: Law, Power, and Politics in Chinese Courts*, in JUDICIAL INDEPENDENCE: LESSONS, *supra* note 7, at 180–95.

<sup>20</sup> See KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA* (2017).

<sup>21</sup> *See id.*

extremes look like. Excluding bodies that engage in private adjudication, such as arbitration and mediation centers, there can be no judicial system that operates entirely independent of another governmental entity so long as someone in that entity selects the judges, pays the judges, or removes the judges. The Sultan of Brunei exercises all of these powers, and the judges of Brunei do not disagree with him.<sup>22</sup> In Ghana, where the authority to appoint is disbursed throughout various governmental entities, this authority nonetheless ultimately traces to one person, the President because it is he who appoints the members of the other governmental entities.<sup>23</sup> Though Senegal's judiciary is known as one of the most independent in Africa, for the past several decades it has been closely controlled by the executive.<sup>24</sup> Yuwen Li asserts that “[t]he ultimate goal” in China is to “realiz[e] fully-fledged judicial independence. . . .”<sup>25</sup> It is unclear what that might look like, and, even if it were in some sense possible, whether it would be desirable. The judges known as magistrates of the *Parlements* of France's pre-revolution *ancien regime* come close to something like complete independence; they were financially self-supporting, handled their own appointments to the bench, and decided cases relatively free from positive law; they were notorious by the late eighteenth century for nepotism and veniality and were obliterated within the last decade of that century.<sup>26</sup>

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<sup>22</sup> See ASIA-PACIFIC JUDICIARIES: INDEPENDENCE, IMPARTIALITY, AND INTEGRITY, (Hoong Phun (H.P) Lee & Marilyn Pittard eds., 2018).

<sup>23</sup> See Kofi Quashigah, *The Supreme Court of Ghana Under the 1992 Constitution: Nature of Jurisdiction as the Apex Court and Contribution to the Promotion of Constitutionalism*, in CHARLES M. FOMBAD, CONSTITUTIONAL ADJUDICATION IN AFRICA 113, 129–31 (2017).

<sup>24</sup> See Bingham, *supra* note 4, at 96–99.

<sup>25</sup> LI, *supra* note 6.

<sup>26</sup> The foremost sources on the structure of the *Parlements*, which “were the highest ranking of the ordinary tribunals,” ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: ORGANS OF STATE AND SOCIETY 255 (Arthur Goldhammer trans., 1984), are ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE (Brian Pearce trans., 1979) and ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: ORGANS OF STATE AND SOCIETY (Arthur Goldhammer trans., 1984). For nepotism in the *Parlements*, and its familial connections to the rest of the King's bureaucracy, see ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: ORGANS OF STATE AND SOCIETY 213 (Arthur Goldhammer trans., 1984). The magistrates were overwhelmingly drawn from the landed nobility, see ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 278–79 (Brian Pearce trans., 1979), and were wealthy, see ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 188–89 (Brian Pearce trans., 1979). Though the *Parlements* were officially staffed by the king's officials and they exercised the authority of the sovereign, they “exercised power over their own recruitment,” see ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 431 (Brian Pearce trans., 1979), and over the discipline of their judges, see ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 433 (Brian Pearce trans., 1979). Candidates for a position in the *Parlements* bought “it from the previous holder,” or, if it was a new position, from the King. See ROLAND MOUSNIER, THE INSTITUTIONS OF



An effort to make universal any definition of judicial review risks skewing it in favor of certain legal traditions at the expense of others. Expertly avoiding this trap, Margaret Woo's landmark study of judicial independence in China revealed an intriguing particularity in the concept of it there, which, she explained, is rooted in an emphasis upon the collective rather than the individual:

Adjudication supervision serves very directly as an institutional check on individual judges. As an initial matter, every decision of a judge or a panel of judges must be approved by the court president, and complex and important cases must be reviewed by the judicial committee before a judge issues the decision. Adjudication supervision is the final institutional check in this process. Under adjudication supervision, even when a final decision is rendered, if the decision is contrary to the opinions of the president of the court, the procurator, or the judicial committee, the judgment can be reopened and re-adjudicated by a new panel. This function of adjudication supervision as an institutional check is fully supported by the Chinese view of judicial independence.

While judicial independence in Western nations means that a judge administers justice independently, subject to no outside interference, the Chinese concept is one of "the people's courts shall exercise judicial power independently, in accordance with the provision of the law." According to the Chinese, judicial independence relates simply to the independence of the court as a whole, not the individual

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FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 431 (Brian Pearce trans., 1979). Magistrates drew multiples more income from that position than from their extensive private lands. See ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 176-89 (Brian Pearce trans., 1979). The courts collected fees called "epices" from litigants. See ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: ORGANS OF STATE AND SOCIETY 264 (Arthur Goldhammer trans., 1984). Though the *Parlements* were supposed to apply the law of the King, in practice they avoided applying it; "they amended the [King's] edicts or even simply rejected them, often with success." ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 434 (Brian Pearce trans., 1979); see also ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: ORGANS OF STATE AND SOCIETY 259 (Arthur Goldhammer trans., 1984). The *Parlements* used their own legal principles, see ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 188 (Brian Pearce trans., 1979), for example in cases of marriage in which the Church attempted to provide countervailing rules, see ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 63-64 (Brian Pearce trans., 1979). Legal training was not required for the magistrates. See ROLAND MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY, 1598-1789: SOCIETY AND THE STATE 149 (Brian Pearce trans., 1979).

judge. The concept of the “independence of the court” lies in the idea of youji zhengti [organic whole]. Under youji zhengti, the individual judge is not independent; he or she is but one component of the judicial system. In China, it is the court and not the judge who has the power to administer justice. Indeed, according to Jiang Hua, then President of the Supreme People’s Court, a court administering justice independently, subject only to the law, “refers to the relationship between the court and other administrative organs, organizations or individuals, and not to the relationship between the collegiate bench and the court president or presiding judge.”<sup>27</sup> [footnotes omitted]

There is a vast comparative law literature that assumes a link between judicial independence and legitimacy. Judicial independence appears from the comparative law literature to be a prerequisite to the enforcement of constitutional and civil rights.<sup>28</sup> In Colombia, for example, courts on their own initiative performed their responsibilities in a way that took on a legislative role when the legislature was too corrupt to pass laws.<sup>29</sup> Comparative law scholars have long studied the related connection between judicial review and individual rights.<sup>30</sup>

Here, too, we need to be careful. Despite the obvious link between independence and legitimacy, judiciaries who exercise unchecked power can be riddled with corruption. As noted above, France’s courts before the revolution of 1789 passed down their judge-ships to family members and routinely enriched themselves at the litigants’ expense with bribes. Similarly, Haiti’s courts under President Duvalier required bribes in order to try lawsuits in the first place. They successfully ignored law codes prohibiting the bribing of judges.<sup>31</sup>

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<sup>27</sup> See Margaret Y.K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMP. L. 95, 114 (1991).

<sup>28</sup> See, e.g., ALLAN R. BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 9 (1989) (the independence of judges is the best guarantor of individual rights); *id.* at 82 (individual rights are not guaranteed by the mere existence of a constitution, but need judges to enforce them); *id.* at 80–85 (the only kind of government that operates under the rule of law is that where courts have “control” over the legality and constitutionality of all official acts); CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* 4 (1996) (when an independent judiciary can review constitutional issues it “becomes the unique institution capable of protecting those rights and therefore is empowered to nullify legislation endangering them.”).

<sup>29</sup> See Landau, *supra* note 3, at 319.

<sup>30</sup> See, e.g., MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 1 (1971) (“judicial review of statutes is . . . one way of “encouraging citizens to ‘trust their government to uphold certain rights considered inviolable.”); *id.* at 16 (judicial review controls arbitrary state action).

<sup>31</sup> Mario Joseph & Nicole Phillips, *Judicial Corruption in Haiti: The Need for Discipline and Civil Society Participation*, 39 HASTINGS INT’L & COMP. L. REV. 183, 183 (2016).

Care must be taken not to stop at a superficial link between judicial independence and legitimacy, which we can see in a variety of published scholarships,<sup>32</sup> because counterexamples exist. Judiciaries that exercise unchecked power can be riddled with corruption.<sup>33</sup> For example, the *Parlements* of the *Ancien Regime* in the major cities of France extended their jurisdiction to include disputes brought by agricultural communities against their feudal lords and in so doing supplied a powerful mechanism for farmers to challenge the state.<sup>34</sup> The judges chose their successors and supported themselves with the fees they collected from litigants.

Whether independence runs against corruption or goes hand in hand with it depends on whether a strong man is controlling a system within which judges are forced to operate corruptly, or if, on the contrary, judges are mavericks taking bribes on their own.<sup>35</sup> And corrupt judicial behavior may extend beyond bribes to clientelism, in which favors are traded and personal relationships influence the selection and promotion of judges.<sup>36</sup>

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<sup>32</sup> For example, the statement that “judicial corruption . . . inevitably undermines judicial independence in today’s China.” LI, *supra* note 6 at 21.

<sup>33</sup> As Fu Yulin and Randall Peerenboom point out when they assert that corruption in the judiciary is an example of “nonsystemic interference,” Yulin & Peerenboom, *supra* note 7, at 101, which suggests that they believe that corruption cannot be institutionalized within courts.

<sup>34</sup> See Rafe Blaufarb, *Conflict and Compromise: Communaute’ and Seigneurie in Early Modern Provence*, 82 J. MOD. HIST. 519, 522–24 (2010).

<sup>35</sup> Xiaobo Lu concluded that “lack of sufficient budgetary funding provided one of the incentives for [governmental] agencies to seek revenues through less legitimate channels.” XIAOBO LU, CADRES AND CORRUPTION 198 (2000). This bribe taking would have undercut the systematic push toward guidance by superior judges.

