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“Judicial Independence in China: A Post-totalitarian
Story”

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Content

Kristian Espelid graduated from the University in Bergen in 2014. His master thesis titled «*Judicial Independence in China: A Post-totalitarian Story*» examines to what extent the Chinese judiciary is politically independent, and identifies the factors that can help explain the degree of judicial independence. It received the grade A.

Kristian was affiliated with the NCHR through the China Programme, from which he received a master student scholarship.

Abstract

This thesis examines to what extent the Chinese judiciary is politically independent, and identifies the factors that can help explain the degree of judicial independence. I build a theoretical framework based on existing theories on judicial independence in authoritarian regimes, where I separate between four legal issue areas in which the judiciary may exercise independence; criminal, civil, administrative, and commercial cases. I then conduct an explorative qualitative case study of the Chinese judiciary, where I examine the degree of judicial independence in each legal issue area and discuss explanatory factors. The data material used to answer the research question consists of 19 expert interviews with 25 judges, lawyers, scholars, and NGO representatives, conducted during fieldwork in China, as well as complementary secondary sources. The findings suggest that the Chinese judiciary is more dependent on political actors than what theories on judicial independence in authoritarian regimes suggest. Political interference from both central and local Party and government organs in each legal issue area is evident. The Party-state's concern for social and political stability seems to compromise the independence of the judiciary, especially in criminal and civil cases. In addition, the courts' structural and institutional subordination to the local governments contributes to undermine judicial independence particularly in administrative and commercial cases, as the courts are sensitive to the preferences and the will of local politicians. Courts in more economically developed urban areas are however less susceptible to political interference in their handling of commercial cases. Further research should be done internally in China to assess to what extent the situation of courts varies between localities.

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List of Abbreviations

BPC – Basic People’s Court

CCP – Chinese Communist Party

HPC – Higher People’s Court

IPC – Intermediate People’s Court

PLA – People’s Liberation Army

PLC – Political-Legal Committee

PRC – People’s Republic of China

SPC - Supreme People’s Court

1. Introduction

Juan Linz has emphasized that rule of law elements “are not incompatible with an authoritarian state and perhaps not even a ‘secularized’ totalitarian state” (1964:296). According to him, authoritarian regimes’ desire for a rational-legal mode of legitimation leads to a process of “constant expansion of a state of law, with an increase in predictability and opportunities for legal redress of grievances” (Linz 1964:327). Recent works on authoritarianism similarly argues that authoritarian rulers who seek to consolidate their power have strong incentives for building rule of law, and particularly for granting and respecting judicial independence (Moustafa 2007, Ginsburg 2008a, Ginsburg & Moustafa 2008). According to Shapiro (2008:328), the Chinese regime is no exception: “China has a fetish with courts and the rule of law”, and there is great Chinese interest in an independent judiciary (Shapiro & Stone Sweet 2002:217). It is not only scholars who are convinced by the compatibility between authoritarianism and the rule of law; Western nations and private donors have spent millions of dollars on rule-of-law projects in authoritarian states, including China (Carothers 1998, 2009, Stephenson 2000).

This thesis questions the idea that authoritarian rule is compatible with judicial independence. Focusing on the post-totalitarian Chinese regime¹, I study the relationship between the Chinese Party-state and the Chinese judicial system. The research question is twofold: *To what extent is the Chinese judiciary independent, and what factors may help explain the degree of judicial independence?*

My theoretical point of departure are previous theories on judicial independence in authoritarian regimes, which hold that the degree of judicial independence depends on the type of authoritarian rule, as well as the political and economic incentives of the rulers (Linz 2000, Toharia 1975, Moustafa 2007). However, since these theories have been developed based on studies of authoritarian regimes that significantly differ from the post-totalitarian regime type, the theories may need modifications in a post-totalitarian context. In the empirical analysis, I therefore investigate the Chinese judiciary’s independence from the Party-state, and propose new explanations to the degree of judicial independence where

¹ In this study, the Chinese political regime is classified as a post-totalitarian regime in accordance with Linz (2000:35). This is due to its totalitarian background, the existence of only one legal political party, its communist ideology, and absence of political opposition and pluralism outside the ruling party. Further discussion of the concept is presented in section 2.1 and classification of China as such a regime is discussed in section 4.2.

existing theoretical accounts are inadequate. The main focus of the study is the empirical and explorative element.

The research question is answered by employing a qualitative case study of the Chinese judiciary. The primary data material used in the study consists of interviews with 25 experts on the Chinese judiciary, including judges, lawyers, scholars, and NGO representatives, conducted during fieldwork in China in January 2014. Secondary sources consisting of previous empirical studies on the Chinese courts are also used.

The analysis is divided into four legal issue areas in which the judiciary may exercise independence: criminal, civil, administrative, and commercial cases². Within each legal issue area I examine the degree of judicial independence, and identify and analyze factors that can explain the degree of judicial independence in China. I focus on the ordinary Chinese judiciary, meaning the courts below the Supreme People's Court, and I examine political interference from both central and local politicians³. Judicial independence is defined as the ability of judges to decide cases according to law, without interference and pressure from the government and ruling party. Three empirical indicators of political interference are identified and used to examine the degree of judicial independence; direct case interference, *ex parte* communication, and policy interference⁴.

I will argue that my study contributes to two strands of literature. First, by studying judicial independence in a post-totalitarian regime, the thesis fills a gap in the literature on judicial independence in authoritarian regimes, which so far has received little academic attention. Second, the thesis adds to the literature on post-totalitarian and one-party communist regimes. As Bunce (2013) has noted, studies on these regimes have largely escaped scholars' interest following the third wave of democracy.

² Here I follow Popova (2012:20) who defines a legal issue area as "the universe of cases litigated with reference to a specific law or group of laws"

³ Central politicians refer to the lawmakers, or rulers, at the national level, while local politicians refer to the lawmakers' political subordinates below the national level (See Barros 2003:190). I use the terms rulers and central politicians interchangeably, as well as the terms political subordinates and local politicians.

⁴ These indicators are further introduced in section 2.1, and described in detail in section 4.4 together with a discussion of how judicial independence is assessed in this study.

The structure of this thesis is as follows. Chapter 2 clarifies the most central concepts in this thesis, namely post-totalitarian regime and judicial independence, and provides necessary background information about the Chinese judiciary. Chapter 3 first reviews previous literature on judicial independence, both in democratic and authoritarian regimes. Second, I present my theoretical framework. This is based on the existing theories on judicial independence in authoritarian regimes, and serves as the starting point for my analysis on the degree of judicial independence in China, and possible explanatory factors. The framework is separated into four legal issue areas in which the judiciary may exercise independence; criminal, civil, administrative, and commercial cases. Chapter 4 presents the research design and method employed in the study. I discuss the choice of a qualitative case study, my case selection, as well as expert interviewing and data triangulation. The chapter ends with a description on how judicial independence will be examined in this study. Chapter 5 contains the empirical analysis. This chapter is structured into the four legal issue areas; criminal, civil, administrative, and commercial cases. Based on the interviews and secondary sources, I discuss the Chinese judiciary's independence in each of the issue areas, as well as possible explanations to the degree of independence identified. Where the theoretical framework is in contrast to my empirical findings, I identify alternative explanations. Chapter 6 concludes by drawing together the main findings. In addition, I address the limitations of the study and discuss themes and topics for further research.

2. Background: Post-totalitarianism, Judicial independence, and the Chinese context

This chapter consists of three parts. The first part is devoted to the concept of post-totalitarian regimes, where I describe what I mean by this regime type (section 2.1). This is necessary in order to place the post-totalitarian Chinese Party-state in a comparative context among other authoritarian systems. The second part discusses the concept of judicial independence, how it relates to rule of law, and how I define and conceptualize judicial independence in this study (section 2.2). The third and last part presents the Chinese judiciary in a historical context, and I describe the current structure of the Chinese judiciary (section 2.3).

2.1 Authoritarian and Post-totalitarian Authoritarian Regimes

To understand post-totalitarian authoritarian regimes, we should start by noting what is meant by authoritarian and totalitarian regimes. A defining trait of both regimes is the absence of free elections (Møller & Skaaning 2009:258), hence they are non-democratic. How authoritarian regimes differ from totalitarian regimes is however seldom addressed in the current literature. Linz (2000:159-166) considers authoritarian regimes to be characterized by a limited form of political pluralism, no guiding ideology, and a low or limited political mobilization. Totalitarian regimes however differ on these dimensions. Møller and Skaaning (2009) contend that authoritarian regimes may differ from totalitarian regimes by the fact that they score higher on measures of electoral rights and other aspects of democracy. In this sense, authoritarian regimes differ from totalitarian regimes by the fact that they are more democratic, as totalitarian regimes have more or complete restrictions on political freedoms. However, few typologies of authoritarian regimes today preserve a separate category for totalitarian regimes, but rather separate between different types of non-democratic regimes, as the totalitarian category by now appears obsolete⁵. A post-totalitarian regime is an authoritarian regime, but it is different from other authoritarian regimes by the fact that it has

⁵ There are several different typologies on how to separate between different types of authoritarian regimes, but given the fact that the focus is here on post-totalitarian regimes, I do not comment on this further. See for instance Geddes (1999, 2003), Gandhi (2008), Møller & Skaaning (2009), and Hadenius and Teorell (2006) on how to separate between different types of authoritarian regimes.

been totalitarian. Hence, it is useful to know what is meant by a totalitarian regime, and how a totalitarian regime becomes post-totalitarian. According to Linz (2000:67), totalitarian regimes can be identified by the simultaneous presence of the following elements: an ideology, a single mass party with mobilizational organizations, and power concentrated in one individual and his supporters, or a small group. Friedrich and Brzezinski (1965) maintain that a totalitarian regime is characterized by the presence of six elements: an official ideology, a single mass party, a system of terror, monopoly control of the mass communication, monopoly of arms, and central control of the economy. Totalitarianism is also frequently characterized in terms of a goal culture (Johnson 1970), where the goals, set by the guiding political ideology, are to be achieved no matter what. The result is totalitarian mobilization; “ruthless pursuit of a single, positively formulated goal is the most distinctive common denominator of totalitarianism” (Spiro 1968, in Johnson 1970:12-13).

The totalitarian regime becomes post-totalitarian authoritarian when the emphasis on the goal culture is replaced by a greater concern for “the functional requisites of the social system” (Linz 2000:250), or “from utopia to development” (Lowenthal 1970). The term post-totalitarian can, however, be understood in two different senses; in a historical sense or in a political sense (Jia 2012:33). In the historical sense, any political regime that has once been totalitarian will forever be post-totalitarian, even if it transitions to democracy. In the political sense, post-totalitarianism refers to a specific type of authoritarian regime that has evolved from totalitarianism. I will in this study treat the term post-totalitarianism in the second sense; it refers to a specific type of authoritarian regime that has once been totalitarian⁶. In other words, “no one would or could create a post-totalitarian regime unless there had already been a prior totalitarian regime” (Linz & Stepan 1996:293).

In addition to having a totalitarian history, post-totalitarian authoritarian regimes differ from other authoritarian regimes in the three following aspects. First of all, post-totalitarian regimes are essentially one-party regimes in the sense that there is only one legal political party (formally or de facto), and there are no opposition parties or national elections to the legislature where opposition parties compete. In institutional terms, a post-totalitarian regime therefore falls within the category of ‘one-party regimes’ in Hadenius and Teorell’s (2006) typology of authoritarian regimes, and can hence readily be institutionally identified by their

⁶ Linz (2000:31) uses the term in both the historical sense as he refers to “post-totalitarian new democracies” (Linz 2000:31), and the political sense when he refers to “post-totalitarian authoritarian regimes” (Linz 2000:245).

authoritarian regime typology. Today, most authoritarian regimes that are run by one political party hold national elections and allow opposition parties (Hadenius & Teorell 2006:10), but this is not the case in post-totalitarian regimes. Given the supreme role of the ruling party in post-totalitarian regimes, one often talks about a Party-state where Party organs parallel all state organs, but real power is vested in the Party organs (Przeworski 2012). In other words, the Party stands above the state, which is in stark contrast to most other party-ruled authoritarian regimes where the ruling party actually receives and maintains power by filling state positions through elections (Schedler 2009:389).

Secondly, a post-totalitarian regime can be identified by how they justify, or how they have justified, why they rule. These regimes have once justified their hold on power by their political ideological goal “to build a utopian classless communist society” (Kailitz 2013:47), and displayed ideological commitment to Marxist-Leninism (Dimitrov 2009:2). Although this ideological commitment may dwindle (Dimitrov 2009:2), it still has a presence in political life (Linz & Stepan 1996:49).

Thirdly, a post-totalitarian regime can be identified according to how it rules when it comes to managing political pluralism and political opposition. There are no opposition parties in post-totalitarian regimes, nor any other forms of political opposition or political pluralism outside the ruling party. Instead, these forces are incorporated into the ruling party and the political elite (Linz 2000:68). The Party exerts strong control on all political groups, forces, and influences outside of the ruling party⁷.

The only post-totalitarian regimes that exist and have existed are communist⁸. Today such regimes may include Vietnam, China, and Cuba, and Saxonberg (2013) even suggests North Korea. While this particular type of authoritarian regime has drastically declined following the end of the Cold War, this is not in itself an argument against the importance and fruitfulness of preserving this separate category. As opposed to most other scholars, Linz (2000) and Linz and Stepan (1996) keep a separate regime category for post-totalitarian regimes. In this study I also use this concept and classify China within this regime type. While

⁷ Møller and Skaaning (2009:262-266) contend that this political pluralism dimension can be empirically measured by how a political regime scores on the attribute of respect for civil liberties.

⁸ Linz (2000:246) notes that the only regimes that were ever allowed to undergo a process of “routinization” of totalitarianism were communist countries, since, due to military defeat, fascist totalitarian states could never undergo such a process.

the theories used in my theoretical framework are adopted from studies on other types of authoritarian regimes, the empirical analysis will reveal whether new and different explanatory factors should be developed.

2.2 The Concept of Judicial Independence

2.2.1 Judicial Independence and the Rule of Law

As noted in the introduction, the concept and element of judicial independence is closely associated with the rule of law. However, the rule of law is again closely associated with democracy, and argued to be an essential pillar of democratic regimes (Larkins 1996, O'Donnell 2004). How then can the rule of law and judicial independence be theoretically and practically attainable in an authoritarian regime? The incompatibility between authoritarianism and the rule of law comes from the fact that authoritarian regimes do not practice a constitutionalist rule of law (Barros 2003:193). What is meant by this is that the constitution, which is meant to prescribe the laws and hence institutional constraints on the power of the rulers, is not practiced. In authoritarian regimes, the constitution itself often remains too flexible, and the authoritarian leadership may change it as they see fit (Magaloni 2003:279-282) or just ignore it altogether (Linz & Stepan 1996:249)⁹. In other words, authoritarian regimes cannot have the rule of law, because they do not practice constitutionalism that limits the powers of the rulers. For this very reason, studies on authoritarianism, the rule of law, and judicial independence, including this current study, can only proceed by removing the necessary and sufficient condition of constitutionalism from the concept of the rule of law. The emphasis is on a rule of law that may be labelled a “rechtstaat”

⁹ Barros (2002), in his study of the Chilean authoritarian regime under Pinochet, has however empirically documented that authoritarian rulers may be bound by its own institutional creations, and specifically a constitution. The reason is not because powers were divided among the different political institutions, but because there was pluralism and power-divisions within the ruling bloc. When each faction within the ruling bloc possessed the same amount of power, and when all decisions required unanimity, no member of the ruling block could dominate the legal system (Barros 2002:8-9). Hence, the authoritarian regime was constitutional.

(Linz 1964), “rule by law” (Barros 2003:189), or “formal legality” (Tamanaha 2004:93)¹⁰. This form of rule of law does not place any explicit requirement on how the laws are made, their content, and whether the lawmakers themselves are subject to law (Barros 2003:190). Strongly inspired by Hayek (1944) and Raz (1979), they define this rule of law, what here will be called formal legality, to mean that the law is prospective, general, clear, public, and relatively stable (Barros 2003:189, Tamanaha 2004:93). There is hence a clear framework of rules that citizens can rely on and form their expectations according to. But importantly for this study, formal legality also requires a legal system that can consistently execute these rules, including an independent judiciary that can adjudicate free from illicit pressure and bias (Barros 2003:189, Tamanaha 2004:93). Other law enforcement agencies, and subordinate organs and actors of the law makers, must also apply and enforce the rules according to law, but “beyond these limits [...] does not specify any requirements regarding how laws be made or that lawmakers themselves be subject to law” (Barros 2003:190). This study focuses on the formal legality conception of the rule of law. Judicial independence is a requirement of formal legality and I now proceed to discuss this concept.

2.2.2 Judicial Independence

Brinks and Blass (2013:7) note that “the traditional, indeed obligatory, independent variable to describe judiciaries is something labelled “independence”, a concept that has led to interminable debates and endless variations on the definition”. Recognizing the fact that this concept remains contested (Gallie 1955), I shall here briefly review the major notions of the concept before I present my definition and conceptualization.

In the literature, it is common to draw a distinction between *de jure* judicial independence and *de facto* judicial independence (Ríos-Figueuroa & Staton 2012:4, Donoso

¹⁰ Linz (1964) does not seem to provide his own definition of the *Rechtstaat*, but emphasizes the predictability that originates from this form of rule of law (See Miley 2011:47). Moreover, what Barros (2003:189) defines as rule by law is by Tamanaha (2004:93) defined as formal legality. Tamanaha (2004:92) criticizes the rule by law as being of no real or theoretical value, but contends that formal legality is. Tamanaha (2004) and Barros (2003) do however rely on the same authors when they discuss the separate concepts of rule by law and formal legality, thus it is highly likely that what Barros (2003) contends is rule by law is the same as Tamanaha (2004) defines as formal legality.

2009:24). De jure judicial independence refers to a formal and institutional conceptualization of the concept (Vanberg 2008:100), and is often expressed in terms of *institutional judicial independence* (Popova 2012:14). This concept refers to the extent to which the judiciary is insulated and independent of other political institutions, government branches, and the public in general (Fiss 1993:59-60, Popova 2012:14). As Ríos-Figueroa (2006:3) puts it “the question is whether or not there is judicial *independence from* other governmental agencies”. Institutional judicial independence is considered to be high when there are specific structural safeguards and institutional mechanisms that insulate the judicial branch from the legislative and executive branch (Popova 2012:14). Such institutional shields may concern the judiciary as an institution, for instance whether the judiciary as a branch controls the basic structure of the judiciary and its overall budget (Ríos-Figueroa 2006:24, Popova 2012:14, Solomon 2004:227), but also institutional shields that speak directly to the insularity of the judges themselves, for instance whether the judiciary and a judicial council is in control of appointment, promotion, and dismissal of judges, whether judges have life-tenure, and whether judges are adequately paid (Ríos-Figueroa 2006: 30-32, Popova 2012:14, Ríos-Figueroa & Staton 2012:3-4, Solomon 2004:227)¹¹. The degree of institutional judicial independence is considered to be higher the more of these mechanisms are in place, but there remains disagreement concerning what these mechanisms are and should be (Vanberg 2008:100).

The goal of acquiring a high degree of institutional judicial independence is to protect the judiciary from interference and influence from government branches, since the latter purportedly have less leverage in exercising influence over the judiciary when it is institutionally independent (Solomon 2004:27, Vanberg 2008:100, Popova 2012:15). The notion that judges should be independent to make decisions without undue interference and influence refers to the other conceptualization of judicial independence: de-facto judicial independence. This study uses a de-facto conceptualization of judicial independence, meaning that the focus is *not* on whether the judiciary and the judges are formally structurally and institutionally independent from government branches, but whether judges are *actually independent to* decide cases without undue interference and pressure (Domingo 2000, Brinks

¹¹ There are in other words two units of analysis, or subjects of independence, here; the judiciary as an institution, and the judges themselves (Ríos-Figueroa 2006:18-20). This is most clearly reflected in Solomon (2004) and Ríos-Figueroa’s (2006) conceptualizations of institutional judicial independence.

2005, Ríos-Figueroa 2006, Vanberg 2008, Ríos-Figueroa & Staton 2012)¹². De-facto judicial independence hence refers to judicial behavior, and whether judges decide cases without responding to undue pressure or influences that may shape the outcomes of the cases in particular ways (Ríos-Figueroa & Staton 2012:4). In this sense, the decision of the judge reflects his or her preferences (Becker 1970:1-8, in Ríos-Figueroa & Staton 2012:4), but this does not mean that the judge has complete freedom to decide cases according to his or her preferences; “it is the freedom to decide cases within the constraints imposed by the court’s jurisdiction, by existing law, and in light of the merit of the case at hand” (Kapiszewski & Taylor 2008:749, Rosenn 1987:4). A sensible definition of judicial independence is therefore: “the ability of judges to decide cases independently in accordance with law and without (undue, inappropriate, or illegal) interference from other parties or entities” (Peerenboom 2010:71).

Since judicial independence is a relational concept (Russel & O’Brien 2001:4) it is crucial to specify who is exercising undue interference, meaning the sources of dependence (Popova 2012:19, Salzberger 2004:70). In terms of concept-building, I argue that specifying sources of interference dependence is crucial, as doing this means thinking about the negative pole of the concept (Goertz 2006:30), where the positive pole is judicial decision making without any interference. Kapiszewski and Taylor (2008:749) argue that there is a consensus in the literature that the potential sources of dependence may be political actors, parties to a case, or superiors in the judicial hierarchy. While I recognize the fact that many different actors and institutions may interfere with judges (see Bowen 2013), this study will limit its focus to interference from political actors. Judicial independence here therefore means independence from political actors¹³. This is essentially because theories on judicial independence in authoritarian regimes are overwhelmingly concerned with dependence or independence from political actors and political institutions. The definition employed in this study is hence the following; *judicial independence refers to judges’ ability to decide cases according to law and the facts of the case, without undue interference from political actors*

¹² Institutional judicial independence will be incorporated as an independent variable in this study and will be accounted for in section 3.2.

¹³ This may also be termed political independence (Kapiszewski & Taylor 2008:749), but similar to most scholars I shall here use the label judicial independence to refer to independence from politicians (e.g. Vanberg 2008, Popova 2012).

*and political branches*¹⁴. Political actors and branches here refer to the government or the ruling party, including political actors working there.

As a concluding point to this discussion of judicial independence, it is important to clarify how judicial independence can be examined and thus measured. There are primarily two ways, with two different units of analysis (Popova 2012:16-19). The first one, which is not employed here, is to take judicial output, meaning the judicial decisions reached by judges, as the units of analysis. By using judicial output as units of analysis, the aim is to examine whether; 1) the judicial output can be classified as a product of independent decision-making by judges (e.g. Popova 2012)¹⁵, or whether 2) the judicial decisions are actually enforced and not left ignored or unimplemented (e.g. Linzner & Staton 2011, Ginsburg & Melton 2012, and Ríos-Figueroa & Staton 2012)¹⁶. In this study, de-facto judicial independence is on the other hand analyzed by using judges as the units of analysis (See Popova 2012:16). The analytical goal is therefore to identify instances of interference and pressure exerted by political actors and organs upon judges as they make decisions¹⁷. To overcome the measurement challenges related to this approach, I follow the suggestion of Kapiszewski and Taylor (2008:749-750) who urge scholars to think about empirical indicators that say something about how pressure by political actors and organs is exerted upon judges. The empirical indicators used to examine judicial independence are detracted from a reading of the literature on judiciaries in post-totalitarian authoritarian regimes, and post-communist democratic regimes (Sharlet 1977, Garlicki 2004, Solomon 2004, 2008, Magalhães, Guarnieri & Kaminis 2006, Peerenboom 2010, Nußberger 2012, and Popova 2012). In short they are 1) direct case interference (telephone justice), 2) ex parte communication, and 3) policy interference. These indicators will be further described chapter 4.

¹⁴ This definition is partly based on the above definition provided by Peerenboom (2010:71).

¹⁵ In line with this approach, some scholars have used the frequency of which courts rule against government as an indicator of de-facto judicial independence (See Kapiszewski & Taylor 2008:479 for a critical discussion).

