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RESEARCH STUDIES ON THE ORGANISATION AND FUNCTIONING OF THE JUSTICE SYSTEM IN FIVE SELECTED COUNTRIES

China, Indonesia, Japan, Republic of Korea and Russian Federation

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RESEARCH STUDIES ON THE ORGANISATION AND FUNCTIONING OF THE JUSTICE SYSTEM IN FIVE SELECTED COUNTRIES

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PREFACE

Renovation of organisation and functioning of justice system is one of focusing duties in the judicial reform process in Viet Nam currently. This has been mentioned in Resolution 49-NQ/TW dated 02 June 2005 of the Polit-buro on Strategy on Judicial Reform to 2020. In order to sucessfully implement the judicial reform in light of Resolution 49-NQ/TW in general and to improve the organisation and functioning of judicial system in particular, it will be necessary to carry out a study on organisation and functioning of judicial system of various countries in the world with aims to have a comparative assessment as well as to absorbe selected positive elements into the Vietnamese practice.

With assistance of the United Nations Development Programme (UNDP) and with the participation of a group of international consultants, the Project "Strengthening Access to Justice and Protection of Rights in Viet Nam" has carried out a study on organisation and functioning of judicial system of five countries, including China, Indonesia, Japan, Republic of Korea and Russian Federation. These countries have history of development rather long with very similar characteristics with Viet Nam. Thus, their experiences in development of their judicial systems shall be valuable lessons for Viet Nam during its process of study to renovate and improve its judicial system.

The bilingual English-Vietnamese report "Study on Research studies on the Organisation and Functioning of the Justice System in Five Selected Countries: China, Indonesia, Japan, Republic of Korea and Russian Federation" is a result of a survey and evaluation of independent consultants and research organisation. This may give a truthful and comprehensive view on the process of establishment of apperatus, coordination mechanism between different organs in the apperatus, activities outputs and outcomes of the judicial agencies such as investigation, prosecution, court, judgement execution in the mentioned five countries.

In coordination with Project "Strengthening Access to Justice and Protection of Rights in Viet Nam" to edit and publish the Report, in spirit of respecting opinions and points of view of independent consultants, the Judicial Publishing House keep mainly all contents of the Report. Accordingly, the views and analysis expressed in this publication are those of the authors and do not represent those of the Judicial Publishing House, of the Project as well as donor for this publication, i.e. the United Nations, including UNDP.

It is hope that, this publication will be a meaningful reference material for research work as well as for all of those interested in.

Hanoi, December 2011

Judicial Publishing House

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PEOPLE'S REPUBLIC OF CHINA

FINAL REPORT

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1. Political, Cultural, Historical and Socio-economic Context

1.1. Major Historical Events

The People's Republic of China was established in 1949, following a lengthy period of war on Chinese territory, first between the Chinese and the Japanese and then between the Chinese Communist forces and the government of the Republic of China. The People's Republic of China was established by the Communist Party of China (the "CCP") under the leadership of Mao Zedong and various combinations of the generals and leaders, who participated in the early development and advance of the CCP, dominated the leadership and policies of China until the death of Deng Xiaoping in 1997. Until 1911, China was an empire, ruled by a succession of dynasties, with the assistance of a wide-spread public service, appointed as a result of success in the imperial examinations. The last dynasty to rule China was the Qing dynasty, which originated in Manchuria and was not ethnically Han Chinese (the largest ethnic group in China) and established itself in 1644 as the successor to the Ming dynasty. The Qing essentially adopted the previous system of government, with some changes designed to institutionalize Manchu rule, but were weakened during the 19th century by a combination of poor government, the increasing presence and dominance of the western powers, who possessed weapons and capabilities which the government was unable to resist, internal revolts, and a failure to adapt or modernize.

The Republic of China was inaugurated in 1912, under its first President, Yuan Shikai. The new government, however, was unable to establish itself throughout the whole of China, and China was soon divided into a number of fiefdoms ruled by warlords. Although Chiang Kai Shek, who rose to power in the 1920s, was able to gain ground against the warlords, his government was weakened by both the rise of the CCP and the incursions of the Japanese. The CCP won the civil war after the conclusion of World War II with the defeat of the Japanese. The PRC succeeded in unifying China (with the exception of Taiwan, which became the seat of the Republic of China government, Hong Kong, which was still under the administration of the United Kingdom, and Macao, which was governed by the Portuguese) under one government. In 1997, Hong Kong reverted to China, under a system of government known as "one country, two systems," which gives Hong Kong considerable autonomy in relation to its political, economic and judicial system, and Macao reverted to China in 1999 under a similar arrangement.

The CCP set out to re-make China, initially on the basis of the Soviet model, and subsequently on the basic of ideological and economic theories developed by the CCP which aimed to be more suited to Chinese circumstances. Since 1949, the CCP, although riven on occasion by internal dissent and faction-fighting, has retained its domination in the political, economic and administrative spheres in China. Communist rule in China has been marked by a number of significant historical events relevant to the development of the legal and judicial systems. The Anti-Rightist campaign in 1957-1958 instituted by Mao as a way of removing internal dissent resulted in approximately 300,000 intellectuals and reformists (including lawyers and judges) being punished or sent to the countryside. At much the same time, the Chinese government fell out with the Soviet government, which had provided large amounts of aid in the form of equipment, advice and technical advisers, all of which was withdrawn in 1960. The late 1950s also saw the inception of the so-called "Great Leap Forward", a policy of collectivisation, relocation of industries and encouragement of self- sufficiency, which had the effect of causing a major famine and mass starvation across China in the early 1960s. In 1966, Mao set off what became known as the "Cultural Revolution", which lasted from 1966 to 1976, during which in the name of pursuing the correcting of political ideology (and removing a number of leaders who might be a threat to Mao), many intellectuals,

businesspeople and others were killed, punished, had their goods expropriated and were removed to the countryside. The devastation of the Cultural Revolution caused the closure of schools and universities, dislocation of production and industry and consequent economic losses and the destruction of the legal system and increased the international isolation of China.