<sup>36</sup> An example of this can be seen in Iceland in 2018, when fifteen new judges were chosen for its Court of Appeal. When one of its judges later upheld a criminal conviction of Gudmundur Andri Astradsson, the defendant appealed eventually to the European Court of Human Rights that the Minister of Justice of Iceland deviated from national procedures in order appoint that judge with whom she had personal or political ties. The Minister of Justice proposed names of candidates that differed from those she had received from the Evaluation Committee, and did not follow the procedures for properly justifying the change. The European Court agreed and awarded him \$20,000 for costs and expenses, though it did not overturn his conviction. See European Court of Human Rights Press Release, ECHR 347, Unanimous violation of right to a “tribunal established by law” on account of grave breaches in the appointment of a judge to Icelandic Court of Appeal (Jan 12, 2020). A summary of the judgment was widely reported within Iceland and was considered scandalous enough to cause the Minister of Justice to resign, e.g., by Jelena Ciric, *Minister of Justice’s Court Appointments Were Illegal: Ruling Upheld by ECHR*, ICE. REV. (Dec. 2, 2020), <https://www.icelandreview.com/politics/minister-of-justices-court-appointments-were-illegal-ruling-upheld-by-echr/>; and Andie Sophia Fontaine, *ECHR Grand Chamber Upholds Verdict on Iceland’s Appeals Court Case*, RJEKJIVIK GRAPEVINE (Dec. 1, 2020), <https://grapevine.is/news/2020/12/01/echr-grand-chamber-upholds-verdict-on-icelands-appeals-court-case/>. Some people in Iceland who knew Astradsson alleged that he launched his appeal to the European Court because he was friends with Spano, the Icelandic member of the seventeen-judge panel of that court. Zoom Interview with David Gudjonsson, Zoom (Apr. 16, 2021). The controversy over the judicial appointment and several others reportedly stemmed from a clash between political factions in Iceland’s government. See Andie Sophia Fontaine, *Icelandic Politicians Respond to ECHR Grand Chamber Ruling*, RJEKJIVIK GRAPEVINE (Dec. 1, 2020), <https://grapevine.is/news/2020/12/01/icelandic-politicians-respond-to-echr-grand-chamber-ruling/>.

Another complication in the link between judicial independence and legitimacy is the notion of arbitrariness. This is a prominent concern of American scholars of the judiciary, who, like Farber and Sherry, conceive of arbitrary judicial decisions as those which do not “offer *some* explanation for how he or she arrived at the decision.”<sup>37</sup> Li contrasts the need for independence with the need for judges in China to become “more accountable,”<sup>38</sup> which seems to go farther than simply trying to prevent judgments made on a whim.

If we were to define judicial independence as freedom from constraint, we might track the sources of the constraints on a judge, from institutions external to the judiciary, to forces within the judiciary, to prevailing cultural and economic pressures, to the kind of training judges received, to positive law that was created by a lawmaker to control the outcomes in litigation.<sup>39</sup> When we think about a zone of autonomy within which judges operate, we are zeroing in on the process by which the judge reaches a judgment. In that process, we want to know how much interference compels the judge to rule a certain way, or how much constraint leaves the judge little room to decide on the outcome, or, by contrast, how much discretion does the judge enjoy to navigate that process unimpeded.

Discretion is a helpful way to think about judicial independence so long as we use it as neutrally as possible. To say that a judge exercises discretion is to say that she on her own makes choices about which law to apply or how to apply it. She operates within a zone of freedom to determine which question is presented in the case before the court, which laws are relevant to the question, and how the laws answer the question. This is the view of discretion espoused by American constitutional scholars Dan Farber and Suzanna Sherry.<sup>40</sup>

Perhaps because, like other influential scholars of the judiciary in the United States, Farber and Sherry have spent their careers studying the ways that judges in the United States arrive at their decisions, they assume that all judges have discretion: “We take the existence of judicial flexibility as a given.”<sup>41</sup> They suggest that this view is part of a “traditional American view,” but they offer their view as universally true.<sup>42</sup> They do not concern

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37 DANIEL A. FARBER & SUZANNE SHERRY, *JUDGMENT CALLS: PRINCIPLES AND POLITICS IN CONSTITUTIONAL LAW* 53 (2009 ed. 2008).

38 LI, *supra* note 6 at 32.

39 Yulin, Peerenboom, and Li propose something similar, though the lists differ slightly. *See id.* at 21–31; Yulin & Peerenboom, *supra* note 7. Yulin’s and Peerenboom’s list ultimately focusses more on types of cases rather than sources of interference. *See id.* at 97.

40 FARBER & SHERRY, *supra* note 37, at 36.

41 *Id.*

42 *Id.* at 11.

themselves with the question of whether a judge may exercise discretion, only normative questions about whether the exercise of discretion is within a “permissible range of flexibility,” its “validity,” and how to make it more “responsibl[e].”<sup>43</sup>

The concepts of validity and responsibility, as broad as they are, can help to frame a comparative look at judicial independence, helping it to include attention to rule of law and corruption. Once respect for cultural differences is brought in as well, however, the framework for understanding the validity and responsibility of judgments becomes mind-bogglingly more complex, in a way that is beyond the scope of this paper, though might be fruitful in other, longer studies. At the same time, while validity and responsibility may be relevant to a study of judiciaries outside the United States, Farber and Sherry single them out in response to “originalist” legal scholars and judges in the United States.<sup>44</sup> This domestic context is essential to understanding their arguments.

For China, we have to focus on the question of whether there is discretion. Any sign of it will be notable. At the very least, this question is of paramount importance in the places where judges face administrative or criminal punishments and even assassination just because they applied law in the way they believed was best, or where they are pressured to apply law in a way that unifies the country and promotes government policies. This harsh reality makes judicial application of law a first step to understanding the independence of any judiciary, and, in this way, forms a foundational element of a universally applicable framework for understanding judicial independence.

The nature of law, also, puts judicial application of it at the heart of the problem of judicial discretion, because law is intended to constrain the judge’s independence. Positive law at least in theory imposes a kind of uniformity on the outcome of lawsuits, while the whole idea of the rule of law is that law has the power to constrain human agency. In contrast, judicial discretion allows judges the freedom to interpret and apply the law as they see fit in light of the particular circumstances of the instant case. It is a balancing act between outcomes dictated by an objective standard and outcomes that make the most sense given the subject elements of the instant case.

There are those who believe that judges do not need to exercise discretion when applying law. Albert Chen developed a distinction between

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<sup>43</sup> *Id.* at 36.

<sup>44</sup> An early proponent of originalism was Raoul Berger, who wrote influential tracts such as *Government by Judiciary* and *Federalism: The Founders’ Design*. See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987).

interpretation and application of law that reinforces the possibility that judges can apply law mechanically without exercising discretion.<sup>45</sup> This view is similar to the official view of how judges apply law in France, where broad judicial discretion runs counter to the basic tenets of the legal system,<sup>46</sup> and to the ideal judge promoted in the United States by originalists and nominees to the United States Supreme Court.<sup>47</sup> Others argue that in practice judges cannot, or do not, decide cases without exercising some discretion.<sup>48</sup> Among them are Farber and Sherry, who assume that positive law imposes an incomplete rubric upon judicial decision making.<sup>49</sup>

Notwithstanding Farber's and Sherry's assumption that judges can exercise discretion, shrinking judicial discretion is the latest battle ground in civil procedure jurisprudence in the United States.<sup>50</sup> The United States Supreme Court's rulings on procedural questions since the 1990s portray another type of effort to shrink the scope of judges' discretion. In Celotex Corp. v. Catrett, the court announced a new requirement that federal district court judges grant motions for summary judgment if the moving party had discharged a relatively minimal burden of production by pointing to portions of the record that showed no genuine issue of material fact, and if, after that, the nonmoving party failed to raise any genuine issues of material fact with something very close to admissible evidence.<sup>51</sup> Before Celotex, district courts had enjoyed broader latitude when ruling on those motions. In Ashcroft v. Iqbal, the Supreme Court imposed a new two-step process on district court judges who were faced with motions to dismiss for failure to state a claim upon which relief can be granted.<sup>52</sup> It would be disingenuous not to notice that the justices in the majorities of both decisions were trying to reign in the independence of federal district court judges.

Efforts to make judging a more uniform process, even if it comes from officially effective law, aim to smooth the judiciary into a more faceless institution where there is little room for individual creativity and intelligence. Such efforts to diminish judicial discretion are not intended to be neutral when it comes to the outcomes. On the contrary, they aim to make the judiciary more controllable. In both Celotex and Iqbal, the U.S. Supreme

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45 Interview with Albert Chen, H.K. Univ. Fac. of L., in H.K. (July 27, 2000).

46 See the section on "official portraits" of the French judge in Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1353 (1995).

47 See generally CODE CIVIL [C. CIV.] [CIVIL CODE] (George Spence et al. trans., 1841) (Fr.)

48 *Id.*

49 FARBER & SHERRY, *supra* note 37, at 27–29, 99.

50 *Id.*

51 Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

52 Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

Court made it easier for defendants to win favorable judgments cheaply, without going to trial.<sup>53</sup> In the case of France, the stranglehold placed on judicial discretion in 1800 aimed to boost the status of the Civil Code.<sup>54</sup>

To look away from the possibility of human agency in judging is to play into the hands of those who try to use the judiciary to promote political policies. By not encouraging a deep look into the activities of individuals, a framework for judicial independence threatens to produce conclusions that attribute everything to monolithic institutions and gloss over details. While legal systems are made up of institutions,<sup>55</sup> it is a myth that they are animated solely by a life of their own. Instead, the acts they produce are decided by the human beings who populate them. Judges are no exception to this.<sup>56</sup> In China, where professional duties are performed within a rich social context that emphasizes personal relationships, or *guanxi*, it is all the more important to keep in mind the ways in which individual judge's obligations to colleagues, friends, and family might cut against pressures from superiors and positive law.<sup>57</sup>

<sup>53</sup> See *Celotex*, 477 U.S. at 327. See also *Ashcroft*, 556 U.S. at 678.

<sup>54</sup> The founder of Europe's first civil law system, Napoleon I, saw the independence and power of the judiciary as a threat to his consolidation of power, knowing well that the nepotism and bribe-taking in the *Parlements* of France's *ancien regime* fueled the growth of their influence. Napoleon wanted to do away with courts altogether, but his government came to depend upon at least a neutered, slimmed-down version of them to help implement his top-down restructuring of France's government and its quest to wipe away political dissent and societal intermediaries between it and the French people. The new legislature passed laws that expressly prohibit judges from exercising their powers in certain ways, or that expressly require judges to act in certain ways.