¹⁶ But note that all of these scholars advocate using both judicial output and judges as units of analysis in studies of judicial independence (Linzner & Staton 2011, Ginsburg & Melton 2012, Ríos-Figueroa & Staton 2012, and Popova 2012).

¹⁷ It is also common to use perception surveys of country experts or lawyers, and ask them whether they feel that courts and judges are independent to decide cases without interference from government, citizens, or firms (See for instance Widner 1999 and Porter & Schwab 2009)

2.3 China and the Chinese Judiciary

It is necessary to provide background information on the case; hence this section puts the current Chinese judiciary in a historical context (section 2.3.1), and then describes the institutional setup of today's judicial system (section 2.3.2).

2.3.1 Historical Background on the Chinese Judiciary

The history of the People's Republic of China (PRC) and the development of the Chinese Communist Party (CCP) is frequently separated into two periods; the period with Mao Zedong as the Chairman of the CCP (1949-1976), and the post-Mao period of "reform and opening up" (1978-present). The period with Mao Zedong as China's ultimate ruler is characterized as the totalitarian phase of the PRC's political history (Johnson 1970, Linz 2000), and was characterized by the associated goal culture as described in section 2.1. The CCP's goals were to be achieved no matter what, which resulted in a total mobilization of society by the Party-state. The CCP, and increasingly Mao (Saich 2011:247), set the goals and reached out to the ordinary people through "the mass line", which referred to the various techniques that the CCP used to shape and gain popular support for its policies, but also the ways in which the CCP would mobilize the people in order to execute its policies (White, Gardner & Schöpflin 1982:70-71, Lubman 1999:42). This governing approach seems to have had important consequences for the legal system and the courts. There was no institutional autonomy for the courts; they were integrated into the Party's control system (Lubman 1999:46), and the courts became part of the Party-state's administration aimed at educating the people in prevailing Party policies and correct political thinking (Lubman 1999:42-43). However, the courts' approach to the various disputes they heard was dependent on whether the dispute was between the people, or between the people and the enemy. Mao held that there were only two types of conflicts, or contradictions, in society; non-antagonistic conflicts between the people, and antagonistic conflicts between the people and the enemy (Fu 2010a:2-3). The people were the masses, and between them conflicts had to be settled by democratic methods, meaning persuasion and education (Lubman 1999:42). When judges handled private civil disputes between the people, they would therefore mediate all disputes because it was an informal and persuasive mode of conflict resolution, in contrast to

adjudication. In addition to trying to end the dispute through mediation, judges would also educate the parties in political ideology (Grimheden 2004:196). Lubman (1999:60) has termed this the “politicization of private disputes”, where personal grievances were seen as part of a larger ideological struggle. In contrast, whenever there was a conflict between the enemy (a member of the exploiting class or a counter-revolutionary) and the people, the courts were however no longer to emphasize democratic methods, but methods of the dictatorship (Lubman 1999:42). Conflicts between enemies and the people were criminal cases, and in these instances the courts were to be an instrument for the dictatorship of the proletariat (the people) to be used against the enemy (Fu 2010b). It must be emphasized that the courts under Mao were primarily criminal courts and handled very few civil cases. Their core function was, according to Fu (2010b:3), to punish counter-revolutionaries. The Party had a hands-on approach to criminal cases and the criminal courts, and initiated several campaigns that aimed to suppress counter-revolutionaries. During some of these campaigns, Mao would himself declare how many criminals should be given the death penalty in various cities, and there was reportedly a competition among various courts to execute the highest number of people (Teng 2013).

The Chinese legal system, including the courts, experienced tension between the highly politicized and policy-dictated administration of justice, and the simultaneous need for greater regularization and rationalization of the legal process. For example, there was an expressed need to settle disputes based on law instead of ad-hoc Party policies and political campaigns (Lubman 1999:74-75, Grimheden 2004:169). Other communist regimes, such as the Soviet Union, also grappled with this conflict (Sharlet 1977). This seems to have resulted in the notion of “socialist legality” as a foundation for a Communist legal order; greater regularization and predictability with less place for the personal desires and impulses of the Party and its leader (Linz 2000:248). The move towards a Soviet-inspired socialist legality may have come underway in China in the early 1950s, but it came to an abrupt end in the late 1950s (Lubman 1999:79), coinciding with worsening relations to the Soviet Union (Grimheden 2004:171). From there on, the legal system fell back to a Party-policy dictated administration of justice, with Mao Zedong expressing his contempt for any form of legality by stating; “the Civil Law, the Criminal Law, who remembers those texts? I participated in the drafting of the Constitution, but even I don’t remember it” (Mao Zedong 1959, in Tiffert 2012:29). Finally, when the Cultural Revolution (1966-1976) descended upon China, most of the legal order already established was gradually swept away. It was the People’s Liberation

Army (PLA) that had to keep and restore social order (Saich 2011:59), and the PLA even occupied the Supreme People's Court (SPC) for several years (Grimheden 2004:172).

With the death of Mao Zedong in 1976, political order was to be restored under the direction of Deng Xiaoping and his supporters (Saich 2011:68). Perhaps somewhat ironically, it was a court trial that in many ways signaled the end to both the political and legal turmoil associated with the personality cult of Mao, when Deng Xiaoping's political opponents in the "Gang of Four" received their criminal sentences in a trial in 1981 (Saich 2011:74). Since 1978, the Party has adopted the policy of "reform and opening up" (Balme 2005:5), which can be described as a transition from an emphasis on the goal culture of totalitarianism, to an emphasis on "the functional requisites of the social system" (Linz 2000:250). The Party-state has since committed itself to build a "rule of law with socialist characteristics" (Balme 2005:26), and it has devoted extensive resources to constructing a modern and functioning legal system (Liebman 2014:98). But as we will see in the following section, the CCP's oversight of the judiciary remains very much intact at the institutional level.

2.3.2 The Institutional Setup

China's current judiciary and court system is structured into four administrative levels which closely correspond with the structure of China's system of government (Gu 2013:3). At the central, national level of government is the Supreme People's Court (SPC), and at the three levels of government below the SPC we find the ordinary judiciary, which is the focus of this study. The ordinary judiciary consists of three types of courts: Higher People's Courts (HPC) at the provincial level of government, Intermediate People's Courts (IPC) at the prefecture or city level of government, and Basic-level People's Courts (BPC) at the county or district level of government (Gu 2013:3)¹⁸.

The Supreme People's Court is the highest judicial organ of the Chinese state (Constitution of the PRC). The President of the SPC, the Chief Justice, heads the SPC and the Chinese judiciary. The current president is Zhou Qiang, who was appointed in 2013 by the

¹⁸ In addition to these courts, there are also something called People's Tribunals at the lowest level of government (Gu 2013:3), and there are also special military, maritime, and railway courts (See Grimheden 2004:197). All these types of courts are left out of this study and hence not described further in detail.

National People's Congress, although it is reasonable to assume that his appointment was pre-approved by the CCP. The SPC has mainly four functions; interpretation of law, adjudication, legislative work, and administration of the judiciary (Finder 1993:164-222). It does not have constitutional judicial review powers, although it can release judicial interpretations that have binding effects similar to legislation. In addition to these judicial interpretations, the SPC may also release "advisory opinions" and "official replies" to lower courts, but these documents have no binding effect and are often ad-hoc (Grimheden 2004:191). The SPC does not hear many cases, apart from some appeal- and first-instance cases, the majority of which are big commercial cases (Grimheden 2004:191). In terms of administration of the judiciary, the Constitution stipulates that the SPC administers and supervises lower-level courts but it does *not* control appointments and funding of lower-level courts (Grimheden 2004:192). As a political institution in a wider political environment, the SPC is considered to be in a weak position but tries to set the agenda on legal and judicial reforms through consultation and bargaining with the CCP (Grimheden 2006, respondent 17).

The focus of this study, and what will be referred to here as the ordinary judiciary, consists of the three levels of courts below the SPC. These are the Higher People's Courts (HPC), the Intermediate People's Courts (IPC), and the Basic People's Courts (BPC). As of 2014, China has 32 HPCs, 409 IPCs, and 3117 BPCs (SPC 2014). The Higher People's Courts belong to the provincial governments and function mainly as appellate courts and first-instance trial courts for special cases transferred to them from IPCs, such as cases that have "a major impact on society" (Grimheden 2004:193). Every Chinese province has one HPC, but so do the four cities of Beijing, Tianjin, Shanghai and Chongqing, which are directly under the central government. There are around 7 000 judges serving on HPCs (Gu 2013:7). The Intermediate People's Courts are usually found in cities with more than one million inhabitants, and hear appeal cases and different first-instance trial cases of greater importance, such as death penalty cases, political cases¹⁹, major commercial cases, and cases involving foreigners (Grimheden 2004:193-194). Around 36 000 judges work in IPCs (Gu 2013:7). Many of the cases heard by the IPCs are transferred from the courts at the lowest level of government, the BPCs (Brown 1997:52). BPCs are found at the county level of government and in cities at the county level. BPCs may hear civil, criminal, and administrative cases (Brown 1997:52). Whether cases are transferred from BPCs to IPCs, or whether cases fall directly under the jurisdiction of IPCs seems to be a function of the "importance" of the case

¹⁹ The criminal case against former CCP politician Bo Xilai was for instance heard in an IPC.

(Brown 1997:52-53). As noted above, most courts are BPCs, and together they employ roughly 146 000 judges (Gu 2013:7).

Every court shares the same internal structure (Grimheden 2004:194), which can be described as highly bureaucratic and hierarchical (Zhong & Yu 2004:442, Wang 2011:74). At the top of the hierarchy is the court president who is said to wield enormous power within the courts (Zhong & Yu 2004:440-442). The president of the court normally lacks a legal education and a legal background, and is generally considered a careerist politician who attains his position as court president after having reached a high position in the government or the CCP (Lan 2012:1-2). Power within the courts descends from the president, to the vice-president, and then to the chief judges of each division within the court (Wang 2011:76-77). Every court usually has three divisions; civil, economic, and administrative. Adjudication within the courts is often a collective enterprise, and most cases are decided by a collegial panel consisting of three judges with a presiding judge in each panel (Wang 2011:73, Gu 2013:5). Moreover, court cases defined as “important” or “difficult” are usually heard by the courts’ internal “adjudication committee” (Wang 2011, He 2011). The court president chairs the committee, and the vice-presidents and chief judges of the various divisions are also members. The decisions of the adjudication committee concerning particular cases are final and cannot be challenged by other judges within the court (Zhong & Yu 2004:397). In addition, lower level courts are responsible to the court placed above it in the court hierarchy, which means that BPCs are subordinate to IPCs, and IPCs are subordinate to HPCs, and the HPCs are subordinate to the SPC. Any study of the Chinese judges’ *internal* independence would therefore necessarily conclude that it is markedly low given the judicial hierarchy described above. China is after all a civil law country, which often means that the internal independence of judges is lower compared to common law countries (Ríos-Figueroa 2006:21).

The legal framework on judicial independence is found in article 126 of the Constitution of the PRC, which stipulates that “the people’s courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization or individual”. In other words, the emphasis is on the courts’ independence as an institution, not the individual judges (Peerenboom 2002:286, Gu 2013:12). That being said, article 8 of China’s Judges’ Law specifies that *judges* should be free from “interference from administrative organs, public organizations or individuals in trying cases according to law” (PRC Judge’s Law). However, neither the Constitution nor the Judge’s Law mention anything about interference from political parties,

and scholars debate whether this means that the CCP can rightfully interfere with the courts' and judges' decision-making (Tong & Qin 2012).

Notwithstanding the fine words in the Constitution and the Judges' Law, courts at every level of government are institutionally and structurally constrained by two kinds of political organs and actors; state organs and government officials, and Party organs and Party officials. The structure of government organs and Party organs is replicated at each level of government (Saich 2011:180), hence the external political environment is the same for every court. The figure below depicts the political environment in which an IPC finds itself, with Party organs on the left and state organs on the right.



Figure 1: Connections between Courts and Political Institutions in China. Sources: Grimheden (2004), Wang (2011)

The interaction with the government is depicted on the right and can come from the local people's congress (LPC), or the local government. The LPC has the formal authority to appoint court personnel and to supervise the court. In reality however, court appointments by the LPC are made by the Party committee, so the LPC only plays a symbolic role in passing the appointments decided by the Party committee (Wang 2011:91). Appointed judges do not have tenure and can be removed or dismissed (Wang 2011:81-82). While the LPC formally controls appointments, it is the local People's Government that is in charge of funding of the courts, including salaries, bonuses, and financial resources to court infrastructure (Wang 2011:90). Importantly, this means that the institutional independence of the Chinese judiciary is markedly low given the fact that it is government organs that have de jure²⁰ power over

²⁰ I say de jure because the government organs are themselves de facto controlled by Party committees at the same level of government (Wang 2011:91, Saich 2011:182).

appointments, dismissals, and funding. It also means that those powers are not in the hands of the national government organs, but instead local government organs. Lower level courts are therefore institutionally dependent on local governments.

The influence from the organs of the CCP is depicted on the left and can manifest itself in two ways. The Party Committee, which is the powerhouse of government at any level and the de-facto principal of the courts, ensures its leadership of the court through interaction with the internal Party committee of the courts (Wang 2011:89), as shown within the blue box. Most often however, the CCP interacts with the courts through its Political-Legal Committee (PLC). The PLCs are branches of Party committees at every level of government, including at the national level (Grimheden 2004:204). The mandate of the PLCs is to coordinate, oversee and direct the work of the police, the procuratorate and the courts (Wang 2011:90, McConville et al. 2011:378). Thus the main interaction between the Party and the courts is exercised through the PLC (Peerenboom 2010:80), where the PLC interacts with the Party committee within the court (Grimheden 2004:205). The rules are that the power of a court is vested in its internal Party committee (Wang 2011:75), and the power of the Party committee is again vested in its leader, the Party secretary. Tellingly, the court president is usually the Party secretary, and the court vice-presidents are also members of the Party committee (Wang 2011:75). The power of the president and vice-presidents is thus reinforced by their occupation of leading positions within the court and their leading positions on the court's Party committee.

While I have separated between Party and state organs in the above figure, it is questionable whether this is analytically feasible given the fact that the local people's government and the local people's congress are subordinate to the Party committee at the corresponding administrative level. Thus the LPC and the government in the above figure are ultimately subordinate to the Party committee on the left of the figure. This intermingling of state and Party positions is of course what gives rise to the notion of a *Party-state*. In this sense, every type of interference by government organs and actors may logically also be Party interference, and scholars note that it is hard to separate between the two (Zhu 2010a:66-67).

In sum, the ordinary courts are internally structured according to a strict hierarchy. Externally, the courts are institutionally dependent on the corresponding level of government and Party organs. More importantly for my purposes, political interference may come from both the central Party and government organs at the national level, *and* local Party or

government branches at the same administrative level as the court, which are shown in the above figure. In the analysis section I will pay attention to both, and discriminate between political interference from central and local Party and government organs.

3. Literature Review and Theoretical Framework

This chapter begins with an overview of previous theoretical and empirical studies on courts and judicial independence. I pay attention to literature on the topic in both democratic and authoritarian contexts section (3.1). Based on the insight from previous studies on judicial independence in authoritarian regimes, I create a theoretical framework for my study that separates between four legal issue areas over which the judiciary may, or may not, exercise independence (section 3.2). The four legal issue areas are criminal cases, civil cases, administrative cases, and commercial cases. I discuss each legal issue area and review the theories' arguments concerning the degree of judicial independence within each legal issue area. The chapter ends with a summary of the theoretical propositions that guide my analysis (section 3.3).

3.1 Literature Review

There is a very large and abundant literature on courts, judges, and judicial independence in comparative politics, comparative judicial politics, and political science. However, most of the previous studies are exclusively focused on democratic regimes. Within this body of literature, several studies investigate the different factors that shape the outcome of judicial reforms in newly established democracies (e.g. Magalhaes 1999, Smithey & Ishiyama 2000, Magalhaes, Guarnieri & Kaminis 2006, see Dallara 2014 for an overview). Within this literature, much attention is paid to why judiciaries are empowered, especially to exercise constitutional judicial review (e.g. Ginsburg 2003 and Hirschl 2004). Other related studies focus on whether courts in new democracies are able to exercise these constitutional judicial review powers and hold rulers accountable (Gargarella, Gloppen & Skaar 2004), with particular focus on the African and Latin-American context (Gloppen et al. 2010). In general, much of the literature on courts in democratic regimes is focused on the exercise of constitutional review and how, especially high courts, become political actors (e.g. Kapiszewski, Silverstein & Kagan 2013).

Studies that deal specifically with judicial independence in democratic regimes, and explanations for why some judiciaries are more independent than others, are also manifold (See Vanberg 2008 and Helmke & Rosenblut 2009 for overviews). The literature often

emphasizes the importance of institutional configurations as a prerequisite for judicial independence (Fiss 1993, Larkins 1996). Such institutional configurations are the same as what was labelled in section 2.2.2 as institutional judicial independence, and refers to structural mechanisms that shield judges from political interference. Judges and the judiciary should thus be able to make independent decisions if control over appointment, promotion, budgets, and dismissal of judges is not in the hands of government, and if judges have life-tenure and are adequately paid. Studies have examined under what conditions institutional judicial independence actually correlate with de facto or actual judicial independence (Ríos-Figueroa 2006), including quantitative studies on the relation between these two types of judicial independence (Ginsburg & Melton 2012). Other studies on judicial independence investigate the strategic incentives that politicians have to establish and maintain judicial independence (See Yadav & Mukherjee 2013 for an overview), hence these works go under the label of strategic theories. Earlier works within this tradition include Landes and Posner (1975), and North and Weingast (1989). More recent works include Ramseyer and Rasmussen (2003), and Finkel (2008) who argue that it is political competition and electoral uncertainty that initially endow politicians with incentives to establish and maintain judicial independence²¹. Popova (2012) focuses instead on the incentives that politicians in unconsolidated democracies have to undermine judicial independence, even when facing electoral uncertainty. Other studies have, instead of paying attention to the role of politicians, focused on the role and behavior of judges in supporting and building judicial independence (Widner 2001), and how judges can act strategically in times of electoral uncertainty (Helmke 2002).

In contrast to the literature on courts and judicial independence in democratic regimes, studies on these topics in an authoritarian political context are fewer and less developed. A number of studies go under the label of “courts in authoritarian regimes”; hence it is difficult to reconcile this literature, the majority of which are case-studies, under a common theoretical framework. One of the earliest studies on courts in authoritarian regimes is provided by Tate and Haynie (1993) who conducted a quantitative study of the institutional performance of the Philippine Supreme Court under the authoritarian rule of Marcos. Tate (1993) has also, through case-studies, analyzed how the independence and power of the Supreme Courts in Pakistan, Philippines, and India were affected by the instigation of martial law, or what he

²¹ This logic is also used in other studies to explain the establishment of constitutional judicial review in new democracies (Ginsburg 2003), and outcomes of judicial reforms in new democracies (Magalhaes 1999).

labels “crisis regimes” (Tate 1995:316). There are some studies dealing with courts and judges in a number of the previous Latin-American authoritarian regimes. Much of the focus here has been on the role of the judges under the different authoritarian regimes; how judges resisted carrying out political orders (Osiel 1995), and why judges did not oppose government repression even when they were trained under a previous democratic regime (Hilbink 2007, 2008, Barros 2008). Pereira (2005, 2008) has investigated political trials in Brazil, Chile, and Argentina, and Magaloni (2008) provides an account of the judiciary’s role under the authoritarian PRI-rule in Mexico.

Ginsburg and Moustafa (2008), in an edited book titled “Rule by Law: the Politics of Courts in Authoritarian regimes”, draw together a number of these works. Some of the studies reviewed above are included in this work (Magaloni 2008, Barros 2008, Pereira 2008, and Hilbink 2008). Since this topic is broad in itself, their approach is largely functional, and they mainly focus on how courts *function* in authoritarian regimes (Ginsburg & Moustafa 2008:4). In addition to the works on courts and judges in Latin-American authoritarian settings, other studies focus on courts and judges in regimes between democracy and authoritarianism in other parts of the world. Widner and Sher (2008:235) analyzes the “semi-democracies” of Uganda and Zimbabwe, with the aim of examining how judicial independence may be maintained in this political setting. Shambayati (2008) has similarly analyzed the Turkish and Iranian judiciaries’ involvement in politics. Solomon (2008) provides a historical examination of the power and independence of the Soviet judiciary prior to the fall of the Soviet Union. More recent works that follow in the footsteps of this research agenda include Ghias’ (2010) study on the Pakistani Supreme Court and its interaction with the legal complex. Urribarri (2011), in his study of the Constitutional Chamber of the Venezuelan Supreme Court, has offered a theoretical framework for the study of courts in what he terms hybrid regimes, meaning regimes that evolve from democracy towards authoritarianism (Urribarri 2011:854).

Of more immediate relevance to this study are previous studies that focus more exclusively on the conditions of judicial independence in authoritarian regimes. There are few studies on this issue, but we may identify two approaches; regime-related theories (e.g. Toharia 1975, Linz 2000), and strategic theories (e.g. Moustafa 2007, Ginsburg 2008a). The regime-related theories argue that authoritarian regimes will leave the ordinary judiciary to be largely independent over ordinary cases, while transferring politically relevant to other forums, such as military courts (e.g. Toharia 1975, Linz 2000, Guarnieri 2010). Studies on other authoritarian regimes, ranging from Chile (Hilbink 2007), to Salazar’s Portugal and partly

Mussolini's Italy have confirmed a similar degree and pattern of judicial independence (Guarnieri 2010:238-239, Magalhaes, Guarnieri & Kaminis 1999). Sharlet (1977), in a study of the Soviet judiciary, also identified a similar dual structure when it came to the independence of the Soviet judiciary. I argue that the insight of these studies are relevant here, and will therefore be included in my theoretical framework below.

Another approach are strategic theories, which are inspired by strategic theories on judicial independence in democratic regimes as reviewed above. Moustafa (2007) and Ginsburg (2008a) have argued that politicians in authoritarian regimes may also, like their democratic counterparts, have political and economic incentives to establish and maintain judicial independence over a wider scope than only ordinary cases, as is argued by the regime-related theories above. Moustafa (2007), in his study of the Egyptian regime under Anwar Sadat, has argued that the Egyptian regime established and maintained an independent Constitutional Court over a long period to convince investors that their property rights were secure against encroachment by the state. In addition, the regime created independent administrative courts to check the Egyptian bureaucracy. These theoretical perspectives are relevant for this study and will also be included in my theoretical framework below.

Studies that deal specifically with the Chinese judiciary are largely conducted by legal scholars and there is a growing body of legal literature on the Chinese judiciary and legal system. It is impossible to review all of them here, but notable works that deserve mentioning are: Lubman (1999) and Peerenboom (2002) provide rich, descriptive works on the entire Chinese legal system. Other notable works on the legal system include Diamant, Lubman and O'Brien (2005), and Woo and Gallagher (2011) who adopt a multidisciplinary approach to examine how Chinese citizens use the law. Studies that deal specifically with the judiciary include Wang's (2011) quantitative case-study of the Chinese judiciary, focusing on the determinants of court funding and corruption. There has been published one edited book on the issue of judicial independence in China (Peerenboom 2010), which presents different viewpoints on the Chinese judiciary. There are only a few empirical studies in this collection and none adopt a theoretical perspective. Hence I will treat this study more as an empirical point of departure in my work.

3.2 Theoretical Framework

As shown above, except for the regime-related theories (Toharia 1975, Linz 2000, Guarnieri 2010) and the strategic theories (Moustafa 2007, Ginsburg 2008a), there is not much previous literature and theories concerning my topic. In this section, I will take these previous works as a point of departure for creating a theoretical framework for my study that says something about what degree of judicial independence we can expect, and which factors that are believed to influence political actors' willingness to interfere with the judiciary. I will follow Ginsburg's (2010:249) notion that what separates authoritarian regimes from democratic regimes when it comes to judicial independence, is that the judiciary in an authoritarian regime is independent over a narrower range of cases. That is, judiciaries in authoritarian regimes are usually independent over some legal issue areas, while not over other legal issue areas²². I argue that based on a close reading of the previous literature on judicial independence in authoritarian regimes, we can create a theoretical framework that separates between four legal issue areas in which the judiciary may be independent and can be used for my analysis. These four legal issue areas are criminal, civil, administrative and commercial cases. The theoretical and analytical framework must be seen as a tentative step towards studying judicial independence in authoritarian regimes, as previous works on this issue are few and offer only vague and probabilistic statements. Nevertheless, it is my understanding here that this framework can be useful for incorporating the theoretical insights that exist. In addition, it offers a clear framework and structure for my empirical analysis. Below I elaborate how the different legal issue areas can be discerned from a reading of the existing literature.