Deng Xiaoping, who came to power after the death of Mao, took a more pragmatic approach to economic issues. Under the "Open Door" policy which he instituted in 1979, China encouraged foreign investment for the purpose of restarting the Chinese economy, reopened the universities, revised the Constitution, and began the process of recreating a comprehensive legal and judicial system. A Criminal Law was one of the first pieces of legislation to be passed as part of this policy. After a period of rapid opening up and development, China acceded to the World Trade Organization in 2001. China also became a party to a large number of international treaties, including human rights treaties, which have had some impact on the development of the legal system in China. (See Spence, 1990; Chen Jianfu, 2008; Cotterell, 1988.)

1.2. Economic System

When the PRC was first established, the government instituted its first five-year plan. In the 1950s, it moved to collective agriculture, bring urban enterprises under state control by moving productive assets into state-owned enterprises and control the movement of labour across China. By 1979, the economy was stagnating. The "Open Door" and subsequent policies benefitted farmers by freeing up agricultural policy, encouraging foreign investment, consolidating and restructuring the large and inefficient state-owned industrial sector and permitting the growth of the private sector and aiming to make the economy more efficient through the liberalisation of the labour system by the gradual abolition of life-time employment and restrictions on labour movement and the introduction of the labour contract system, introducing securities markets and gradually privatizing property rights. The Preamble to the 1982 Constitution (the Fourth Constitution since the PRC was established) states that China will be "in the primary stage of socialism for a long time to come." Official policy is therefore that China should be regarded as a "socialist market economy" (rather than a Communist one) and legislation and policies reiterate the importance of supporting and strengthening the socialist market economy. However, for purposes of, for example, responding to anti-dumping actions brought against Chinese goods overseas, the Chinese government has strongly lobbied for treatment as a full market economy. As an example, as a preamble to the Australian government entering into negotiations for a free trade agreement with China in 2004, Australia recognized China as a market economy for the purposes of Australian legislation.

Although the implications of the socialist market economy concept are not completely clear, and in many ways, the Chinese economy works as a market economy, China continues to have a large and strong state-owned sector. In addition, governments and CCP organisations at all levels in China play an active role in economic activity, not merely in the traditional government roles of planning, regulation and administration of business sectors. Chinese governments and individual Party members and officials directly participate in business, not only through state-owned enterprises in which governments at all levels act as investors, but through close relationships with, or in some cases, personal investments in, local companies and businesses.

Current government policy is to maintain a large State presence in the economy, in the form of state-owned enterprises under the various levels of the Chinese government *(Circular of the General Office of the State Council concerning Transfer of the Opinions of the SASAC on Guidance for Promotion of Adjustment of State-owned Assets and Restructuring of State-owned Enterprise, 2006)*. Pursuant to this "Key Pillars" policy, the state sector will continue to hold majority interests

in a number of state-significant areas, such as telecommunications and steel and will have a strong presence in a number of others. Foreign investment in these areas is restricted, and private Chinese participation in those areas controlled by the state sector will also be limited.

The Chinese government issues a five-year plan relating to economic activity, and issues and implements policies relating to the economic direction of the country in relation to areas such as the development of technologically advanced companies, encouragement of indigenous brands and so on. It also maintains pricing policies in relation to crucial commodities such as oil, another sector in which state-owned companies dominate the Chinese market. The government is, however, constrained by its commitments pursuant to WTO in relation to the provision of subsidies and preferences for domestic products, and is under constant pressure from foreign governments, particularly the United States, in relation to its management of the economy insofar as it affects international trade and foreign investment and operations in China. (See Spence, 1990; Chen Jianfu, 2008; Cotterrell, 1988; DFAT website, 2010).

1.3. Political System

Leadership and Authority

Under the Constitution, the PRC is "a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants" (Art 1). The National People's Congress ("NPC") is the highest organ of state power (Art 57). The NPC is comprised of deputies who are, according to the Constitution, elected by the various provinces, municipalities under the central government and autonomous regions of China (Art 59). The President of China (Hu Jintao) is elected by the NPC, but, under the Constitution, is not given a substantial amount of independent power. The supreme executive authority under the Constitution is the State Council, which is led by the Premier (Wen Jiabao) (Art 85). Each province, region and municipality in China similarly has a people's congress. China is not, however, a federal system. It is a unitary system, which practises "democratic centralism" under the Constitution, which is, very roughly, a system pursuant to which power is centralised and the local authorities exercise power pursuant to authorization from a higher level (although in practice this can mean that local authorities have a considerable amount of autonomy). (Chen Jianfu, 2008, p125).