<sup>55</sup> Both Stanley Lubman and Randall Peerenboom take an "institutional approach" to researching law in China. See STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 36–37 (1999); PEERENBOOM, *supra* note 15, at 8–9. For example, see Peerenboom's conclusion that "[a]t the end of the day, it is hard to imagine that in the long run, China will not adopt the basic institutions of democracy . . . the implementation of rule of law is a feasible intermediate point along the way to an as yet undetermined form of Chinese democracy." *Id.* at 545–46; see also Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?*, 19 COLUM. J. ASIAN L. 185, 187 (2005) ("At this stage of development, China is meeting or exceeding expectation on most measures . . . China has made remarkable progress in a short time in improving its legal system, having essentially begun from scratch in 1978.").

<sup>56</sup> See, e.g., *Pennoyer v. Neff*, 95 U.S. 714 (1878); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987); *Walker v. Birmingham*, 388 U.S. 307 (1967); David Benjamin Oppenheimer, *Martin Luther King*, *Walker v. City of Birmingham*, and *the Letter from Birmingham Jail*, 26 UNIV. CAL. DAVIS L. REV. (No. 4) 791, 826–28 (1993); *Erie R.R. v. Tompkins*, 304 U.S. 64, 73–76 (1938); Edward A. Purcell Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *CIVIL PROCEDURE STORIES* (Kevin M. Clermont ed., 2008).

<sup>57</sup> For discussions of the important role that family ties play in business culture in Chinese societies, see S. GORDON REDDING, *THE SPIRIT OF CHINESE CAPITALISM* 53–54 (1990); BILL PURVES, *BAREFOOT IN THE BOARDROOM: VENTURE AND MISADVENTURE IN THE PEOPLE'S REPUBLIC OF CHINA* (1991); Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 LAW & SOC'Y REV. 193, 204–07 (1994).

And yet, institutional culture surely affects the work of individual judges *en masse* as well. In an important example of this, despite the fact that a powerful way that judges can exercise their independence is in applying law in an individualized fashion, one of the practical challenges for the rule of law is getting judges to apply law at all. Large-scale institutional factors contribute to this phenomenon, such as the great distance, both geographically and institutionally, that normally separates the law maker from the law applier. Compounding judges' sense of safe distance from the law maker is the conservative mindset that arises within courts that operate within vast bureaucracies.

The distance between the sources of law and the law applier is perhaps greater in civil law systems, where judicial precedent rarely carries the formal weight of law. It is a notable irony that, where law is restricted to non-judicial sources, out of an effort to reduce judicial power, there is less law and it is imposed on courts from the outside, and therefore judges necessarily feel freer to decide cases without reference to law.<sup>58</sup> This practical, even existential, freedom, to ignore law, may be why two of the first five provisions of the French Civil Code, part of its preamble, threaten to punish judges who refuse to apply relevant provisions of the code.<sup>59</sup> More than just another example of a legislature exercising control over judges by enacting substantive laws, this law attempts to force judges to apply law, even if they believe that there is no relevant law, or the law is ambiguous. These provisions stand as evidence that judges, at least in France, were inclined to avoid applying law in some cases. A statute enacted shortly before that code reinforced the government's effort to turn judges into law citation machines. Drafted under the supervision of Napoleon I, who was eager to nip in the bud any resurgence of the powerful pre-revolution courts, the statute limited the judgments of both civil and criminal courts to a single sentence, with additional requirements for word choice, punctuation, and grammar.<sup>60</sup> In so

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<sup>58</sup> French scholar Stephanie Balme writes that French courts have achieved in practice a large degree of independence from other branches of government, despite a lack of constitutional guarantees of this independence. See Stephanie Balme, *Local Courts in Western China: The Quest for Independence and Dignity*, in JUDICIAL INDEPENDENCE: LESSONS, *supra* note 7, at 179. French scholar de Lasser demonstrates with painstakingly thorough research that this practice of independence includes the freedom to ignore the dictates found in the Civil Code. See Lasser, *supra* note 46.

<sup>59</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 4 (George Spence et al. trans., 1841) (Fr.) (“The judge who refuses to judge, on pretext of silence, obscurity or insufficiency of the law, may be prosecuted as guilty of a denial of justice.”); *id.* at art. 5 (“Judges are forbidden to pronounce decisions by way of general and regulative disposition on cases that are submitted to them.”).

<sup>60</sup> The Law on Judicial Organization of 1790 provides: “The drafting of judgments, on appeal as well as in the first instance, shall contain four distinct parts—In the first, the names and qualities of the parties will be stated—In the second, the questions of fact and law that constitute the case will be formulated with precision—In the third, the result of the facts recognized or noted by the instruction, and the reasoning that will have determined the judgment, will be expressed—The fourth will finally contain the ruling of the judgment.” de S.-O.-l’E. Lasser, *supra* note 46, at 1340. The statute limits each judgment



doing, the drafters of the law tried to make the interpretation of law impossible, and therefore preclude the publication of judgments that gave the impression that the civil code contained gaps or was ambiguous.

What about judges in common law legal systems who enjoy the power to create their own law, albeit in an aggregate, organic way? It is a myth that all judges in the United States regularly apply or interpret law. Trial-level judges instruct the trier of fact, who may or may not be the judge, in the relevant law, and then the trier of fact applies it. And that is only if a case goes to trial, which happens in roughly one percent of lawsuits filed.<sup>61</sup>

Even at appellate levels of adjudication, judges in the United States can comfortably avoid the application of relevant law by invoking the prudential rule that judges are not supposed to apply any law that was not raised by the litigants in their arguments before the court.<sup>62</sup> As a matter of principle, this unwritten rule is especially important to conservative judges, who believe that the bench should not be “activist.” As a practical matter, also, judges of any philosophy, who are saddled with ever-growing dockets due to underfunding and slow processing of judicial appointments, are understandably willing to rely on the litigants to determine which laws are potentially relevant, leaving to the judge the smaller task of pronouncing yea or nay.

Farber and Sherry do not look at the judge’s choice to ignore law even when it is formally promulgated and relevant to the instant case.<sup>63</sup> Perhaps the reason for this is that the choice to ignore law does not appear as stark in a common law system where a judge can choose from a larger variety of potentially relevant legal principles than in a civil law system where law emanates only from a legislature. Another reason clearly derives from Farber’s and Sherry’s focus on appellate judging, where, freed from the drudgery of amassing a factual record, the sole job of American judges is to reason their way from the law to a result.

In sum, a framework for studying judicial independence is helpful if it leads to specific descriptions backed up by documentation and does not aim, without solid proof, to link those specific instances together into a broad

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to a single sentence, which contains all four of these parts in the form of clauses that begin with prescribed words.

<sup>61</sup> Benjamin Spencer observed a 0.5% trial rate in federal courts in 2020, compared to a rate of 6.1% in 1982 and an 11.5% rate in 1962. He draws in part on Marc Galanter’s empirical study *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 465 fig. 2 (2004). See A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 753 (6th ed. 2021).

<sup>62</sup> Judge James Buckley pointed this rule out to me in a private interview in the spring of 1990. Interview with James L. Buckley, Judge, U. S. Ct. of Appeals for the Dist. Of Columbia Cir., in Chambers of James L. Buckley (1990).

<sup>63</sup> See FARBER & SHERRY, *supra* note 37.

trend. The framework aims to be as universal as possible by avoiding assumptions and key terms that are based upon characteristics of particular judiciaries or the official statements of government. At the same time, it should aim to identify nuanced local understandings of judicial independence, such as the emphasis in China upon the courts as a whole rather than individual judges. Judicial discretion can be a neutral focus of the framework, and an important exercise of judicial discretion occurs in the application of law. It is important because the makers of positive law, the very heart of a legal system, conceive it to be a constraint on judicial discretion. Particularly for legal systems in which judges are embedded in vast bureaucracies or other institutional straight-jackets, a study of how judges apply law must include decisions by judges to avoid applying relevant law currently in effect. Despite the importance of institutions as sources of pressure on judges, the framework must leave open the possibility of human agency in order avoid a false picture of inevitability and monolithic conformity.

### III. CONTROL OVER THE APPLICATION OF LAW THROUGHOUT TWENTIETH-CENTURY CHINA

For China, we want to focus on the question of whether there is judicial discretion in the application of law, because for the past century, judges' careers have followed precarious arcs and rapidly changing political conditions, all of which threw into chaos the very contours of positive law and kept judges from taking for granted that they were free to decide cases on their own. This means that any sign of an autonomous application of law would be notable.

In the late nineteenth and early twentieth century, the *Da Qing Lu Li*, the centerpiece law code of China's final dynastic rulers, contained official annotations of its provisions that read as if they were derived from specific judicial decisions.<sup>64</sup> Volumes of sub-statutes further promulgated factually-detailed rules. Both kinds of laws represented a high level of detail at which the national government desired to control judicial outcomes.<sup>65</sup>

During these same decades, foreign consular officials founded dozens of courts in coastal cities of China, where they tried millions of lawsuits. This collection of foreign-influenced courts on Chinese soil in the late nineteenth and early twentieth century were built quickly and played a vital role in a rapidly expanding economy. Largely disconnected from the sovereign

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<sup>64</sup> See generally *THE GREAT QING CODE* (William C. Jones trans., 1994).

<sup>65</sup> *Id.* at 3 (“[I]t is in part a collection of rules that deal with particular fact situations, sometimes in great detail.”).

powers that their officials purported to represent, these courts handed down decisions that only lightly, if at all, referred to positive law.<sup>66</sup>

From the very beginnings of the Chinese Communist Party's influence in China, its leaders' pronouncements reflected the tension between distrust of positive law and an understanding of the effectiveness of judicial processes. In 1941, eight years before the party founded the People's Republic of China, Mao Zedong's lieutenant Liu Shaoqi declared that it was "permissible . . . but it would be incorrect to universalize the practice" of holding "special trial meetings."<sup>67</sup> In the early 1950s China's new Communist government convened tribunals that sentenced tens of thousands of people to prisons designed to cure opium addiction and break the cycle of sex trade and trafficking. Although judges from the 1930s and 1940s still sat on the bench of courts after they were taken over by the Communist government, the courts were fully integrated into the government's effort to rid the country of widespread practices that weakened the social fabric.<sup>68</sup> In 1952, the Chinese Communist Party removed those judges held over from before the revolution and replaced them with people who lacked legal training but were considered loyal to the party.<sup>69</sup> Beginning in 1953 and widespread by 1955 were "comrades courts" modelled modeled on those in the Soviet Union that tried individual infractions of workplace discipline, like not meeting production targets, in large factories.<sup>70</sup>

In 1954, a new constitution outlawed any interference by administrative government with the courts, providing that only courts could hand down criminal punishments, and that they were "independent, subject only to the law."<sup>71</sup> This ideal, of judicial decision-making constrained only by positive law, did not get a chance to be implemented, however, falling just a few years

<sup>66</sup> For a description of these courts in Shanghai during the late nineteenth and early twentieth century, see Tahirih V. Lee, *Law and Local Autonomy at the International Mixed Court of Shanghai* (1990) (Ph.D. dissertation, Yale University) (ProQuest).