According to the regime-related theories (e.g. Toharia 1975, Linz 2000, Guarnieri 2010). Toharia (1975), judiciaries in authoritarian regimes will be largely independent in their handling of ordinary cases, while the politically relevant cases will be transferred out of the judiciary and into forums where political leaders will be in control of the decision-making. There is hence a dual or "bifurcated" (Guarnieri 2010:239) structure of judicial independence, keeping the ordinary judiciary independent while transferring political relevant cases to other forums. This argument has become a conventional theory or model concerning the conditions

²² As noted in the introduction, a legal issue area refers to: "the universe of cases litigated with reference to a specific law or group of laws" (Popova 2012:20).

of judicial independence in authoritarian regimes (Cheesman 2011:802). The regime-related theories therefore draw a concrete distinction between two categories of cases: ordinary cases and political relevant cases. The former are adjudicated independently by the ordinary judiciary, the latter adjudicated with heavy political involvement through other judicial forums. To transfer the insight of these theories we must hence pay attention to what are considered to be ordinary- and political relevant cases, in order to develop some propositions concerning the degree of judicial independence. An examination of previous studies shows that political relevant cases are generally criminal cases, especially those involving the political opposition. Ordinary cases on the other hand are overwhelmingly civil cases, meaning cases “involving private parties” (Guarnieri 2010:239), which can be anything from family law cases to property and tort cases (Toharia 1975:488). Hence, Stephenson (2003:2) has termed this “authoritarian solution” to judicial independence as having independent courts in civil cases. In terms of legal issue areas then, regime-related theories are mainly concerned with *criminal* cases and *civil* cases.

The strategic theories, on the other hand, mainly pay attention to two other legal issue areas; *commercial* cases and *administrative* cases (Moustafa 2007, Ginsburg 2008a). They argue that authoritarian rulers may have incentives to allow the judiciary to handle these cases independently, in addition to ordinary civil cases as highlighted by the regime-related theory above.

We are then left with four legal issue areas in which a judiciary in an authoritarian regime may, or may not, be independent in. These are criminal, civil, administrative, and commercial cases²³. The different theories offer different propositions concerning the degree of judicial independence within each legal issue area, as well as the factors that are believed to influence the political leaders’ willingness to interfere in these different cases. In this study, I will therefore use these four different legal issue areas as my analytical framework. Hence my theoretical framework and approach is not institutional, but based on legal issue areas, and is thus a case-based approach to examine judicial independence (Popova 2012:20). In the

²³In this study commercial cases will refer to court cases between firms, as theories on judicial independence and commercial cases in authoritarian regimes stress the firm-to-firm aspect (Mousfa 2007:23). Commercial cases are therefore typically contract cases between firms. Civil cases, on the other hand, are court cases between individual citizens, or where an individual citizen is one of the parties. Typical civil cases are therefore family cases, property cases, labor, and tort cases, where an individual constitute one of the parties to the case (Toharia 1975:488).

following sections I shall present each legal issue area separately, and discuss the potential degree of judicial independence within each area as argued by the different theories. Before I do this, it is however important to comment on how judicial independence is attainable in authoritarian regimes and how the insight of structural insulation theories may be incorporated into my framework.

According to Popova (2012:20), any study of judicial independence should specify if the observed or hypothesized degree of judicial independence is an outcome of politicians' *incapacity* to interfere with judges, or if it is a result of politicians' *unwillingness* to interfere with judges²⁴. In previous studies of judicial independence in authoritarian regimes, these issues are not directly addressed, but it is nevertheless clear that those scholars who seek to explain why a certain degree of judicial independence is attainable in an authoritarian regime, explain this by pointing towards the incentives authoritarian rulers have not to interfere. That is, they argue that judicial independence is attainable in authoritarian regimes because the rulers have certain incentives that are believed to reduce their *willingness* to interfere with the courts. Authoritarian rulers always have the *capacity* to interfere, a logical consequence of the nature of authoritarian rule (Barros 2002). This assumption has important consequences for the study of judicial independence in an authoritarian regime. It means that structural insulation theories, which posit that a high degree of institutional judicial independence, such as constitutional guarantees and structural mechanisms that insulate courts and judges from pressure by politicians (see section 2.2.2), cannot produce actual or de facto judicial independence. This is because the rulers always have the discretion to interfere with the judiciary if they want to. Hence, if one wants to explain why judicial independence is attainable in authoritarian regimes, one should point towards the incentives that reduce the rulers' willingness to interfere with the judiciary.

Recognizing this at the outset is preferable because it brings coherence to the following theoretical discussion. It means that any argument as to why we should expect to observe judicial independence in authoritarian regimes over a specific legal issue area, must provide a sufficient explanation by highlighting why the rulers' willingness to interfere is low; either by showing why it is in their best interest not to do so, or by showing that the benefits of interfering are marginal (Popova 2012:22). However, there is another element to this,

²⁴ Vanberg (2008:104-105) makes a similar point, arguing that any explanations for why judicial independence is maintained must point to why politicians have certain preferences that in turn causes them to favor judicial independence and refrain from interfering with the courts.

especially in this study where the focus is on ordinary lower courts, and not high courts where we might think that interference from central politicians are stronger. If the theory hypothesizes unwillingness from the part of the rulers to interfere because it is not in their best interest, does this also mean that the same political leaders will ensure that lower-level politicians are incapable of interfering with judges? The theories all take the incentives of the rulers as their point of departure for explaining judicial independence, but we do not know whether the rulers' political subordinates, the local politicians, harbor the same incentives. If they do not, then it may be crucial for the rulers to make sure that the courts are institutionally independent of local politicians, in order to incapacitate them from interfering. For this reason, structural insulation theory will be used as an intervening variable in this study. I include this theoretical perspective in the discussion below concerning administrative and commercial cases, as it is most relevant here given the strategic theories' emphasis on rulers' incentives to support judicial independence.

Notwithstanding the benefits that both higher and lower-level politicians may derive from independent courts, the theories overwhelmingly focus on why authoritarian rulers establish and maintain a certain degree of judicial independence; they never directly address or provide explanations for why politicians interfere, i.e. why judicial *dependence* is maintained²⁵. Hence, the following theoretical discussion in most parts focuses on explanations for why authoritarian rulers may maintain judicial independence.

3.2.1 Criminal Cases

According to Shapiro (1981:27), it is hard for judges to be conceived of as independent in criminal cases because the criminal law is so obviously shaped and controlled by one of the parties in a criminal case; the regime and the state. Judges who administer the criminal law therefore impose the will of the regime on the party being prosecuted by the regime. That being said, judges' ability to administer the criminal law independently, even when it is created by one of the parties in the case, is the main focus here. In the regime-related theories, criminal cases are the type of cases most often noted as being politically relevant and thus

²⁵ Popova (2012:33) notices this as well; "the benefits that incumbents reap from a subservient judiciary are curiously absent from most theoretical accounts".

outside the jurisdiction of the ordinary independent judiciary (Toharia 1975, Linz 2000). This is especially true when it comes to criminal cases that have an explicit political character and that concern any members of the political opposition or actors engaged in anti-regime activities (Linz 1964, Toharia 1975:492). These types of criminal cases may be called political criminal cases, and it is quite conventional to explain why the rulers are willing to interfere in these cases, because doing so is the most effective and reliant way to sideline political opponents (Ginsburg & Moustafa 2008:4). The conventional wisdom that there will be heavy political interference into political criminal cases in authoritarian regimes is reflected in the literature, as there are few, if any, arguments for why the rulers should be less willing to interfere in these cases. There is generally a quest for explanations as to why political opponents are brought before courts in the first place (e.g. Pereira 2005). Discussing the subject of explicitly political criminal cases in authoritarian regimes, Dallin and Breslauer (1970:196-210) and Solomon (2007:132) argue that the longer an authoritarian regime exists; there may be more room for formalism and procedures in political criminal cases due to the regime's desire to harness some sense of legal legitimacy. Solomon (2007:132) considers this especially relevant in today's world, where there is increasing global scrutiny on the actions of authoritarian regimes and how they treat potential political opposition. However, given the nature of the regime, such legitimacy concerns are not argued to decrease the willingness of political actors to interfere to such an extent that the judiciary may be independent in its handling of these cases (Solomon 2007:132).

However, it may be useful to draw a distinction between pure criminal cases as described above, and criminal cases that have no explicit political character. Sharlet (1977:156) notes that what is defined as a political criminal case may vary according to a regime's political and historical development, a point also made by Toharia (1975:492). But they nevertheless both contend that if a criminal case is not labelled as politically relevant by the regime, the ordinary judiciary may be allowed to deal with those cases independently as the rulers have no political interest in such cases. For this reason, there may be a form of judicial independence dualism when it comes to criminal cases; clear political interference in what above was termed political criminal cases, while less political interference in what may be called ordinary criminal cases, meaning those criminal cases that do not directly concern actors engaged in anti-regime activities.

3.2.2 *Civil Cases*

In the regime-related theories, ordinary cases, meaning those cases that are independently adjudicated, are overwhelmingly civil cases, meaning court cases between private parties (Guarnieri 2010:269). In handling civil cases, courts are usually portrayed as playing the role of “conflict resolution” (Shapiro 1981:15-17, Tate & Haynie 1993:713-715)²⁶. Civil cases are almost by nature non-political as they concern citizen-to-citizen disputes where the government or the regime is not the party in the case. They include such matters as family disputes, personal property disputes, labor disputes, and tort cases (Sharlet 1977:156-157)²⁷. However, it must be noted that some civil cases may be politically relevant and thus not independently adjudicated by the courts, both Toharia (1975:487-488) and Linz (1973:252-253) have recognized the potential political nature of labor cases, thus we would not hypothesize that the courts are politically independent when handling these kinds of civil cases. For the majority of other civil cases however, the regime-related theory posits a greater degree of judicial independence. While the explanation as to why politicians would not interfere in such cases may seem straightforward, as there is purportedly little benefits from doing so, it is however important to pay closer attention to the explanations for why authoritarian regimes and rulers generally refrain from interfering in these cases.

First of all, it is not only that authoritarian regimes refrain from interfering in civil cases because the benefits of doings so are marginal. More importantly, the explanations for why the regimes and the politicians do not interfere in these cases is closely connected to the nature of the regime (Linz 2000:109, Guarnieri 2010:249), hence the regime-related theory. First of all, politicians in authoritarian regimes should have low willingness to interfere in these cases because they explicitly seek to avoid processes of politicization and political mobilization of individuals and institutions (Toharia 1975:495). The regime and the state do not want to associate themselves with, and politicize, the handling of private disputes between individuals. Thus, a quite real boundary maintenance between state and society, politics and

²⁶ However, as Shapiro (1981:17-18) notes, the conflict resolution function and social control function are largely intertwined.

²⁷ As noted, I distinguish civil cases from commercial cases by stressing the fact that a commercial case is between firms, and civil cases are cases in which at least one of the parties is an individual.

administration, under an authoritarian regime, guarantees a relative high degree of judicial independence over these ordinary civil cases (Linz 2000:109). Secondly, and associated with the first explanation, the politicians' willingness to interfere in these cases is thought to be lower because it involves legitimacy costs (Guarnieri 2010:239). By allowing the judiciary to handle ordinary civil cases independently, the regime can gain rational-legal legitimacy by showing its respect for the rule of law (Toharia 1975:495). Related to this is the fact that authoritarian regimes usually have few modes of legitimation, for instance the lack of an explicit political ideology to justify their hold on power (Linz 2000:162-165), thus a rational-legal mode of legitimation becomes a crucial substitute for the lack of ideological legitimacy (Miley 2011:48). In this sense, any political interference with the judiciary's handling of cases which it usually handles independently may be considered costly in terms of legitimacy, since it illustrates the regime's disrespect for some notion of the rule of law.

3.2.3 *Administrative Cases*

Strategic theories have argued that authoritarian regimes and rulers may have strong incentives to support judicial independence in administrative cases, and to refrain from interfering with the courts' handling of these disputes (Moustafa 2007, Ginsburg 2008a). Before we review their arguments as to why, it is preferable to comment on what administrative cases are. Administrative cases involve individuals challenging the legality of government or administrative agencies' action and behavior (Couso 2005:206), thus it is a form of judicial review often dubbed "administrative review" (Shapiro 2004:14). It is in this sense crucially different from constitutional judicial review, since administrative review is usually performed by the ordinary courts which are under scrutiny in this study. In administrative cases, it is normally citizens that challenge the specific procedural or substantive acts of local governments and bureaucracies (Shapiro 2004:15-16). Thus any administrative case will necessarily deal with the question of whether the government has observed the prescribed laws and rules in its interaction with private parties (Ginsburg 2008b:3).

According to Shapiro (2004), Moustafa (2007), and Ginsburg (2008a), whether authoritarian rulers will support independence in administrative cases depends on the size of an authoritarian regime's bureaucracy and the severity of the principal-agent problems related

to running this large bureaucracy. If the rulers (the principal) are running a large bureaucracy of which it struggles to obtain accurate information about, for instance whether local governments (the agents) are acting and behaving according to law, then the rulers will have strong incentives to support judicial independence over the scope of administrative cases. This is because independent administrative courts may help the central government in monitoring and controlling the bureaucracy and lower-level officials (Shapiro 2004:14-15, Moustafa 2007:25). Independent administrative courts therefore function as a third-party, legal mechanism for monitoring and supervising the subordinate agents of the authoritarian rulers (Ginsburg 2008:65). An administrative lawsuit by an aggravated citizen who complains and challenges the action of a bureaucratic agency hence creates an upward flow of information about the behavior and performance of the regime's local government officials (Moustafa 2007:27). Upon hearing this information, the central government learns that its local, subordinate government official is neither implementing the laws and policies of the legislator as prescribed, nor acting legally in its conduct with citizens²⁸. Furthermore, Moustafa (2007:26-30) argues that independent courts in administrative cases are particularly suited for authoritarian regimes because they give their citizens the opportunity to pursue legal recourse for governmental wrongdoings and hence provide some sense of justice for the citizens. This sense of justice can thus "relieve political pressures and perform a legitimizing function *without* opening up the political system" (Moustafa 2007:30, italics in original).

In important respects, having courts that are independent in administrative cases doesn't need be a challenge to the regime, nor does it need to be considered in opposition to the leadership. Independent administrative courts and judges may rather be an ally of the central leadership, helping them increase the efficiency and governing capability of the political regime (Shapiro 2004:14). These benefits that come by having independent courts in administrative cases thus explain why the willingness of authoritarian rulers to interfere in administrative cases should be low. They presumably have strong incentives to leave the

²⁸ Bureaucratic supervision through administrative review is hence a particular type of monitoring advice which McCubbins and Schwartz (1984:166) call "fire-alarm oversight", due to its relatively inactive and indirect nature. It is passive because it hinges on citizens' willingness and efforts to bring a case to court when they have experienced problems with administrative agencies. If no such case comes forward, the fire-alarm does not go off. This particular type of oversight hence stands in contrast to "police-patrol oversight" which is a more direct mechanism of agency oversight that is controlled and continuously employed by the central government through practices such as screening agency documents, field observations, and official hearings (McCubbins & Schwartz 1984:166).

courts alone because doing so is the best way to ensure that the courts are fulfilling their mission of controlling and monitoring local officials (Ginsburg & Moustafa 2008:13, Ginsburg 2008a). This in turn should facilitate a higher degree of judicial independence in administrative cases.

Nevertheless, while these factors may explain why the central authoritarian regime and its rulers should have strong incentives to create and support administrative courts, and subsequently not interfere in administrative cases, these theories do not have explicit hypotheses concerning interference from local politicians. If the incentives that should decrease the rulers' willingness to interfere in administrative cases are shared and internalized by local politicians, then we would hypothesize that most politicians have strong incentives to refrain from interfering with the courts in handling administrative cases. However, if local politicians do not share the same incentives as the central politicians, then it becomes crucial for the latter to decrease the capacity of local politicians to interfere. In such a situation, institutional judicial independence from local governments and politicians becomes a crucial intervening variable for the establishment of judicial independence over administrative cases. The establishment of institutional judicial independence therefore works to incapacitate local politicians from interfering, since it disables them from threatening the courts with possible sanctions, such as dismissal and salary reduction.

Indeed, the literature seems to suggest that the judiciary's structural and institutional insulation from local governments may be crucial for the establishment of judicial independence over the scope of administrative cases. Moustafa (2007:84) notes how the Egyptian regime reduced the capacity of local politicians to interfere in administrative cases by structurally and institutionally insulating the administrative courts through transferring the control over appointments, promotions, and other internal functions to the administrative courts themselves. Magaloni (2008:188-189) also indirectly stresses this aspect in her review of the amparo trials during the PRI rule in Mexico²⁹. In order to incapacitate local politicians and governments from interfering with the judiciary in its handling of amparo cases, only federal courts, which were tightly linked to the central leadership through a highly politicized Supreme Court, were allowed to hear such cases (Magaloni 2008:188-190). This degree of institutional judicial independence should thus work in a way that decreases the capacity of

²⁹ The amparo trial is a type of court case highly similar to administrative cases whereas citizens can challenge the state for violating his or her rights (Magaloni 2008:188).

non-central politicians to interfere, which in turn increases the degree of judicial independence over administrative cases.

3.2.4 Commercial Cases

In addition to focusing on the benefits that judicial independence over administrative cases may have for an authoritarian regime, strategic theories have also stressed the benefits an authoritarian regime may gain from supporting and respecting judicial independence over commercial cases. As noted, in this study, commercial cases are defined as a legal issue area that includes court cases between firms that are engaged in commerce, thus most commercial cases are contract cases between firms (Moustafa 2007:42, Root & May 2008:307-308, Silverstein 2008:82), a definition that is consistent with theories' stress on firm-to-firm interaction in the commercial arena (Moustafa 2007, Root & May 2008). When courts adjudicate commercial cases, they therefore function primarily as a third-party arbiter and enforcer of contractual rights (Clarke 2003a:90).

Moustafa's (2007) claim that authoritarian regimes may have strong incentives to support judicial independence in commercial cases is quite directly a transfer of North's (1990:35) insight; the provision of effective third-party arbiters in the economic arena and for firms engaged in economic activity, such as independent courts, is a crucial mechanism whereby governments facilitate economic growth and trade, attract investors, enhance economic predictability, and lay the foundation for a well-functioning modern economy. Moustafa's (2007) argument is that authoritarian regimes' desire to facilitate exactly these aspects may result in greater judicial independence over commercial cases, and the rulers' support for independent courts in the commercial arena. However, before we discuss this argument in greater detail, it is important to note that Moustafa's (2007) original argument about authoritarian regimes and judicial independence over commercial cases is broader than how it is applied here.

According to Moustafa (2007:23-25), authoritarian regimes' desire to facilitate economic growth, trade and investment, may result in two forms of independent courts. First it may result in an institutionally and actually independent Constitutional or Supreme Court that is empowered to review executive and legislative actions (Moustafa 2007:23). The

purpose of an independent constitutional court with judicial review powers it to function as an embodiment of the regime's credible commitment to respect property rights (Moustafa 2007:23). To assure investors and economic actors that the state will not intrude on their property rights and confiscate or nationalize property, the regime makes a credible commitment to this pledge by creating an independent constitutional court that serves as a constraint on the policy options that the rulers can pursue (Moustafa 2007:23, Knutsen & Fjelde 2013:95-96) Altogether, this should convince investors and economic actors that their property is secure vis-a-vis state encroachment, which in turn should spur economic performance by reducing economic uncertainty (Knutsen & Fjelde 2013:96).

However, the focus of this study is on the independence of the ordinary courts in their handling of commercial cases between firms, and another element of the theory also serves here as an important guideline. To facilitate trade and investment, economic actors not only need protection against property expropriation by the state, they also need independent courts that can effectively and impartially enforce contractual rights between firms (North 1990, Root & May 2008:307). Authoritarian regimes that seek to attract investments and facilitate trade may therefore do this by supporting the independence of the ordinary judiciary in its handling of commercial cases *between firms* (Moustafa 2007:24). An independent judiciary may therefore facilitate trade and investment, and spur economic growth, by efficiently adjudicating commercial cases between firms which work to protect the firms contractual rights and property rights vis-a-vis other firms (Moustafa 2007:23). Ginsburg (2008b:9) argues that authoritarian regimes who seek to participate in the global economy are under even more pressure to support and provide independent courts in the commercial arena. This is due to the increasing international competition for investors and capital, and the fact that capital does not only float into a state, but can also flow out. Investors may therefore take their capital out of a country if it is not protected by a proper and independent judiciary, or if they feel that their contractual rights are not predictably enforceable by an independent judiciary.

The above discussion hence suggests that authoritarian rulers, who seek to attract investment, facilitate trade, and spur economic growth, may have several strong economic incentives that should make them support independent courts in the commercial arena. This in turn should decrease their willingness to interfere with the courts in their handling of commercial cases. Similar to the discussion of administrative cases however, judicial independence in commercial cases can only be high if the economic incentives outlined above

are shared by both central and local politicians. If not, then the rulers must reduce local politicians' capacity to interfere with the courts, primarily through making sure that the courts are institutionally independent of these political subordinates.

3.3 Summary

Based on the existing literature on judicial independence in authoritarian regimes, I have created a tentative theoretical and analytical framework that will be used in my empirical analysis. The theoretical discussion has revealed the following propositions concerning the degree of judicial independence in authoritarian regimes that will be used as a point of departure: in criminal cases that deal with political opponents, the regime-related theory hypothesizes strong political interference. However, there may be less political interference in criminal cases that do not deal with the political opposition, due to politicians' lack of interest in these matters. In civil cases, the regime-related theory hypothesizes a relative high degree of independence, since these cases concern disputes between private individuals. Politicians in authoritarian regimes have low willingness to interfere in these cases as they do not want to be associated with the politicization of private disputes, and since it may carry legitimacy costs. In administrative cases, the strategic theory argues that authoritarian rulers, who face problems of monitoring the bureaucracy and its political subordinates, may have strong incentives that should make them support judicial independence in this legal issue area. In commercial cases, the strategic theory argues that authoritarian rulers, who seek to facilitate trade and investment and spur economic growth, may have strong incentives to support judicial independence over these matters. However, I noted that while the rulers may have incentives that should make them less willing to interfere with the courts in administrative and commercial cases, it is not clear whether this applies to local politicians as well. If the rulers and the local politicians share the same incentives and support for independent courts in administrative and commercial matters, then we would hypothesize that none of them would be willing to interfere. On the other hand, if local politicians harbor different incentives and are more willing to interfere in these cases, then it is crucial for the rulers to incapacitate local politicians from interfering. The rulers may ensure this by making the courts institutionally independent of local politicians, which may raise the costs and make it more difficult for local politicians to interfere and impose their preferences on the courts.

4. Methods and Data

The goal of this thesis is twofold; first, I want to examine the extent to which the Chinese judiciary is politically independent. Second, I want to identify and analyze the factors that may help us explain the observed degree of judicial independence. By placing my study within the wider literature on judicial independence in authoritarian regimes, and by highlighting that my focus is on a case whose regime type significantly differs from those regimes previously studied, this study is therefore close to what George and Bennett (2005:75) refer to as a heuristic case study. I focus on a deviant case in order to identify new variables and new explanations, which means that my research is of an exploratory form (Gerring 2007:106).

The first research goal of examining judicial independence requires a research design that pays attention to the complexity of the concept of judicial independence, and that allows for an accurate description of the phenomenon. The second research goal requires a research design that allows for a careful exploration and identification of variables and processes that may affect the phenomenon under study. I argue that both these considerations call for a qualitative case study approach. Hence I will start this chapter by describing my case study approach and justify my choice of this research method (section 4.1), and comment on my case selection (section 4.2). Following this, I turn to a description of the data and various data sources used, including a discussion of challenges related to fieldwork and the use of semi-structured interviews (section 4.3). The chapter ends with a more detailed description of the three main empirical indicators used to assess judicial independence, and a short discussion of how I will measure the degree of judicial independence (section 4.4).