The CCP does not play a large role in the Constitution. It is referred to only in the Preamble, which refers to "the leadership of the Communist Party". It is generally agreed, however, that the Communist Party leads China and the congresses of the Communist Party, which are held every 5 years, make the decisions as to major issues of policy and who will constitute the policy-makers and leaders of China. A system of parallel positions in the CCP and civil government means that officials generally hold both CCP and government offices. Hu Jintao, for example, is the Secretary-General of the Communist Party. All of the major officials in the Chinese government, including the Vice-President, Xi Jinping, the Premier, Wen Jiabao and others hold high positions within the Communist Party. Zhou Yongkang, for example, is a member of the Politburo and the State Council, where he is member of the Leading Party Members' Group of the State Council, deputy secretary of the Political and Legislative Affairs Committee of the CCP Central Committee (Politico-Legal Committee), and was formerly Minister of Public Security (News of the Communist Party of China website). Wang Shengjun, President of the Supreme People's Court is a member of the Communist Party Central Committee, and secretary of the Politico-Legal Committee; Cao Jianming, Procurator-General, is also a member of the Communist Party Central Committee and a member of the Politico-Legal Committee (Chinapeace website). The membership of significant bodies such as the Central Military Commission (of which there are 2 – the government body set

up under the Constitution and the CCP body) is identical. The CCP further controls the machinery of government through the appointment of CCP members to important positions in government and elsewhere. As discussed in more detail in this Report, the CCP plays a significant role in both the legislative process, in judicial reform and in some cases in the day to day administration of justice in China.

Election of deputies to the NPC and to other provincial assemblies is strictly controlled. Parties other than the CCP are represented in the China People's Consultative Committee but have little influence or participation in policy-making. There have been some experiments with democratic voting at the village or "grass-roots" level but this has not led to wider elections for positions above this point.

Aims, Objectives and Visions for the Justice Sector

The modern system of justice in China essentially dates from the commencement of the reform process in 1978 to 1979 and demonstrates extraordinarily comprehensive and rapid development, both in the creation of a legislative system dealing with major areas of legal concern and the implementation and reform of a judicial system, including investigation, prosecution and court judgment. Together with the court system, the legislative and social system has encouraged the operation of systems of alternative dispute resolution, such as arbitration and mediation, as well as an extra-judicial system of petitions (or "letters and visits") whereby Chinese citizens can complain against the operation of the pervasive Chinese bureaucracy. The way in this system has been implemented and operates is discussed in more detail in the course of this Report.

Historically, Chinese law under the Qing Dynasty was essentially penal in nature and drew heavily on Confucianist and legalist concepts in defining crimes and allocating punishments. In order to update the law and to respond to the refusal of the ever-encroaching foreign powers to submit to imperial law, efforts were made at the end of the Qing Dynasty both to revise the criminal law and to draft and implement a system of commercial law which would be acceptable in China and to the foreign powers and allow China to participate fully in the outside world (Bath, 1977). These new laws looked at and took many elements from civil and common law systems, a practice which has also been adopted in the more recent process of legal reform in China. The Kuomintang drew heavily on this early reform work in establishing their own system of laws and courts, subject to the incorporation of principles derived from the work of Sun Yatsen, which emphasized nationalism, democracy and the livelihood of the people (Chen, 2008, pp30 to38). When the Communist Party took over the mainland in 1949, part of its purpose was to abolish the Kuomintang system of laws in favour of a system of a class-based system of legal implementation, based, in the absence of written law, on the policies of the Communist Party and laws, decrees and so on issued by the People's Government. Soviet theories of law, along with other Soviet concepts, had a strong influence on attitudes towards law and the legal structure. There was some collaboration with those lawyers and judges who had been trained prior to 1949, however, the first Constitution was passed (1954) and the four-tiered system of courts which is in operation today (Supreme People's Court, High People's Court, Intermediate People's Courts and Basic People's Courts) was established. In the course of the Anti-Rightist movement which commenced in 1957, however, the lawyers and legal scholars who had criticized the implementation of laws and Communist approach to the legal system were purged, and institutional reform suffered from a sustained set-back which lasted until the initiation of the Open Door Policy. Very generally, the view taken to law in this period reflected the concept that in an ideal state under communism it will not be necessary for there to be law or a formal legal system. In the short term, therefore, law should serve political ends (Peerenboom, 2002, pp43 to 46). Practically, prior to 1979, the legal system in China was dominated and closely

controlled by the Communist Party, the drafting of laws was sporadic, training of lawyers was effectively stopped and judges, to the extent that they conducted cases, were often poorly trained and not free to make independent judgements on their cases. (For more detail on this period, see Peerenboom, 2002 and Chen Jianfu, 2008.)

Deng Xiaoping, succeeding to the rule of China in the chaos of the after- math of the Cultural Revolution, saw the need for law. "There must be laws for people to follow; these laws must be observed; their enforcement must be strict; and law-breakers must be dealt with." (quoted in Chen Jianfu, 2008, p52). This does not mean that law is separate from, or above, policies of the Communist Party. However, it does mean that there must be written laws. The relationship between policies and the Communist Party and the role of written law and the courts and other bodies which are responsible for implementing it continues to cause practical difficulties in China. As Chen Jianfu comments, the introduction of economic reforms, opening up the state-run economy and ultimately resulting in the "socialist market economy" necessarily brought with it changes to the legislative and judicial systems and opened up a discussion among Chinese legal scholars on the nature of law and the development of the legal and judicial systems. In 1999, the Constitution was amended (art 5) to provide that "the People's Republic of China implements government in accordance with law and builds a socialist country governed by law." Further impetus for reform was provided by China's accession to the WTO, which required substantial amendments to China's economic and commercial laws, commitments on transparency, and China's increasing involvement with the international community and accession to major international agreements (Chen, 2008, pp63 to 66; Bath, 2009).

In addition to the active commentary and contribution to legal theory and legislative content made by the growing group of Chinese scholars, Chinese legislation and the judicial system has also drawn heavily on laws, concepts and training from other legal systems. As noted above, Soviet law played a strong role in the 1950s. In drafting laws from the end of the 1970s, the Chinese government has also looked at legislation and absorbed legal concepts from common law, civil law and socialist systems in order to create a system which is considered suitable for Chinese purposes (Chen Jianfu, 2008, pp65-75; Clarke, 2006; Erie, 2009).

