

THE INDEPENDENCE AND SUPERVISION OF THE JUDICIAL POWER ——IN THE VIEW OF INJUSTICIES

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In recent years, many miscarriage of justice cases have been discovered in China. In my opinion, this is the result of a failure of the judicial system. The close involvement of the CCP, the lack of independence and supervision within the judicial system, and the distortion of the relationship between the judiciary and the people all contribute to the lack of independence and supervision of the judicial power, which ultimately result in the pattern of injustice. As such, China needs to, on one hand, change its theory of the operation of the judicial power to be based on independence and checked by supervision. On the other, China needs to reconstruct its judicial institution based on the principle of the coexistence of independence of the judicial branch and the supervision by the legislative branch, coexistence of the independence of the judicial decision making and prosecution and the supervision within the judicial system, coexistence of the independence of judges and prosecutors and the supervision of the public voice, and the coexistence of the independence of the judicial procedure and the supervision of the CCP. Only with these developments can China completely cleanse the soil that cultivated injustices and promote the smooth operation of the criminal justice and realize social justice.

In recent years, many miscarriage of justice cases have been discovered in China. These injustices not only triggered comprehensive discussion among scholars and the public around the problems of “value oral confession and ignore factual evidence”, a traditional “rule” of criminal evidence, but also enhanced the National People’s Congress’ overhaul of the Criminal Procedure Law. However, in my view, the origin of these injustices is not only the deficiencies in procedure and evidence. The deeper reason lies in the ongoing operation of the judiciary. Some of the injustices are the result of negotiations involving the Politics and Law Committee (PLC), others faced the pressure of petitions (*shangfang*) by the victims and their relatives. Some of these miscarriage of justice cases are unearthed because of the emergence of the alleged victims (such as in the *She Xianglin Case* and the *Zhao Zuohai Case*), some are a result of the confession of the real offender afterwards (such as *Nie Shubin Case* and *Uncle and Nephew of Zhejiang Case*). However, almost none of them are revealed through trial supervision procedure or other supervision procedures. The only case acquitted due to a lack of evidence (*Li Huailiang Case*) has been up and down for decades. Behind the practice of extortion of confession by torture and the unsuccessful appeals¹, is

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¹ An incomplete survey done by scholars and journalists shows that almost all of the injustices involve extortion of confession by torture and unsuccessful appeals. See: *Experts’ Research on 20 Injustices in China: All involved Torture*, <<http://news.sohu.com/20130513/n375649175.shtml>>.

the malfunction of judicial system. Thus, the only way to clear the soil which cultivated injustices and to promote the proper operation of criminal justice and realize social justice is to innovate the idea and reconstruct the operation system of the judiciary.

1. A Pattern of Injustices: Lack of Independence and Supervision

In my view, all of the miscarriage of justice cases share the same institutional cause: failure in the supervision from those who are responsible for leadership and supervision. Instead, we see a pattern of those in the position of leadership and supervision unjustly intruding into the judicial process. This undermines proper supervision and contributes to the lack of independence the operation of judicial powers.

1.1. The Close Involvement of the Leadership of the Chinese Communist Party

The Chinese Communist Party's (CCP) leadership theory and practice of judicature has existed for years. In the early years of the People's Republic of China, the CCP decided to establish the PLC² in every level of the judicial branch to clarify the idea and organization of the old legal system, change the ideology and structure and help the judicial branches to deal with policy issues³. However, over the years, the change in the domestic situation and the increase on the pressure to maintain stability have brought about the expansion of PLC's function and scope of involvement. They are not only in charge of the controlling of the macro-policy of politics and law and the administration of leaders in political-legal organs⁴, but also have the responsibility to negotiate works between political-legal organs, supervise major cases, take care of petitions and carry out other work need to be done to maintain social safety and stability.⁵ In fact, the involvement of the PLC is apparent in many big cases.

The judicial branch is an extension of state power and should take the responsibility of maintaining social safety and stability. In addition, the judiciary is not only about facts and laws, but should also cast its eyes on the influence of its decision. On this view, the CCP's leadership of judicial branch through PLC is necessary and acceptable. However, if the leadership affects the normal operation of judicial power, injustices can easily appear⁶. In the *She Xianglin Case*, after the court remanded the case for retrial and reinvestigation due to obvious doubt in evidence, local pressure had built up from petitions launched by hundreds of people gathered by the alleged victim's relatives. In order to maintain social stability, the local PLC held a "3-heads (police, procuratorate and court) meeting" and resolved to give a light sentence in the end. The wrongful

² During the judicial reform movement from 1952 to 1953, Peng Zhen suggested to deploy some party leaders to the courts. The Party Central Committee (PCC) accepted this suggestion and set the PLC up as an institution. See *Deng Xiaoping Wenxuan III (Selections of Writings of Deng Xiaoping III)* (Beijing: Renmin Chubanshe, 1993), pp. 73-74. The content of the suggestion could be found in Peng Zhen, *Lun Xinzhongguo de Zhengfa Gongzuo (On New China's Politics and Law Work)*, (Beijing: Zhongyang Wenxian Chubanshe, 1992), pp. 75-77.

³ Yu Minsheng ed., *Zhongguo Fazhihua de Lishi Jincheng (The Historic Process of China's Rule of Law)* (Guizhou: Guizhou Renmin Chubanshe, 1997), p. 232.

⁴ In general, political-legal organs include the courts, the procuratorates, the police, the national security agencies, the judicial bureau and so on. However, my use here only includes the courts and the procuratorates.

⁵ For specific duties of PLC, refer to Yin Xiaohu, "The Investigation of the Functions of PLC in the Political-Legal Relationship" (*Dangwei Zhengfawei Zai Woguo Zhengfa Ganxizhong de Gongneng Shenshi*), (2012) 6 *Law Science (Faxue)* 5-7.

⁶ Some scholars agree that the PLC's negotiation plays a significant, if not deciding, role in the emergence of miscarriage of justice cases. See Yanli, "The 'Negotiation of Injustices' of Local LPC should be Abolished" (*Difang Zhengfawei de Yuanan Xietiaohui de Qianguize Ying Yuyi Feichu*), (2010) 6 *Law Science (Faxue)*.

conviction in the *Zhao Zuohai Case* was made in 2002 against the background of the Supreme Court's push to clear cases with extended detention period. Despite the fact that this case does not meet the requirements to prosecute, because there have been a significant period of detention, the police submitted this case to the PLC, the PLC gathered the court and the procuratorate together to discuss. After the meeting with the PLC, the court made a guilty finding on this case quickly. It is not hard to see that the intrusion by the PLC into the judiciary has been very apparent. The principle that PLC should respect and supervise judicial decisions only in accordance with existing procedure, and that it should allow independence in judicial decision making has been discarded at the cost of proper operation of judicial power and the correctness of judicature's orientation. Instead, PLC is discussing cases with prosecutors and judges before they are decided, sometimes it even decide the case at this stage and instruct the courts to follow. This practice by the PLC assumes the power of judicature and forces the judiciary to obey the will of the CCP and disrupts the procedure and independence of the operation of judicial power. This also means that the constitutional structure that aims at eliminating the influence from the CCP and separating the responsibility among the police, courts and procuratorates in criminal justice becomes nominal⁷. Furthermore, the revelation of the truth decades later will definitely lead to the general public's questioning of to the credibility and authority of the judiciary and the CCP itself, which may undermine the PLC's original intention of maintaining the social stability through its negotiation and as a result create a paradox where CCP's attempts to maintain stability by intruding into the judicial process creates instability in the end. Above all, I think that the short-sighted close involvement by the CCP in the judiciary is the ultimate cause of injustices.