4.1 Case Study

Gerring (2007:20) defines the case study as “the intensive study of a single case where the purpose of that study is – at least in part- to shed light on a larger class of cases (a population)”. This definition is quite similar to the first part of Yin’s (2009:18) definition of a

case study where he asserts that a case study is an in-depth investigation of a contemporary phenomenon in its real-life context. In the present study, the case or contemporary phenomenon under investigation is the judiciary in China and its independence from political actors and organs. King, Keohane and Verba (1994:34) note that case studies have an advantage in attaining precise descriptions of complex phenomena. This is particularly relevant to the first part of my research question, since it is centered on describing and assessing the dependent variable of judicial independence. While measuring or examining the degree of judicial independence may be considered highly descriptive, I will argue that it contains strong elements of exploration since any good measurement and description must also specify *how* political actors interfere with the judiciary, and *how* this compromises judicial independence. These are issues related to the complexity of the concept and our desire to identify and measure it correctly. George and Bennett (2005:19) note how case studies have an advantage in ensuring conceptual validity, which is an important justification for the choice of a case study here. This is especially relevant in studies of judicial independence in authoritarian regimes since the theories directly suggest that levels of judicial independence vary across legal issue areas. It is not clear whether this could be adequately addressed by quantitative measures. In addition, many quantitative measures of judicial independence are developed based on examination of Supreme Courts (See Ríos-Figueroa & Staton 2012), but this study is concerned with the ordinary judiciary which complicates quantitative measurements. In sum, compared to a quantitative approach, a qualitative case-study allows me to preserve the complexity of the phenomenon and the concept, and to study it as such (Yin 2009:4, George & Bennett 2005:19). Regarding data observations on the dependent variable, it should be noted that I restrict the temporal scope to be the last ten years. This is in order to ensure data quality and reliability.

The descriptive inference acquired through the first research question thus enables me to engage in explanations (King, Keohane & Verba 1994:34) which form the basis of my second research question which asks; *what factors can help us explain the observed degree of judicial independence?* This question is essentially about why things are as they are, and can only be answered after the first research goal is adequately achieved. Traditionally, ‘why’ questions are associated with the case study method and it ultimately involves an element of explanation (Yin 2009:9). Nevertheless, the main focus of the study and the second research question is the exploration and uncovering of new variables and explanations, and here the case study has a natural advantage (Gerring 2007:41). In this sense, the second research

question is primarily Y-centered (Gerring 2007:71), meaning I try to explain the dependent variable but have relatively few factors to consider other than those presented in the theory section. If they do not hold up, my research approach allows me to make a concrete effort to identify alternative factors in order to explain the phenomenon (George & Bennett 2005:20). Hence, the second research question is highly exploratory in its form. Some comments should however be made concerning the identification of variables and how they are causally related to the dependent variable of judicial independence. My approach to linking causes with the dependent variable is here done by using the form of process-tracing which George and Bennett (2005:211) call “more general explanations”, which pay attention to constructing general explanations rather than a detailed tracing of causal processes. This is done due to the scarcity of theory and data (See George & Bennett 2005:211). It also remains a fact that theories that try to explain why judicial independence is maintained are by nature challenging to ascertain, since they generally point to the incentives that underlie the behavior of political actors. The existence of a high degree of judicial independence is only possible because politicians do not interfere with judicial decision making (i.e. behavior), but the absence of political interference is not an explanation for why the degree of judicial independence is high (Elster 2007:28). Behavior must hence be explained by the motives that cause them, but this is a research challenge in the social sciences (Elster 2007:59-65). These challenges are not unique to the case study (Gerring 2007:70), but the qualitative case study approach adopted here should allow me to come closer in identifying certain hypotheses about politicians’ behavior vis-a-vis the judiciary, given its intensive and in-depth investigation procedures (Gerring 2007:48-49).

4.2 Case Selection

The case selected for study is the ordinary judiciary within the post-totalitarian regime of China. As noted, most previous research in comparative politics on the topic of judicial independence in authoritarian regimes has been focused on regimes that significantly differ from the one studied here. In relation to the general studies on the topic, I do consider my case to be deviant, and the anomaly of the case is the type of political regime in which it is found. Although I have constructed a theoretical framework based on previous research on judiciaries in different authoritarian regimes, I do not situate my case within the universe of

authoritarian regimes in general. Gerring (2007:84-85) states that it is vital for researchers to situate one's case in a broader universe of cases, and the broader universe of cases explicitly identified in this study are other post-totalitarian regimes. I make no attempt to empirically generalize my findings beyond the specific case studied, and the lack of the generalization potential, or external validity, is therefore a weakness in my study (George & Bennett 2005:22, Gerring 2007:43). Since these considerations are here made explicit, methodological issues of case selection, such as selection bias and selection on the dependent variable (King, Keohane & Verba 1994:129, Geddes 2003:89), should not constitute challenges to my study since I do not attempt to empirically generalize my findings beyond the case studied.

Nevertheless, since I have argued that I aim to make a contribution to the literature on judicial independence in authoritarian regimes through a focus on a post-totalitarian one, it is worth commenting on whether China *is* a post-totalitarian regime. As noted in section 2.1, I treat post-totalitarian regimes as a distinct type of authoritarian regimes which usually exhibit four specific traits. Apart from Linz (2000), Linz and Stepan (1996) other authors or typologies do not preserve a distinct category for either post-totalitarian regimes or communist one-party regimes for that matter. The only reason for this appears to be because there are few such regimes left in the world (Dimitrov 2009:2), but as argued, this is not an argument against the importance of keeping a separate category for post-totalitarian regimes in itself. The next question is thus whether China is a post-totalitarian regime as I conceive of these regimes (see section 2.1). I argue it is, based on the following arguments: first, there is only one legal political party in China; the CCP. Although there are eight other political parties in China (Saich 2011:213), they cannot take an independent position and are barred from operating as opposition parties (Lawrence & Martin 2013:33). Second, China remains a communist country (Gilley 2011:530), and it cannot be considered as having transitioned away from the communist or post-totalitarian phase as there has been an "official refusal both to emerge from communism and to implement a democratic transition" (Balme 2005:5). Third, political pluralism outside the CCP remains more or less absent. As Brødsgaard and Zheng (2006), Perry (2007), and Gilley (2011) all note, today's CCP has managed to incorporate all forms of political pluralism within the ruling party and the political elite.

Related to the marginal status of post-totalitarian regimes in comparative politics, other reasons have also led me to choose China as a case. As an empirical terrain, China is largely overlooked in comparative politics (Reny 2011), and so is the study of post-totalitarian regimes (Bunce 2013). An important reason for choosing China as a case is therefore to

contribute to filling an empirical gap in current comparative politics research (King, Keohane & Verba 1994, Geddes 2003). In addition, elements of curiosity and enthusiasm for both the phenomenon and the case have had an impact on case selection. Instead of considering this a weakness, I take part with Geddes (2003:29) and other scholars who see curiosity and enthusiasm as an important part of research (See Munck & Snyder 2007). Furthermore, practical reasons have also guided my case selection, since being situated at a research institution with expert knowledge on the case, including data and contacts for fieldwork, also played an important role³⁰.

4.3 Data

When it comes to collecting data needed to answer my research question, the aim has been to maximize data observations given the fact that both the topic and the case of this study is complex. The main and major source of evidence in my study have been semi-structured expert interviews which I will describe in detail below given their prominence as data sources in this study. However, a major advantage of the case study research method is its ability to use not only one, but multiple sources of evidence or data (Yin 2009:114). I have hence followed the advice of Yin (2009:101, 114-118) and used different sources of data as complementary pieces of evidence in order to increase the numbers of observations, and to strengthen data quality, construct/measurement validity, and reliability.

Following Andersen and Gamdrup (1994:63-74), I have used three sources of data: interviews, observations, and examination of documents. Before I introduce these different sources, I would however like to express a word of caution regarding data saturation in this study. It is a fact that studying the ordinary Chinese judiciary, which comprises several thousand courts across a vast area, presents data saturation challenges. In addition, secrecy remains a challenge when doing research on authoritarian regimes (Barros 2011). For these reasons, data saturation may never be completely reached in my study and this affects the generality of this study's findings.

³⁰ The China-programme at Norwegian Centre for Human Rights, Faculty of Law, University of Oslo.

4.3.1 *Expert Interviews and Fieldwork*

There are several reasons why I chose to do fieldwork and conduct interviews. First, as noted, empirical data on the Chinese judiciary is scarce, so more empirical knowledge is always needed (Lubman 2013:447-451). Second, doing interviews allowed me to acquire data that was targeted and spoke directly to my topic (Yin 2009:102). This was crucial as most prior research into Chinese courts is carried out from a legal perspective, while I wanted to probe the political perspective. Third, the interviews gave me invaluable insight and knowledge into the contextual factors surrounding the judiciary's independence from political actors, both as to why politicians interfere or not, as well as how they interfere. Information on the concrete circumstances, as well as the historical context and trends, was here necessary. The interviews allowed me to corroborate certain facts (Yin 2009:107), and they were furthermore critical in sorting out interpretations and explanations of the observed facts (See Richards 1996:200).

When interviews are used as a source of data, it is crucial that the interviews are suited to the research task and that the respondents, in this case the experts, are appropriately selected on the basis of their knowledge (Bogner & Menz 2009:72). Who the experts are is defined by the researcher (Littig 2009:100) and in the social sciences, the experts are normally individuals who possess specific contextual knowledge concerning the phenomenon under scrutiny, and those who possess specific internal knowledge about the organization you are studying (Littig 2009:100). For my research purposes, experts are those who have concrete and specific knowledge about the Chinese judiciary and its decision-making, including knowledge about how political actors and organs interact with and affect this decision-making. There have been two expert groups which I have wanted to select and recruit respondents from: first, individuals who have practical experiences from working *in* and *with* the judiciary. This means interviewing people who work, or have worked, as judges or lawyers. Furthermore, they should have experience with different types of cases; criminal, civil, administrative, and commercial. Recruiting both judges and lawyers mean that different viewpoints are gathered, in contrast to if only judges were interviewed. Second, I have also wanted to recruit individuals who work *around* the judiciary, meaning scholars and organization representatives who research or work closely with the Chinese judiciary. Among the latter group of respondents, many of these had themselves researched and interviewed

judges and lawyers on earlier occasions, which meant that they could share with me their experiences and knowledge from this work. This was crucial to me since time and resource limitations meant that I had to try and recruit respondents with many different types of knowledge. That is, the sampling procedures reflect not only relevance to the research question, but also certain practical considerations. Finally, I wanted to recruit respondents who were based not only in Mainland China, but also Hong Kong. This is because academics that are located in Hong Kong generally enjoy greater academic freedom and thus may feel freer to share their knowledge and thoughts with me.

My clear preferences for who I wanted to talk to imply that the sampling procedures for this study are largely strategic and theoretical, meaning that the respondents are recruited due to their perceived relevance to the research question and theoretical considerations (Littig 2009:104). While this is true, the recruitment process involved snowball sampling due to access problems (Littig 2009:104). After all, recruiting interview respondents is a sampling issue (Goldstein 2002:669). In order to get access to both groups, I followed a two-track approach prior to the fieldwork. The first approach was to contact certain academics and NGOs directly by e-mail and request an interview. Through this procedure I was able to set up some interviews independently before leaving for fieldwork. The second approach, which I mainly relied on, was to use certain key individuals as entry-points before heading to the field. Being located at the NCHR, the institution had research visits from Chinese scholars and they offered to help me in recruiting respondents for my fieldwork. In the end, I was able to secure 19 interviews with 25 persons. One interview was attended by two persons, while another interview took the form of a group discussion with six participants. Among the 25 persons I talked to, five persons had experiences as judges and five persons had experiences as lawyers. Several of these respondents did not occupy the respective positions at the time of the interview, but had quit over the recent years and pursued other careers. Thus it is a weakness of my sample that not many did work as judges or lawyers at the time of my fieldwork, but this is to some extent alleviated by the fact that the temporal scope of my dependent variable is the last ten years. It was difficult to recruit current judges, and a couple of interviews initially set up with judges were cancelled by themselves shortly prior to the confirmed time or date. Nevertheless, the people whom I was able to recruit and that had worked either as a judge or lawyer had experiences with most of the four types of legal issue areas that I address

in this study³¹. Of the respondents interviewed, many occupied, or had occupied, different positions. For this reason, my sample of respondents has background as: judges, lawyers, academics, NGO representatives, government officials, and government consultants. The background of the respondents, place, and date of the interviews is provided in the table below.

³¹ The only exception is the fact that I was not able to talk to a judge who had handled criminal cases. I was told by other respondents that securing interviews with judges who handle criminal cases is notoriously difficult.

Table 1: Interviews Conducted During Fieldwork

Respondent Number	Position	Place	Date	Nationality
1	Legal scholar, former civil case judge in a high court	Guangzhou	06.01	Chinese
2.0	Six legal scholars, two former civil case judges	Guangzhou	07.01	Chinese
2.1				
2.2				
2.3				
2.4				
2.5				
3	Administrative case judge	Guangzhou	08.01	Chinese
4	Professor in law	Guangzhou	09.01	Chinese
5	NGO representative	Beijing	14.01	American
6.0	Two NGO representatives, one a former commercial case judge	Beijing	17.01	Chinese
6.1				
7	Professor in political science	Beijing	17.01	American
8	Legal scholar	Beijing	17.01	Chinese
9	Associate professor in law	Beijing	18.01	German
10	Lawyer	Guangzhou	21.01	Chinese
11	Associate professor in law	Guangzhou	22.01	Chinese
12	Professor in law, government consultant, and former lawyer of civil and administrative cases	Guangzhou	24.01	Chinese
13	Professor in law	Hong Kong	27.01	Italian
14	Associate professor in law	Hong Kong	27.01	Finnish
15	Professor in law and government consultant	Hong Kong	28.01	Chinese
16	NGO representative	Hong Kong	28.01	Chinese
17	Professor in law and government consultant	Hong Kong	29.01	American
18	Professor in law, former lawyer and government official	Hong Kong	29.01	Chinese
19	Criminal defense lawyer	Skype	12.03	Chinese

Regarding the representativeness of my sample of respondents, most of the people who worked or had worked as judges and lawyers had mainly done so in larger cities, although some of them had worked in different localities. Hence it is probable that the

knowledge I obtained mainly comes from the respondents' knowledge of the courts in larger cities. My sample is also to some extent heavy reliant on academics, but only 12 of the respondents were purely scholars, as most respondents would have a mixed background and experiences. Another issue is variation among the respondents' point of view. Since I relied on snowball sampling to a great extent there is a danger that the people I talked to largely share the same viewpoints, as people would suggest me to talk to people whom they know share the "correct" view (Tansey 2007:770). Although I thought this could be an issue, it was my experience that the people I talked to exhibit a very wide variety of and viewpoints and different types of knowledge (See Bogner & Menz 2009:52-53).

The interviews took the form of informed conversations revolving around certain common themes and topics, which meant that a semi-structured interview approach with open-ended question was used (Aberbach & Rockman 2002:674). The interview guides and structure of the interviews were reviewed prior to the fieldwork through consulting with Chinese guest researchers at NCHR where I tried out questions in the form of pilot interviews. A useful experience from these conversations was that I learnt that I needed to introduce myself as having a fair amount of knowledge about the research subject in order to avoid tedious answers. As Richards (1996:202) notes, the more professional and well-informed you appear to the respondent, the greater the chances for a useful and well-conducted interview. This approach may of course have an impact on the interview situation, and specifically how I was perceived by the respondent (Bogner & Menz 2009). As an interviewer, I felt more often than not that I was assessed as an "accomplice" whom shared a normative orientation with the respondent (Bogner & Menz 2009:67). Although this was beneficial in the sense that I gained a lot of information, I was not overly enthusiastic about this fact, but I refrained from questioning this underlying assumption as I was afraid it would ruin my relationship with the respondents (Bogner & Menz 2009:67).

In the field I would use different interview guides depending on the respondent, thus flexibility was important. It would be a waste of opportunity if I did not tailor certain questions to the specific experience of my respondents (Richards 1996:202). For instance I would prepare different types of question if the person I was interviewing worked as a judge or a lawyer, compared to when I was interviewing a scholar. Thus there was a somehow clear difference between interview guides used for people working with the judiciary (judges and lawyers) compared to those people working around the judiciary (scholars and NGOs). Since my interviews were semi-structured, I exploited the somehow structured form by asking all

respondents about certain similar topics. The comparability between the interviews are therefore based on the similarity of the topics covered, not because the questions were asked in the direct same way or in the same specific order. When interviewing academics I would pay attention to becoming familiar with their work prior to the interview, allowing me to probe for the underlying logic of their arguments by asking “why they think what they think” (Aberbach & Rockman 2002:674). Moreover, feedback and answers retrieved from the interviews were often used in later interviews (Richards 1996:203). I hence found it useful to use information and citations obtained in some interviews as a basis for later topical conversations, if only because these citations spoke more directly to the heart of the matter than how I had previously formulated the initial question. Thus the interview guide was also modified during fieldwork.

Two other key concerns of the interviews must be addressed; language and recording. When interviews were conducted solely in Chinese, a Chinese professor in law would accompany me and help translate parts of the conversations which I did not understand. Although using an interpreter may bring problems in terms of validity and reliability (Filep 2009), his knowledge of both languages and the topic ensured me that this problem was not severe. Other interviews were conducted in English. When it comes to the recording of the interviews, I was warned by other researchers that requesting to use a tape-recorder would be met with skepticism since respondents would fear it could be used against them. For this reason, I decided not to use a tape recorder in my interviews but instead took detailed notes during the interviews. The notes were immediately transcribed on to my computer following the interviews and are available upon request. The issue of interview recording and protecting the identity of respondents is related to research ethics and how I as a researcher protect the respondents as human subjects in my study (Yin 2009:73). I now proceed to a discussion of such ethical considerations.

The first real interview I conducted was with a Chinese academic and former judge. Prior to the interview I had gained his approval for participating in my research and I had informed him about myself, my affiliations, and my research topic. When I met him I did not even get the opportunity to introduce myself properly before he raised his concerns about the protection of his identity, and how important it was that our meeting was confidential. He emphasized that it was not only his personal security that could be at stake, but also his family’s security. This was a stark reminder about the sensitivity of the topic and the importance of protecting my respondents’ identities. For this reason I have worked from the

understanding that the respondents in my research are “especially vulnerable groups” (Yin 2009:73), as it is not only their personal integrity that is at stake, but also their personal safety (Gentile 2013:427). All respondents are henceforth anonymized. When conducting the interviews, I would start each session with explaining the purpose of the study, and I received informed consent from all my respondents and I assured them I would keep their identity anonymous. I also stressed the fact that I was aware of the sensitivity of the topic, and I felt it was important to communicate to them that I was well aware of these issues, and that I knew there were important contextual differences between doing research in China compared to Norway. The respondents agreed to letting me publish their positions and working experience, but only in very general terms, such as academic, NGO representative, or lawyer. Their workplaces are therefore not published, and I have only noted the city and date for when the interviews were conducted. I have followed the guidelines of Norwegian Social Science Data Services (NSD) on how to anonymize the identity of respondents³². As mentioned, none of the interviews were tape-recorded; instead I took notes with pen and paper and transcribed these notes onto my laptop immediately following the interviews. The notes on my laptop are considered electronic data and I have therefore been very conscious so as not to include any names or information about the respondents in these notes. The only background information about the interviews that appear in the electronic data is the date of the interview and their general background and professional position. It should therefore be impossible to acquire the respondents’ identity from a reading of these notes.

That being said, I never felt completely assured that my fieldwork and accompanying interviews were sealed off from external scrutiny and surveillance. I have however worked from the understanding that the greatest risk is being unaware of the risks (Gentile 2013:432). In two of the interviews I conducted, I was told that the respondents might be under surveillance by the Chinese authorities due to his and hers involvement in politically sensitive court cases. Those interviews were therefore conducted in public places. I explicitly told each and every respondent that they were free to choose time and place, as this was not only a matter of being practical and accommodating, but was also related to issues of confidentiality and anonymity. Realizing that electronic information monitoring is pervasive in authoritarian regimes (Gentile 2013:429), and China particularly, I always used the University of Bergen’s VPN service if I had to communicate with respondents via e-mail during fieldwork. This was

³² For this reason my research does not need the permission of NSD and I have therefore not applied for it.

done as a precautionary measure against potential information monitoring and to protect the identity of my respondents³³.

4.3.2 Complementary Data Sources: Documents and Observations

The evidence obtained from the interviews has been corroborated by data derived from other sources. Of immediate connection to the fieldwork are *observations* which either have provided me with direct evidence, some of which is used in the analysis, or for the most part “contextual information” (Yin 2009:102) through observation of court buildings and propaganda posters in various places. The majority of other data are however documents, which Yin (2009:101-104) argues are relevant to any case study topic, both prior to and during fieldwork. A wide number of documents are here used, including administrative documents, academic studies and articles in the media. In terms of *administrative documents*, I have used various official documents published by the Chinese Supreme People’s Court, including judicial opinions and work reports. These documents include useful statistics on courts cases, and although the accuracy of these official documents is questionable, it is acknowledged that they reflect general trends (Clarke 2003b, Liebman 2007).

When it comes to previous *academic studies*, such as journal articles and books dealing with the Chinese judiciary, I have used a number of these as corroborating evidence. While most of these studies are either atheoretical or conducted from a legal perspective, George and Bennett (2005:68) note that such case studies may be useful as data points in case studies that aspire to theory development. As far as I know, most prior English-language empirical research on Chinese courts has been reviewed³⁴. These studies have either appeared in academic journals, in books, or as yet unpublished articles on the webpage of the Social Science Research Network (SSRN). I have also reviewed Chinese journals and newspapers that publish articles and opinion pieces on the subject of the Chinese judiciary. In terms of my research, they were critical in gaining insight into the Chinese domestic debate on the issue which I am researching, and they were very useful as a way of augmenting the potential

³³ Using this service has the advantage that it gives my computer an IP address from the University of Bergen, located in Norway, which means that my computer, while connected to the Chinese Internet, cannot be traced back to a place and location in China.

³⁴ Even though these works are written in English, most scholars are Chinese which publish in English-language journals, including journals from both China and the US.

selection bias of mainly relying on English literature as well as my own potential research bias. Some of these articles were suggested by people that I interviewed and the rest of the articles I retrieved myself. It is important to note that the purpose of reviewing these articles was not to further induce selection bias; it was to uncover the variety of Chinese academics' viewpoints on these issues, and this served the purpose of teaching me whether or not the questions and topics I was addressing were also relevant to the people and case I am actually researching³⁵. In many instances, the data gained from reading these articles were useful for preparing questions for my expert interviews.

In addition to previous academic studies, other documents used as data include articles in the media. While most media articles were retrieved from the Internet, I have also used this platform to gain other data. Throughout the research period, I have subscribed to certain online discussion list, such as the Chinalaw list (chinalawlist.org)³⁶, and I have subscribed to certain key topics and search words in various online search databases in order to keep me up to date on the subject of interest. In most cases, these data points are only used as observations, but in some cases I have used them directly in the study as data documents. Even though the reliability of these documents may be questioned, I argue that overlooking or ignoring them as potentially useful observations is a mistake greater than at least trying to observe and assess their usefulness. Yin (2009:103) also contends that observations and documents online, even if biased, should be reviewed and may prove themselves useful. In any case, I have been both conscious and critical towards other sources and myself when reviewing and interpreting all data observations.

³⁵ O'Brien (2006) has noted the low fruitfulness of researching topics and asking questions that the researcher is interested in, but have no immediate relevance for the subjects you are studying and interviewing. This is a critique which is related to one of the primary goals of research, namely the real-world importance of research topics (King, Keohane & Verba 1994:17). It is my understanding that the topics and questions I am researching were of great interest to the subjects I interviewed and the general domestic debate in China.