Legislation in China includes both legislation passed by the National People's Congress and the provincial and other local people's congresses, but a variety of regulations, rules and decrees issued by administrative agencies. The parameters of the law-making process are set by the Constitution, which provides that no laws, or administrative rules or regulations may contravene the Constitution (art 5). Pursuant to Article 58 of the Constitution, the National People's Congress (NPC) and its Standing Committee "exercise the legislative power of the State." The NPC can amend the Constitution (Article 62), to enact and amend "basic laws governing criminal offences, civil affairs, the state organs and other matters" and to elect the President and the Vice-President and, upon the recommendation of the President, the Premier and the State Council. The Standing Committee of the NPC is comprised of the Chairman of the National People's Congress, the Vice-Chairmen, the Secretary-General and members elected by the NPC. The Standing Committee can enact and amend laws other than those which should be enacted by the NPC itself. These provisions are further elaborated on by the *Law on Legislation*, 2000, which states that only "national Law" may be enacted in respect of matters relating to state sovereignty, the establishment and operation of people's congresses, governments, courts and procuratorates, crimes and criminal law, the deprivation of political rights or personal freedom of a citizen, expropriation of non-state assets, fundamental civil institutions, economic system, tax, customs, financial and foreign trade systems and litigation and arbitration systems. The Standing Committee is responsible for interpreting the

Constitution and interpreting (and amending) laws (Constitution, art 67). Interpretations so issued have the force of national law (*Law on Legislation*, art 47). The fact that this power is given to the Standing Committee of the NPC rather than to the courts presents the judiciary with significant problems when faced with legislation enacted by different levels of government.

The State Council, which is the highest organ of state administration (*Constitution,* art 85). not only submits proposals to the NPC and its standing committee, but adopts administrative measures, administrative rules and regulations *(xingzheng fagui)* and regulations and issues decisions and orders. Administrative regulations may be adopted in relation to matters for which enactment of administrative regulations is required in order to implement a national law (such as the *Labour Contract Law Implementation Regulations*) and for matters reserved to the State Council under Article 89 of the *Constitution*, which include providing unified leadership, economic affairs, education, science and culture, nationalities, and so on. If a relevant ministry or agency under the State Council wishes to draft an administrative regulation, it must obtain permission from the State Council to do so, and submit the final version to the legislative affairs office of the State Council for approval (Articles 57 and 59 of the *Law on Legislation*).

Under the NPC, as noted above, there are levels of government at provincial, municipal and county level, each of which has significant governmental responsibilities and the ability to pass legislative instruments. There are 27 ministries and commissions under the State Council, each of which can also issue rules. The conflict between the powers of the ministries and the lower level governments which are directly responsible for the implementation of legislation can be difficult to resolve, and neither the *Constitution* nor the *Law on Legislation* fully resolve the ranking of conflicting items of legislation passed by different entities. For judges attempting to deal with these conflicts, who do not have the power to declare a regulation invalid on the grounds of inconsistency, and may be subject to pressure from local government or officials, this presents a number of difficult issues.

In practice, the distinctions between different types of law and law-making responsibilities set out in the *Constitution* and the *Law on Legislation* are not clear, and there exists a considerable amount of confusion as to which bodies can pass or implement laws or legislative instruments and what authority they have (Chen, 2008, 180 et seq.). In particular, the role of the CCP in relation to law-making is not spelled out in either the *Constitution* or the *Law on Legislation,* although it plays an important role through approval of the legislative agenda, reviewing draft laws, expressing views through Party meetings, controlling government appointments and pressuring government leaders to support certain items of legislation (Peerenboom, 2002, p234, note 130; Chen Jianfu pp192-195).

Although not mentioned in the *Law on Legislation*, the Supreme People's Court has become an important source of what can be described as secondary legislation through its interpretations and regulations (Keith and Lin, 2009). The SPC may issue the following types of document to assist lower level courts: an "interpretation", which sets out how to apply or interpret a specific piece of legislation in cases before the courts; a "regulation", which clarifies the administration of justice "based on the legislative spirit", a "reply", which provides guidance on a particular cases, and a "decision", which amends or repeals a judicial interpretation. (The type of interpretation and the method for initiating the issue of such an interpretation was standardised by the SPC, *Judicial Interpretation Provisions*, 2007). The SPP, separately or jointly with the SPC, also issues interpretations relevant to the conduct of investigations and other activities of the procuratorate. The effect of these documents is to provide additional detail in relation to the interpretation and application of laws and other legislative instruments, to provide a standard approach for the courts to apply (which is arguably of particular importance in China's civil system, which does

not utilize case precedents in the same way as the western system) and to centralise control over interpretations and applications in the hands of the Supreme People's Court (Keith and Lin, 2009; Chen, 2008, pp 198 to 203).

The fact that a law is passed does not, however, mean that it is easy to implement, particularly in the context of the Chinese institutional structure. The absence of references to the CCP in Chinese laws, despite its own formalised internal structure and pervasive presence and influence in Chinese government creates a fundamental issue for those bodies formally appointed to implement and enforce legislation. Part of the role of SPC Interpretations and other administrative regulations and decrees is to attempt to deal with areas which are either not clearly covered in the laws or in which difficulties appear in practice. Existing institutions or interests may be resistant to changes; officers and party officials may be unwilling to comply with the law. China is not a multi-party democracy despite its Constitutional structure – it is an authoritarian state and its leaders may be reluctant to allow the role of the courts in implementing the law to expand into areas of its own political control (see Fu, 2009). In discussing the judicial system, therefore, it is particularly important to consider the way in which the system operates in practice, so the extent that such information is available in China.