1.2. The Lack of Independence and Supervision within the Judicial System

Under Articles 123, 126, 129, 131 and 135 of the Chinese Constitution, the courts and procuratorates are set up as mutually independent organs and should supervision each other. The Organic Law of the People's Courts, Organic Law of the People's Procuratorates and the three procedure laws contain detailed provisions on this issue. In a criminal case, the police and national security agencies exercise most part of the power of investigation and make the decision whether to initiate a case; the procuratorate the investigation done by the police through its power of examination, approval of an arrest, and decide whether reinvestigation and prosecution is necessary; after the prosecution is initiated, the power to decide the case belongs to the courts and thus the courts check and place restraint on the exercise of the power of prosecution and investigation. At the same time, the conduct of the court in a criminal case is affected not only by the content of investigation and prosecution, but also by the procuratorate's power or obligation to bring the courts' attention to any illegal act in the process of the trial to supervise the judicial procedure. This kind of procedure structure creates check and balance between the investigation, prosecution and judgment through separation of responsibilities and allows effective punishment of criminals on one hand, and on the other, prevents abuse of power and violation of human rights. However, the kind of negotiation and joint decision engaged in by the PLC disrupts this structure: once the PLC sets the tone, the duty of the police, procuratorate and court became striking the criminals quickly and strictly together to ease the pressure brought about by the petitions. When this happens, the investigations don't get supervision from the procuratorate, nor do the

⁷ See also: Zhou Yongkun, "The History and Development of the PLC" (*Zhengfawei de Lishi yu Yanbian*), (2012) 9 *Yan-Huang Historical Review (Yanhuang Chunqiu)* 11.

prosecutions get supervision from the courts, which leads to guilty findings in cases with doubtful evidences which may be obtained by way of torture. In addition, because of these extra-judicial decision making, the procuratorate's supervision over the investigation and the courts' conduct became supervision of itself and is thus reduced to mere formality. The chief prosecutor of Shangqiu Procuratorate who was responsible for the *Zhao Zuohai Case* said afterwards: "The biggest mistake of the procuratorate was that we didn't insist on our own opinion (that this case should not be prosecuted)"⁸. In fact, because of the meeting held by the PLC, the police, the procuratorate and the court could not maintain independence on their decisions or effectively supervise each other, which at last result in the injustices.

Along with the PLC's pressure on the court and prosecutorate, the internal opinion seeking system and leader-instruction system are also undermining the independence of the court and judges. According to the Constitution, the organic laws and procedural laws, the relationship between the superior and inferior court is one of supervisor and supervisee; under the law, if a case received by lower courts is considered big and need to be decided by the upper court, the lower courts can ask for the case to be transferred to the upper court. However in practice, when lower courts hear cases, they would initially ask for instructions from the superior courts, and the superior courts would issue special documents or specific opinions to the inferior courts on issues in the case if the superior courts think that the case has some great influence.⁹ No doubt this practice will legalize superior courts' intervention on the inferior courts, which not only interrupts the independence of the court handling the case, but also simulates the system of appeals which aims at supervision and correction, and of course also violates the right to appeal.¹⁰ Furthermore, according to Chinese laws, a normal cases should be decided by a collegiate bench; if a case is difficult or the judges on the bench have quite a divergence, the bench should submit it to the judicial committee. However this practice gradually evolved to one where inferior courts will seek the instructions from the executive vice president or president of the court or the judicial committee¹¹; some decisions are even made before the trial. This deprives the decision making power of the judge handling the case, and makes it appears that the outcome of a case is not the decision of the judge handling the case but one of a judge who is not handling the case. At the same time, because of the involvement of superior officials, the appeal by the defendant will not always be properly carried out and the trial supervision procedure is often hard to initiate. In the *Uncle and Nephew of Zhejiang Case*, the defendants have tried to appeal for almost a decade, but the appeal was never entered into the computer system of the Zhejiang Higher Court. In the *Nie Shubin Case*, even though the real offender Wang Shujin has confessed his crimes, the main judge

⁸ *The Whole Story of Zhao Zuohai Case*, <<http://news.sina.com.cn/s/2010-06-12/101420465898.shtml>>.

⁹ For example, when a superior court come across a case it wants to remand for retrial, it will not only void the existing decision, but also send an instruction of how to decide this case to the inferior court. The instruction is private, but contains much more information. This is actually a direct instruction of the retrial in the lower court. See Zhang Weiping, "The De-Administratisation of Chinese Court System: A Basic View of the Reform of the Court System" (*Lun Woguo Fayuan Tizhi de Feixingzhenghua: Yizhong Fayuan Tizhi Gaike de Jiben Silu*), (2000) *3 Studies in Law and Business (Fashang Yanjiu)*.

¹⁰ HeWeifang, *The Idea and System of Judicature (Sifa de Linian yu Zhidu)* (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1998), pp. 125-126, 132-133; *ibid*.

¹¹ In judicial practice, if the bench has a divergence, the head of the bench will submit it to the committee of court affairs for comment; if the committee disagrees with the opinion of the bench, the bench always decides the case according to the opinion of the committee. If there is major difference in opinion between the bench and the committee, the case will be submitted to the executive vice head of the court. If the vice head could not or will not decide, the case will then be submitted to the head to submit to the trial committee. Tan Shigui, Liang Sanli etc., *A Study on the Mode of Management in a Court (Fayuan Guanli Moshi Yanjiu)* (Beijing: Falü Chubanshe, 2010), p. 222.

failed to amend the judgment because of lacking of instructions of leaders. Also, the higher courts have been discussing the *Zhejiang Xiaoshan 5-Youth Killing Case* for some time but the original decision was not overturned until there was a leadership change in the court and the new leader presided the meeting. The lack of independence and supervision between the court and the procuratorate, between superior and inferior courts and also within the judicial system is another important reason why the injustices emerge and are hard to correct.

1.3. The Distortion of the Relationship between the Judiciary and the People

Modern nations are founded upon the principle of social contract and popular sovereignty. The operation of the judicial power should therefore comply with other actions of the state and should be responsible to the people. As such, the relationship between people and the judiciary is the most fundamental among the relationships the judiciary has with other things. The relationship between the people and the judiciary takes two forms: firstly, direct participation by parties in the judicial process; and secondly, indirect participation where the people show their attitude and comment on the structure, process and result of judicial process. However, in the miscarriage of justice cases, this relationship has been distorted.

Firstly, the victims and their relatives always disrespect proper legal procedure and are unwilling to exercise their legal rights. Instead, they prefer ways outside of the law such as vexatious suits, petitions and threaten to place pressure on the procuratorate and the court to decide the case according to their wish. Victims and their relatives often ask for agency or local people's congress (LPC) on the next level to influence or force prosecutors and judges to decide a case in a certain. The *Li Huailiang Case* is a typical example. The court signed a Death Guarantee with the victim's relative under the great pressure of petition, which led to the 12-year-delay of an innocence sentence in the case which lacked major evidences since the beginning. The media considered Li Huailiang as a beneficiary of the principle of presumption of innocence recognized in the new Criminal Procedure Law¹². But as I see it, Li is more a victim of the fact that the court was unable to prevent influences from the people. Even though seeking solutions outside of normal legal procedures could be justified under the circumstances that the existing laws and procedure could not effectively restrict judges and prosecutors and decisions are always unjust, this does not make the approach effective and legal. In fact, disrespect of the independence of judicial procedure and decision making would only violate the constitutional rules for the court and the procuratorate to exercise their powers of judicial decision making and legal supervision independently. The result of the influence is always opposite to the intention: the real killer is at large while the innocent gets incriminated.