<sup>67</sup> Liu Shaoqi, Sec'y of N. China Bureau, *On the Intra-Party Struggle* (July 2, 1941) translated in BOYD COMPTON, *MAO'S CHINA: PARTY REFORM DOCUMENTS, 1942-44*, 231 (1966).

<sup>68</sup> See JEROME ALAN COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963: AN INTRODUCTION* 241 (1968); Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 HARV. L. REV. 967, 976-77 (1969).

<sup>69</sup> On April 21, 1952, as part of the Party's and the government's "three-anti" and "five-anti" campaigns, the government promulgated the Act of the People's Republic of China for Punishment of Corruption. See COHEN, *supra* note 68, at 308-11.

<sup>70</sup> See *id.* at 170.

<sup>71</sup> XIANFA art. 73 (1954) (China), translated in COHEN, *supra* note 68, at 214. In the same year, The Organic Law of the People's Courts was enacted, essentially creating a new court system. Organic Law of the People's Courts of the PRC (Sept. 21, 1954), translated in FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA 131 (A. Blaustein ed., 1962).

later to the pro-Party dictates of the Anti-Rightist Campaign of 1957<sup>72</sup> and then even more completely to the Cultural Revolution of the late 1960s and early 1970s. During both of these sweeping national campaigns, loyalty to Party leaders gained renewed supremacy over legal expertise.<sup>73</sup> Courts were disbanded; all positive law was officially discredited, now labeled a mere tool of Communism's enemies.<sup>74</sup> Judges were separated from their families when they were sent to the countryside to do degrading manual labor. Judges disappeared, but law became a way to unify the country amidst factionalization and restore order amidst uncontrollable violence.<sup>75</sup> Even as the Cultural Revolution was in denouement, new constitutional provisions enacted in 1975 conspicuously omitted any guarantees of judicial independence. "The masses," the army, and political committees were expected to carry out the law by punishing "counterrevolutionaries."<sup>76</sup>

Courts were reestablished in 1978, the ceremonial start to the era of "Gaijie Kaifang," the opening of China to the rest of the world. The enactment of a new constitution that year subjected courts to the authority of the Party. In these courts, a judge sat on the bench flanked by lay Assessors when presiding over cases that reached the courts primarily through the public security and prosecutorial systems. A necessary qualification for judges was "good political awareness," and "revolutionary councils," which were "the political arm of the party leadership," appointed them.<sup>77</sup>

The resurrection of positive law began swiftly thereafter. It took only one year for the National People's Congress (NPC) to enshrine in several new

<sup>72</sup> For an analysis of the Anti-Rightist Movement that stresses practical priorities over ideological stances, see Victor H. Li, *The Role of Law in Communist China*, 44 CHINA Q. 66, 73–81 (1970).

<sup>73</sup> See Laio Kuangsheng, "Independent Administration of Justice" and the PRC Legal System, 16 CHINESE L. & GOV'T 123, 131 (1983).

<sup>74</sup> For a contemporary expression of the conviction that law was a purely bourgeois, and therefore elitist and anti-communist, construct, see "Zhonguo 'yihuimi' de pochuan," [The Bankruptcy of China's Parliamentary Addict], WEN-HUI PAO, Aug. 10, 1967, in READINGS IN THE CHINESE COMMUNIST CULTURAL REVOLUTION 287–92 (Wen-Shun Chi, ed., University of California Press 1971).

<sup>75</sup> These notions are embedded within a famous speech given by leading Chinese Community Party official Lin Piao in which he denounced Peng Zhen who had favored the use of courts. See Lin Piao, Address to Politburo (May 18, 1966), translated in 2 CHINESE L. & GOV'T 42, 55–56 (1969); see also, *Completely Smash the Feudal, Capitalist and Revisionist Legal System*, FAN P'ENG, LO HEI HSIEN, July 1968, translated in 2 CHINESE L. & GOV'T 3, 7–11 (James D. Seymour ed., 1969).

<sup>76</sup> The Central Committee of the Chinese Communist Party promulgated a document in 1969 in which it declared that those who interrupted the normal functioning of workplaces and transportation were punishable "according to law" by the People's Liberation Army, "the Shansi Provincial Revolutionary Committee," and denounced by "the masses." See *The July 1969 Proclamation*, STUD. ON CHINESE COMMUNISM, Sept. 19, 1969, translated in 3 Chinese L. & Gov't 269, 271–272 (James D. Seymour, ed., 1970).

<sup>77</sup> These were terms that an American observer obtained from an interview of judges in Shanghai in 1978. See D. Stephen Kahn, *Resolution of Civil Disputes in People's Republic of China*, 53 FLA. BAR J. 198, 199–02 (1979).

statutes the principle that judges were independent from all but the law.<sup>78</sup> Accompanying this principle was the qualification that the correct application of the law would be clear from the bare text of the law and that judges' application of law could be reviewed and redone by a variety of routes as many times as needed in order to achieve that correct application.<sup>79</sup> Soon thereafter, the NPC gave constitutional status to the prohibition against making law by the judiciary when it established itself as the highest government organ and the only body invested with legislative power, thereby implicitly excluding courts from exercising this authority.<sup>80</sup> The new constitution echoed the language from the statutes that judges were independent, subject only to the law.<sup>81</sup>

With a new constitution in 1982 and only a handful of statutes enacted by the NPC, many of them concerning foreign investment, there was little positive law for China's courts to apply to the bulk of their cases in the early 1980s. One of the government's projects was to publish official translations into English of these statutes. After Jerome Cohen created a presence in Beijing for the American law firm Paul, Weiss, Rifkind, Wharton and Garrison, in 1982 the lawyer that the firm stationed there, Jamie Horsley, upon invitation of officials in Beijing, worked on translating those statutes into English. These were published in the mid-1980s in book form by the Commercial Press side-by-side with their Chinese original and sold in a massive government-run bookstore on the busy Wangfujing Road.<sup>82</sup> By the early 1990s, each new statute enacted by the National People's Congress was heralded with a book-like publication in Chinese and some in English that was sold in popular bookstores on the major commercial streets of China's

<sup>78</sup> See *Xíng fǎ* (刑法) [Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980), art. 57; *Xíngshì Sùsòng Fǎ* (刑事訴訟法) [Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980), art. 4 (both published in Chinese and English translation in *CRIMINAL LAW AND CRIMINAL PROCEDURE LAW OF CHINA*, Foreign Languages Press, Beijing, 1984).

<sup>79</sup> See *Zūzhī fǎ* (組織法) [Organic Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980), art. 4; *Xíngshì Sùsòng Fǎ* (刑事訴訟法) [Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980), art. 148–50. As Margaret Woo analyzed it, the ease with which judgments could be reopened “renders a judgment particularly vulnerable to the legal system's temporal concept of right and wrong.” Woo, *supra* note 27, at 101.

<sup>80</sup> See *XIANFA* art. 57–58 (1982) (China).

<sup>81</sup> See *id.* art. 131.

<sup>82</sup> See, e.g., *Xíng fǎ* (刑法) [Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, effective Jan. 1, 1980); *Xíngshì Sùsòng Fǎ* (刑事訴訟法) [Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980) (both published in Chinese and English translation in *CRIMINAL LAW AND CRIMINAL PROCEDURE LAW OF CHINA*, Foreign Languages Press, Beijing, 1984).

largest cities.<sup>83</sup> Each enactment of a statute, including its content, was publicized in government-run media.<sup>84</sup>

While access to positive law by the public and to foreign audiences was a priority for the government, access to law by the courts was possibly less so. The texts of laws were distributed to the courts individually in print form as well and, according to an eyewitness account, stored away in filing cabinets that accumulated dust from disuse.<sup>85</sup> With the growth of non-statutory laws, such as administrative regulations and internal governmental decrees, circulars, and measures in the late 1980s and throughout the 1990s, it became practically more difficult for judges to stay abreast of the latest laws.

The emphasis when appointing judges during the 1980s continued to be placed on loyalty over legal expertise, and so retired military officers were moved to the rapidly expanding bench. These elements of the judiciary encouraged obedience by judges to orders from officials outside the judiciary. By the late 1980s, with law schools operating in China's major cities,<sup>86</sup> a national bar examination was introduced, and it tested for knowledge of pronouncements by China's top leaders. Judges' salaries were paid by the executive government at the level of the court, whether that be local, provincial, or national, and in addition these executives were given the authority to supervise those courts. In the 1980s, other limits on judicial independence in China were institutionalized. Judges work was firmly placed within a vast bureaucracy that was established, maintained, and monitored by the Chinese Communist Party.<sup>87</sup>

The mechanisms for influencing the work of judges spanned multiple branches and levels of government beyond the judiciary itself.<sup>88</sup> Though presided over by the President of the court at the relevant level, Political-Legal Committees were established by the Chinese Community Party for each court at all levels, were staffed also by officials from outside the courts,

<sup>83</sup> See generally ST. COUNCIL GAZ. (1994-1996) (published in Beijing by the Guowuyuan bangongting); FALŪ HUIBIAN (1994-2001) (published by Guowuyuan and the ZhonguoFazhi Chubanshi).

<sup>84</sup> See Tahirih V. Lee, *Media Products as Law: The Mass Media as Enforcers and Sources of Law in China*, 39 DENV. J. INT'L L. & POL'Y 437, 437 (2011).

<sup>85</sup> This was an observation by Pitman Potter given at the Association of Asian Studies annual meeting, 1995.

<sup>86</sup> In 1979, Peking University's law department, the first to reopen in China, admitted 182 new students. See Timothy A. Gelatt & Frederick E. Snyder, *Legal Education in China: Training for a New Era*, 1 CHINA L. REP. 41, 44 (1980).

<sup>87</sup> See Perry Keller, Book Note, 66 MOD. L. REV. 652 (2003) (reviewing RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002)).