³⁶ Chinalaw is an electronic discussion group that is devoted to issues of modern Chinese law. The discussion group is run by Professor Donald Clarke at the George Washington University Law School.

4.4 Judicial Independence: Conceptual Issues

Seeing that the first part of my study aims to examine the degree of the judiciary's independence from political actors and organs, this inevitably involves measuring judicial independence. As outlined in the background chapter, my conceptualization of the concept means a focus on judges' ability to decide cases on the basis of the law and the facts of the case, without undue interference and pressure from political actors. In executing such a research task, it is crucial to ensure measurement validity, which refers to the extent the researcher is able to operationalize and score observations in a way that reflects the concept (Adcock & Collier 2001:529). As noted in section 4.1, case study research has a natural advantage in ensuring conceptual validity (George & Bennett 2005:19-20), and I will here note challenges related to measuring judicial independence and outline my approach.

The first challenge I would like to note is conceptual stretching. Since post-totalitarian regimes are in many ways deviant from both democratic and other authoritarian regimes, this may increase the chances of conceptual stretching (Sartori 1970). This phenomenon occurs when concepts used in one context are transferred to another context, which they are not originally intended for, and in this process the concept loses its analytical content, precision, and usefulness. It might seem that judicial independence is a concept or variable not fit for an authoritarian context, but this seems not to be the case as studies of judiciaries in authoritarian regimes frequently use the judicial independence variable and it has a history in comparative politics. The problem for the current study, as noted in background chapter, is the lack of institutional judicial independence in a post-totalitarian context, and some may therefore argue that it is inappropriate to speak of, or research, actual judicial independence in China. Stephen (1985:531) for instance, argues that one cannot speak of judicial independence in political regimes that practice a communist model of government. I realize the dangers of conceptual stretching involved in the current study, and to the extent that I consider this a research obstacle I will report and comment on this in both the analysis chapter and concluding chapter as an exercise in "reporting uncertainty" (King, Keohane & Verba 1994:31-32).

The lack of institutional judicial independence also points towards measurement challenges of judicial independence. In some situations, a judge's ability to decide a case independently may be impaired through subtle political control mechanisms which are hard to

observe. Judges are always connected to government branches in some way or another, and interference may flow from these connections (Russel & O'Brien 2001:20-21). It is highly imaginable that a judge, who does not have tenure and that may easily be dismissed by the government, will sometimes decide a case in a way that disrespects the law and facts of the case in order to keep his or her job (Russel & O'Brien 2001:15). These are in other words "structural sources of political bias" (Gloppen 2014:71), stemming from politicians' control over appointment, tenure, and finances of judges. Such political bias may be very real, but is difficult to observe, especially in authoritarian regimes where such biases are arguably more prevalent than in democratic regimes. To overcome these challenges I restrict my focus here to more direct and observable ways of political interference (Russel & O'Brien 2001:20-22). I follow the suggestion of Kapiszewski and Taylor (2008:749-750) who urge scholars to think about potential empirical indicators that say something about how pressure by government branches is exerted upon judges. I have hence created three empirical indicators based on a reading of the empirical literature on judicial independence generally, and on judiciaries in post-totalitarian, communist, and post-communist regimes (Garlicki 2004, Solomon 2004, 2008, Magalhães, Guarnieri & Kaminis 2006, Peerenboom 2010, Nußberger 2012, Popova 2012). The indicators are presented in the sections below.

Direct Case Interference

Direct case interference is often described in the terms of "telephone justice" or "telephone law" (Popova 2012:131). This type of political interference occurs as politicians communicate to judges how a particular case should be decided, whether it is done through a phone call, a meeting between a judge and a politician, or a note sent to the judge by a political actor. Ledeneva (2008:326) defines telephone justice as "the practice of making an informal command, request, or signal in order to influence formal procedures or decision-making". Direct case interference usually involves substituting the law and the facts for the preference of one or a few political actors. The consequence of this is that the ability of the judge to decide the case according to law and facts, is more or less replaced by the preferences of political actors. In other words, there is no place for independent judicial behavior.

Ex-Parte Communication

Not very different from direct case interference is *ex parte* communication, the practice whereas judges discuss the case with litigants or other parties with an interest in the case outside the courtroom and prior to decision-making (Popova 2012:129). In this study, we are interested in the extent to which the judges discuss cases with political actors. *Ex parte* communication need not be very different from direct case interference, since they both entail that the case is increasingly decided outside the courtroom and with potentially less place for the law and facts of the specific case. The difference between direct case interference and *ex parte* communication seems to be twofold (Popova 2012:129-133); first, it is often the judge himself who initiates the communication and approaches political actors after having received a case. Second, there may potentially be a greater element of bargaining and compromise between judges and political actors in this practice. Since there is an element of discussion and compromise involved in *ex parte* communication, it may be that this type of political interference entails a greater place for the law and the facts in the decision-making process.

Policy Interference

Policy interference occurs as the ruling party or government issues temporary policies that are distributed to courts and that tell them how to decide specific cases. Policy interference seems to be a particularly common form of interference in communist regimes (Cohen 1969, Grimheden 2004, Solomon 2007, 2008) and usually means that a temporary Communist Party or government policy takes precedence over law in specific cases. It is important to emphasize that it is Party policy *outside law* (Solomon 2008:268), and Howson (2010a:374) has defined policy interference as “deference by the courts to national social or economic policy and in contravention of what the law commands or permits”. Thus we can clearly see how policy interference compromises judges’ ability to decide cases according to law and facts. The most common example in the literature is temporary Communist Party policies and campaigns dealing with criminal cases (Solomon 1996, Teng 2013). Here, judges are told to decide cases in a way that conforms to the Party’s current crackdown on crime, and to disregard the criminal law.

The literature suggests that Party policy is often pushed internally in the court system, where the high court receives orders from the government or the Party to ensure that lower courts rule according to the Party policy of the day. Thus the tight integration between the top echelons of the Party and the high court enables the latter to function as a transmission belt for pushing Party policy downwards in the court hierarchy (Peerenboom 2002, Solomon 2007, Popova 2012)³⁷. The measurement challenge of this kind of interference is of course that we may not know whether the interference is internal or external. However, I argue that this measurement problem can be overcome by analyzing whether there is congruence between the Party or government's temporary policies and the high court's internal documents and policies.

Final Notes on Examining Judicial independence

This study will measure the degree of judicial independence through an examination of the judiciary's handling of cases across four different legal issue areas. The degree of independence is measured within each category by looking for the kind of political interference identified above; direct case interference, ex parte communication, and policy interference. While judicial independence may be hard to identify, I follow the advice of Larkins (1996:618) who urges scholars to measure judicial independence by looking for evidence of *dependence*. In other words, the absence of these empirical indicators indicates judicial independence, while the presence and identification of one or more of these indicators indicate judicial dependence. The degree of judicial independence is in the last instance a function of the frequency and pervasiveness that the data observations reflect and report instances of interference.

That being said, direct case-interference and ex-parte communication is much less observable to the researcher compared to policy interference, as the latter type of interference can often be verified by tracing public documents. Identification of direct case interference and ex-parte communication is therefore highly dependent on the subjective evaluations of my respondents, including the extent to which other documents report the same findings. Whenever the data suggests political interference, I therefore try to verify this by considering

³⁷ The practice of which the political leadership controls the high court and then uses this control to require the high court to impose political requirements internally and downward to lower courts is noted in non-communist authoritarian regimes as well. See Magaloni (2008) on Mexico during the PRI-rule.

how that interference occurs, including the probability of this type of interference being exercised. In addition to looking for evidence of the three modes of interference described above, I push the measurement exercise one step further by considering *plausible implications* of the degree of independence identified. This is done through a “careful interpretative exercise” (Larkins 1996:618) of various other data sources, such as statistics on case outcomes, respondent answers, court user surveys, media articles, and other relevant information. In sum, my measurement of judicial independence follows the suggestions of Larkins (1996), Rios-Figueroa (2006), and Kapizewski and Taylor (2008), by exploiting data-triangulation in order to be able to highlight both instances and possible observable consequences of judicial independence and judicial dependence.

5. Empirical Analysis: Judicial Independence in China

This chapter presents my findings and analysis and is structured into four sections according to legal issue area; criminal cases (5.1), civil cases (5.2), administrative cases (5.3), and commercial cases (5.4). Each section is structured in the same way; I begin with a short description of the types of cases that fall under the particular legal issue area. I then turn to an examination of the judiciary's independence in these cases, and I end each section with a discussion of explanatory factors.

5.1 Criminal Cases

Courts in China have often been synonymous with criminal courts (Fu 2010a:2), and it has been argued that “criminal law is the necessary legal background to understanding Chinese courts as a whole” (Kinkel & Hurst 2011:470). The number of criminal cases heard by the Chinese court has been continuously rising over the last decades, and in 2013 the judiciary heard around 1 million criminal cases (SPC 2014). This section proceeds with an examination of the degree of judicial independence over criminal cases and ends with a discussion of explanations. As briefly suggested in the theory section, there may be a certain dualism in criminal cases, where political criminal cases³⁸ are typologically different from non-political, or ordinary criminal cases. This divide is supported by my findings and it is therefore justified to discuss political and ordinary criminal cases separately.

5.1.1 Judicial Independence in Political Criminal Cases

Before I turn to an examination of the judiciary's degree of independence in political criminal cases, it is imperative to note what is meant by a political criminal case, and this paragraph will therefore be devoted to this. In order to delineate what constitutes a political criminal case, it is worth reviewing Fu's (2010b) identification of the types of terrorist threats that the Chinese regime faces. Fu (2010b:4) argues that the Chinese regime faces two types of terrorist

³⁸ I shall here use the term ‘political criminal cases’ for these cases, and ‘ordinary criminal cases’ for the type of criminal cases not falling within the first category.

threats; boundary threats and regime threats. Boundary threats are criminal actions performed by separatist movements who aim to challenge the national boundaries of the PRC. Regime threats are criminal actions performed by individuals and groups that seek to challenge and change the existing political regime of the CCP. In line with this, the respondents I talked to who had intimate knowledge about this element of the Chinese criminal courts, would identify criminal cases that involve individuals seeking to challenge the national boundaries of the PRC or the political regime of the CCP as clear examples of political criminal cases. Respondent 13 pointed out that political criminal cases were generally: 1) criminal cases involving democracy activists or individuals with direct criticism against the CCP and its form of political rule, 2) religious groups and 3) ethnic separatists. Similarly, respondent 19, who had himself been a defense lawyer in several political criminal cases, stated that a criminal case would be perceived as political if it was related to Tibet, Xinjiang, Falun Gong, and political and democracy activists who advocate human rights³⁹. The criminal cases identified as ‘political’ by respondent 13 and 19 therefore fit squarely into the two terrorist threat categories suggested by Fu (2010b). Boundary threats relate to criminal cases that involve ethnic separatists (Tibet and Xinjiang), and regime threats relate to criminal cases that involve political and democracy activists, as well as anti-regime religious groups (Falun Gong). In addition, several respondents would add criminal cases involving government or Party officials, or persons with direct family connections to government or Party officials, to the category of political criminal cases⁴⁰ (respondents 5, 6, and 13). Most criminal cases which directly or indirectly deal with members of the CCP will inevitably be considered political since they may first of all be the result of a Party-internal struggle (Tiffert 2012,

³⁹ Tibet and Xinjiang are two Chinese provinces that often see ethnic tensions and violence. Their sensitive nature comes from the fact that the provinces house a number of ethnic groups that advocate independence from the PRC. As Saich (2011:183) notes; “the only provinces where a breakaway might be a reality are Tibet and Xinjiang”. Falun Gong on the other hand is a Buddhism-inspired religious group that is considered a political enemy of the CCP and the PRC by the Chinese political leadership. The regime has cracked down on Falun Gong practitioners since 1999. At the time, Party secretary of the CCP and president of China, Jiang Zemin, described the struggle against Falun Gong as “a political battle in which either the Party or the sect would survive” (Peerenboom 2002:99).

⁴⁰ However, investigation of Party members, and thus also government officials since they are more often than not Party members, is usually done outside the ordinary criminal system by the CCP’s own disciplinary system, the ‘disciplinary inspection committee’ (Fu 2013a:393-400). After such Party-internal investigations, the criminal case may be transferred to an ordinary court for trial and judgment. The criminal case against former high-ranking CCP-politician, Bo Xilai, was for instance handled in this way (Tiffert 2012).

Teng 2014). Furthermore, they may also be considered political because the CCP puts a lot of effort into ensuring that its external image is good; either by showing the public that Party officials are generally law-abiding, or by showing that the Party is not afraid to punish those officials that are not law-abiding (Hansen & Thøgersen 2008:85).

When interviewing respondent 19, whom as noted had been a criminal defense lawyer in a number of political criminal cases, I asked him who he thought would decide the cases he had handled:

“In the cases I have handled, it is obvious that the judges cannot decide for themselves. Political authorities prepare and have the verdict and a detailed sentence ready before the trial. For example in the Falun Gong cases that I handled, these cases would be decided by the 610 Office. In other sensitive cases, they are usually decided by the CCP’s political-legal committee” (respondent 19)⁴¹.

The answer given by respondent 19 regarding the judiciary’s independence in political criminal cases corresponds with most other respondents’ opinions on if and how political authorities interfere in such criminal cases. They suggested direct case interference, and it is usually the Party’s political-legal committee (PLC) that interferes and decides the case before their decisions and instructions are given to the presiding judge (respondents 4, 5, 6, 9, 11, 12, 13, and 16). It is thus politicians who decide the cases, not judges. According to respondent 19, whether political criminal cases would be decided by a more local PLC (provincial, prefecture, and county) or central PLC, was a function of the perceived sensitivity of the case. This implies that there is effective communication between PLCs at different administrative levels, and it was suggested that in political criminal cases that are seen as grave threats against the political supremacy of the CCP, high-ranking political leaders may get personally involved (respondent 6 and 16). In other words, central political organs may also directly interfere in these criminal cases, not only local PLCs.

Direct-case interference by the CCP through the PLC is arguably unsurprising, both in theory and in reality, as the decision to prosecute these individuals is in the first place often supported and controlled by the Party and the government (respondent 13, Tiffert 2012).

⁴¹ The 610 Office is a CCP agency that was established in order to carry out the suppression of the Falun Gong movement. It has the authority to coordinate with both local and central Party and state agencies (Tong 2002:805). According to respondent 19, the 610 Office is only involved in deciding criminal cases that involve Falun Gong practitioners or other religious groups as defendants.

Other scholars have also pinpointed to the PLC as the main political organ that directly interferes in political criminal cases (Peerenboom 2010, McConville et al. 2011), but it is nevertheless a kind of interference that is hard to observe, and even harder to verify. Thus I can only rely on previous research and the answers given by my respondents as confirming empirical evidence. This observational challenge was reiterated by some respondents, stating that; *“since the government at least tries to maintain some appearance of judicial independence, there are strong efforts to keep instructions to judges secret”* (respondent 9). Some suggested that these trials were video-recorded and attended by pre-approved individuals that looked like officials (respondent 9, 19), but concluded that *“those who decide the case will not appear in the trial”* (respondent 19). It is generally also the fact that certain trials of political criminal cases are closed off to the public through creative means⁴².

Commenting on how the interference by the CCP and the PLC was exercised, the respondents' answers present us with two scenarios. One scenario, suggested by respondent 19, was that the outcome of the case would be decided by the PLC before the case was allowed to proceed to trial. Another scenario, envisioned by respondents 6 and 9, was that the outcome of the case would be decided by the PLC after the trial hearings, but prior to the judgment. It was suggested that the decision to withhold the verdict was because *“there is a need to think more thoroughly about the outcome and the process, and they need to take different things into consideration”* (respondent 9). It is likely that the political authorities feel it is necessary to take into consideration both media coverage and public sentiment, and that the outcome should perhaps reflect these considerations. Respondent 6.1 made the same remark based on her close observation and involvement in the criminal trial of Li Tianyi⁴³ that had been concluded in a Beijing court just prior to my fieldwork; *“In the Li Tianyi case, which has recently been ongoing in the Haidian court here in Beijing, everyone has been involved, government organs, the PLC. Together these organs decide on a verdict that will ensure the best social stability effects”*.

⁴² For example, it seems common to choose a very small courtroom for trials of political criminal cases. In the Liu Xiaobo case, diplomats were denied attending the trial because “all passes to the public had already been given out” (American Embassy Beijing 2009a).

⁴³ Li Tianyi is the son of Li Shuangjiang, a high-ranking military general in the CCP's People's Liberation Army. He was convicted of rape and sentenced to ten years in prison (BBC 2013). As respondent 6 made clear “actually it is not a sensitive case at all, it is a straightforward rape case, but since he has connections to the government and the Party it becomes politically sensitive”.

Any ability of judges to decide these cases independent of political pressure and in accordance with law is arguably more or less completely compromised. Most respondents took this as a matter of fact (4, 5, 6, 9, 12, 13, 15, 17 and 19):

“When you as a judge are faced with this kind of case, even if you would like to decide the case impartially, you simply cannot” (respondent 6.2)

“I have had lawyers telling me that after a sensitive criminal case has been heard in court, and the lawyers have put on a big show, the judges have come over to the lawyers and told them they did a good job, but just reminded them that it is impossible for them to issue a fair verdict. The judges should not be saying this, but sometimes they are” (respondent 9)

“These types of sensitive criminal cases have always been there, they have always been sensitive, and there will always be Party interference” (respondent 4)

As the last quote from respondent 4 suggests, political interference in political criminal cases is not something that appears to have lessened over the years. In addition, a number of respondents stressed the fact that the PLC, the main organ who usually stays in control of these cases, had grown politically stronger over the last decade thus further limiting the possibility of independence in political criminal cases (respondent 4, 6, and 19, see also Minzner and Wang 2013, and Liebman 2014). Nevertheless, some respondents were quick to note that there was an immense pressure on judges hearing these cases (respondent 6, 12, 13, 15), and it is likely that the presiding judges are financially and politically compensated after the case is closed (Fu 2003:196, McConville et al. 2011:406)⁴⁴. These findings suggest that the degree of judicial independence in political criminal cases is markedly low or non-existent due to the heavy direct case interference by Party organs, and particularly the PLC.

⁴⁴ A recently published news article in the Chinese media confirms that the presiding judge, who handled the criminal case against former high-ranking CCP politician Bo Xilai, was promoted to the SPC following the closing of the case (Sohu 2014). This is a substantial promotion considering the fact that he was a judge in an Intermediate People's Court, not a Higher People's Court.

5.1.2 Judicial Independence in Ordinary Criminal Cases

Scholars have suggested that the majority of criminal cases in China are not what we may define as ‘political’, but rather ‘ordinary’ or ‘routine’ criminal cases (Fu 2010a:4, Fu & Peerenboom 2010:123). Statistically, it has become difficult to verify this because criminal provisions used in political criminal cases now vary substantially, whereas earlier most political criminal cases would be tried using the criminal provision of “counter-revolutionary crimes”, later re-labelled “crimes of endangering national security” (Saich 2011:166). Nevertheless, statistics on types of criminal cases show that the majority of criminal cases concern ‘crimes of property violation’ and ‘crimes of infringing upon citizens’ rights of person and democratic rights’ (Fu 2010a:17), which are generally theft, interpersonal violence and crimes against public order (Fu 2010a:4). Notwithstanding the difficulty of separating between ordinary and political criminal cases, this chapter proceeds with an analysis of ordinary criminal cases, which are generally criminal cases not covered in the section above. While direct case interference by the PLC seems to be the norm in political criminal cases, this is not true for ordinary criminal cases. Several respondents noted that 30 years ago, the PLC would directly interfere in almost every criminal case regardless of its political nature, but that this had changed now, and the PLC’s direct case interference was more or less limited to the types of cases discussed in the section above (respondent 3, 4, 12, and 15). That being said, the one form of interference in ordinary criminal cases that would be mentioned time and time again was the pervasive interference exercised by the police, also called the Public Security Bureau (PSB).

Many respondents claimed that interference and pressure from the police is substantial in ordinary criminal cases (respondents 5, 6, 12, 13, 16, 19, see also McConville et al. 2011:395-413). Interference and pressure from the police may not be considered obvious political interference, since it does not originate from a government or Party organ but instead from another administrative agency. However, I will here argue that it is conceptually difficult, and perhaps flawed, to separate between these two types of interferences when discussing judicial independence in the Chinese context. As I will explain more thoroughly in the discussion below, the reason for this is that the police does not only have administrative power. They also have political power stemming from the police chiefs’ occupancy of leadership positions in the CCP Party hierarchy, and particularly their occupancy of

leadership positions on the CCP's Political-Legal Committees at most levels (respondents 12 and 19).

The interference from the police is exercised through frequent pre-trial ex parte communications between the three institutions of the police, the procuratorate and the courts. According to several of my respondents (5, 6, 12, 13, 16, and 19), it is the greatest form of interference in ordinary criminal cases. My respondents noted the particularly close co-operation between the police and the prosecutors, followed by pre-trial ex-parte communication between prosecutors and judges, in which prosecutors will pass on the desires of the police regarding the case outcome to the judges. Thus, there seems to be a clear power hierarchy between the police, prosecutors and judges, where the flow of ex-parte communication largely follows this hierarchical structure (respondent 5, 6, 12, 13 and 16, McConville et al. 2011:382-398). It is therefore important to emphasize that while judges are extremely inclined to favor the prosecutors (McConville et al. 2011:398); the prosecutors are themselves following the police's lead. The pressure and interference originates from the police, and the prosecutors are merely passing on the message of the police to the judges prior to the trial. This was summarized by one of my respondents who had frequently cooperated with prosecutors, when she said that "*the prosecutors are frustrated by a lack of respect from the police, so in this sense, they are in the same position as the courts in the general political system*" (respondent 6). McConville et al. (2011:382-398) who have carried out the largest empirical study on ordinary criminal cases in China, report the exact same type of interference, and conclude that this is a general phenomenon. The police file the case with the prosecutors, and the desires of the police are passed on and downwards, with both prosecutors and judges afraid of upsetting the police. This chain of pressure was summarized by respondent 12 who spoke of the relationship between these three institutions in the following way; "*the police make the food, the prosecutors serve it, and the courts eat it*" (respondent 12).

In addition, the evidence suggests that interference and influence from the police and the PLC may be channeled into the decision-making process through the courts' own internal structures. Respondent 6, 9, 12 and 16 reported that judges were sometimes unsure what judgments they should give in criminal cases, and that under such circumstances, they would normally report the criminal case to the court's internal adjudication committee for discussion: "*there is a lot of self-censoring going on among the judges, arising because of their fear. If they are a little bit insecure they check with higher judges and report to the adjudication*

committee” (respondent 6.1)⁴⁵. When criminal cases reach the adjudication committee however, there is a large chance that the court president or one of the chief judges contacts the police or the PLC to discuss the case, as court presidents and chief judges are known to be highly loyal to government and Party organs (Liu 2006, He 2011, Lan 2012:1, McConville et al. 2011:403-411, respondent 19). The very hierarchical internal structure of the courts therefore becomes an effective channel for the introduction of outside pressure and interference, and also works to compromise the independence of the judges.

According to my respondents and other scholars, the clearest example of this interference, and consequently low degree of judicial independence, is the heavy pressure on judges to find every defendant guilty in order to please the police, no matter what the law and facts of the case are (respondent 5, 6, 12, 13, 16, and 19, McConville et al. 2011:378, 406).

“It is simply ordinary procedure to find the defendant guilty in any case” (respondent 12)

“Judges in ordinary criminal cases are basically afraid not to deliver a judgment, so if there is no evidence, they basically just give the defendant a lighter sentence” (respondent 5)

A possible consequence of this is the extraordinary high conviction rates of the Chinese courts, with conviction rates stabilizing at around 99, 93 percent over the last five years (Fu 2010a, SPC 2013)⁴⁶. In 1997, both academics and officials from China’s Supreme People’s Court, Supreme People’s Procuratorate, and Ministry of Public Security, argued that conviction rates would decrease in the future as a consequence of greater judicial

⁴⁵ This phenomenon is also reported by He (2011), who finds that in some courts, as many as 80 percent of all criminal cases will be reported to the adjudication committee.