Secondly, as the strength of the media gets greater and there are more and more ways to convey an opinion, people's opinions and attitudes will have increasingly strong influence on judicial decision making. Although China still lacks freedom of the press and judicial justice, and social supervision upon judicature should be enhanced,¹³ it will go too far if it affects the

¹² *The Murder of Li Huailiang: 12 Years has Collapsed Two Families*, <http://news.sohu.com/20130503/n374690436.shtml>.

¹³ Tan Shigui argues that under the current situation, we must increase the supervision by the media, and the judicial branch should hold a tolerant attitude towards the supervision of the media. Tan Shigui, "On the Relationship Between the Independence of Judicature and the Supervision of the Media" (*Lun Sifa Duli yu Meiti Jiandu*), (1999) 4 *Jurisprudence of China (Zhongguo Faxue)* 15; Gao Yifei argues after a study of international laws and the western relationship between the media and the judiciary that China should protect the freedom of the press since it has just started, and the court should prevent the unreasonable intervention of the public opinions by

independence of the judiciary. In recent years, the change of courts' decisions as a result of pressure of the media and public opinion are not rare and making decisions according to the public opinions is becoming a trend. In my opinion, the people's influence over the judiciary has the effect of replacing the judicial opinion with public opinion, and replacing proper judicial procedure with social trial. This deprives both parties' legal rights and weakens the independence of judicial power, and ultimately prevents the last guarantee of judicial justice of interim and post monitoring. Obviously, the distorted relationship which interrupts both judicial independence and judicial supervision could hardly achieve the desired outcome: substantive justice.

Above all, it is not hard to see that the lack of supervision of CCP and the people and the weakness of the internal check system are because of the paradox created by the intervention beforehand which results in the self-supervision. This not only leads to the frequent emergence of injustices, but also hinders the activation of the correction system. In fact, Independence and supervision are in a symbiotic relationship. There will be no supervision if there is no independence. Therefore, the resolving of the pattern of injustices and the proper operation of judicial power will need the new idea of symbiosis and new structure of simultaneous protection.

2. Coexistence of Independence and Supervision: Innovate the Theory of Judicial Operation

Even though Chinese scholars have paid attention to the operation and construction of judicial power for many years, and discussions involving the relationships within the judicial system, public opinion and judicature are rich in amount, most of them emphasize either on the importance of independence based on the western ideology of the construction of powers¹⁴, or on the necessity of supervision on the ground of corruption and injustices¹⁵. However, neither explains the Chinese power structure of one government and two branches (*yifu liangyuan*, "two branches" referring to courts and procuratorate) under the National People's Congress according to the Constitution, nor considers the deep relationship between independence and supervision and its significance in ideology and system. Therefore, I suggest that the first and most important step to restore the proper operation of judicial power is to build up the new idea of independence as the foundation and use supervision as the guarantee according to the Constitution.

2.1. Taking Independence as the Foundation

The proposed new idea of judicature first takes the independence of the operation of the judicial power as the foundation. The independence of the operation does not equal to the independence of the power. Although they can both be referred to as judicial independence, the independence of the judicial power is a natural outcome of separation of powers in the meaning of Locke and Montesquieu theories, but it obviously conflicts with the people's congress system set up by

restricting itself and use mechanisms such as open trial, live trial, restriction of judges' speech, information disclosure of the procuratorate and judicial privilege. Gao Yifei, *Meiti Yu Sifa Guanxi Yanjiu (A Study on the Relationship between the Media and Judiciary)* (Beijing: Zhongguo Renmin Gong'an Daxue Chubanshe, 2010).

¹⁴ Chen Guangzhong, "The Principle of Judicial Independence with Chinese Characteristics in the View of Comparative Law" (*Bijiaofa Shiyexia de Zhongguo Tese Sifa Duli Yuanze*), (2013) 2 *Journal of Comparative Law (Bijiaofa Yanjiu)*; Li Changlin, "Institutional Assurance of Judicial Independence: Taking the International Standard of Judicial Independence as Reference" (*Cong Zhidushang Baozheng Shenpan Duli: Yi Sifa Duli de Guoji Biaozhun Wei Canzhao*), (2005) 3 *Journal of Southwest University of Political Science and Law (Xinan Zhengfa Daxue Xuebao)*.

¹⁵ For example, Ge Hongyi Points out that the studying of Chinese judicial power must put the supervision and restriction in the center. Ge Hongyi, "The Chinese Problem of Judicial Power" (*Sifaquan de Zhongguo Wenti*), (2008) 1 *Science of Law (Falü Kexue)*.

Chinese Constitution. Hence, however hard scholars have tried to normatively and factually justify the independence of judicial power¹⁶, it is unconstitutional. On the contrary, the independence of the operation does not advocate the independence of the judicial power and only insist the independence of its operation. This idea suits Chinese Constitution, and is the prerequisite of the proper operation of all powers under the frame of the Constitution.

On the constitutional level, the independence of operation means the court system operates independently under the condition of people's authority and legislation supremacy. Under Articles 2 and 3 of the Constitution, all powers of the State belong to the people, the people exercise its power through NPC and LPC. And powers of local government and agency originate from the authority of the people, and the executive, judicial and procuratorate branches originate from the people's congresses as well. State agencies operates under democratic centralism in which the people has all the state power and exercise it through NPC. Each local government and each agency operate separately. Local governments share the state power and operate independently, and each agency: the central government, local governments, judicial branch and prosecutorial branch share the NPC's power and operate independently. This forms a power structure of a system of one government and two branches under NPC and local autonomy under centralism. With this in mind, even if the independence of operation of judicature does not include the independence of the judicial power, it still emphasize the independence of judicial decision making, responsibility and judicial procedure. Therefore, both the courts and the procuratorates and, on an individual level, judges and prosecutors should exercise their judicial and supervision powers independently. Unreasonable intervention is prohibited.

On the level of power exercise, the independence of the operation of judicial power is not only the prerequisite for the normal operation of judicial procedure and judicial activities, but also a necessary part of the normal running of the whole nation. If the operation of the judicial power is influenced by the government, outside influences, such as the PLC's negotiation, will result in an opaque, tedious and divergent judicial process and will create difficulty in clarifying responsibilities. It would also lead to judicial decisions being made by someone who is not handling the case. For example, where the judicial committee makes the decision, the instructions of leaders or superior court will prevent the constrain effect of the normal judicial procedure, making the decision arbitrary and misplacing responsibilities. All of these will lead to the practice of abnormal operation of judicial power and create more and more miscarriage of justice cases which will pose great challenges to the authority of the judicial system and even the state. For this reason, I think the independence of the operation of judicial power should be set up as the foundation of the new idea of judiciary both on the normative level and on the practical level.