<sup>88</sup> See generally Margaret Y.K. Woo & Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 AM. J. OF COMPAR. L. 911 (2005); CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA (Margaret Y. K. Woo & Mary E. Gallagher eds., Cambridge University Press 2011); JUDICIAL INDEPENDENCE: LESSONS, *supra* note 7; LI, *supra* note 6.

and their purpose was to direct individual judges in their decisions in criminal cases.<sup>89</sup> Beginning in 1980, when the Criminal Law came into effect, judicial committees charged with “adjudication supervision” (*shenpan jiandu*) comprised of members of the Chinese Communist Party within each court were given the authority to decide and to reopen the outcomes of civil and criminal cases, expressly to guarantee the influence of the party in those decisions.<sup>90</sup> These features of China’s courts minimized the possibility that individual judges would interpret the law on their own without considering case-by-case instructions from other officials, even those outside the courts.

Gradually during the 1990s, legal education expanded institutionally<sup>91</sup> and became more focused on positive law, concurrent with an explosion in the enactment of both statutory and regulatory law.<sup>92</sup> Major legislation from the National People’s Congress stressed even more strongly than before the independence of the judiciary, and yet continued to omit any mention of the application of law, let alone the interpretation of law, from the enumerations of the judiciary’s duties. The 1995 Judges Law listed only one “function and duty,” which was “to take part in a trial as a member of a collegial panel or to try a case alone according to law. . . .”<sup>93</sup> The law further listed “obligations” that judges had to carry out, and while each of them referenced positive law, none of them described the act of applying it.<sup>94</sup> If a judge failed to perform any of these mandatory functions, duties, or obligations, the law

<sup>89</sup> See LI, *supra* note 6 at 27–28.

<sup>90</sup> See Xingshi Sùsòng Fǎ (刑事訴訟法) [Criminal Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 7, 1979, effective Jan. 1, 1980), arts. 148–50 (as cited in Woo, *supra* note 27, at 97; Mínhì sùsòng fǎ (民事訴訟法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 177 (as cited in Woo, *supra* note 27, at 99. See also Yuwen Li’s brief outline of “Adjudication Committees.” LI, *supra* note 6, at 30.

<sup>91</sup> According to government estimates, in 1994 there were 66,754 lawyers licensed to practice law in China. See generally He Jun, *China: Law to Standardize Legal Practice is Set*, CHINA DAILY, May 11, 1994. Taking numbers from Timothy Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT’L L. & POL’y 751, 767 (1991), I calculate that the figure from 1994 represented an increase of about 16,754, or thirty-four percent, from January of 1991. Also, in 1994, ten percent of law firms were privately run. See *Nongovernmental law firms account for 10% of the total*, XINHUA NEWS AGENCY (Apr. 27, 1994), in *BBC Summary of World Broadcasts*.

<sup>92</sup> See Tahiri V. Lee, *The Future of Federalism in China*, in *THE LIMITS OF THE RULE OF LAW* (Karen G. Turner, James V. Feinerman, & R. Kent Guy eds., University of Washington Press 2000).

<sup>93</sup> Fǎguān fǎ (法官法) [Judges Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 1995, effective July 1, 1995), art. 5(1), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=1861#menu4>.

<sup>94</sup> See *id.* art. 7 (provided that “judges shall perform the following obligations: (1) to strictly observe the Constitution and laws; (2) to take facts as the basis and laws as the criterion when trying cases, to handle cases impartially, and not to bend the law for personal gain; (3) to protect the litigation rights of the participants in proceedings according to law;” and to “keep State secrets and the secrets of judicial work; and to accept legal supervision and supervision by the masses”).

provided for dismissal.<sup>95</sup> Even after extensive amendments to the law in 2001 signaled an effort to upgrade judges' knowledge of law<sup>96</sup> and to encourage the independence of judging and a close adherence to law in the performance of judicial duties,<sup>97</sup> the law still did not include the application of law among those duties.

In the 1990s, the introduction of the internet as a tool for circulating laws, regulations, and other legally significant documents emanating from China's various lawmaking entities may have helped judges expand the pool of laws to which they could easily cite in any given opinion. The digital format afforded the advantage of easier storage and organization, which grew increasingly necessary as statutes and regulations proliferated.

Judicial opinions also made the shift from print to digital during the 1990s. The digital format made some opinions from a wide variety of courts lower than the Supreme People's Court available for the first time. Before that, during the 1980s, selections of the SPC's "interpretations" of statutory law were published in book form and distributed to the public through the bookstores of universities that housed law departments.

Notwithstanding the expansion of the audience for laws and judicial decisions to which the digital format gave rise, access to the digitally stored and distributed laws remained somewhat limited at that time. To take advantage of this, at least one Chinese law firm in the 1990s tried to get foreign business by asserting that it had more access to judicial opinions than other law firms. By the 2000s, private database developers broadened the public's access to law. Since its appearance in 2007, vip.chinalawinfo.com (北大法宝) as of 2015 or so was widely recognized as the best source for Chinese law. Originally developed at the Legal Information Center of Peking University in Beijing to be independent of the PRC government, the site provided fairly reliable access to thousands of laws enacted by China's legislatures, hundreds of laws originating from its President or the State Council, hundreds of national administrative regulations, and a myriad of lesser laws such as provisions, measures, circulars, replies, opinions, notices, announcements, judicial case summaries, provincial and municipal regulations, legal news, tax treaties, and some law journals, both in their original Chinese version and in translations into English by the owners of the

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<sup>95</sup> Fǎguān fǎ (法官法) [Judges Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1995, effective July 1, 1995), art. 40(5), <http://www.lawinfochina.com/display.aspx?lib=law&id=1861#menu4> (China) ("A judge shall be dismissed if he or she is found . . . to fail to perform a judge's duty, and make no rectification after criticism.").

<sup>96</sup> Fǎguān fǎ (法官法) [Judges Law, 2001 Amendment] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective June 30, 2001), art. 9(6), <http://www.lawinfochina.com/display.aspx?lib=law&id=1861#menu4> (China).

<sup>97</sup> *Id.* art. 1.



website. The site was supported by professional technology and translation experts. The material ranged from the 1980s to a month or two ago before the search.

By the mid-1990s, the courts of China at all levels coalesced into a discrete, even if not independent in the fashion of checks and balances, part of the legal system and economy and commanded respect extraterritorially. Not only is this an astoundingly rapid example of institution-building, but rapid, too, was the integration of the courts into the ambitious program of China's economic growth. It is hard to imagine that China's imminent status as the world's largest economy could have been achieved within these four decades without the work of the country's courts. One reason for this is that courts lend legitimacy and efficiency to the resolution of disputes in a way that signals to investors outside of the country that their investments, which in China's case jump-started its bid to become the world's most prolific manufacturer, would be protected by the rule of law. The speed with which court buildings were built and judges were appointed could only have been possible with the strong support of China's government.

China's ambitious program of legal institutional engineering succeeded at projecting an image to the rest of the world of courts that are well-functioning. Courts in the United States in the last decade of the twentieth and the first decade of the twenty-first century encountered hundreds of requests to review the effectiveness of the court system of the PRC, and when they did, they almost universally concluded that it was effective. The principal conduits for this analysis were *forum non conveniens* defenses and judicial review of asylum applications.<sup>98</sup>

Each time a defendant files a motion in United States federal court to dismiss for *forum non conveniens*, the court is obligated to determine whether there is an "adequate alternative forum."<sup>99</sup> Normally, the court invites the parties to submit expert testimony on this question. Even in the face of strong condemnations by experts of the neutrality of courts in China, federal courts have determined that those courts are adequate for the instant case. In response to one such testimony, for example, that "[m]eaningful judicial independence does not exist in China," and "political authorities are capable of interfering in any lawsuit in which they may take an interest," the US District Court for the Central District of California concluded that the

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<sup>98</sup> I analyzed sixty-four judicial opinions from the United States Second and Ninth Federal Circuits and from the state courts of California, the District of Columbia, Maryland, Massachusetts, New York, and Virginia from January 1, 1990 to May 18, 2011.

<sup>99</sup> For a thoughtful description and analysis of the doctrine of "adequate alternative forum," see Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L. J. 1059, 1070–77 (2010).

testimony was “speculative and fail[ed] to convince the Court that China would not provide an adequate alternative forum.”<sup>100</sup>

In a suit against Air China by a Chinese national, the United States District Court for the Eastern District of New York ruled that “plaintiff has come forward with no support for her conclusory claim that Chinese courts will favor Air China because of the government’s financial interest in that entity.” Air China’s submission of an affidavit by “an experienced Chinese attorney” persuaded the court “that both parties are amenable to process in China and that China would entertain this cause of action.”<sup>101</sup>

The United States Supreme Court found so important the question of whether the courts of the PRC “provide an adequate alternative forum for American litigants,” that it issued a broad ruling in the affirmative.<sup>102</sup> This ruling extended an earlier move by the Court to make it easier for courts in the United States to dismiss cases brought by foreign plaintiffs on the hard-to-counter ground that they could have tried the case at home.<sup>103</sup> The construction of a vast and cohesive court system in China therefore fits neatly into the U.S. Supreme Court’s effort to close off American courts to Chinese and other foreign litigants.

Where solely China is selected in a forum selection clause in a Bill of Lading, U.S. courts have dismissed. A principal condition of dismissal is that both parties pledge to use the U.S. statute Carriage of Goods by Seat Act in subsequent litigation in China.<sup>104</sup> The courts’ willingness to set such a condition implies trust in the courts of the PRC to allow the parties to carry out this pledge.

A similarly positive view of China’s judicial system has been voiced by American courts in asylum cases. The United States District Court for the Eastern District of Virginia ruled that the Chinese plaintiff was properly denied asylum because he failed to show that the One-Child Policy was “persecutive,” in the sense that it was not discriminatorily applied. Instead,

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<sup>100</sup> *CYBERSitter, LLC v. People’s Republic of China*, No. CV-10-38-JST, 2010 U.S. Dist. LEXIS 128345, at \*14 (C.D. Cal. Nov. 18, 2010) (in which Chinese law and/or Chinese litigants were involved). The online search for this sample was conducted by inputting into Lexis Nexis on May 24, 2011, the terms “statute or regulation or law w/s China or Chinese” and restrict by date from January 1, 1990 to May 18, 2011.

<sup>101</sup> *Lu v. Air China Int’l Corp.*, No. CV 92-1254, 1992 U.S. Dist. LEXIS 20927, at \*4 (E.D.N.Y. Dec. 16, 1992).