Institutions

Under the Constitution, there are two main judicial bodies, the people's courts and the people's procuratorate (see "Constitutional Structure"). The President of the Supreme People's Court (the "SPC") and the Procurator- General of the Supreme People's Procuratorate (the "SPP") are appointed, under the Constitution, by the National People's Congress, and each is responsible to the Standing Committee of the NPC. The functions and responsibilities of judges and procurators are further regulated by the Judges Law and the Procurators Law (see sections 3 and 4). More detail in relation to the court and procurator system is set out in the Organic Law of the People's Courts and the Organic Law of the People's Procuratorates.

Chinese courts are divided into 4 levels. It is the responsibility of the SPC to review and supervise the work of lower level courts. However, each level of court is also answerable to (and funded by) the local level of government or people's congress at which it is appointed. The Supreme People's Court is the highest level of courts. Below the Supreme People's Court are the High Courts of the Provinces, cities with provincial level status (Beijing, Tianjin, Shanghai and Chongqing) and autonomous regions (Xinjiang and Tibet), then Intermediate Courts, and then Basic Level or Grassroots Courts. Rules of procedure are set out in the CPL and the Law of Civil Procedure. In addition, the SPC issues rules or interpretations which clarify issues relating to interpretation or application of law and the appropriate procedure to be followed.

The Supreme People's Procuratorate is also considered to be a judicial body. Like the courts, there are 4 levels of the procuratorate, corresponding to the levels of the courts. The functions of the procuratorate are to supervise the enforcement of laws according to law, conduct public prosecutions on behalf of the State, investigate certain criminal cases (mainly cases of corruption) and other functions as provided by law (Procurators Law, art 6) (see Chapter 3). As discussed in more detail in Chapters 3 and 4, the Procuratorate may institute appeals and may also ask for reconsideration of cases in certain circumstances.

There are a number of bodies which play a role in the judicial process. The CPL (srts 3 and 18) provides that the "public security organs" or "police" (Ministry of Public Security ("MPS") and its subsidiary organs) are responsible for investigations, detention, execution of arrest and

preliminary examination of suspects. Unless otherwise provided by law, the public security organs also conduct investigations into criminal cases (art 18). Criminal cases involving the endangerment of state security, however, are handled by the Ministry of State Security (art 4), a bureau directly under the State Council, which in turn has bureaux in the various localities. As noted above, the Procuratorate also has investigatory responsibilities in relation to corruption cases.

The CPL regulates the conduct of investigations and in particular the right of the police or the investigating body to detain suspects (see also Chapter 4).

Outside the court system, the Disciplinary and Inspection Commission of the CCP has responsibility for investigations of members of the CCP who may have breached internal discipline. The Disciplinary and Inspection Commission of the CCP may impose penalties ranging from warnings to probation and suspension to expulsion from the CCP. The role of the Disciplinary and Inspection Commission is significant, because the ability of this Commission to investigate cases of corruption involving Party members may overlap with and supersede the procuratorate in the exercise of one of its main functions, that is, the investigation of corruption.

Another body that does not have an official role under the legislation relating to the judicial system but has a powerful and strongly institutional role in the administration of justice is the CCP political- legal committee. There are politico-legal committees at each level of government, under the Central politico-legal committee of the Central Communist Party, with responsibility for leading, supervising, coordinating, administering, instructing and serving the politico-legal function. They therefore monitor and supervise the judicial bodies and may play a role directly in deciding or changing the decisions in particular cases.

Accountability

The system of accountability within the judicial system is a complex one, due to the system of dual supervision; vertical and horizontal. For example, courts are responsible to the bodies which appointed them (the people's congress on the same level), which are currently responsible for paying the costs of the courts and the salaries of judges. They are also, however, under the general supervision of the Supreme People's Court and the higher courts. The same responsibility and supervisory structure applies in relation to the procuratorates.

As discussed in this Report, the multi-faceted accountability system presents a number of major issues for the administration of justice. The vertical system whereby each Ministry or department of government operates separately from its peers means that officers of one department have little incentive to cooperate with other departments. The horizontal system, whereby local government and party officials have direct input and control over appointments and pay of local judges and procurators also provides local government officers and party officials with the ability to interfere with individual cases, as well as creating disparities in remuneration between judicial officers working in different areas (He Xin, 2009a). Pressure from the media both assists the courts to obtain some measure of judicial independence and makes the task of meting out legally justified but unpopular judgments more difficult (Liebman, 2007). On a personal level, individual judges and procurators are reviewed and rewarded (or punished) on the basis of their performance. Major steps have been taken as part of the overall reform process to resolve some of these issues including reforms to procedural law, improving the quality of the judiciary and improving judicial training and a withdrawal of the CCP from direct involvement in individual case supervision (Fu, 2009). The extent to which further reform may be required is discussed in more detail later in this Report.

Constitutional Structures

Under the Constitution (art 123), the people's courts and the people's procuratorates are the judicial bodies of the Chinese state. Article 135 of the Constitution also refers to the public security organs in requiring that in handling criminal law matters, the courts, the procuratorate and the public security organs shall divide their functions, take responsibility for their own work and coordinate their activities, As discussed in more detail in this Report, the division and allocation of functions is not as clear as the Constitution suggests, and continues to present issues in practice.