2.2. Taking the Supervision as the Check

Another important aspect of the new idea of judicature is supervision. The independence of the operation of a power is similar to the independence of a power. Lack of supervision or restriction

¹⁶ For example, Li Buyun and Liu Zhiwei point out that the independence of the judicial power is an important factor of democracy, and the main sign of rule of law, and is vital to the protection of human rights. Li Buyun, Liu Zhiwei, "Some Issues of Judicial Independence" (*Sifa Duli de Jige Wenti*), (2002) 3 *Chinese Journal of Law (Faxue Yanjiu)*. However, as He Weifang sees it, there was no tradition of judicial independence in Chinese social structure, institution or culture. So the reform to modernize judicial system is supportless. He Weifang, "Chinese Reform of the Court System and the Judicial Independence: An Observation and Rethinking of a Participant" (*Zhongguo de Fayuan Gaige yu Sifa Duli: Yige Canyuzhe de Guancha yu Fansi*), (2003) 2 *Zhejiang Social Science (Zhejiang Shehui Kexue)*.

will definitely lead to corruption and dictatorship. Lord Acton said many years ago: “Power tends to corrupt, and absolute power corrupts absolutely”, the operation of a power tends to lead to dictatorship as well. However, complete independence of the operation of a power will quite likely end up in the total independence of the power and result in the intrusion of the people’s authority and the alienation of the state system. With the necessity of restrain the nature of the power and maintain the normal order, supervision of the operation of judicial power is of great significance.

Secondly, the deciding nature of the operation of judicial power calls for supervision at the same time. Judicial power in China includes the power of judging and legal supervision, which means the nature of them are the powers to decide and judge¹⁷. The fundamental feature of the operation of judicial power is judging. As Professor Pierre Schlag of Colorado University Law School pointed out, judging is full of violence, not only the sentence involves physical violence such as death, life in prison or money transfer, the whole process is full of interpretative violence as well. A judge has to simplify the multi-perspectives into two conflicting points and then unify them into one opinion that the court supports, and at the same time the judge has to decide which one is the binding rule applicable to this case among the conflicting and heterogeneous rules.¹⁸ The physical and interpretative violence of judging makes it unavoidable of the postmodernism terrorism¹⁹. As such, an essential step to keep the operation and outcome of the judiciary reasonable is to maintain the high rationality of judges and their behaviors. Even though in the most part this will depend on the development of legal governance and the level of education, the supervision by the CCP, public opinion and internal checks are indispensable.

Last but not least, supervision is a requirement of the Constitution. The preface of the Constitution declares and justifies the legitimacy of CCP’s leadership through the narrative of its function and status in the history of the state construction.²⁰ Therefore, as a part of state power, the operation of judicial power should accept the leadership and supervision of CCP. In addition, Articles 3, 62, 63, 67, 104, 128 and 133 of the Constitution and Articles 5, 31, 34 and Chapter Two of the NPC Standing Committee Supervision Law set up a system of supervision, which includes the appointment and removal mechanisms, work supervision, procedures for interpretation and register, and for challenge and inquiry. These together make up the supervision of the operation of judicial power by NPC, LPC and their standing committees. Furthermore, Articles 127, 132 and 135 of the Constitution set up an internal system of supervision within the judicial branch. The Organic Law of People’s Court and the Organic Law of People’s Procuratorate details and specify the system by a two-tiered trial system, trial supervision system, checking system and legal supervision system. Finally, the Constitution confirms the people’s authority and the citizens’ right to criticize, suggest, appeal, accuse and impeach to endow them with multiple avenues to supervise the operation of the judicial power. Thus, the supervision of the operation of judicial power is not only the demand of the nature and feature of a power, but also the natural meaning of Chinese constitutionalism.

¹⁷ Sun Xiaoxia, “The Nature of the Judicial Power is Judgment: 10 Differences between the Judicial Power and Executive Power” (*Sifaquan de Benzhi shi Shenpanquan: Sifaquan yu Xingzhengquan de Shida Qubie*), (1998) 8 *Legal Science Monthly (Faxue)*; Jiang Xiaochuan, “An Investigation of the Fundamental Feature of Judicial Power” (*Sifaquan Jiben Shuxing zhi Tanxi*), (2007) 5 *Law Science Magazine (Faxue Zazhi)*.

¹⁸ Pierre Schlag, “Clerks in the Maze”, (1993) 91 *Mich. L. Rev.* 8.

¹⁹ According to the view of the postmodernists, there’s no foundation of meaning or interpretation, so the judges’ declaration of laws and sentencing is actually terrorism through the physical violence or interpretative violence which decides the meaning of a text arbitrarily. Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (Oxford: Oxford University Press, 2000), pp. 357-358.

²⁰ Note 5 above, pp. 3-4.

2.3. Independence as the Premise of Supervision

The core of the new idea of judicature is the principle of independence and supervision, which means the overall supervision under the condition of independence of the operation of judicial power. Supervision should be based on independent judicial decision making . If agencies or individuals outside the normal judicial process , such as the PLC’s negotiation involving the court and the procuratorate, the superior courts’ instructions before the trial, or the opinion of the public, are allowed to influence the decision of a court, the supervision mechanism will be undermined. This is because the agencies and individuals would be supervising the decisions of themselves. Just like judging one’s own case will lead to injustices, no agency or individual has a motive to supervise himself; even if he has one, the supervision will not be effective enough. If there is no independence, there will be no supervision. This is the ultimate reason why there have been so many miscarriage of justices cases and why they are hard to correct.

Actually, even without any outside influence, the judicial branch is prone to be influenced by opinions within the judicial system in order to enrich the information on which the decision is based, rationalize the outcome and most importantly prevent accountability. This is especially true given the operation of the “responsibility allocation system of misjudged cases” (“RASMC”)²¹, under which it is reasonable for judges and prosecutors to seek for help outside of normal legal procedures. However, there are many shortcomings of this model of joint decision. Firstly, the allocation of responsibilities is not reasonable; many of agencies or individuals will share responsibility for misjudged cases which they were not involved in. Secondly, the individuals held responsible for the injustices could not foresee it because of the complex mechanism of the allocation and the risk is thus unclear. This furtherleads to the carelessness of those who handle the case and increases the occurrence of miscarriage of justice. Thirdly, the reliance on others’ opinion will affect the development of judges, prosecutors, courts and procuratorates. The more dependent they show in their decision, the less they exercise their capacity to make decisions. At the same time, the less they are able to decide independently, the more they have to rely on others, which creates the vicious circle that dependence leads to incapacity and incapacity leads to more dependence. In the end, supervision becomes dependence. The whole judiciary would thus fall into the abnormal circle where dependence leads to lack of supervision, which leads to more dependence. In other words, intervention of CCP, public opinion and those inside the judicial system not only harms judicial branch and its staff, but also prevents the growth of them. So both the CCP and public opinion should voluntarily restrain their intrusion into judiciary, and judicial branch should resist that intrusion. The normal operation of judicial power and state system starts

²¹ In the late 1980s or the beginning of 1990s, the RASMC started to be implemented in local courts. After he report of the 15th central meeting of CCP suggested to establish the RASMC, this system has been set up through the *Experimental Rule of Allocating Responsibilities to Judges Who Violates the Law* which was issued by the Supreme Court and local rules. Recently, Henan High People’s Court issued an *Experimental Rule of Life-Long Accountability of Misjudged Cases*, which provides that judges who misjudge a case will be accountable for their entire life, the relocation, retirement or resigning will not prevent the accountability.