<sup>102</sup> *CYBERSitter*, 2010 U.S. Dist. LEXIS 128345, at \*14 (quoting and citing *Sinochem Int’l. Co. Ltd. V. Malaysia Int’l Shipping Co.*, 549 U.S. 422, 435–36 (2007)).

<sup>103</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981).

<sup>104</sup> *See Thyssen, Inc. v. M/V Alpha Jupiter*, No. 96-Civ-8734, 1997 U.S. Dist. LEXIS 23803, at \*2 (S.D.N.Y. Nov. 3, 1997); *see generally Indemnity Insurance Co. of North America v. M/V “Easline Tianjin”*, No. 07-CV-959, 2008 U.S. Dist. LEXIS 10926 (S.D.N.Y. 2008); *Calchem Corp. v. Activsea USA LLC*, No. CV-06-1585, 2007 U.S. Dist. LEXIS 53904 (E.D.N.Y. July 24, 2007).

the Plaintiff only succeeded in showing that he feared prosecution in China's courts, a problem that U.S. law did not aim to prevent by granting asylum.<sup>105</sup>

This broadly held official respect for China's courts evolved and deepened even after the violence in Tiananmen Square in 1989. Four years later, evidence of a Chinese plaintiff's "torturous interrogation" in the PRC led the United States District Court for the Northern District of California to conclude that China's criminal and constitutional law system would violate the plaintiff's due process rights if he were deported to China.<sup>106</sup> But this case stands as the only example of any kind of dim view of China's courts that I could find after a search through twenty years of opinions at the state and federal level that dealt with some aspect of China's legal system. One can even regard the respect by courts in the United States for China's court system as an official position adopted by American courts during the last decade of the twentieth century and the first two decades of the twenty-first. This respect signaled the arrival of China's judiciary into the international judicial community, a place where the members' rulings are little questioned and are given force. To have achieved this status in forty years, when the starting point was virtually no court system at all, is an astounding feat.<sup>107</sup>

At the same time, the low bar in the United States for an "adequate alternative forum" means that U.S. courts' decisions do not measure the independence of a country's courts.<sup>108</sup> In one high visibility tort case, the U.S. court concluded that China's courts were available and adequate, notwithstanding evidence submitted by the parties attempting to keep it in the United States that revealed patterns in the courts of China that may have resulted from political interference in certain cases. One hundred Chinese citizens brought a products liability lawsuit against the manufacturer of milk products allegedly containing melamine in the U.S. District Court for the District of Maryland. The court dismissed because it was convinced of the

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<sup>105</sup> *Huan v. Carroll*, 852 F. Supp. 460, 464 (E.D. Va. 1994). For other examples of denials of asylum claims that were based on the One Child Policy, see *Chen v. Slattery*, 862 F. Supp. 814, 824 (E.D.N.Y. 1994); *Gao v. Waters*, 869 F. Supp. 1474, 1483 (N.D. Cal. 1994); *Lan v. Waters*, 869 F. Supp. 1483, 1491 (N.D. Cal. 1994).

<sup>106</sup> See *Wang Zong Xiao v. Reno*, 837 F. Supp. 1506, 1512 (N.D. Cal. 1993).

<sup>107</sup> This fairly uniform position on China by courts in the United States fits within a broad reluctance in the U.S. to designate any foreign courts as "inadequate." See the dicta *Gonzales v. P.T. Pelangi Niagra Mitra, Int'l.*, 196 F. Supp. 2d 482, 486–87 (S.D. Tex. 2002).

<sup>108</sup> For examples of court systems deemed to be adequate without evaluating evidence of a lack of judicial independence, see, e.g., *id* at 487; *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1313 (11th Cir. 2001); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1525 (D. Minn. 1996); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1365 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165, 181 (5th Cir. 2000); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1353 (1st Cir. 1992). For a summary of decisions by U.S. courts that deemed foreign courts in Latin America adequate despite evidence of corruption or discrimination against certain groups, see *Henry Saint Dahl, Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIA. INTER-AM. L. REV. 21, 21–34 (2004).

existence of procedural rules and of the Chinese court system's readiness to adjudicate tort claims related to melamine-tainted milk. The court arrived at this conclusion after hearing expert testimony that the Beijing Bureau of Justice "demanded all attorneys to withdraw from representation on tainted-milk cases," that the Intermediate People's Court of Qingdao and the High People's Court of Shandong Province had left melamine lawsuits in limbo, that other courts had refused to accept them, and that lawyers who brought those lawsuits had been fired from their law firms. Other experts persuaded the court that the PRC's statute of limitations did not preclude the plaintiffs from bringing suit in the PRC, that the defendants were amenable to suit in the PRC, that Chinese tort law provided for a wide range of compensatory damages, and that the delays by the Chinese courts in the lawsuits that were filed were due to "procedural defects in these filings rather than an unwillingness of the courts to adjudicate such matters."<sup>109</sup>

This case illustrates that the process of *forum non conveniens* limits courts to a narrow consideration of the effectiveness of a country's courts, so narrow that it excludes evidence as to judicial independence. The rulings in these cases fall far short of declaring official United States positions on the independence of China's courts, as they similarly fall short in other cases with respect to the courts of any other country. The point here is that a mere few decades of building a court system in China has resulted in a baseline of international recognition of it without scrutiny of the degree of its independence.

The judicial experience during the full sweep of China's last century means that the exercise of independent judging in China would be notable wherever and however it might arise. That is why signs of resistance by the judiciary to external advice about how and whether to apply law, which cropped up starting in the late 1990s and continued for the decade thereafter, are significant. This resistance may be seen in the refusal by Chinese courts to process the melamine cases in the late 2000s. It can be seen, as demonstrated by Xin He, in the negotiations by judicial officials in Guangdong Province with the Political-Legal Committees at each level to dismiss factually intractable and legally ambiguous family property disputes in order avoid the blame for failing to prevent them from blossoming into protests or violence from around the years 2000 to 2006.<sup>110</sup> In a similar

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<sup>109</sup> *Jiali Tang v. Synutra Int'l, Inc.*, No. DKC-09-0088, 2010 U.S. Dist. LEXIS 29868, at \*22–23 (D. Md. Mar. 29, 2010), *aff'd*, 656 F.3d 242 (4th Cir. 2011).

<sup>110</sup> *See He*, *supra* note 19, at 180–95. These negotiations ended successfully from the vantage point of the courts, despite the demotion by the early 2000s of the presidents of the courts within the Political-Legal Committees, from head to regular committee member. *See id.* at 185. The pressure applied by the senior party member who headed the committees at each level upon the courts to resolve these family property disputes represents a judicialization of social and political problems, and it strikes a continuity with the responsibility to quell violent disputes placed upon courts in the 18<sup>th</sup> century by

development, by the late 1990s, according to Yuwen Li, scholars in China were observing that the Adjudication Committees had become a conduit for the “collective power [of courts] to deter external interference.”<sup>111</sup> All of these are examples of decisions by courts about whether to apply law that furthered or protected their own interests.

There were multiple ways in which the courts furthered their internal interests by refusing to take certain kinds of civil cases which, though they were officially not the politically more sensitive class of criminal cases, nonetheless were of interest to the public security organs of the state because of their potential to blow up into opposition to the government more widely. Courts at every level made it more difficult for non-judicial officials to blame the courts for unrest among the local population, which had grown into a serious problem by the 2000s after the shuttering of the largest government-run enterprises. By refusing to adjudicate certain lawsuits, lower-level courts in particular were able also to avoid the censure of their work that higher courts could meet out through the several procedural avenues for reopening lower court decisions. These avenues had become more elaborately institutionalized by the early 2000s.<sup>112</sup>

The refusal to adjudicate certain cases in order to protect personal or institutional judicial interests begs the question of whether judges also refused to apply law even in lawsuits that they fully adjudicated to a judgment. The rest of this article examines this question by analyzing a sample of tort judgments.

#### IV. A SNAPSHOT OF THE WAY THAT COURTS IN THE PEOPLE'S REPUBLIC OF CHINA APPLIED LAW IN THE EARLY TWENTY-FIRST CENTURY

In the 1990s, the introduction of the internet as a tool for circulating laws, regulations, and other legally significant documents emanating from China's various lawmaking entities expanded the pool of laws to which judges could easily cite in any given opinion. Judicial opinions also made the shift from print to digital during the 1990s. The digital format made some opinions from a wide variety of courts lower than the Supreme People's

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litigants and by China's imperial administration. See Thomas M. Buoye, *Litigation, Legitimacy, and Lethal Violence*, in *CONTRACT AND PROPERTY IN EARLY MODERN CHINA* (Madelin Zelin et al. eds., 2004); THOMAS M. BUOYE, *MANSLAUGHTER, MARKETS, AND MORAL ECONOMY: VIOLENT DISPUTES OVER PROPERTY RIGHTS IN EIGHTEENTH-CENTURY CHINA* (2000). In its final chapter, he “explore(s) the implications of this study for our understanding of the social and economic history of late imperial China.” BUOYE, *supra*, at 15.

<sup>111</sup> Li, *supra* note 6, at 31.

<sup>112</sup> See *id.* at 28–29.

Court available for the first time. Before that, during the 1980s, selections of the SPC's "interpretations" of statutory law were published in book form and distributed to the public through the bookstores of universities that housed law departments.

By the early 2000s, published opinions reflected a regularized approach to the citation of laws. This can be seen in the tort litigation that is the focus of this article. I chose tort litigation because it lacks the political sensitivity of criminal cases, and also because, by adjudicating these cases, courts offered themselves as a service to the public more than even in commercial cases, where the parties have anticipated disputes in advance and can therefore more equitably choose private means of dispute resolution. Courts throughout China tried tort cases in the 1990s and the 2000s. The cornerstone statute for tort law, which aimed to centralize a variety of smaller regulations that had been applied up until then, did not come into force until July 1, 2010. It consisted of 92 articles, most comprised of one or two sentences. I read 499 judicial opinions from the period of 2002 through 2010 that spans the introduction of this major statute and found that the statute was not widely applied within its first six months. The cases were selected randomly from online databases.

In many of the tort opinions in this sample, all citations were simply tacked on in the penultimate paragraph, all in a row,<sup>113</sup> followed by the ruling and then the addition of the obligatory citation to Article 229 of the Civil Procedure Law<sup>114</sup> in first-instance cases and Article 153 in appeals. This last citation failed to appear in this manner in only about ten out of the 499 opinions. The pattern held true in shorter opinions just as consistently as in longer ones, though the opinions that cited most extensively to law tended to be among the longer ones.