⁴⁶ It is theoretically possible that all criminal cases that come before the courts are bulletproof, meaning the police and the prosecutors have made sure evidence and investigation stand up to scrutiny by the court. Japan for instance has a conviction rate at around 99 percent. Ramseyer and Rasmusen (2001) argue that the Japanese conviction rate is particularly high because the prosecutors are understaffed and underfunded and therefore only bring the most obviously guilty defendants to court. My respondents did not even entertain this as an explanation for the Chinese conviction rate, and stories of wrongful convictions were frequent topics that respondents voluntarily brought up during interviews. Senior Chinese court officials do occasionally acknowledge and discuss the problem of wrongful convictions in the Chinese public press which suggests that the Japanese explanation does not extend to China (SCMP 2013).

independence and a greater role for criminal defense lawyers (Brown 1997:139). However, the development is opposite to their predictions, conviction rates have actually increased⁴⁷.

When probing for answers as to why the police are so successful in compromising the independence of the judges in ordinary criminal cases, all the answers point towards the political power of the police:

“The conclusion is that the courts do not have authority. The main reason for this is because the Political-Legal Committees, which control the courts, are staffed with a lot of police chiefs” (respondent 12).

“The Political-Legal Committees at most levels are controlled by the head of the police, so within the Chinese Communist Party, the head of the police may be the head of the Political-Legal Committee. It is ridiculous, but it is China’s reality. If the police want to find a defendant guilty, then the judges obey, they dare not be against the local police” (respondent 19).

What begins as administrative interference hence turns out to be political interference due to the tight integration, and almost overlap, between the police and the CCP’s political organ in charge of monitoring the state’s legal institutions, the PLC (McConville et al. 2011:378-379, 441). I therefore argue here, that it is difficult to think of interference from the police as distinct from political interference.

5.1.3 Discussion

Based on the available evidence, the degree of judicial independence in criminal cases is considerably low. While the type of interference is arguably more hands-on in political criminal cases with direct case interference by Party organs, the courts’ independence in ordinary cases is also compromised due to the strong political influence of the police. The point made by respondents 1, 12 and 15 lends support to this conclusion; criminal case judges are the type of judges most likely to consider themselves political tools. The next section will conclude my examination of judicial independence over the legal issue area of criminal cases

⁴⁷ The Chinese conviction rate has not been less than 99 percent since 1958, while in 1997 it was 99, 7 percent (Fu 2010a:24).

by considering the second research question; what factors may help us explain this low level of judicial independence.

The low degree of judicial independence in political criminal cases is arguably explained by the regime-related theory; we would not expect the courts to be independent when hearing these cases given the political nature of the regime. To make sure that its political opponents are effectively sidelined, the CCP stays in control by directing the judges' decisions of these cases. Nevertheless, the fact that a low degree of judicial independence extends to ordinary criminal cases deserves an extended explanation. The argument raised here is that judicial independence in ordinary criminal cases continues to be compromised, because the central political authorities generally consider crime a threat to both political and social stability. This has in turn led to the political empowerment of the police, which has become a de facto structural constraint on the independence of the judiciary over ordinary criminal cases.

Respondent 15 stressed that the politicized view on crime and criminal cases was still deeply embedded in the political and judicial system. He held that there was still a political recognition that the judiciary was not supposed to be independent when handling criminal cases, as criminals were enemies of the state; *“it is like the first principle of the Chinese constitution, the PRC is a democratic dictatorship, meaning it is a democracy for the people and a dictatorship for the enemies”*. This is arguably a legacy of the totalitarian regime and the highly politicized view on crime during this period, which seems to be in place to various extents even today. Hence, the disinterest that an authoritarian regime and its leaders may have towards criminal cases is apparently not present in the Chinese regime to the same extent. Fu (2003:195) has made a similar argument, noting that a violation of the criminal law is not merely a violation of the law, but can simultaneously be considered a threat to the socialist system and social stability, and therefore indirectly a political challenge to the CCP. Social stability ties in with the legitimacy of the regime. Since the maintenance of social and political stability continues to be a source of legitimacy for the CCP, the regime has every interest in ensuring a sense of safety (Fu 2010a:4). Ensuring safety and social stability appears to be done mainly by a rather hands-on political approach to criminal cases however. This is not to suggest that the regime's concern for social and political stability results in a situation where political actors and organs interfere, and are willing to interfere in every criminal case. But it appears to be this concern that has led the CCP to politically empower the police to the extent that they have done. The political empowerment of the police, by appointing them as

heads of the PLCs, does not happen automatically as respondent 12 noted; *“this is also a political decision from the top!”* As a result of these actions, judicial independence continues to be compromised in criminal cases generally, as the politically influential police have become an institution that appears able to direct much of the decision-making of the courts⁴⁸.

Respondent 12 elaborated:

“The central political authorities have gotten afraid of social instability, so they empower the police to handle this. Because of this, the system is now stuck in a vicious circle. Courts, under pressure from the police, must find criminal defendants guilty. The defendant or his or her contacts may protest this, so you have more social instability because of the tougher handlings of criminals. But as a consequence, you need more police to control this. And the police are usually very rough in handling these incidents, and this again sparks more unrest!”

As McConville et al. note after having conducted hundreds of interviews with criminal case judges;

“in the larger picture, judges operate as state agents in preserving social stability which is seen to be threatened by the ‘serious’ crime with which they have to deal. In this context, procedural irregularity, evidentiary weakness or unlawful behavior (including torture) must be subordinated to the court’s mission in preserving public order and social stability, a function that has been re-emphasized in recent years” (2011:399).

The explanation for a low degree of judicial independence in criminal cases hence firstly points to the politicized view on crime and the recognition that crime is a great threat to social and political stability. In turn, this has affected the composition of the institutions and Party organs surrounding the courts, with the police attaining major political influence. All this appears to greatly affect the independence of the judiciary over criminal cases.

⁴⁸ Research indicates that the political empowerment of the police through staffing the PLCs with police chiefs have been ongoing for at least two decades (See Minzner & Wang 2013).

5.2 Civil Cases

The Chinese courts have historically played a minor role in handling civil cases. During Mao's reign and continuing throughout the 1970s and the 1980s, the majority of civil cases were not resolved in the courts, but by mediation in People's Mediation Committees. Today Chinese courts hear a great number of civil cases each year. In 2013, Chinese courts heard around 8 million civil cases, and according to the Supreme People's Court, most cases are family cases, property and land cases, general tort cases, and medical tort cases (SPC 2014). The majority of cases heard by the Chinese courts are civil cases, with about twice as many civil cases compared to commercial cases, and eight times as many civil cases compared to criminal cases (SPC 2014). The next section examines the degree of judicial independence in civil cases, before I conclude the section by offering explanations for the degree of judicial independence identified.

5.2.1 Judicial Independence in Civil Cases

In contrast to the judiciary's independence in criminal cases, a number of my respondents described to the notion that "*in many civil cases, you may talk about a certain degree of independence*" (respondent 4, reiterated by respondents 6, 11, 13, and 16). Similar statements are found among other scholars; "there is little systemic interference in the vast majority of civil cases" (Fu & Peerenboom 2010:125) and "the Chinese judiciary enjoys more independence in the area of civil litigation (Zhong & Yu 2004:415, see also Fu 2003:205 and Stern 2009:84). To the extent that judicial independence can be measured by looking for evidence of dependence as noted in section 4.4, then there is less evidence of direct forms of interference, such as direct case interference and ex-parte communication. There are however two caveats to this conclusion. The first caveat is the fact that certain civil cases are of a nature that attracts the attention and direct case interference from political organs, such as Party committees and local governments. These types of civil cases include land disputes in which there is often disagreement between individuals, such as farmers, and industrial and commercial businesses concerning the right to use the land and compensation over the land.

Furthermore, the local government itself often has a stake in the outcome of these disputes (Peerenboom & He 2009:33-34, Shao & Whiting 2013)⁴⁹. It is also the fact that local governments remain heavily involved in many labor disputes and are subject to clear guidance from local governments (respondent 10, Su & Xin 2010, Wang 2011). This type of direct case interference in civil cases was however not mentioned often by my respondents, including the civil case judges I talked to. What the interviews and the answers by my respondents instead reflect when it comes to the courts' independence in civil cases is a persistent form of policy interference, and I will therefore focus on this in the preceding sections.

Therefore, apart from the type of political interference in civil cases as mentioned above, there does seem to be another caveat that prevents us from concluding that there is little political interference in the remaining civil cases. A form of political interference that would time and time again come to the fore in discussions about judicial independence in civil cases was the political pressure exercised by the CCP through its Party policies of 'social stability' and 'harmonious society' (Respondent 1, 2, 4, 8, 9, 13, 15, 16, 18, and 19. See also Minzner 2011 and 2013). When I then asked respondent 15, a Chinese legal scholar who had been researching and observing the Chinese courts for over 30 years, whether we could presume that there is little interference from the political authorities in civil cases, he provided the following answer:

"The political system has larger ramifications than sensitive criminal cases and ordinary civil cases. For example, the political leaders choose to push mediation in ordinary civil cases. So suddenly, policy matters even in ordinary cases, and not rules and laws. This sends a message to even the ordinary people that laws and rules do not matter!" (respondent 15).

Respondent 15 was referring to how the CCP's governing policies of 'social stability' and 'harmonious society' had affected the work of the civil courts, as they had over the last ten years come under increasing political pressure to mediate all civil cases, instead of adjudicating these. The official reason given for the political preference for mediation, is because mediation of civil cases is a form of judicial work that is better at upholding social stability and ensuring a harmonious society compared to adjudication (SPC 2010, in Hand 2011:134, Gu 2013:22, Cai 2014:45-46). As one of my respondents, a former civil case judge, put it:

⁴⁹ Since all land belongs to the state, there is no disagreement over ownership of the land, but the right to use it.

“The question they faced was: how do we create a harmonious society? They initiated some policies and the judiciary was given the task to contribute by mediating more. The political pressure was strong, so mediation became top priority” (respondent 1).

The argument raised here, based on an analysis of the available evidence, is that this form of policy interference by the CCP must be seen as a particular form of political interference that extends even to ordinary civil cases. It is a far more indirect type of political interference, and in no way do I suggest that it prevents judges from deciding cases in ways that may secure a fair outcome. Moreover, judges in any country will necessarily or arguably sometimes change their judicial behavior according to the prevailing policy of the day (Baum 2006:5-6). But the way prevailing political policy affects judges in China is here argued to be very different. Several respondents stressed the fact that political interference through the CCP’s emphasis on the policies of “social stability”, “harmonious society” and “mediation first”, was a significant factor that compromised judges’ independence when handling civil cases. The clearest way in which this happens is, as respondent 1 and 15 made clear, that courts and judges are under heavy political pressure to mediate all civil cases. A political policy emphasis on mediation in civil cases need not be problematic from the perspective of judicial independence, but it is the way such political policies are implemented in China that arguably negatively affects the independence of the judges. The CCP did not stop pushing the “mediation first” policy only after expressing its desires for how civil cases should be decided, it simultaneously required the SPC to release several judicial opinions that directed lower courts to mediate all possible civil cases⁵⁰ (SPC 2007, 2009, see also Fu & Cullen 2011:49, Minzner 2011:945). It should be noted that the judicial opinions on mediation released by the SPC have no force as law or legislation. They are also in contradiction with China’s Civil Procedure Law which states that mediation should be voluntary and that judges shall adjudicate or mediate upon the request of the parties’ in civil cases (Woo 2012:239-240). Arguably then, judges are pressured to set the Civil Procedure Law aside and mediate all cases, as this is what is politically required of them. It is this concern that is reflected in

⁵⁰ The SPC was purportedly very reluctant to follow this requirement from the CCP (Fu & Cullen 2011, Zhang 2012), but became more committed to the Party’s policies after the reformist SPC president, Xiao Yang, was replaced by a highly conservative politician, Wang Shengjun, as SPC president in 2008 (Keith, Lin & Hou 2013:40). The judicial opinions cited include “Several Opinions of the Supreme People’s Court on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society” (SPC 2007), and “Notice of the Supreme People’s Court on Issuing Several Opinions on Further Implementing the Work Principle of “Giving Priority to Mediation and Combining Mediation with Judgment” (SPC 2010).

respondent 15's answer quoted above, as the courts are politically required to follow the prevailing Party policy instead of the law, and that this affects their independence when handling civil cases. In addition to releasing judicial opinions on mediation, several respondents noted that the political pressure to mediate was also exercised through the performance evaluation system⁵¹ that is used to evaluate judges annually (respondents 1, 2, 4, 18, see also Minzner 2011 and Xin 2013). The criteria used in the performance evaluation system were concurrently changed to emphasize mediation, so if judges had a low rate of mediated civil cases, they were sanctioned:

“Mediation is connected to the performance evaluation system, so the pressure to mediate affects the independence of the courts and judges in civil cases. If you are not mediating a lot you are not doing well. This becomes apparent when the judges have their annual evaluations and it turns out they have a low level of mediated cases. Judges have been complaining a lot because of this” (respondent 1).

“Mediation is not problematic per se, but the political pressure to mediate had a negative influence on the judiciary since they were pressured to mediate cases that they otherwise would not, and judicial independence was affected through control mechanisms such as the performance evaluation system” (respondent 4).

When institutional mechanisms, such as the performance evaluation system, are concurrently modified to promote the political authorities' policies and preference for mediation, it becomes difficult to argue that there is no political interference in civil cases. Judges are clearly inhibited from deciding themselves whether to mediate or adjudicate a civil case, as the law actually stipulates they should be.

Beyond the pressure to mediate, it is however a challenge to directly trace how these Party policies affect the decision-making of judges in civil cases, but in many instances it is clear that the overarching political preference for social stability, implemented through the performance evaluation system, may clash with the judges' ability to decide a case according to the law and the facts. This form of indirect policy interference and pressure was noted by

⁵¹ The performance evaluation system is a centrally controlled evaluation system of judges that evaluates and disciplines their work (He 2011a:38). It sets certain criteria that the judges need to fulfill in order not to be sanctioned. For instance, as showed above, they must mediate a set quota of cases in order not to be financially sanctioned. My respondents suggested that the criteria were set by central government and Party authorities (respondents 1, 4, and 16).

the respondents who had themselves worked as civil case judges; *“as a judge you cannot guarantee happiness, but the government’s policy means that no one should be left unhappy because this is bad for social stability”* (respondent 1). Similarly respondent 2.2 stated that: *“Judges have to make sure that litigants are satisfied so that they do not become a threat to social stability, and the current social stability trends mean that judges must ensure that litigants are pleased with rulings. Judges are really afraid of unhappy litigants [...]. The system basically says that you cannot make mistakes, but they are not mistakes, they are judgments!”*

Respondent 18, who had himself done ethnographic research in several civil case courts, reiterated these points when he stated that top court officials have had to respond to the social stability policy of the CCP, by pressuring judges to handle cases in a certain way that ensures social stability. As he said, *“this will lead the case handlings to become twisted and different from what courts usually do”*. In sum, he argued that the social stability pressure on the courts had the following effect on judicial behavior; *“what this means is that the judges cannot judge according to law, they need to find a way out that takes social consequences and performance evaluation matters into account”*. Other studies of civil case courts in China have documented this. Liebman (2013), who has analyzed civil tort cases (medical disputes), has documented how judges adjust decisions and outcomes to appease aggravated litigants even when there are no legal basis for doing so. His conclusion was that social stability concerns trump legal rules when certain civil cases reach the courts (Liebman 2013:251). He and Ng (2012a, 2012b, 2012c) and Xin (2013), who have conducted ethnographic studies on civil family cases in courts, also emphasize how social stability concerns and the policy preference for mediation have pushed judges to go through great lengths to ensure that court cases end in mediated outcomes⁵².

Before I move on to a concluding discussion, it should be mentioned that according to some my respondents (1, 2, 6, and 19), the main reason why the above documented policy

⁵² The consequences and effects of the social stability policy in the civil case courts on such aspects as the rule of law and upholding of citizens’ legal rights are not the focus of this study. Nevertheless, it is impossible not to note how this policy seems to have compromised these aspects, one consequence being that judges force mediation upon litigants (coercive mediation) and downplay citizens’ legal rights in mediation (He & Ng 2012a, Xin 2013, Cai 2014). Respondent 1 stated that judges would pressure litigants to accept mediation by threatening them that an adjudicated outcome would be worse than a mediated one, and that mediated settlements would often be at the margins of what was legally permissible.

interference had spurred such strong reactions from both judges and scholars, is because it contradicts developments when it comes to the judges' independence over civil cases prior to 2002. During the 1990s, the courts' handling of civil cases largely did not attract the attention of the CCP; "as long as the CCP remained largely uninterested in civil cases, the courts achieved autonomy by default and the reform continued" (Fu & Cullen 2011:44). The CCP's lack of political interest into civil cases led to, and coincided with, a concerted reform process within the courts with heavy focus on building professionalism and enhancing the educational quality of civil case judges⁵³. Ultimately, the consequence was that the civil case judges were largely more independent in their handling of cases (Fu & Cullen 2011). Several respondents, including all the civil case judges interviewed, emphasized these aspects (respondent 1, 2, 6, 15, and 18). As respondent 1, who had worked as a civil case judge during the late 1990s, declared:

"In the 1990s, efforts were put into legal work and legal training. The SPC would regularly conduct legal training sessions in the courts, and judges acquired higher academic degrees, there was a need for expertise. If you were expert, you were popular. Mediation was highly voluntary, and we had no pressure when it came to whether cases should be decided by mediation or adjudication" (respondent 1)⁵⁴.

A consequence of the interference mentioned above is the changing percentages of mediated and adjudicated civil cases. Official statistics released by the SPC reflect these trends as shown in the figure below, with the number of adjudicated cases rising until 2002.

⁵³ Of course, professional competence of judges is crucial for realizing judicial independence as it is part of the infrastructural and organizational factors that enable it in the first place (Schedler, Diamond & Plattner 1999:158-161). It is worth noting that my respondents, including most Chinese and international scholars, conclude that the most impressive accomplishment of Chinese judicial reforms has been the increased professional competence and quality of judges (See Zhang 2012:4).

⁵⁴ Respondent 1 had quit as a consequence of the increasing political pressure that the courts had come under, noting that "you get out of the system to be freer". As a judge, he had mainly handed civil tort cases in a higher people's court.

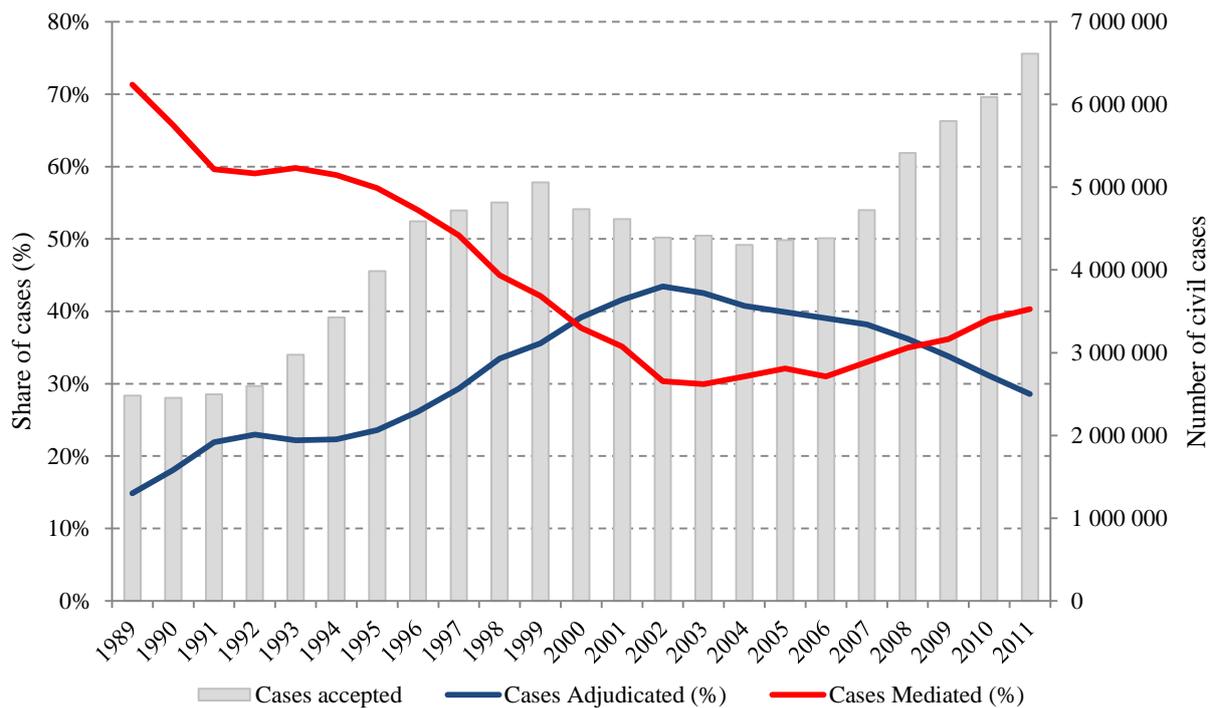


Figure 2: Share of Civil Cases in Court Adjudicated and Mediated (1989 - 2011).

Sources: Zhu (2007), SPC (2005-2012)

5.2.2 Discussion

It would be wrong to conclude that the degree of independence in civil cases is as low as criminal cases, or very low generally, as the form of political interference and pressure is much more indirect, and probably absent in a number of cases. The Chinese judiciary hears several millions of civil cases each year, and many are surely straightforward in the sense that the judges can make a decision based on what they deem suitable. In addition, courts and judges in any country will necessarily make decisions based on the current social and political climate (Stern 2009:98). However, it becomes difficult to conclude that the judiciary is largely independent over the realm of civil cases when much of the evidence indicates substantial policy interference, with particularly heavy political pressure on judges to mediate, and to make sure that individual litigants do not become a threat to social stability. The Party-state's policy interference is also very effectively implemented through certain institutional mechanisms, namely the performance evaluation system that the judges are subject to. This

means that the CCP's policy interference is not only limited to indirect pressure, such as public announcements by political leaders, and judicial opinions released by the SPC in response to these announcements. It becomes much more direct when it is also exercised through the judges' and the courts' performance evaluation system. As He and Ng (2012a:37) conclude following their investigation into civil trials; "it is through these institutional constraints that the state imposes its governing norms such as social stability and harmonious society".

The effective deployment of the above documented policy interference is in many ways made possible because of the highly bureaucratic and hierarchical nature of the Chinese judiciary. But these characteristics are not unique to China's judicial system; it is also the case in many other civil law judiciaries where lower court judges follow the requirements of their superiors (Merryman 1987, Guarnieri & Pederzoli 2001, Hilbink 2007). The difference in the current Chinese context is that pressure is not internal, but actually external since the SPC is politically subordinate to the CCP⁵⁵. The outcome is, as Popova (2012:139) has noted in her study of post-Soviet judiciaries in Ukraine and Russia; "the easy transfer of political goals and mandates from incumbent politicians to the leadership of the judiciary, which then delegates the implementation of these goals down the hierarchy to the lower court judges".

In sum, the Party-state's policy interference casts a shadow over the degree of judicial independence in civil cases. It is therefore hard to argue that the Chinese judiciary's independence over civil cases is relatively high, as Toharia (1975), Linz (2000), and Guarnieri (2010) argue is the case for many authoritarian regimes, as shown in section 3.5. While both Linz (1964) and Toharia (1975) recognized that certain civil cases may be susceptible to political interference, such as labor cases, this appears to be true for China as well as noted in the beginning of this section. But it appears that the Chinese judiciary is not independent in the remaining cases.

In search of an explanation, most of my respondents attributed the decline in the courts' independence over civil cases, starting from around 2002, to a recognition within the political leadership that social instability was on the rise, coupled with the fact that the political leadership was generally politically conservative (respondents 1, 2, 4, 8, 9, 11, 12, 15, 16, and 18). The relatively low degree of judicial independence over civil cases can therefore be

⁵⁵ As noted, the SPC was reluctant in implementing this policy, a point emphasized by respondent 1, 2, 4, 15, and 18.

explained by pointing towards the politically conservative beliefs of the political leadership, who decided to interfere with the courts in order to combat what they saw was rising social instability. Hence the concern for social stability affects the civil courts, same as it does with the criminal courts.