In this system, the person who is responsible for the misjudged case include: the judge handling the case, if the case is misjudged because of his mistake; the investigator, inspector, recorder and translator, if it is their fault; the executive leader if it is his wrong decision; the directors of the police station, national security agency and judicial bureau and the ones who insisted the wrong opinion, if the mistake is led by a collective decision; the superior court or its director, if the mistake of the lower court was led by the instructions of the upper court or its director.

For problems in the implementation of the RASMC, see: Wang Chenguang, “The Uncertainty in the Application of the Law and the Mistake in the RASMC” (Fal ü Yunxing zhong de Buquedingxing yu Cuoan Zhuijiuzhi de Wuqu), (1997) 3 *Legal Science (Faxue)*; Zhang Weiping, *Sifa Gaige: Fenxi yu Zhankai (The Judicial Reform: The Analysis and Expanding)* (Beijing: Fal ü Chubanshe, 2003), pp. 515-517.

from the new idea, but it still needs the institutional guarantee.

3. Coexistence of Independence and Supervision: Reconstructing the Judicial Institution

Innovation of ideas is not enough to reform the operation of a power. Reconstruction of the institution is essential to both in reinforcing and maintaining the idea. Therefore, in my opinion, the Chinese judicial system should be reconstructed according to the idea of coexistence of independence and supervision.

3.1. Coexistence of the Independence of the Judicial Branch and the Supervision of the Legislature

The first part of independence of the operation of judicial power is the independence from the NPC and the LPC, and the first part of supervision is also the supervision of the NPC and the LPC. Even if the relationship between the judicial branch and legislatures didn't play an essential role in the forming of the miscarriage of justice cases, the involvement by the legislature is one of the important reasons why these cases are difficult to discover and correct. In fact, the legislatures' control and supervision has gradually evolved into judicial localism, in the sense that the appointments and financial source of the courts and the procuratorate is controlled by local governments. The performance of the judicial branch has been included as one of the factors that is considered when determining the promotion of local officials. In addition, judicial decisions always reveal local policy or opinions of local leaders, which undermines the independence of the judiciary and prevents the legislatures' supervision.

My suggested solution to this problem is that the powers to appoint and remove should be nationalized. For example, the judges and prosecutors of the Supreme and higher people's courts and Procuratorates should be appointed and removed by the standing committee of the NPC, under which a judicial personnel committee involving senior judges, prosecutors, attorneys and public officers could be established as well to take charge of nominating, examining, evaluating, impeaching, awarding and punishing judges and prosecutors.²² At the same time, the power over finance should also be nationalized so that the Supreme Court and Procuratorate are in charge of budget planning of the whole judicial system, subject to the NPC's approval. After the approval of NPC, the appropriation of funds is the duty of the Council, while the management and allocation of the funds is handled by the Supreme Court and Procuratorate.²³ In addition, the allocation and collection of litigation expenses should be unified and nationalized to exclude any handling by local governments.²⁴ On that ground, we will be able to reform the aspects of judicial personnel and finance within the framework of the Constitution to reduce the control of local government

²² For discussion on the nationalization of the power to appoint, appraise and evaluate judges, see: Zhang Wusheng, Wu Zeyong, "The Judicial Independence and the Adjustment in the Court System II" (*Sifa Duli yu Fayuan Zuzhi Jigou de Tiaozheng II*), (2000) 3 *Jurisprudence of China (Zhongguo Faxue)*; Ma Junju, Nie Dezong, "The Problems and Improving Methods in Chinese Current Judicial System" (*Dangqian Woguo Sifa Zhidu Cunzai de Wenti yu Gaijin Duice*), (1998) 6 *Law Review (Faxue Pinglun)*; Zhang Min, Jiang Huiling, *Fayuan Duli Shenpan Wenti Yanjiu (A Study on the Issue of Judging Independently of the Court)* (Beijing: Renmin Fayuan Chubanshe, 1998), pp. 220-221; Liang Tianning, "On the Legal Supervision of the Judicial Power" (*Lun Shenpanquan de Falü Jiandu*), (1999) 1 *Hebei Law Science (Hebei Faxue)*.

²³ *Ibid*, Ma Junju; *ibid*, Zhang Min; *ibid*, Zhang Wusheng; Han Bo, *Fayuan Tizhi Gaike Yanjiu (A Study on the Reform of the Court System)* (Beijing: Renmin Fayuan Chubanshe, 2003), pp. 276-277.

²⁴ Wang Liming, Yao Hui, "A Study on the Problem of the Organization Structuring of the Court and the Reform of the Trial Mode I" (*Renmin Fayuan Jigou Shezhi ji Shenpan Fangshi Gaike Wenti Yanjiu I*), (1998) 2 *Jurisprudence of China (Zhongguo Faxue)*.

and realize the independence of judicial power.

However, as I emphasized above, the independence of judicial power does not go against supervision. Even if the personnel and finance of local judicial agencies are no longer under the control of the local government, this does not mean that the LPC has no right to supervise them. On the one hand, the local judicial agencies still originate from LPC and should still be accountable to the latter and accept its supervision. The LPCs and its standing committees at all levels retains the powers to hear the report, to challenge, inquire and examine judicial interpretation and other normative documents, to inspect the work of judicial agencies and to handle petitions. On the other hand, we could gradually build up an institution of judicial ombudsmen. The ombudsmen will be nominated by the judicial personnel committee on the basis of legal knowledge, education background and ethnic clearance, and will be appointed and accredited by the NPC in the Supreme and higher courts and procuratorates. The ombudsmen of the Supreme Court and Prosecutorate are responsible for the judicial affairs over the entire nation, and the ombudsmen of the higher courts and Prosecutorate are responsible for the judicial affairs in their own province, including the ones of higher, middle and lower judicial agencies. The ombudsmen will have no rank or affiliation and will all be led by the judicial personnel committee. That will increase the specialty and effectiveness of people's congress' supervision over the judicial power with the ground of its independence.

3.2. Coexistence of the Independence in Judicial and procuratorial decision and the Supervision within the Judicial System

Problems inside the judicial system firstly concern the allocation of duties among the public security organs, the courts and the procuratorates. The duty of the public security and court is relatively clear and so is the supervision relationship between the two, while the procuratorate as the connecting agency is responsible both for the investigation of crimes and the supervision of crime investigation, as well as for making the decision to prosecute. Additionally, the procuratorate also prosecute and supervise the trial process. This not only affects the independence in judicial and prosecutorial decision making, but it also means that the procuratorate is, unavoidably, supervising itself and so can easily affect the credibility and authority of legal supervision. Therefore, what I suggest is that firstly we should reallocate the special investigation power of the procuratorate to the police; the power to investigate in normal cases will certainly remain with the public security organs and this power in cases involving national security will be allocated to the national security agencies.²⁵ Secondly, the trial supervision power should be allocated to a special supervision agency, and the procuratorate should only be responsible for prosecution and the supervision of investigation involved.²⁶ Thirdly, we could assign the duty of prosecuting on behalf of the public to the procuratorate. This is consistent with the natural meaning of legal supervision and will solve the problem that no authority stands out when the

²⁵ Dong Hao, "Thinking of the Multi-Duties in the Reform of Chinese Judicial Agencies" (*Woguo Sifa Jiguan Duochong Gaige Zhineng zhi Sikao*), (1999) 4 *Jurisprudence of China (Zhongguo Faxue)*; Deng Liangyin, "A Discussion on the Hot and Difficult Issues in the New Judicial Reform" (*Xin Yilun Sifa Gaige de Redian yu Nandian Wenti Tanta*), (2010) 2 *Law and Economy (Fazhi yu Jingji)*.