In the opinions of the sample, the most frequently cited law apart from the Civil Procedure law was the General Principles of the Civil Law.<sup>115</sup> It was

<sup>113</sup> For example, Wang Yuanming v. Tian Hengxuan, (王渊明诉田恒軒) (Hubei Province Badong Cnty. People's Ct. July 7, 2009).

<sup>114</sup> The version that was in effect between 2006 and 2011, the years of most of the cases in this sample, was the Civil Procedure Law of the People's Republic of China adopted on April 9, 1991 at the Fourth Session of the Seventh National People's Congress and later revised in 2007. This was the version before the revisions in 2012. *Mínshì sùsòng fǎ* (民事诉讼法) [Civil Procedure Law, 2007 Amendment] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008), <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=98761> (China); *Mínshì sùsòng fǎ* (民事诉讼法) [Civil Procedure Law] ST. COUNCIL GAZ., May 15, 1991, at 481, <http://www.gov.cn/gongbao/shuju/1991/gwyb199113.pdf> (China).

<sup>115</sup> The General Principles of Civil Law, the version that was in effect between 2006 and 2011, is *Zhonghua Renmin Gongheguo Minfa Tongze* (中华人民共和国民法通则) [General Principles of the Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), <http://www.asianlii.org/cn/legis/cen/laws/gpotcl298/> (China); *Zhōnghuá rénmín gònghégúo mínfǎ tōngzé* (中华人民共和国民法通则) [General Principles of the Civil Law (2009 Amendment)] (promulgated by

normally cited first in the cluster of laws cited toward the end of the opinion, followed immediately by one or more interpretations of the Supreme People's Court, and then followed by provisions from the Civil Procedure Law. Before this formula, citations to national statutes on the more specific area concerned in the facts and parties' legal arguments appeared. Such statutes included a proto-tort law,<sup>116</sup> as well as those related to road traffic safety,<sup>117</sup> railroads,<sup>118</sup> hospitals, property, insurance,<sup>119</sup> the quality of commercial goods, and contracts. These citations included the Articles and sometimes sub-articles, and also sometimes the quotation of an entire sentence from the statute. But there followed no discussion of the meaning of the quoted sentence or cited provisions, of words that explained why the legal text controlled and what effect it should have. Individual key terms were not zeroed in upon with an aim to decide how best to apply them to the instant case, or to lay bare multiple meanings possible in them. Some judges appended to the end of the opinion the entire text of the legal provisions cited to, but with no linguistic connection between them and the opinion itself.<sup>120</sup>

Treating the legal texts in a formulaic way created the impression that the meaning of the law was obvious, and therefore projected an image of judges as less powerful than the lawmaker. The role of a judge who mechanically applies positive law plays a smaller role than that of a judge who chooses the meaning of the positive law. And yet, the impression that judges project need not align with the actual role they play. The lack of interpretive language around citations to law draws the curtain on a judicial process, thereby creating more room for the exercise of discretion unobserved, behind that curtain. This phenomenon was studied in France by Mitchel E. de Lasser in the 1990s.<sup>121</sup> In contrast to the terse, one-sentence opinions handed down by judges throughout the courts of France, he discovered, their deliberations paid little attention to the statutory law that

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the Nat'l People's Cong., Aug. 27, 2009, effective Aug. 27, 2009), <http://en.pkulaw.cn/display.aspx?id=23f9f84f7b767ad8bdfb&lib=law> (China).

<sup>116</sup> Guójiā péicháng fǎ (中华人民共和国国家赔偿法) [State Compensation Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug 27, 2009, effective Aug. 27, 2009), <http://en.pkulaw.cn/display.aspx?id=23f9f84f7b767ad8bdfb&lib=law> (China).

<sup>117</sup> Dàolù jiāotōng ānquán fǎ (道路交通安全法) [Road Traffic Safety Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 22, 2011, effective May 1, 2011) 2011 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 418 (China).

<sup>118</sup> Tiělù fǎ (铁路法) [Railway Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2015, effective Apr. 24, 2015) 2015 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 553 (China).

<sup>119</sup> Xiǎn fǎ (险法) [Insurance Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2015, effective Apr. 24, 2015), 2015 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 546 (China).

<sup>120</sup> BUOYE, *supra* note 110; Buoye, *supra* note 110.

<sup>121</sup> See de S.-O.-l'E Lasser, *supra* note 46, at 1327.

they eventually cited to at the end of their opinions. Although French judges, like their Chinese counterparts, are not allowed to create case precedents, they were guided by internal pressures often framed in arguments that showed deference to past judicial rulings, even those that contradicted the relevant statutes. The Chinese tort opinions in the sample that I studied revealed much more than the French ones about the facts, the evidence in the record, and the arguments of the parties. Nonetheless, in both these opinions and the French ones, interpretive language was absent. It is this absence that creates a barrier between the public and the real, detailed reasons for the judges' rulings.<sup>122</sup> This barrier amounts to a lack of transparency that shields judges from scrutiny, and thereby expands their discretion.

A significant minority of the opinions in the sample cited to law before the end. These outliers are significant for a number of reasons. First, they existed and persisted, which is some evidence that this practice was allowed. Second, law was discussed in many of these passages in a thoughtful, organized, and precise way. After the summary of the facts and the evidence and arguments of the parties, aspects of them are broken out and shown to lead to relevant law. This more complex use of substantive law was not more prevalent in the appellate opinions than in the trial-level ones, and was not more prevalent in the largest cities than in the smaller ones. They all created an impression of a larger role to play in the legal system than merely a cog in a machine. Perhaps these more complex incorporations of law point the way in the future toward a pattern of revealing the discretion exercised by judges.

Only five of the 199 opinions I read that were handed down from July 1, 2010, the date of the enactment of the Tort Liability Law,<sup>123</sup> and November 2010, cited to the new law. Instead, the same pattern of citing the General Principles of the Civil Law, at least one Supreme People's Court advisory opinion or interpretation, and the Civil Procedure Law—usually Article 229 (or 153 at the end of appellate opinions)—at the end of the opinion continued unaltered after July 1, 2010.

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<sup>122</sup> To recognize a significant role for judicial discretion in China runs counter to other scholarship on the judges of China. See Wei Zhang, *Understanding the Law of Torts in China: A Political Economy Perspective*, 11 UNIV. PA. ASIAN. L. REV. 171, 183 (2016) (asserting that judges in China are uncomfortable with the exercise of discretion).

<sup>123</sup> Qīnquán fǎ (侵权责任法) [Tort Liability Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 4 (China).



## V. SIGNIFICANCE OF A BROAD-BASED OMISSION OF A NEW AND IMPORTANT RELEVANT STATUTE IN JUDICIAL RULINGS

This delayed transition toward using the new statute cannot be explained by the judges' surprise at the enactment of the law or by a lack of preparation, given the six months of notice that the courts were given before the law came into effect. That is, the Tort Liability Law was promulgated in January of 2010, half a year beforehand. Rather, the delay suggests a relatively deep entrenchment of judicial work patterns and culture, one that somewhat resists change coming from outside, even from the most powerful lawmaker, the NPC Standing Committee. Even though the Tort Liability Law became, by one report, one of the most frequently litigated laws in China,<sup>124</sup> this minimum of a five-month delay shows the development of a judicial culture that adapts to change from outside at a pace dictated by its own institutional rhythms.

Problems with retroactivity could have explained the delay in the judges' citation of the Tort Liability Law, but they do not. In each of the five opinions in which the new law was cited in this sample, there was no mention of its retroactive application.<sup>125</sup> Throughout the sample, the timing of publication between the date that the judges signed off on the opinion until the date of submission (*tijiao*) varied considerably, in some cases several years; but in these five opinions the new law was applied to facts that occurred before the statute came into force.

So far, I have used a thickly descriptive approach that focuses on textual analysis to demonstrate that judges in China refrained from applying a major statute enacted by the National People's Congress. To understand the significance of that startling finding, I will look to the courts' institutional context to uncover three reasons for the delayed transition to applying the new tort statute. The first reason is that judges in China have no legal duty to apply law. The second reason is that it is professionally risky for them to apply law and that judges there operate within a professional culture that encourages restraint. The third reason is that the court system has developed a strong set of internal rules that encourage reference to judge-made rules rather than to external rules such as those enacted by legislative or executive bodies.

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<sup>124</sup> See the conclusion drawn by Zhang, *supra* note 122, at 184; see also *id.* at 172 (referring to a report released by the courts of Shanghai that the statute was cited there in 33,746 judgments in a period of four years).

<sup>125</sup> See *Si Anli v. Bing Junsheng, et al.*, (司安里诉兵軍生·等) (Zhuzhou Cnty. People's Ct. Oct. 21, 2010); *Ma Jianying v. Xu Mengsong*, (馬劍英诉徐夢松) (Fuzhou Mun. CangShan Dist. People's Ct. Sept. 30, 2010); *Zhou Zhenxiu v. Lin Huxiong*, (周振秀诉林虎雄) (Longsheng Gelu Zitai Cnty. People's Ct. Oct. 15, 2010); *Li Gaiwei v. Liu Candong*, (李改偉诉劉燦東) (Henan Province Weishi Cnty. People's Ct. Sept. 15, 2010).

One explanation for the widespread avoidance by lower courts throughout China of the tort law is that judges have no duty to apply law, and that, moreover, applying law is risky from a professional standpoint. As established earlier in this article, applying law in China is close to interpretation and therefore creates the appearance of exercising judicial discretion. Any exercising of judicial discretion that shows up in the judgment becomes transparent as an increasing number of judgments are published and made available on the internet. The more visible the exercise of discretion, the more professionally risky. As shown earlier, the risk of censure or punishment for incorrectly applying law was enshrined in statute, and the belief that correct judgments were easily distinguishable from incorrect ones was widespread across official discourse.