The Constitution is not specific in relation to the functions of the courts and the procuratorate. However, it provides for the establishment of courts and procuratorates at different local levels and for military and other special courts and procuratorates, as prescribed by law (arts 124 and 130). The Supreme People's Court is the highest judicial organ and supervises the administration of justice at lower levels (art 127); the Supreme People's Procuratorate is the highest procuratorial organ and directs the work of procuratorates at lower levels (art 132). In both cases, higher courts supervise the administration of justice at lower levels and higher procuratorates direct the work of procuratorates at lower levels. As noted below, in addition to this vertical line of supervision, each court and procuratorate is also answerable to local government on a horizontal level. Thus the President of the Supreme People's Court (the "SPC") and the Procurator-General of the Supreme People's Procuratorate (the "SPP") are appointed and may be removed, under the Constitution, by the National People's Congress, and each is responsible to the NPC and its Standing Committee (arts 128 and 133). Their work is supervised by the Standing Committee of the NPC (art 67). The Vice-Presidents, judges of the SPC, members of the Judicial Committee and President of the Military Court are, on the recommendation of the President, appointed and removed by the Standing Committee of the NPC (art 67(11)). The Standing Committee also, on the recommendation of the Procurator-General, appoints and removes, the Vice-Procurators, Procurators, members of the Procuratorial Committee, and Chief Procurator of the Military Court, and approves the appointment removal of the Chief Procurators of provinces, autonomous regions and municipalities directly under the Central Government. Similar provisions relating to appointment, removal and supervision of judges and procurators and the responsibility of courts and procurators are put in place in relation to local congresses by articles 102, 104, 127 and 132 of the Constitution.

The Constitution provides little guidance on the role and powers of the courts and the procurators. It does, however, set out certain basic principles. First, no citizen may be arrested except with the approval or pursuant to a decision of a people's procuratorate or a people's court, and arrests must be made by a public security organ (art 37). Secondly, both the courts and the procuratorates are guaranteed the right to exercise their functions independently, without interference from "any administrative organ, public organization or individual" (arts 126 and 131). Thirdly, all cases must be heard in public, except as otherwise prescribed by law, and the accused has a right to defence (art 125). Fourthly, art 134 gives a right to all Chinese citizens to use their own written and spoken languages in court. As discussed in more detail in this Report, the Constitutional guarantees in relation to judicial independence, in particular, cause considerable difficulty in practice.

Although, as noted above, the Ministry of Justice, the MPS and the Ministry of State Security also have a role under the law in relation to aspects of the administration of justice, unlike the court and the procuratorate, these bodies are not created by the Constitution, but sit under the State Council (a constitutional body) and their name, constitution and functions can be modified from time to time. The Ministers of these different bodies, however, obviously have influence in relation to the running of the judicial system, and their differing objectives may cause conflicts in relation both to the administration of justice and the priority which is given to changes to the law.

1.4 Other Actors

Other actors in the judicial system include the Ministry of Justice, lawyers and the lawyer associations which regulate their activities, some non-government organisations which have an interest in the administration of justice and law reform and legal academics and activists who campaign for reform. Non-government organizations are strictly controlled in China, but may play a role in campaigning for changes. The expansion of access to the internet in China has also had an impact on the justice system. Particular cases where the public perceives that there has been an injustice or corruption by officials or the court system have been widely publicised, resulting, in some cases, in changes to procedure or verdicts (Liebman and Wu, 2007). The public also plays a role in commenting on legislation, which is publicized for comments at any early stage in the drafting. The many parties involved in the drafting of the Labour Contract Law, which included ordinary Chinese citizens, employees, foreign chambers of commerce, local and Hong Kong industry and business associations and the All-China Federation of Trade Unions provide an excellent example of the way in which the law and the judicial system have become matters for public interest and involvement (Karindi, 2008).

In addition to actors which play a direct role in law-making and implementation through the judicial system, we should also note the existence of parallel systems of legal enforcement and implementation. The system of "administrative punishment" allows agencies and institutions to impose administrative punishments, which are generally relatively minor, in relation to minor cases, subject to the proviso that an administrative punishment involving the deprivation of personal liberty can be established only by a law and can be imposed only by a public security organ) (Administrative Punishment Law, arts 9 and 16). Similarly, systems relating to the imposition of "re-education through labour" (laojiao) and dealing with drug addiction and prostitution operate outside the formal court system.

Another extra-judicial system is the system of petitions, or "letters and visits," directed by individuals to government departments (including the courts) who are dissatisfied with actions taken in relation to them and are not able, or choose not to, litigate by way of administrative suit, or resolve disputes with government departments in other ways. This informal complaints procedure involves a large number of complainants, despite the fact that it appears that very few of the petitions are successful. The court system, among others, receives and must respond to, an enormous number of petitions each year (Xie, 2009).

Conclusion

Since 1979, there have been major changes to the Chinese judicial system. A widespread court system has been established, law schools have been opened to train Chinese lawyers, a system of examination has been introduced to raise academic standards for judges, procurators and lawyers and an entire legislative and procedural system has been established to deal with the administration of justice. The progress in the space of 30 years has been truly remarkable. There are, however, a number of areas in which more progress can still be made, as outlined in this report. Issues relate to the question of a fair investigation and trial for criminal defendants (that is, closing the gap between the principles set out in the relevant legislation and the practice), improvements in legislation relating to procedures, judicial competence and independence from outside interests (for example, by changing the court funding system so as to make courts less dependent on local government favours), building up public trust in the judicial system and other issues touched upon more detail below.