²⁶ Ibid. On the topic of abolishing the trial supervision power of the procuratorate, could also refer to Chen Weidong, Liu Jihua, "An Investigation of the Prosecutors: And a Comment on the Procuratorate's Trial Supervision Power upon the Court" (*Gongsuren de Susong Diwei Tanxi: Jianping Jiancha Jiguan dui Fayuan de Shenpan Jiandu*), (2003) 6 *Law and Social Development (Fazhi yu Shehui Fazhan)*; Wei Bing, "A brief Discussion on the Reform of the Procuratorate's Supervision upon the Civil Trial" (*Qianyi Gaige Qiancha Jiguan dui Fayuan Minshi Shenpan Huodong de Jiandu*), (2006) 2 *Law and Economy (Fazhi yu Jingji)*.

public interest is affected.²⁷ Lastly, the supervision power over normative documents could be allocated to the procuratorate in some instances as the supplement of the supervision of the legislature and higher-level government in order to give citizens complete remedy when their rights are violated by normative documents.²⁸ Under this arrangement, the procuratorate will carry the duty of legal supervision, and will be responsible for the operation of investigations, prosecution. This will allow the judiciary to be more independent while the supervision will be more effective.

Secondly, the relationship between the superior and inferior court or procuratorate needs adjustment as well, especially the ask-and-instruction system between the superior and inferior courts. As I see it, this system undermines the independence of lower courts, and at the same time affects the operation of the supervision duty of superior courts. Therefore, this system should be abolished. The superior courts should supervise the lower court only through the legal procedure of the appeal and trial supervision,²⁹ in order to afford the litigants the full right to appeal and to allow the full and independent judicial decision making power to judges in the lower courts. However, since the lower court has relied on this ask-and-instruction system for quite some time, an immediate abolition may create many problems. So we could try to reduce the scope of cases that could be asked for instructions gradually until the judicial system is ready for a complete abolition.³⁰ At the same time, we could try other means to improve superior courts' supervision over the inferior courts, such as to restrict the system of hearing in appeals, regulate the standard, time limit and remedy available on an appeal, establish an accountability and retrial system for procedural violation, enforce the supervision of the superior court over the lower court's trial³¹ and so on. In addition, unlike the court system, the procuratorates' legal supervision duty has a special function in correcting judicial localism, the vertical leading system between the superior and inferior procuratorates should be enhanced. This will guarantee the independent operation of the power of prosecution and the unity of legal implementation and supervision.³²

²⁷ For duty of prosecuting on the behalf of public interest: see note 24; Shao Wenhong, Jiang Huiling, "An Outline of Reform of Chinese Court System" (*Zhongguo Fayuan Tizhi Gaige Lungang*), in Sun Qian, Zheng Cengliang ed., *Sifa Gaige Baogao: Zhongguo de Jianchayuan, Fayuan Gaige (The Judicial Reform Report: The Reform in Chinese Procuratorates and Courts)* (Beijing: Falü Chubanshe, 2004); Chen Guiming, "A Discussion on Procuratorates' Prosecuting on the Behalf of Public Interest" (Tan Jiancha Jiguan Jieru Gongyi Susong), (2005) 3 *Journal of National Prosecutors College (Guojia Jianchaguan Xueyuan Xuebao)*.

²⁸ Wang Wenli, "The Prosecutorial Supervision on Governmental Normative Documents" (Xingzheng Guifanxing Wenjian de Jiancha Jiandu), in Wang Shaofeng ed., *Jiancha Zhidu Lilun Sisuo yu Yanjiu (The Thought and Study on the System and Theories of Prosecution)* (Beijing: Zhongguo Jiancha Chubanshe, 2005).

²⁹ For similar opinions, see He Weifang, "The Relationship between the Upper and Lower Court in Judicial Reform" (*Sifa Gaige zhong de Shangxiaji Fayuan Guanxi*), (1998) 9 *Science of Law (Faxue)* 42-44; Li Rongzhen, "The Administratization of Chinese Judicature and the Reform Suggestion" (Woguo Sifa Gongzuo de Xingzhenghua Jiqi Gaige Jianyi), (1999) 4 *Chinese Lawyer*; Zhang Weiping note 21, p. 526; Lai Bojun, "Rethinking and Reconstructing: The Integration Institution of Judicial Experience, The Switch of Mode From Authority Ranking to Levels and Procedures" (*Fansi yu Chongsu: Sifa Jingyan de Zhengtihua Jigzhi, Cong Cengji Quanwei Xing xiang Shenji Chengxu Xing de Moshi Zhuanhuan*), in Wan Yuexiang ed., *Sifa Nengli Jianshe yu Sifa Tizhi Gaige Wenti Yanjiu: Sifa Nengli Jianshe yu Susong Zhidu Gaige I (A Study on the Problems of the Judicial Capacity Construction and Judicial System Reform: The Judicial Capacity Construction and Litigant System Reform I)* (Beijing: Renmin Fayuan Chubanshe, 2006).

³⁰ Gan Wen, "A Few Problems Regarding Judicial Justice" (*Guanyu Sifa Gongzheng de Jige Wenti*), (1999) 5 *Jurisprudence of China (Zhongguo Faxue)* 27.

³¹ Some scholars suggested that after the head of a court or the trial committee has realized the mistake in an existing case, they should submit it to the procuratorate on the same level or the superior court. The court has a right to suggest instead of the power to amend. Bai Shanyun, "A Discussion on the Promotion and Protection of the Realization of the Principle of Judging Independence" (*Guanyu Wanshan he Baozhang Woguo Duli Shenpan Yuanze Shixian de Tantaoyao*), (2000) 2 *Jurist (Faxuejia)* 86-90.

³² For specific ways to enhance the leadership system in the procuratorate, see: Tong Jianming, Wan Chun, Gao Jingfeng, "An Idea of Enhancing the Legal Supervision of the Procuratorate in the Judicial System Reform II"

Thirdly, the heads of the court and procuratorate should be banned to give instructions, so should the system of trial committee and prosecution committee which have bad influence on the judges and prosecutors' decisions.³³ This will not only cultivate the independent judicial and prosecutorial decision making,³⁴ but it will also build up a judges' council and a prosecutors' council with the senior judges or senior prosecutors in the court³⁵ to take charge of answering difficult questions in big, complicated cases and supervising the work of judges and prosecutors. On this basis, a supervision and administration model led by the judicial authority will be formed, and the bureaucratic influence on the judicial activities will be reduced greatly.

3.3. Coexistence of the Independence of the Judges and Prosecutors and the Supervision of the Public Opinion

Even though the guarantee of the personnel and finance and the restructuring of the judiciary will greatly promote independence of judicial activities, without security of tenure, judges and prosecutors can still be easily affected by litigants and public opinions, which played an important role in injustices. The administration of Chinese judicial staff is a mechanical application of administration of public servants. All staff in the judiciary are administrated according to the system of public servants, whenever he is a judge, prosecutor, clerk, bailiff or other leaders.³⁶ The position, rank, salary, appraisal, award, punishment and retirement system is identical to the one designed for to public servants, the appointment and removal conditions and procedure is also similar.³⁷ This not only makes it easy for political leaders and public opinions to influence the

(*Sifa Tizhi Gaige zhong Qianghua Jiancha Jiguan Falü Jiandu Zhineng de Gouxiang II*), (2005) 2 *People's Prosecutorial Monthly (Renmin Jiancha)*.