Was there something in the content of the tort law that made its application riskier? The tort law of 2010 contains several provisions that target torts committed in state-owned enterprises. For example, in one, the word “*danwei*” is used to refer to the employer who “causes any harm to another person in the execution of his work duty,” whom the court is instructed to impose “tort liability.”<sup>126</sup> *Danwei* has been used since the founding of the People’s Republic of China to refer to government-run workplaces. In a climate where applying any type of law is risky, applying this provision of a new law to adjudge the government a tortfeasor no doubt posed a particularly high risk to a judge in the months following the law’s enactment. The application of provisions of the statute that provide for strict liability for harm caused by defective products also may have appeared fraught with risk to judges.<sup>127</sup> These provisions were sparsely worded, comprised of only a sentence or two each, and their potential scope was broad. Strict liability was also a relatively new form of tort in China, and it was likely known to lead to the most sweeping liability with the least amount of proof of any tort wherever it was used outside of China. Confusion about the meaning of strict liability might have added to judges’ hesitancy in applying these provisions, as two of them used the concept of “fault.”<sup>128</sup>

The lower courts in this sample of tort judgments demonstrated reticence when they declined to apply a law that was relevant. A second possible explanation flows from the first, namely, that a culture of restraint had taken hold within the judiciary. Widespread belief that judgments could be incorrectly decided, coupled with the legal obligation on judges to correctly decide cases, in turn compounded by the law’s imposition of

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<sup>126</sup> Qīnquán zérèn fǎ (侵权责任法)[Tort Liability Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2009, effective July 1, 2010), art. 34, 2010 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 4 (China).

<sup>127</sup> *Id.* arts. 41–47.

<sup>128</sup> *See id.* arts. 42, 43.

censure or punishment upon judges who incorrectly decided cases inevitably led to the development of a culture of passivity in the judiciary. It was safer to refrain from acting than to act. Face with a new, major statute with sparsely-worded provisions, judges may have refrained from applying it out of an abundance of caution because they were unfamiliar with it. A mindset of self-restraint is similarly visible in Xin He's research in Guangdong Province during the period of roughly 2000 to 2006 in which courts refused to take on certain types of disputes even in the face of pressure from governmental policy to take them.<sup>129</sup>

A third explanation for the delay in applying the national tort statute lies in the development by the Supreme People's Court of an internally-oriented court system where judges look to its rules, promulgated to the lower courts, more than to legislative statutes or executive regulations. In other words, judges in China by 2010 operated within a professional culture where the Supreme People's Court functioned as the primary lawmaker. Of all of the 499 opinions that spanned the period 2002 through 2010, the citations to national statutes were outnumbered by the citations to rules handed down by the Supreme People's Court.<sup>130</sup> This pattern further suggests an internal cohesion of the judiciary, for it shows respect for dictates from within. These interpretations issue from the Supreme People's Court by way of a delegation

<sup>129</sup> See He, *supra* note 19, at 180–95.

<sup>130</sup> The most commonly cited were *Zuigāo rénmin fāyuàn guānyú shēnlǐ rénshēn sūnhài péicháng ànjian shiyòng fālǚ ruògān wéntí de jiěshì*, (最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 26, 2003, effective May 1, 2004), <http://en.pkulaw.cn/display.aspx?id=89b582dc1e87aa66bdfb&lib=law> (China); *Zuigāo rénmin fāyuàn guānyú shēnlǐ tiělù yùnshū rénshēn sūnhài péicháng jiūfēn ànjian shiyòng fālǚ ruògān wéntí de jiěshì* (最高人民法院关于审理铁路运输人身损害赔偿纠纷案件适用法律若干问题的解释) [Interpretations of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Compensation for Personal Injuries During Railway Transportation] (promulgated by the Sup. People's Ct., Mar. 3, 2010, effective Mar. 16, 2010), <http://www.lawinfochina.com/display.aspx?id=8170&lib=law&SearchKeyword=&SearchCKeyword=%D7%E8%DF%C8%CB%C3%F1%B7%A8%D4%BA%B9%D8%D3%DA%C9%F3%C0%ED%C%FA%C2%B7%D4%CB%CA%E4%C8%CB%C9%ED%CB%F0%BA%A6%C5%E2%B3%A5%BE%C0%B7%D7%B0%B8%BC%FE%CA%CA%D3%C3%B7%A8%C2%9C8%F4%B8%C9%CE%CA%CC%E2%B5%C4%BD%E2%CA%CD> (China); *Zuigāo rénmin fāyuàn guānyú mínshì sùsòng zhèngjù de ruògān guīdìng* (最高人民法院关于民事诉讼证据的若干规定) [Some Provisions of the Supreme People's Court on Evidence in Civil Procedures] (promulgated by the Sup. People's Ct., Dec. 21, 2001, effective Apr. 1, 2002), <http://www.lawinfochina.com/display.aspx?lib=law&id=2197&EncodingName=big5> (China). Revised by *Zuigāo rénmin fāyuàn guānyú tiáozhēng sīfǎ jiěshì dèng wénjiàn zhōng yīnyòng “zhōnghuá rénmin gònghéguó mínshì sùsòng fǎ” tiáowén xùhào de juédìng* (最高人民法院调整司法解释等文件中引用《中华人民共和国民事诉讼法》条文序号的决定) [Decision of the Supreme People's Court on Adjusting Ordinal Numbers of Articles of the “Civil Procedure Law of the People's Republic of China” Cited in Documents Including the Judicial Interpretation] (promulgated by the Sup. People's Ct., Dec. 16, 2008, effective Dec. 31, 2008), [https://szlx.pkulaw.com/en\\_law/6e01d456d64e5fa7bdfb.html](https://szlx.pkulaw.com/en_law/6e01d456d64e5fa7bdfb.html) (China).

in the early 1980s by the National People's Congress. The judges of the 2000s therefore had two decades to become familiar with the gradually growing number of interpretations and to get used to citing to them. When the NPC delegated this authority to the Court, it enhanced the efficiency of the courts below, because statutory language is rarely self-explanatory, nor tailored to the particularities of the instant case. But, perhaps unforeseen by the NPC at that time, during the nearly forty years since, the authority to issue what are essentially regulations helped to build a judicial culture that resists to some extent intrusion by central legislators.

China does not officially recognize any power by courts to create law or any type of legal rule. But, for the purposes of determining the influence of a court on the courts beneath it, there is no significant difference between the dissemination of that court's ruling in a single lawsuit and the dissemination of that court's interpretation or advisory opinion handed down in the absence of a lawsuit. The difference in format does not create a difference in how lower courts use the rulings or acquiesce to them.

There is further proof that judges declined to apply the 2010 Tort Law because they were waiting for guidance from the Supreme People's Court. In 2011, the SPC revised the primary set of regulations by which it had since 2001 provided such guidance and included in them reference to the 2010 Tort Law. In the notice of this revision that the SPC sent to the lower courts, the SPC explained its reasons for amending the regulations, and in that portion of the notice it stated: "In particular, with the entrance into effect of the Tort Law on July 1, 2010 it is necessary to supplement the causes of actions concerning tort liabilities."<sup>131</sup> The SPC issued its "Regulation on the Causes of Civil Action of the Supreme People's Court of the People's Republic of China" directly to the lower courts, as provided in the SPC's own legislative history of the revisions in 2011, which begin by addressing them ("To the Higher People's Courts of all provinces. . . .") and then stating that the regulation "is hereby issued to you for earnest implementation."<sup>132</sup>

It is difficult to rule out from this snapshot, then, that the central legislators and their colleagues in the highest reaches of the Chinese Communist Party allowed an internally cohesive judicial culture to grow and endure. This culture fosters the collective style of judicial independence identified by Margaret Woo. If this delay in citing to a major statute does stand as an example of judicial independence, it does so in a way that fits

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<sup>131</sup> *The Notice of the Supreme People's Court on the Issuance of the Revised "Regulation on the Causes of Civil Actions"* (Fa [2011] No. 42), as reprinted and translated in DONG YILIANG, LIU HONGYAN, & KNUT BENJAMIN PIBLER, *THE 2011 REGULATION ON THE CAUSES OF CIVIL ACTION OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA* 8 (2012).

<sup>132</sup> *Id.* at 7.

deeply into China's legal culture, where positive law has not for over a century carried with it an aura of instant and automatic force.

It is also possible that part of the explanation for it may stem from universal experience. Courts everywhere and in every era may tend to develop in a direction of their own simply by virtue of the expansion of the volume of cases that they handle. This is in part true because it is not practical for legislators to anticipate and therefore to control the minutia of litigation. The four decades of growing institutional strength of China's courts may have been seen by China's leaders as necessary to achieve a larger goal of economic growth. Throughout these past four decades the Ministry of Commerce and its antecedents worked to attract foreign investment in order to jump-start China's export-led economy. Many of the companies with the greatest potential to invest were advised by lawyers trained in the United States and the United Kingdom, for whom judicial opinions were the *sine qua non* of the rule of law. The architects of the legal system after 1978 no doubt understood this, they themselves or their parents having been exposed to the Anglo-American approach to law in law schools in Shanghai before 1949.

## VI. CONCLUSION

Judges across China in 2010 and 2011 for a period of at least seven months declined to apply a law that the National People's Congress had newly brought into effect. This instance of resistance to the will of China's central legislative body, which the constitution of China singles out to occupy the pinnacle of the governmental structure, represents a possible exercise of judicial independence. Support for that conclusion can be found by using a thickly descriptive approach that applies textual analysis to 499 randomly selected tort case from trial level and lower appellate level courts throughout China, accompanied by an examination of the institutional context of those courts. In examining their institutional context, I demonstrated that judges in China have no legal duty to apply law and that furthermore it is professionally risky for them to apply law. This risk helped to create a professional culture that encourages restraint. I also showed that the court system has developed a strong set of internal rules that encourage reference to judge-made rules rather than to external rules such as those enacted by legislative or executive bodies.

Understanding judicial independence in China is important for a myriad reason. It is a gauge of the robustness of the rule of law there. It is an important proving-ground for judicial independence as a universal phenomenon. It adds perspectives from China to the comparative law literature on judges. It is a bell-weather of the kind of decentralization of

authority that famously marks China's post-Mao government. There is no question that the courts of China were enlisted to play a role in the larger governmental initiatives of the past century. Its courts garnered respect for the People's Republic of China's legal system, which in turn helped China participate as an equal in the international legal order, as well as the international economic system.

The topic of judicial independence is important not just for China and for other countries outside the United States, but for the United States as well. As the United States' court system becomes the focus of accusations of political bias, scholars of American jurisprudence and constitutional law owe it to their field to pare away their own biases that accrued by virtue of their narrow focus on courts only in the United States. Instead, to examine the degree to which judges in the United States are independent, they should adopt a framework developed from a broadly comparative perspective. I hope that the framework I set out in this article and that I applied to a recent set of tort cases in China may offer a starting point.