2. Criminal Investigation

China reputedly has a low crime rate, though within China there is a great deal of concern that the problem of crime and social disorder has worsened dramatically since introduction of the economic reform policies. The rate of criminal offending in China since establishment of the PRC has gone through three broad stages. The first, from 1949 until the 1970s, was marked by a low crime rate, with the number of criminal cases put on file varying from 160,000 to 500,000 per annum. The second phase, from the 1980s until the end of the 1990s, saw a rapid increase in the crime rate, with the number of criminal cases put on file by the police increasing to around 3,000,000. Since 2001 the rate of cases put on file has stayed at around 4,500,000 per annum. Concern at the increasing amount of crime and the policies adopted to address the problem; both to prevent and to punish severely forms the backdrop to understanding the policy imperatives of criminal investigators and some of the existing problems in enforcing the law. (Ministry of Public Security, 2009 Outline of the Development of Crime in China).

2.1 Organisation

Criminal investigation: jurisdiction

The task of carrying out criminal investigation is primarily the responsibility of the criminal investigation police. However, the people's procuratorate is responsible for carrying out investigation in cases relating to official corruption and abuse of official powers. The matters where the procuratorate has power to investigate directly are set out at CPL art 18.

CPL art 18 provides that the procuratorates may place on file for investigation directly by the procuratorate the following offences: embezzlement and bribery, dereliction of duty committed by State functionaries, crimes involving violations of a citizen's personal rights such as illegal detention, extortion of confessions by torture, retaliation, frame-up and illegal search and crimes involving infringement of a citizen's democratic rights committed by State functionaries by taking advantage of their functions and powers. The procuratorate may place other 'grave' crimes on file for investigation where it is decided by the procuratorate at or above provincial level and the crime is committed by State functionaries by taking advantage of their office.

The number of criminal cases directly investigated by the procuratorate is much smaller than those investigated by the police. In 2007 the People's Procuratorate put 33,651 cases on file and concluded 32,534 of those. In 2007 by contrast the public security organs put a total of 4,807,517 cases on file (China Law Yearbook, 2008).

A number of other agencies have been given special jurisdiction to conduct criminal investigation. CPL art 4 provides that the state security organs are responsible for investigation of crimes that endanger state security. Separate powers of investigation and prosecution are exercised in respect of offences committed by soldiers, smuggling, customs, maritime, forestry and passenger train offences Where a criminal offence is committed by a soldier, public security organs should transfer the matter to the PLA Security Division (baowei bumen) which exercises jurisdiction to investigate the offence.

A special Smuggling Crimes Investigation Division has been established under the joint supervision of the General Administration of Customs and the MPS with primary responsibility to the General Administration of Customs, to investigate smuggling offences(SPC, SPP, MPS, Ministry of Justice, General Administration of Customs, *Notice on the Application of the CPL to the Criminal Cases of Smuggling that are handled by the Smuggling Crimes Investigation Division*,1998) This division

is empowered to list as wanted, request frontier control, detain (Point II) apply for arrest (Point IV) and carry out surveillance of the suspect's residence (Point II), conduct a preliminary hearing (Point III), complete investigation and submit the brief to the procuratorate to commence a public prosecution (Points V and VI). The Smuggling Crimes Investigation Division coordinates with the local public security organs in respect of executing arrest warrants, surveillance of suspects released on bail, or convicted smugglers released to serve the sentence out of custody or suspended sentences (Point II).

The 2007 SPC, SPP and MPS *Notice on the Relevant Issues Concerning the Transaction of Cases in Violation of Laws and Criminal Cases Occurring at Sea* vests the jurisdiction of the public security organs in respect of criminal investigation in the Frontier Defence arm of the People's Armed Police (PAP) with respect to criminal offences committed at sea.

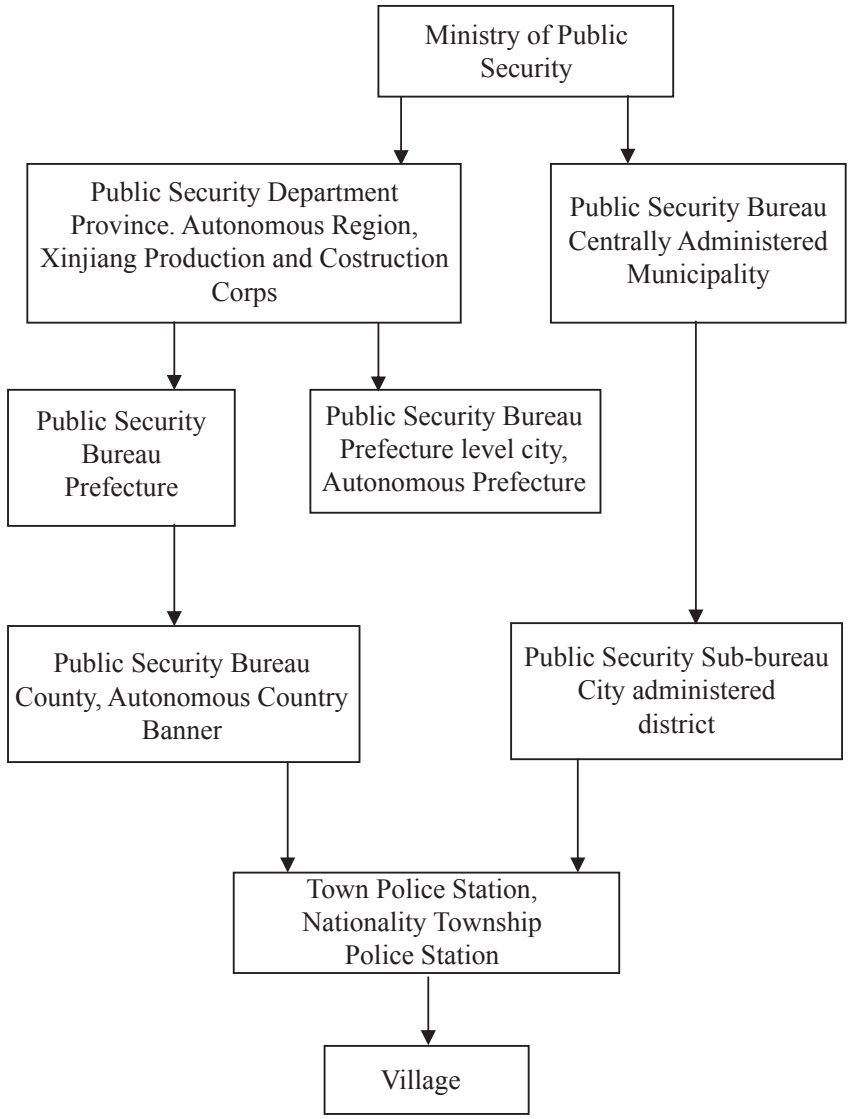
Investigation of criminal cases occurring on passenger trains shall be conducted by the railway police under the 2001 SPC, SPP and MPS *Notice on Jurisdiction in Criminal Cases occurring on Passenger Trains*. 2001 State Bureau of Forestry and MPS, *Jurisdiction and Case Registration Criteria on Criminal Cases of Forests and Terrestrial Wild Animals* vest jurisdiction to conduct criminal investigation in the Forestry police.