³³ Wang Qiguo, "It is Not Proper for the Trial Committee to Discuss and Decide Cases" (*Shenpan Weiyuanhui Taolun Jueding Diyishen Anjian Zhiju Butuo*), (1988) 6 *Modern Law Science (Xiandai Faxue)* 18-80; note 24, p. 7; Cai Yanmin, "An Investigation of the Origin of Independent Judgment and An Analysis of Its Practice: Find a Confirmation Between the Legislature and the Practice" (*Duli Shenpan Tanyuan Jiqi Xianshi Fenxi: Xunqiu Shixian Lifa yu Xianshi de Qihe*), (1999) 2 *Law Review (Faxue Pinglun)*; Han Xu, "Reform and Improve the Institution of the Trial Committee" (*Gaige he Wanshan Shenpan Weiyuanhui Zhidu*), (1999) 3 *Law Science Magazine (Faxue Zazhi)* 43-44; He Weifang, "Some Comment on the Trial Committee" (*Guanyu Shenpan Weiyuanhui de Jidian Pinglun*), *Beida Falü Pinglun (Peking University Law Review)*, Vol. 1, No. 1 (1999), pp. 368-369; Tian Wenchang, "Legal Governance and Judicial Reform" (*Yifa Zhiguo yu Sifa Gaige*), in Chen Guangzhong, Jiang Wei ed., *Susongfa Luncong IV (Essays on Procedure Law IV)* (Beijing: Falü Chubanshe, 2000), pp. 122-123; The Intermediate People's Court of Zhejiang Yangzhou, "The Judicial Reform has Stepped Into the Deep Zone: How to Approach Legal Governance-In the perspective of Horizontal Allocation of Duties inside the Court" (*Sifa Tizhi Gaige Shiru Shenshuiqu: Ruhe Tongxiang Fazhi-Yi Fayuan Neibu Zongxiang Sifa Zhiquan Peizhi Wei Shijiao*), in Gong Pixiang ed., *Huigu Yu Zhanwang: Renmin Fayuan Sifa Gaige Yanjiu (Retrospection and Expectation: A Study on the Judicial Reform in Courts)* (Beijing: Renmin Fayuan Chubanshe, 2009). Some other scholars argue that we could expand the bench to allow senior lawyers to handle cases, while we abolish the trial and prosecutorial committees. Wang Huaian, "A Primary Investigation of Court System Reform" (*Guanyu Fayuan Tizhi Gaige de Chutan*), in Xin Chunying, Lilin ed., *Yifa Zhiguo yu Sifa Gaige (Legal Governance and Judicial Reform)* (Beijing: Zhongguo Fazhi Chubanshe, 1999), pp. 447-448.

³⁴ Note 33.

³⁵ Wang Liming, *Sifa Gaige Yanjiu (A Study on Judicial Reform)* (Beijing: Falü Chubanshe, 2001), pp. 200-215; Xiong Xianjue, *Sifa Zhidu yu Sifa Gaige (Judicial Institution and Judicial Reform)* (Beijing: Zhongguo Fazhi Chubanshe, 2003), p. 383.

³⁶ Though the Judges Law and Prosecutors Law of 1995 and 2001 provide four ranks of judges and prosecutors, being chief, grand higher and normal, and try to separate them from the public servants, this is in fact a replicate of the ranks for public servants. The Civil Service Law as at 2005 clearly includes judges and prosecutors in the realm of public servants.

³⁷ In Practice, the appointment of judges and prosecutors is handled according to the nomination of the legislature and is by no means by general election. Because this process is effectively an election with only one candidate, the nomination of the legislature is actually a veto power instead of nomination power. And the procedure to nominate a judge or a prosecutor not different from the procedure to nominate a general public officer.

The conditions of judges and prosecutors to be elected do not include the requirement of special knowledge and experience either. The new Judges Law and Prosecutors Law has introduced the requirement of education

outcome of a case, but also cultivates corruption. Therefore, I think the hierarchy system of judicial staff in the Judges' Law and Prosecutors' Law should be abolished, and be replaced with a technical ranking system to evaluate the judges and prosecutors according to their knowledge, qualification and capacity.³⁸ The evaluation, appraisal, award and punishment of the rank should be handled by a judicial personnel committee³⁹ in order to prevent local influences.⁴⁰ As to the appointment, the experience in other civil law jurisdictions could be borrowed: each year the Supreme People's Court and the Supreme People's Procuratorate can publish vacancies, and after the application of judicial students, a unified⁴¹ examination will be held to select suitable candidates, and they will be appointed by the NPC or its standing committee.⁴² At the same time, an institution of judicial assistance⁴³ should be set up to provide learning position for prospective

background to a bachelor's degree and included a requirement for strict work experience. However the work experience does not strictly refer to the legal practice. "Engaged in a work related to laws", according to the interpretation of Law Work Committee of NPC, this not only includes the work of legislation, judgment, prosecution, an attorney, teaching and research, but also involves the work of a police, national security, prison administration, labor education management, and the legal work in CCP or government, which is not related to laws or legal practices in substance.

³⁸ Article 19 of Judges Law provides: "The determination of a judge's status should be made according to his position, ethnic, professional skills, judgment outcomes and years of work." As I see it, the number of years of work as a judge is not a reflective factor for judges' experience and should be abolished, while the others could be taken as the evaluation standard. In addition, since a judge is a neutral and passive decider, the outcomes and rate of misjudges can be affected by many factors and does not reflect the capacity and ethnic of a judge. Therefore, using the outcomes as an evaluation standard will push judges to prefer mediation rather than making judicial decisions. As such, outcome of a case should be taken as an aspect to refer to, but should not be a deciding one.

³⁹ The appraisal is connected to the technical ranking system. Well performing judges will get a raise in salary and a promotion, the ones who do not pass will get a lower salary and be demoted. Judges and prosecutors could only be removed once he is corrupted or perverts the law. This rule on one hand prevents the laziness brought by tenure, and relieve them from excess caution or fear to exercise their proper power. The appraisal will be held by the judicial personnel committee, the award or punishment will be decided by the committee and carried out by the agency to which the judge or the prosecutor belongs. The impeachment of the serious violators is decided and launched by the committee. The removal of judges or prosecutors of the Supreme and higher courts or prosecutorates is decided by NPC, and the removal of the ones in the intermediate and lower courts or procesutorates is decided by its standing committee.

For more points on the building up of the multi forms of examinations, see note 24.

⁴⁰ For similar opinions, see: Zhang Wusheng, Zhang Weiping, *Sifa Xiandaihua yu Minshi Susong Zhidu de Jiangou (Judicial Modernity and the Construction of Civil Procedure)* (Beijing: Falü Chubanshe, 2000), pp. 719-720.

⁴¹ For comments on unifying the examination and appointment agencies, see: Gao Hongbin, *Sifa Gaige de Lilun yu Shijian Yanjiu (A Theoretical and Practical Research on Judicial Reform)* (Beijing: Renmin Fayuan Chubanshe, 2004), pp. 138-143.