Theoretically, the question is why the degree of judicial independence over civil cases seems to be lower in post-totalitarian China compared to authoritarian regimes generally? According to the regime-related theories, as mentioned in Chapter 3, there are two factors that decrease authoritarian rulers' willingness to interfere with the judiciary in civil cases. In short, they refrain from interfering with the courts in their handling of ordinary civil cases between private individuals, because they seek to distance themselves from the political mobilization of individuals and institutions (Toharia 1975:492). As a consequence, the regime may gain a fair degree of rational-legal legitimacy because of this, which in turn should decrease the rulers' willingness to interfere with the judiciary because it entails legitimacy costs (Guarnieri 2010:249).

Regarding the first factor, the Chinese regime apparently remains very ambivalent towards its political role in society. In the past, it did mobilize and politicize both individuals and institutions to a rather heavy extent, as seen in section 2.3.1. But the post-totalitarian phase is apparently not a guarantee for a complete political retraction from the civil case courts. The political leaders appear to be hesitant about the extent to which the Party-state should detract from the judiciary and its handling of civil disputes between private individuals. As Liebman (2013:252) notes concluding his investigation into civil tort cases; "unease regarding the role of law and courts and unwillingness to allow courts more autonomy to resolve *private disputes* reflects broader uncertainty about the role of the state" (Liebman 2013:252, emphasis added). It is this ambivalence that causes politicians to interfere and that affects the judiciary's independence over civil cases, at least in times of perceived social instability. This is significantly different from an authoritarian regime, where a thorough mobilization and politicization of all state institutions and major parts of society has never been the case.

When it comes to the potential legitimacy costs, also here the Chinese case provides interesting observations. The central political authorities' political pressure on the civil courts and judges, with the emphasis on mediation and social stability, has not been publicly downplayed so as to avoid potential legitimacy costs. Instead, the CCP's political directions to

the judiciary have been publicly wrapped in a highly populist discourse that has direct linkages to the Maoist era, and particularly the “mass line” (Liebman 2011). The CCP has told judges to abandon their formality and professionalism in order to “link with the masses” and to “nurture the feelings of the people” (Keith, Lin & Zhou 2013:41). Communist model judges, emphatically engaged in mediation, have been ideologically promoted by the CCP, both within and outside the courts, so as to function as correct reference points for modern Chinese civil case judges (Minzner 2011, Liebman 2011). Thus, there is apparently an attempt by the regime to gain legitimacy, however not by refraining from interfering and thus harvest rational-legal legitimacy, but instead by re-incorporating the judges and the courts closer into the political system. The official emphasis is on today’s courts’ linkages with the nature of the courts under the Maoist era, and not the courts’ distinctive modern rational-legal nature⁵⁶. The communist, populist ideology therefore functions as an alternative source of legitimacy for the regime. This may reduce the potential legitimacy costs associated with political interference into the judiciary, as may be the case in authoritarian regimes that lack a strong, alternative political ideology to which it can justify its political actions⁵⁷. As Linz (2000:246) notes when it comes to post-totalitarian regimes: “The totalitarian phase [...] has left many structures [...] that can be transformed but are unlikely to disappear and has created an image of a type of polity to which some of the elites still feel attached and whose “positive” aspects they might wish to retain or attain”. When I asked some of my respondents why there was again political pressure on the civil case courts to mediate and to contribute to social stability, their answers reflected very well these tendencies noted by Linz (2000:246):

“Mediation returns today because the political leaders grew up with these communist practices, and they turn to these old mechanisms so as not to lose power today” (respondent 1)

⁵⁶ This is not in any way meant to suggest that today’s Chinese judges resemble that of judges during Mao’s rule, as they certainly do not. However, the political authorities are apparently committed to publicly portraying them as such.

⁵⁷ It is however apparent that the political interference documented above may have had significant legitimacy costs for the regime among more liberal intellectuals and legal scholars, as became clear during many of my interviews. On the other hand, there are also Chinese scholars who praise this, arguing that the Chinese judiciary must play an active part in the CCP’s transformation of Chinese society and establishment of a harmonious society (Zhu 2010b).

“The leaders felt that there were a lot of disputes and protests and they did not know what to do. Earlier they used to have a system that worked, and that system did not have any rules, or was not especially rule-based, so they returned to this system” (respondent 15).

In sum, the Chinese judiciary’s independence over civil cases is here argued to be lower than what the theory would suggest because the Party-state remains ambivalent about its role in society, coupled with the availability of political ideological sources of legitimacy inherited from the former regime.

5.3 Administrative Cases

The Chinese judiciary was empowered to hear administrative cases in 1989, when China’s Administrative Litigation Law (ALL) was promulgated by the Chinese government (Lubman 1999:205). Before examining the judiciary’s independence over these cases, it is useful to provide a short description of China’s Administrative Litigation Law to understand its content and which administrative lawsuits that may be brought before a court. While the law has been described as “one of the most controversial pieces of legislation ever enacted in post-Mao China” (Chen 2008:247), it is less controversial in its form as only *concrete* administrative decisions by government entities may be challenged through an administrative lawsuit. This means that it is only the legality of specific instances of government actions that can be challenged in court, and whether these actions infringed upon a citizen’s lawful rights and interests (Lubman 1999:206). The validity and legality of *abstract* administrative decisions, meaning general rules and regulations promulgated by state agencies, cannot be challenged under the ALL (Kinkel & Hurst 2011:480). Decisions made by the CCP’s own organs cannot be challenged through an administrative lawsuit as they are not state agencies (Lubman 1999:206). Importantly, citizens’ lawful rights are narrowly defined to mean personal and property rights, not political rights (Peerenboom & He 2009:45-46). To exemplify, a citizen may sue a state agency for refusing to grant him or her a license needed to operate a business, but cannot sue a state agency for violating his or her freedom of speech⁵⁸.

⁵⁸ Interestingly, citizens have purportedly been trying to sue state agencies for deleting their posts and comments on online social media. An internal court document from 2009, leaked online, shows the SPC guiding lower

In 1990, Chinese courts accepted just above 13,000 administrative cases, and in 2002 this number had risen to over 100,000 cases (He 2010:263). The different types of administrative cases heard by the courts vary according to time and space, and most cases in the 1990s involved citizens challenging administrative punishments administered by the police (Lubman 1999:209, respondent 3, respondent 9). Currently, administrative cases mainly involve challenges against state agencies' actions over matters such applications and permits, taxes and fees, and notably housing demolitions and evictions (Gechlick 2005:117, Peeremboom & He 2009:47, He 2014:3, respondent 3).

5.3.1 Judicial Independence in Administrative Cases

While political criminal cases are what may be termed sensitive cases, some respondents (2, 6, 9, and 19) pointed out that administrative cases are also sensitive in the Chinese context. This could imply that the degree of judicial independence in administrative cases is low as in political criminal cases. So while respondent 2 mentioned that getting administrative cases accepted by the courts is one difficulty, another difficulty was hearing and deciding the case, the process which I focus on and analyze here⁵⁹. When I interviewed an administrative case judge with 20 years' experience in an intermediate court, including being the chief judge of

courts on how to handle these cases. The document itself speaks volumes about the independence of the judiciary, and it is worth quoting pieces from it. The SPC document states that: *“do not accept suits involving Internet management and do not issue court documents [...] When courts at all levels, including detached tribunals at the grassroots level, receive suits involving internet management, they must immediately report upward to the SPC and also report the situation to the local party committee and political-legal committee [...] When handling problems regarding suits related to Internet management, courts must proactively seek the support of the local party committee and political-legal committee and coordinate with the relevant authorities to “work with” the parties to the case in order to avoid creating a negative impact. Unauthorized public comment is prohibited”* (Siweiluozi 2013).

⁵⁹ Respondent 2 said that there are three general difficulties with administrative cases: getting the case accepted by the court, hearing and deciding the case, and enforcing the court's decision. The difficulty of having administrative cases accepted by the courts has led to very few administrative cases actually being heard by Chinese courts (Liu 2006:90-91), a topic that was commented upon during my group discussion with legal scholars and judges (respondent 2) who expressed bewilderment with the fact that I was interested in administrative cases in Chinese courts as “they are an extremely small part of the courts' work and identity”.

the administrative division, he elegantly avoided my more direct questions concerning the actual process of hearing and deciding administrative cases. He would not tell me or specify whether the courts were susceptible to any political pressure or interference in this process. Using beautiful communist language, he however admitted that administrative cases were often “sharp contradiction cases”, but after approximately 15 minutes he declared that: *“basically, we need to find a workable agreement between the Party, the courts, and society. In any situation, the court must be just!”* (respondent 3), and upon finishing the sentence he politely indicated that the interview was over. The senior administrative judge’s behavior during the interview; the wooden language, the avoidance of political issues, almost resembled the behavior of a careerist politician. This observation is however very telling, as the close relation and interaction between senior judges and politicians seems to be crucial when examining the issue of judicial independence in administrative cases.

As respondents 2, 6, 9, and 19 made clear, and as previous studies have documented (Wang 2011:73, He 2012a:10-12), since administrative cases are considered sensitive, most of these cases will end up in the court’s internal adjudication committee for discussion among the president, vice-president, and various chief judges. When administrative cases reach the adjudication committee however, the independence of the judiciary seems to be in danger almost immediately as the president of the court often engages in ex-parte communication with outside political actors that have an interest in the case, specifically the local government and the PLC (respondents 2, 6, 9, 19, Gechlik 2005:114, He 2012a:30, He 2014:14). The court president therefore ends up discussing the administrative case with the PLC and the local government⁶⁰, whose one of its entities is being sued. A number of respondents suggested that this was the most common mechanism through which political interference occurs in administrative cases (respondents 2, 6, 9, and 19), although it is suggested that that other members of the adjudication committee, such as vice-presidents and chief judges of divisions, also may contact the local government and the PLC (Wang 2011:73). Nevertheless, the President will have the last word when it comes to the adjudication committee’s final decision on the case, since as noted in the background section; there is a clear hierarchical power structure within the courts.

⁶⁰ The local government is of course in turn controlled by the local Party committee, hence it may be appropriate to consider the PLC as an intermediary between the court and the local government.

Recognizing that there is a fine line between ex-parte communication and direct-case interference (Popova 2012:131), it is worth commenting closer on how local governments’ and PLCs’ interference into administrative cases occur. The first thing to note when it comes to political interference in administrative cases is that the court, and particularly the court president, is inclined to engage in ex-parte communication by volition (Gechlick 2005:114, He 2012a:30, He 2014:14). The second thing to note is that political interference, as noted in the previous sections, is effectively channeled into the decision-making process due to the very strict administrative hierarchy within the court (respondent 2, respondent 6, respondent 12, Liu 2006:94). Administrative cases therefore never seem to be decided solely by the presiding judge and the collegial panel. This process is depicted in the figure below, where the stipulated arrows indicate the feedback process after the court president has discussed the case with the local government or PLC.

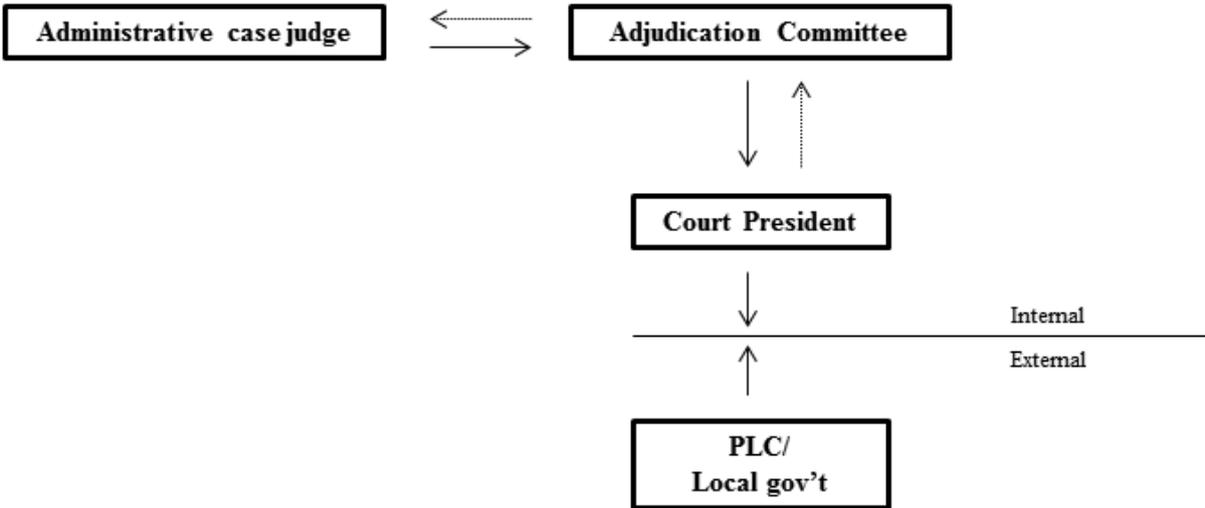


Figure 3: The Decision-Making Process in an Administrative Case

It is worth commenting closer on the communication between the court president and the government and Party organs, the process depicted in the figure above, where internal structures meet external structures. If Party and government organs can strictly direct the court president on how to decide the case, we may cross the line over to direct-case interference (Popova 2012:131); for instance, if the local government or the PLC will tell the court how to specifically decide the case. Here however, the evidence suggests a more complicated picture, and the result of the communication between the court president and the

government and Party organs may have several outcomes. Under pressure from Party and government organs, judges may persuade plaintiffs to withdraw their case after it has reached the court (respondent 2, Gechlick 2005:108, He 2010:266). Respondent 3, the administrative case judge, admitted that more and more administrative cases were withdrawn over the recent decade, and said this was because cases were getting more complicated and often involved “the allocation of power”. He said that the court often had difficulties in deciding who had the power and that in these cases they would try to convince plaintiffs to withdraw. This implies that the courts are acting under pressure from local political organs, although he never admitted this directly. However, he stated that the court sometimes tried to convince government organs that they should compensate the plaintiff in some ways, and thus facilitate some kind of settlement, but that there was no decision or judgment in the formal, legal sense. This suggests that there is effective *ex parte* communication between the court and the government. Other studies note that government and Party organs often pass on quite indirect messages to the court president, where they state that the court should not make a judgment that may cause social instability, and that in these cases the court most often decide in favor of the government (He 2014:14). It is therefore debatable whether *ex parte* communication in administrative cases can cross the line over to direct case interference.

The evidence indicates a low degree of judicial independence over administrative cases and a possible consequence of this is the high rates of administrative cases withdrawn by plaintiffs (i.e. the citizens suing, see figure below). This aspect was commented upon by respondent 2 as testimony to the judiciary’s lack of independence over administrative cases. The percentage of withdrawn cases has shown some variation over time, but the mean percentage of withdrawn cases from 1989 to 2011 seems to be around 40 percent (He 2010:263). In 2011 this percentage was close to 50 percent, with 65 000 cases out of 136 000 cases being withdrawn (China Statistical Yearbook 2012)⁶¹. Observing statistics on the percentage of administrative cases won by plaintiffs, we also here find that percentages vary over time⁶². In 2000, 20 percent of all cases concluded with a decision in favor of the plaintiff, but this percentage has shown a gradual decrease since that time with 7.8 percent of all cases being won by the plaintiffs in 2010 (He 2010:263). We could take these numbers an example

⁶¹ But note that plaintiffs sometimes receive compensation even if they withdraw cases, as respondent 3 made clear and as others have suggested (Fu & Peerenboom 2010:129-130).

⁶² Some scholars have used the number of rulings against the government in court cases as an indicator of judicial independence (e.g. Baker 1971).

of a limited form of judicial independence of course, but the conclusion must nevertheless be that the judiciary’s independence in most administrative cases appears low⁶³.

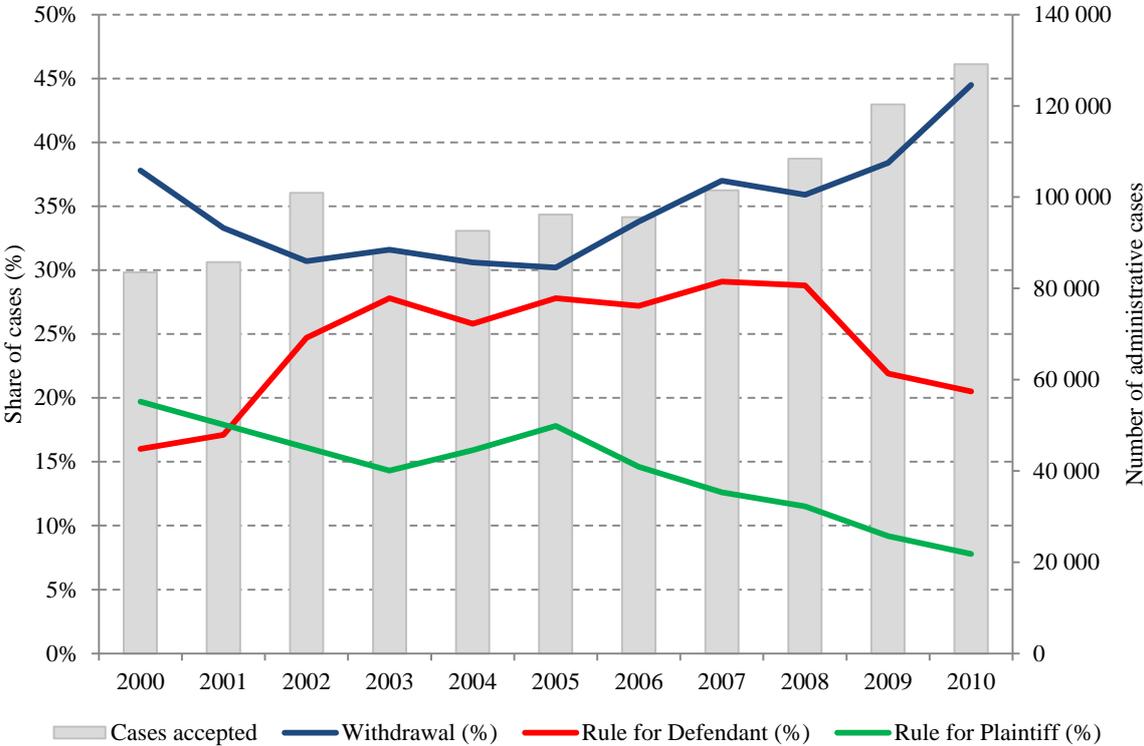


Figure 4: Outcome of Administrative Cases (1987-2010). Source: He (2010)

5.3.2 Discussion

According to theory, and as argued by Moustafa (2007) and Ginsburg (2008a), rulers in authoritarian regimes that struggle to monitor the bureaucracy and local government organs, have incentives to support and provide independent courts in administrative cases, because this helps the central government control its subordinates. If this is so, then the Chinese case provides us with a highly contradictory observation because the local government organs who

⁶³ Analyzing why plaintiffs are actually able to win administrative cases should thus be an interesting topic of inquiry. The literature offers some explanations; governments in more developed areas are often less likely to interfere with courts in administrative cases, at least in less sensitive cases, resulting in judgments favoring plaintiffs (Gechlick 2005). Another explanation is provided by He (2012) who suggests that courts are sometimes able to rule in favor of plaintiffs in administrative cases if they can convince the local Party committee that a ruling for the plaintiff is good for social stability.

are supposed to be *monitored and controlled* by the administrative courts have apparently been able to *take control* of the administrative courts.

It may be the case, as the theory argues, that the desire to control local agents means that rulers/central politicians' willingness to interfere with the courts in administrative cases may be low. Indeed, there is not much evidence that suggests that central politicians interfere in administrative cases in China, so in this sense the theory offers some useful propositions regarding the behavior of central politicians vis-a-vis the administrative courts. However, while central politicians' willingness to interfere with administrative courts may be low, this is certainly not so when it comes to local politicians, who evidently harbor very different incentives compared to the central government. In theoretical terms, the degree of independence in administrative cases is low because: (i) local politicians do not share, or have not internalized, the same incentives as central politicians, and; (ii) the central government has not made efforts to limit local politicians' capacity to interfere with the administrative courts. This latter crucial intervening variable, which is most often ensured through structural and institutional mechanism, is thus effectively missing in the Chinese context. The local government, whose one of its entities is always a party in an administrative case, effectively funds and staffs the court (See section 2.3.1). This makes interference from local political actors and organs easy, less costly, and more likely to have an impact on the judges' decision-making. Judges and courts handling administrative cases are constantly afraid of upsetting or stepping on the toes of the local government since this may carry significant negative consequences for the judges and the court itself (respondents 2, 4, and 11). Judges may lose their job and/or salary and bonuses because the local governments also control welfare benefits for the courts' staff and its families (Clarke, Murrell & Whiting 2006:20). To avoid the negative consequences and the responsibilities that come with deciding an administrative case in a way unfavorable to the local government, the courts appear to remain very attentive to local political actors' view on these cases. Both by being inclined to engage in ex-parte communication with the local government by volition, but also by being inclined to follow the directions of these political actors.

It appears then that the judiciary cannot be structurally and institutionally dependent on the same level of government which is a party in an administrative case if it is to be independent in its handling of these cases. While the importance of structural and institutional safeguards for ensuring judicial independence is often downplayed or empirically hard to verify (Popova 2012, Ríos-Figueroa & Staton 2012), the Chinese case suggests that

institutional judicial independence may be crucial and a necessary factor for judicial independence, at least over the scope of administrative cases, and at least when it comes to limiting interference from local politicians. It may very well be that interference from local governments would still occur even if court funding and staffing was controlled by the SPC for instance, something that several respondents suggested (respondents 4, 6, 11). But it would potentially at least increase the degree of judicial independence over administrative cases.

Nevertheless, since the theory takes its point of departure by pointing to the incentives that the rulers may have to support independent administrative courts under certain circumstances, it is worth asking why the rulers, faced with rampant unruly behavior by local governments which the political leaders themselves admit is a major challenge (People's Daily 2013), appear to have little support for more independent administrative courts? As the administrative chief judge himself admitted "*when it comes to the position of the administrative courts, there has been no change or greater acknowledgment from the top*" (respondent 3).

If it is only when authoritarian rulers have problems of monitoring their political subordinates that they support and establish independent administrative courts, then the explanation offered here as to why the independence of China's administrative courts is, and continues to be, low, can only be that the rulers have other more forceful mechanism for monitoring its political subordinates. As Ginsburg (2008a:65-67) notes, whether political rulers will support independent courts in the area of administrative law does not only depend on the severity of principal-agent problems and the size of the bureaucracy, but also (i) whether there are other mechanisms available to the rulers for monitoring the bureaucracy, and whether the rulers believe they can monitor the bureaucrats more effectively with these mechanisms, (ii) the process costs associated with independent courts in administrative cases, such as slower administration, and (iii) the rulers' perception of judicial agency costs. I argue that the two first factors combined reduce central support for independent administrative courts and hence de-facto judicial independence in administrative cases.

First, post-totalitarian rulers, such as China, have a vast Party-organization and a system of nomenclature available for monitoring its agents (Linz & Stepan 1996:45). Furthermore, this system has historically always been considered and used as the primary means for monitoring agents, and it is therefore improbable that the rulers would want to

weaken this system or question its effectiveness. In terms of costs, strengthening its own Party discipline system, which has been in place since the inception of the regime, is probably also cheaper than supporting independent courts which have more or less no institutional history considering the prior totalitarian regime. Indeed, this is what we observe in China. The Party's nomenclature system has been strengthened (Landry 2008), and the Party's central control of all government and Party positions through its organizational department; "is still the main glue that holds the world's largest authoritarian polity together" (White 2009:238).

Second, according to some of my respondents (7 and 13), having independent courts in administrative cases remain to some extent irreconcilable with the Chinese Party-state's current top-priority policy goal; to spur economic growth. They noted that if the administrative courts were to be more independent in their decision-making and thus more inclined to rule in favor of plaintiffs, this meant that economic growth would sometimes have to be sacrificed. This is because many administrative cases involve challenges against actions of state agencies which are done to facilitate urbanization, construction, and hence economic development (Gechlick 2005:117).