⁴² A judicial student should be graduated from a decent university law school, who has undergone systematic legal education and has obtained a bachelor's degree and possess the fundamental skills of judicial staff. For skills a judicial staff should possess, see: Xu Yichu, "On Judicial Justice and Judicial Staff" (*Lun Sifa Gongzheng he Sifa Renyuan*), (1999) 4 *Jurisprudence of China (Zhongguo Faxue)* 8-10; Gan Wen, "Some Basic Problems in Judicial Justice" (*Guanyu Sifa Gongzheng de Jige Jiben Wenti*), (1999) 5 *Jurisprudence of China (Zhongguo Faxue)* 31-32; Fang Liufang, "An Observation on Chinese Legal Education" (*Zhongguo Faxue Jiaoyu Guancha*), in He Weifang ed., *Zhongguo Falü Jiaoyu Zhilu (The Road of Chinese Legal Education)* (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1997), p. 23; Wang Liming, note 35, p. 403-406.

The junior judge of prosecutor requires two years experience as an assistant, who could be allocated to the lower or intermediate courts or procuratorates. The judges and prosecutors in the higher and Supreme courts or prosecutorates are not appointed directly from the students, but from the junior judges or prosecutors, senior attorneys and professionals. This will change the usual mode of promoting the clerks to judges after years of practical training. Note 40, pp. 712-716; Jiang Huiling, "On the Judicial and Administrative Reform of Courts" (*Lun Fayuan Sifa Xingzheng Tizhi Gaige*), (1998) 8 *People's Judicature (Renmin Sifa)*; Wang Liming, note 35, pp. 414-417; He Rikai, "On Judicial Authority and Judicial Reform" (*Lun Sifa Quanwei yu Sifa Gaige*), (1999) 5 *Law Review (Faxue Pinglun)* 8.

Since 2003, the new clerks in court are employed all under contracts and managed separately to replace the old practice where a clerk can be promoted to an assistant and then to a judge. Tian Yu, "All New Clerks in Courts Are Employed under Contracts Since This Year", *Xinhuashe*, 19 February 2003.

⁴³ Jiang Huiling, *ibid*; Zhang Wusheng, note 22; Gao Hongbin, note 41, pp. 91-92; Tong Jianming, note 32; Cai Keyong, "The Idea and Practice of Judicial Reform in Lower Courts", in Gong Pixiang ed., *Huigu Yu Zhanwang*:

judges and prosecutors and help solve the problem where there is an increase in work load and a decrease in the number of judges and prosecutors. The principle of high salary and secured tenure should be adopted⁴⁴ as well, in order to create a space for independent judgment with a complete guarantee of jobs and technical ranking system and to prevent unreasonable pressure from litigants and public opinions.

Of course the independence of the judges and prosecutors does not go against supervision of public opinion. Actually, the public opinion and judiciary stands for the two most fundamental values of modern nations: democracy and rule of law. Public opinion is especially important where judicial corruption often occurs, where judicial activities are not independent and are localized. In this sense, social supervision over the judiciary is good for justice. However, social supervision over the judiciary should not undermine judicial independence, otherwise it would only create more injustice. The development of the press and the realization of the freedom of speech should depend on the legitimacy of the free speech. As such, we need to, on the one hand, guide the rationalization of the public influence on the judiciary through the self-discipline of the press⁴⁵, the improvement of the perception of law and the development of ways to effectively supervise the judiciary, and on the other, build up public's confidence in the judiciary through the construction of an independent and authoritative system. That will help the judiciary to accept social supervision and to prevent bias at the same time, and achieve constructive interaction between democracy and the rule of law.

3.4. Coexistence of the Independence of the Judicial Procedure and the Supervision of the CCP

Although the CCP's intervention of judicial procedure is the main reason for the occurrence of the many miscarriage of justice cases, it does not mean that the leadership of CCP is wrong. In fact, the emergence of these cases is not because of the leadership of CCP itself, but because of the abnormality of its leadership. Thus only through institutionalizing the leadership of CCP, could we realize the coexistence of the independence of judicial procedure and the supervision of the CCP.

Firstly, the leadership of the CCP has great significance because the CCP's leadership over the judiciary is the natural outcome of the Constitution's confirmation of the CCP's leading state power, and the prerequisite for rule of law. This significance is further consolidated because the PLC's own methods in resolving conflicts and maintaining social stability has its advantages⁴⁶. As

Renmin Fayuan Sifa Gaige Yanjiu (Retrospection and Expectation: A Study on the Judicial Reform in Courts) (Beijing: Renmin Fayuan Chubanshe, 2009), p. 281.

⁴⁴ Zhang Wusheng, note 40, pp. 721-728.

As I see it, if the judicial staff is considered as a part of public servant system, it will be hard for citizens to accept their high salary and tenure. Therefore, we could trial in a short period with different salaries and retire ages according to individual judge's technical skills. The higher the rank, the higher the salary and the later the retire age. This will help judicial staff to gradually specialize and perfect their skills. With the institutional protection of judicial independence, the authority of judges and prosecutors will increase greatly, and then the high salary and tenure will be accepted by the people.

⁴⁵ For regulation and improvement of the social supervision over judicature, see: Liang Tianning, note 22, pp. 120-124; Yang Zhejing, Cheng Xinsheng, "Three Topics on the Freedom of the Press and Judicial Justice" (*Xinwen Ziyou yu Sifa Gongzheng Santi*), (1998) 8 *People's Judicature (Renmin Sifa)* 31; Cai Dingjian, "Public Participation and the Supervision of Judicature" (*Gongzhong Canyu yu Jiandu Sifa Zhuti*), in Xin Chunying, Lilin ed., *Yifa Zhiguo yu Sifa Gaige (Legal Governance and Judicial Reform)* (Beijing: Zhongguo Fazhi Chubanshe, 1999), pp. 569-570; Jing Hanchao, *Zhongguo Sifa Gaige Celun (A Strategic Research on Chinese Judicial Reform)* (Beijing: Zhongguo Jiancha Chubanshe, 2002), pp. 60-65.

⁴⁶ Feng Zhidong, "The PLC and the Integration of Conflicts Resolving Resources" (*Zhengfawei yu Jiufen Jiejue Ziyuan de Zhenghe*), (2011) 1 *Journal of Central South University (Zhongnan Daxue Xuebao)*.

such, the leadership of the Party could not be abandoned. Secondly, the specific ways to leading judicature, as I see it, should remain on the macroscopic level. That is, the CCP should guide the construction and operation of judicial power through the control of state policies and orientation of development. At the same time it should resolve the problems of vexatious suit and petition with its own resource in order to reduce influence on the judiciary brought about by the need to maintain stability and ensure compliance with normal judicial procedure. The check and supervision on the micro level should be left to the legislature, public opinion and institutions inside the judicial branch. This will keep the judicial agencies from being interfered by the PLC and help them to make decisions independently.

Above all, what I suggest is that China should enhance judicial independence by using independence of judicial and prosecutorial decision making as the core, the independence of judges and prosecutors as the safeguard and the independence of judicial procedure as the background, while at the same time establish a system of supervision with the personnel and finance supervision of the legislature as the ultimate supervision, the supervision inside the judicial branch as the main supervision, the social supervision and CCP's leadership as the micro and macro levels of supervision. This will help to ensure the benign operation of the judicial power and prevent the emergence of injustices from the origin.