In sum, the low degree of judicial independence in administrative cases can firstly be explained by local governments' aversion of being controlled and challenged by the courts. These same political actors have strong capacity to interfere with the courts' decision-making and impose their preferences due to the courts' institutional dependence on the local government. Going further back in the explanatory chain, the absence of support for more independent administrative courts by the central politicians may be explained by two factors; first, the CCP's possession of its own, more effective system for monitoring political subordinates, and second, the discrepancy between the CCP's overarching policy goal of economic growth and more independent administrative courts.

5.4 Commercial Cases

The history of commercial cases in China is tightly linked with the country's economic reforms, and the transition from a centrally planned economy to a more market-oriented economy, although still labelled "transitional" (Yang 2004:292). For instance, China's first commercial law, the 1981 Economic Contract Law, applied only to businesses under state control, since these businesses were the only ones that "could engage in meaningful economic activity" (Potter 1992:32, in Clarke, Murrell & Whiting 2006:11). In other words, the only

commercial cases that could enter Chinese courts at the time were between state-owned enterprises. Ever since 1981, numerous pieces of legislation pertaining to commercial activity have been passed (Clarke 2007), and Chinese courts now hear a range of different types of commercial cases. Contract cases are the major bulk of commercial cases heard by the courts today (Clarke, Murrell & Whiting 2006:40), but the courts also hear commercial cases concerning various types of property rights between firms, such as property rights in stocks and intellectual property rights (Peerenboom & He 2009:10). In 2013, the courts heard close to four million commercial cases (SPC 2014).

5.4.1 Judicial Independence in Commercial Cases

The analysis so far has uncovered that both central and non-central politicians interfere in the courts' adjudication. The examination of the courts' political independence in hearing commercial cases also seems to reflect a mixed picture when it comes to what kinds of politicians that interfere, but with local politicians arguably being the main interferers. Nevertheless, we begin with a short examination of central politicians' behavior towards the courts and commercial cases.

Extraordinary times call for extraordinary measures, and this seems to have been the case when it comes to the central government's behavior towards the judiciary in its handling of commercial cases during the financial crisis in 2008-2009. An examination of policy guidelines and opinions released by the SPC during these years shows the court responding to the requirements set forward by the leader of the CCP's central Politico-legal committee, Zhou Yongkang. His message was that during the financial crisis "it was necessary to more fully take into account the risks and difficulties that might affect social stability" (in Fewsmith 2009:8). In response, the SPC issued opinions to lower courts in line with the Party's temporary policy, where it required lower courts and judges to handle commercial cases in a way that did not threaten social stability by jeopardizing the viability of certain companies, which could again lead to layoffs and cause unrest among laid-off workers. The president of the SPC at the time, Wang Shengjun, publicly declared that courts at all levels should "prudently use such compulsory measures as sealing up, impounding or freezing assets of companies," and the courts should "promptly offer judiciary advisories to help enterprises in operational difficulty tide over economic woes" (Xinhua 2009). This is arguably evidence of

policy interference as policies of the day takes command over law, which is clearly reflected in the ad-hoc judicial opinions released by the SPC at the time, with one of its opinions being titled “Guiding opinions of the Supreme People’s Court on several issues concerning the trial of cases of disputes over civil and commercial contracts *under the current situation*” (SPC 2009, in Li 2010:29, emphasis added). To what extent these central policies actually decreased the ability of judges to decide commercial cases according to law and the facts are hard to ascertain, but it is highly likely that they had an impact on this issue⁶⁴. For instance, one of the SPC’s chief judges, Kong Xiangjun, is quoted in the Chinese media saying that businesses caught up in a court case should not receive a judgment that may threaten their sustainability (SIPO 2008). As a consequence, US businesses were reporting about substantial problems with the handling of some of their commercial disputes in courts, especially in cases where certain outcomes could destabilize local companies and their employees (American Embassy Beijing 2009b).

That being said, apart from the type of policy interference during the financial crisis, there is not much evidence of political interference by the central government into commercial cases. None of the respondents mentioned policy interference in commercial cases as still being present. Moreover, in comparison to policy interference in criminal and civil cases as documented and examined in the previous sections, policy interference in commercial cases carries a much less politicized and ideological tone. The policies merely stress the need to help distressed businesses and there is no overt ideological tone stressing mediation, harmony, and the mass line, as in civil cases (SPC Work Reports various years). Judges do not seem to be under pressure to mediate commercial cases as in private civil cases (Hand 2011:134, Woo 2012:261).

But if central politicians are careful of interfering in commercial cases, then this cannot be said to be true of non-central politicians. Interference in commercial cases by non-central governments is much more evident, and it usually goes under the rubric of ‘local protectionism’ (Zhong & Yu 2004:429-431, Gu 2013:13), as the goal of this type of interference is to protect businesses that are in various ways tightly integrated with the locality in which they are based. It was not only the central government and the SPC that interfered through policies during the financial crisis, non-central governments seem to have

⁶⁴ Again it must be noted that not only did the policy seem to affect de facto judicial independence, it also led to courts refusing to accept certain cases (Howson 2010a, 2010b, Wang 2011:98, respondents 10 and 11).

issued even more plentiful and more direct policy requirements to the courts at the same time (Howson 2010b:149-150, Wang 2011:94-102). As respondent 11 made clear; “*during the economic downturn in 2008, the courts received policy guidelines from both local and central Party committees that instructed judges how to handle certain economic cases*” Howson (2010a:374-377) has documented such internal non-central policy guidelines in the Shanghai area, where the Shanghai Higher People’s Court issued guidelines to all courts under its jurisdiction, requiring them to “conform to national social policy, and exercise heightened sensitivity to the impact of decisions on distressed industries” (Howson 2010a:337), ultimately for the purpose of keeping businesses operating even if they were insolvent (Howson 2010b:338, 376). Wang (2011:94-102) has documented similar local-level court policy guidelines in Southern China during the financial crisis. At the time, the American Consulate General in Guangzhou, Southern China, reported the same phenomenon and questioned if the rule of law in this region was “another casualty to the economic downturn” (American Consulate General Guangzhou 2009). The fact that local and provincial courts seem to more or less freely publish policy guidelines is another testimony to the highly fragmented and localized court structure of China as already noted.

Political interference in the name of local protectionism is not only done through issuing polices and requirements to the courts. More direct forms of political interference through ex-parte communication and direct-case interference seem to be much more prevalent in commercial cases. Here however, the evidence suggests that we need to separate between courts and commercial cases in more developed, urban areas, and courts and commercial cases in more underdeveloped, rural areas. This because the amount of political interference, and hence degree of judicial independence in commercial cases, seem to differ quite between these two localities.

In rural areas, political interference in commercial cases is purportedly quite likely (He 2009:431, Peerenboom & He 2009:23, respondent 4, 6, 7, 10, 13, and 17, see also Wang 2011:99). This is all the more true if one of the firms in a commercial case is a state-owned enterprise (SOE), or government-supported business (GSB). As respondent 10 noted; “*if a case involves a state-owned enterprise, or if the government has investment or tax interest in the involved business, then political interference is much more likely*” (respondent 10).

Commercial cases involving SOEs and GSBs⁶⁵ in rural areas are thus strongly susceptible to direct-case interference from the local government, and it is argued that rural courts handling these cases often receive written notes from the local government or Party committee on how the case outcome should be (Fu 2003:204). It is also here worth noting that in many cases, it is the court and the court president that directly contacts the local PLC and party committee if they receive a commercial case involving a local SOE or GSB (He 2011a:16-17, Wang 2011:94-99)⁶⁶. Thus outside political interference is purportedly channeled into the decision-making process through *ex parte* communication, with the court reporting to outside political actors by its own initiative. This appears similar to what happens in administrative cases (section 5.3.1), and it is also here debatable to what extent this *ex parte* communication turns into direct case interference.

In contrast to the situation of courts in rural areas, the independence of courts in urban areas over the scope of commercial cases is evidently considerably higher (respondents 6, 10, and 17, He 2009, Peerenboom & He 2009, Howson 2010a, 2010b). Commenting on this issue, respondent 17, who had been a legal advisor to a city government in the more developed areas of Southern China and worked with commercial litigation, noted that; “*in commercial cases in urban areas, as long as there is no big SOE, then there should not be much political interference, but here you have the issue of corruption*” (respondent 17). The word ‘big’ is important, as this suggests that commercial cases in urban areas involving SOEs are only susceptible to political interference if the SOE is a major firm. This similar point was made by a number of respondents who stated that in urban areas, particularly cities like Beijing, Shanghai, or Guangzhou, only commercial cases involving *big* SOEs were now particularly susceptible to political interference (respondent 6, 10, and 17). But as respondent 17 mentioned, corruption remains an issue. Respondent 6, who has worked as a judge handling commercial cases in a Beijing Intermediate Court, provided a similar statement:

⁶⁵ It is difficult to provide a clear-cut definition of what these businesses are, but as respondent 10 made clear; they are locally embedded businesses of which the local government has great tax or investment interests in, and that therefore perform some of the same functions as an SOE. The important issue is that the business’ jurisdiction overlaps with the court’s jurisdiction.

⁶⁶ Political interference in commercial cases involving SOEs does not only occur during decision-making, it is widely reported that the local Party committee may instruct local courts not to accept any commercial cases involving SOEs (Fu 2003:200), and that the local Party committee may also ask the court to underenforce certain judgments (He 2008, He 2009, Wang 2011, respondent 12).

“I worked in the economic chamber where we had many contract disputes between private companies. I mean cases that are not sensitive. We tried those cases impartially by law and facts. But here guanxi⁶⁷ and corruption can easily be an issue. For example if I was the judge and a former class mate was a lawyer, or if one of the chief judges was a good friend with one of the lawyers or parties... In those cases you have to listen to your boss and follow the hierarchy and judge accordingly.”

The answer highlights the indicated low degree of political interference, but with corruption as an acknowledged part of working as a commercial case judge⁶⁸.

Supporting evidence of the indicated higher degree of judicial independence in commercial cases in urban areas are other studies on courts in Shanghai and southern China, which show that SOEs are generally not more likely to win commercial cases. There is neither a consistent bias towards local enterprises, and the majority of businesses are pleased with the courts and the judges (He 2008, He 2009, Pei et al. 2010, Howson 2010a, Howson 2010b). The most current World Economic Forum’s annual Global Competiveness Report, which is based on surveys of leading firms in a specific country, shows that China ranks as number 57 out of 148 in the ‘judicial independence’-category, outranking countries such as Spain and Italy (Schwab 2013:415). Although the measurement is based on firms’ perceptions, it nevertheless indicates that larger firms in China trust the fact that the judiciary is relatively free from political interference.

5.4.2 Discussion

The analysis has shown that similar to the judiciary’s independence in civil and criminal cases, the judiciary in commercial cases is also susceptible to political interference if the government has concerns about social stability. This was apparently the case during the financial crisis in 2008-2009. Apart from this, the findings reveal that in commercial cases, there seems to be a

⁶⁷ “Guanxi” is the Chinese term for relationship and usually refers to interpersonal connections (Xin & Pearce 1996:1642).

⁶⁸ Respondent 6’s answer is notable for showing how the strict internal judicial hierarchy not only facilitates the effective deployment of instructions from political organs and actors, but also corruption initiated by senior judges within the courts. Li (2010) has documented that judicial corruption is far more prevalent in commercial cases compared to other civil cases and criminal cases.

relative higher degree of judicial independence in urban courts, with lower degree of judicial independence in rural courts. According to theory, it is politicians desire to facilitate trade and investment that leads to a higher degree of judicial independence in commercial cases (Moustafa 2007). Thus, we could potentially conclude that urban courts are more independent because they are more inclined towards attracting trade and investment. A closer analysis reveals another story however, as to whether the desire to attract trade and investment results in greater degree of judicial independence in commercial cases seems to be highly contingent on a locality's economic structure. Below, I analyze why the desire to attract trade and investment result in greater judicial dependence in rural court, and why it results in greater political independence in urban courts.

First, it must be noted that all Chinese local governments want to attract investment and facilitate trade and economic growth. This is an assumption often mentioned (World Bank 2011:103, Wang 2011), and as Saich (2011:267) argues; "legitimacy is now tied more than ever before to the ability to deliver economic goods". The local governments in any locality are thus evaluated to a large degree on their ability to deliver economic growth (See Wang 2011:45-47). This understanding was shared by a number of my respondents who saw the desire to facilitate economic growth as the most important policy objective of Chinese politicians (respondents 6, 7, 10, 12, 13, and 15). The question must then be; why, , does the local governments' desire to facilitate trade and investment seem to lead to less independence for the courts in rural areas, with largely the opposite happening in urban courts? The reason suggested here is because the underlying economic structure, and hence the underlying tax base for the local government, is markedly different in rural areas than in urban areas. The economic structure endows politicians with different economic incentives in such a way that politicians in urban developed areas have stronger incentives to refrain from interfering with the courts in commercial cases, while the opposite is true rural areas. Below I elaborate this argument.

China's local governments, here meaning all governments below the national level, are generally considered to be financially in squeeze. A disproportionate large amount of their fiscal revenues are channeled to the central government, while at the same time; local governments have a disproportionate large responsibility for government expenditures. In terms of government expenditures, China is actually one of the most decentralized countries in the world with local governments responsible for around 80 percent of all expenditures (World Bank 2011:55-56). However, when it comes to local governments' tax revenues, the

majority is transferred to the central government with only around 40 percent of the central government's tax revenues being transferred back to the local governments (World Bank 2011:58). In such a situation, it becomes crucial for local governments to ensure income that can cover the expenditure gap, with one opportunity being business taxes and income taxes from enterprises. Importantly, the revenue gained from these kinds of taxes are entirely kept by the local governments themselves, and hence not funneled to the central government (Jin, Qian & Weingast 2005: 1723-1724, Saich 2011:198)⁶⁹. However, in rural areas, the number of enterprises who contribute with revenue by paying business taxes is rather low. The major tax contributors to local governments in rural areas are larger enterprises, often SOEs (Kanamori & Zhao 2004:32). Thus, the structure of economy is rather concentrated, with few and larger businesses being crucial to the local government by providing revenue. Under such a situation, the local government has every interest in keeping these businesses happy and protecting them if they are challenged by another non-local or smaller business in court (Wang 2011:99). The consequence is that local governments in rural areas, with a less diversified economy, have strong economic incentives that actually increase their willingness to interfere with the courts in commercial cases. This appears to be especially true if the case involves a business that is a substantial tax provider. And it is also true here, as in administrative cases, that interference appears costless for the local politicians since the courts are institutionally dependent on the local government. In many ways, it is also in the interest of the courts to favor these businesses, not only because the courts are afraid of retaliation from the local government, but because adequate funding of the courts is also a function of the local government's wealth and revenues. The point to be emphasized is that political interference does not occur because local politicians are against trade, investment, and economic growth, it is rather because politicians seem to consider political interference as a way of facilitating these aspects in the local economy (Wang 2011:99, 104).

In many urban localities, the structure of the economy is rather the opposite, which changes the outcome. Here the local government's income from enterprise and business taxes is not dependent on some few, big businesses. Instead, the tax base is dispersed across a much larger share of various private enterprises, including foreign-owned and foreign-invested enterprises. Foreign trade and FDI are heavily concentrated in the urban centers along the coast, such as Beijing, Tianjin, Shanghai and Guangdong (Saich 2011:191). The same is true

⁶⁹ Taking up shadow loans, leasing government land to enterprises, and issuing arbitrary and illegal taxes are other popular ways of ensuring revenue (See Saich 2011:203).

for private enterprises, with the majority being located in the urban localities along the coast; such as Beijing, Shandong, Shanghai, Jiangsu, Zhejiang and Guangdong (Kanamori & Zhao 2004:29, He 2008:10). The structural diversification of both the economy and the tax base of local governments in urban areas means that these governments are less dependent on the tax incomes from some few and large enterprises (Kanamori & Zhao 2004:30). The consequence is first of all that the government has fewer incentives to protect certain businesses and hence interfere with the commercial courts. The second consequence appears to be that in order to attract even more businesses and investments, the government facilitates this by being careful to interfere with the commercial courts because it wants to provide a better legal environment (He 2008:10). Respondent 10, who is a commercial lawyer in the highly developed Guangdong-area in Southern China, emphasized this when he stated that:

“Here in Guangdong, local governments, in one sense, are afraid to piss off investors. So they make sure that investors’ interests remain strong. They really want to attract high-technology intensive businesses. But these businesses are quite big and they sometimes invest a lot. They are Fortune 500 companies! And these companies, they stick to the legal regulations, they follow the law, and they want good courts. In other regions, such as Jiangxi where I recently was, there is another logic. Here regulations and laws may not matter that much, because maybe the investors don’t like it. So here the government compromises with the investors by changing the regulations because it wants investors! So you see, here law is not that important” (respondent 10).

Apart from showing how different economic conditions affect the behavior of local governments within China, the statement of respondent 10 also indicates that local governments with a developed economy in which there are many and major investors, may have strong incentives to refrain from interfering with the courts. This is thus in support of the argument forwarded by Moustafa (2007), that authoritarian rulers may have incentives to respect judicial independence in order to attract trade and investment. However, this is not the same across China. In sum, Chinese politicians’ willingness to interfere with the courts in commercial cases is thus very much a function of whether it is in their best interests, but their interests are again shaped by the economic environment and structure wherein they are embedded. And again, this structure varies internally in China, and this variation is allowed to affect the degree of judicial independence in commercial cases since the courts remain so institutionally dependent on the local governments.

6. Conclusion

This study has examined to what extent the Chinese judiciary is politically independent, and identified and considered factors that may help explain the degree of judicial independence identified. An exploratory qualitative case study with expert interviews and supplementary secondary data was employed to answer the research question. I created a theoretical framework based on previous studies on judicial independence in authoritarian regimes which separated between four legal issue areas in which the judiciary may be independent: criminal, civil, administrative, and commercial cases. The analysis was devoted to examining the degree of judicial independence in each legal issue area with a focus on interference from both national/central and local political actors through direct case interference, ex parte communication, and policy interference. In each legal issue area I have identified and analyzed explanatory factors. The explanations have been discussed in relation to the existing theories embodied in my theoretical framework.

The main finding of this thesis is first and foremost that the Chinese judiciary's independence is low. Both central and local political organs and actors interfere with judges' decision-making in various ways, not only through direct case interference and ex parte communication, but also through more indirect policy interference. However, it seems to be mostly local, and not central, political organs and actors that are behind the interference.

In *political criminal cases*, I find that there is substantial political interference, especially direct case interference, both by local and central political actors. This low degree of judicial independence is explained by the regime-related theory and is therefore an expected finding. Political authorities interfere in order to sideline political opponents. In *ordinary criminal cases*, there also appears to be a quite low degree of judicial independence. This is unexpected and in contrast to previous theory stating that political actors lack incentives to interfere in non-political matters, such as ordinary criminal cases. My findings suggest that it is actually the local police who pressures and interferes with judges in ordinary criminal cases. Their ability to interfere, and the disability of judges to handle criminal cases independently, comes from the fact that police chiefs are often also leaders of local Party organs that are in charge of overseeing the courts. The general view on crime is highly politicized in China, and central political authorities' are concerned with social and political stability. In turn, the police have been politically empowered by the central authorities. All this has affected the independence of the judiciary in ordinary criminal cases, since the police

can impose their will on the courts given their political power. Furthermore, I have argued that the politicized view on crime in general and the close association between Party organs and the police can be traced back to the communist totalitarian regime.

In *civil cases*, the degree of judicial independence is also moderate, and the dependence on political actors is considerably higher than could be expected from theory. Political interference mostly happens through policy interference, where judges appear to be pressured by central authorities to mediate, instead of adjudicate, civil cases. This can be explained by the conservative Chinese political leadership and its concerns for social stability. The theory presented in my theoretical framework appears not to be fitting, as it suggests that political actors lack incentives to interfere in non-political matters such as civil cases. The low degree of political independence can be a consequence of the totalitarian legacy, where the Party-state was deeply embedded in society and state institutions. This is in contrast to authoritarian regimes, which have never politicized and mobilized individuals and state institutions to the same extent. The post-totalitarian Chinese regime also appears to have different legitimacy costs of interfering than regular authoritarian regimes, since it can justify its interference by invoking communist political ideology from the previous totalitarian regime.

In *administrative cases*, the degree of judicial independence is also low due to frequent *ex parte* communication between the courts, the local governments, and the Political-Legal Committee. Local governments appear to be very sensitive towards administrative lawsuits against their own agencies. In the first sense, this is in accordance with structural insulation theory, which states that political interference in administrative cases is more likely to happen, and less costly, when the courts are structurally dependent on the government. In China, the administrative courts are highly interlinked with the local governments, and the local governments can easily impose its preferences on the courts. According to strategic theory, however, central authoritarian governments have strong incentives to support independent administrative courts if they struggle with monitoring the bureaucracy and its political subordinates. This has not happened in China, even in the face of disobedience and corruption by local governments. My explanation to this is that the central regime has other and more forceful mechanisms for monitoring its agents: the nomenclature system and the Chinese Communist Party's own monitoring system.

In *commercial cases*, my findings indicate that the degree of judicial independence has varied over time and space. Policy interference from both central and local politicians was strong during the financial crisis in 2008 and 2009, but has since decreased. Furthermore, commercial cases involving state-owned enterprises and other businesses that local governments have tax and investment interests in, have a high degree of direct case interference in rural, but not in urban areas. Moustafa (2007) argues that if the firms that local governments try to attract favor a good legal environment, then the local government has greater economic incentives to refrain from interfering with the courts in commercial cases. However, my findings show that politicians' economic incentives to interfere with commercial courts are largely a consequence of the underlying economic structure, which are different in rural and urban areas. The government has fewer incentives to interfere in commercial cases if it has a broad tax base and is not dependent on just a couple of large firms, such as in urban areas.

To sum up, the Chinese judiciary is highly dependent on both central and local political actors. The judiciary appears more dependent than what theories on judicial independence in authoritarian regimes generally suggest. While Linz (1964) considered elements of the rule of law to be compatible with authoritarian regimes, and perhaps even "secularized" totalitarian regimes, my study has revealed that insofar as judicial independence is an element of the rule of law, then this element does not seem to be very compatible with the Chinese post-totalitarian regime.

The consequences of this lack of judicial independence in China may be wrongful convictions and denial of legal redress for individual citizens. In the long run, this may in turn affect the legitimacy and viability of the Chinese political regime, which is currently struggling to convince its citizens that the government is ruling in accordance with law. However, there also appears to be many benefits of undermining judicial independence. Further research should be devoted to the consequences of the strong link between the Chinese judiciary and the local and central political actors.

The findings of this thesis could also be used for further theory building on judicial independence in authoritarian regimes, particularly in post-totalitarian regimes. In China, the totalitarian legacy and the Party-state's great concern for social and political stability seem to compromise the judiciary's independence, especially in criminal and civil cases. It could therefore be pertinent to theorize about how historical legacies affect judicial independence in

authoritarian states more generally. Such a theoretical approach would bear resemblance to theories on how the legacy of the past may affect outcome of judicial reforms and the functioning of the rule of law in new democracies (e.g. Linz & Stepan 1996, Dollora 2014).

Furthermore, my findings have suggested that the degree of judicial independence vary according to legal issue areas. Further research on judicial independence in authoritarian regimes could exploit this further and analyze how judicial independence in some legal issue areas co-exists with judicial dependence in other legal issue areas. Here, it would be pertinent to identify those factors that contribute to greater judicial independence in some legal issue areas, and this study has briefly suggested that there may be important economic factors at play in commercial cases.

I would also suggest that further research points towards uncovering regional variations within China, and how the independence of different courts may vary both according to location and legal issue area. The courts' structural and institutional subordination to the local governments appears to undermine judicial independence in China. However, the analysis also revealed that this need not result in the same amount of interference everywhere. Judicial independence becomes a complex phenomenon as soon as we consider the fact that it varies between legal issue areas and different localities. Further research could pay more attention to uncovering this variation.

Another issue for further research is the increasing professionalism of the Chinese judges, and how this goes together with a judicial system that is highly subordinate to the preferences of political organs and actors. The tension in the judicial system between professionalism and political control was very clear in all my interviews, and more research should be done on how this tension plays out in the work of the courts. Particularly, if and how this professionalism may, or may not, be a barrier against political interference.

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