Organisational framework of the police

Criminal investigation police are a division within the Ministry of Public Security. The Ministry of Public Security is established under and responsible to the State Council, the chief executive organ of state. The MPS is the command organisation and exercises leadership over all police divisions and lower level public security organs. The MPS exercises tight hierarchical control over police officers who are required to obey orders issued from higher levels.

Higher level police departments exercise leadership over lower level departments. Local level public security organs are also under the leadership of the local people's government at the same level. This is known as the system of dual supervision, both horizontal and vertical (discussed in the Introduction above). The Public Security organs are established at each level throughout China as set out in the diagram below.

Public Security Organs



Police functions are exercised by different divisions. Police functions broadly are divided into two categories. The first is the criminal judicial function. The second is the administrative enforcement function. Departments exercising the administrative enforcement function include public order, traffic management, administration of household registration, domestic security protection, economic security protection, fire prevention and control, drug prohibition and information management and supervision.

The local police station fulfils an important community policing role. A fundamental policy of policing is the 'mass line' which emphasises establishment of a close relationship between the police and the people. In order to improve the responsiveness of the police to the public, the number of patrol police has been increased and the telephone hotline number 110 has been established. Not only do the police seek to use these mechanisms as a way of resolving disputes before they escalate into more serious disputes, they also are a way of providing information to the police about unlawful or criminal conduct. The police have a network of 'eyes and ears' which provides information on criminal activities and activities of targeted, subversive and potentially terrorist groups.

Judicial function: criminal investigation

Criminal investigation is primarily carried out by the criminal police in the Criminal Investigation Departments ("CID"). The central Criminal Investigation Department (CID) is established within the MPS. The central Criminal Investigation Bureau has primary responsibilities that include: gathering and disseminating information about crime, developing crime prevention and suppression policies including for drug crimes and supervising and coordinating the work of the CIDs established at each level. The central Criminal Investigation Bureau has responsibility for commanding, directing and coordinating the work of lower level CIDs. Lower level CIDs are established within police departments at county level and above (please refer to diagram above).

In 1997 criminal investigation divisions were rearranged to have distinct 'areas of responsibility' in carrying out investigation of criminal offences. At that time the local police station was made responsible primarily for management and for crime prevention work. However, local police stations are authorised to carry out investigation of ordinary criminal offences.

Whilst other agencies have powers to carry out investigation of suspected criminal offences, discussed above, the primary responsibility is with the CID.

2.2 Model

Model

The primary legislative instrument setting out the powers and procedures for conducting criminal investigation, prosecution and the conduct of a trial is the PRC *Criminal Procedure Law* ("CPL"). Crimes and punishments are defined in the *PRC Criminal Law* (amended in 1997 and thereafter).

A distinctive feature of the Chinese criminal justice system is the division of responsibilities between the 'judicial' organs of state; the public security agencies (the 'police'), the people's procuratorates ('procuratorates') and the people's courts ('courts').

The public security organs are primarily responsible for investigation of criminal offences (CPL art 18) and the imposition of criminal coercive measures set out in CPL Chapter IV including coercive summons, detention, arrest, bail and residential surveillance.

The procuratorate has power to investigate some types of criminal offences directly (discussed above) and is authorised to approve arrests, public prosecution of criminal cases and, within categories of criminal offence designated in CPL art 18, to initiate and conduct investigation and public prosecution itself. The prosecutorial functions of the procuratorate and its supervisory functions, with the exception of its power to supervise the criminal investigation powers of the public security organs are dealt with in chapter 3 below.

The courts are responsible for adjudication and also accept and try privately initiated prosecutions (see Chapter 4).

The basic model, set out in the *Constitution* (art 135) provides that each of the organs exercises separate functions in the criminal justice process, which is a means to check the work of the other agencies and ensure the correct enforcement of the law. At the same time, they are required to coordinate their efforts. The requirement that judicial agencies coordinate their efforts and at the same time mutually check the work of the other agencies creates a tension in enforcement priorities between the judicial agencies. This tension is especially pronounced for the procuratorate which is responsible both for prosecution of crime and supervising the lawfulness of police investigation, court adjudication and the operation of prisons and detention centres.

The structure of China's criminal justice agencies is based on the inquisitorial system of civil law countries, with a strong influence in terms of structure from the Soviet model. The first *Criminal Procedure Law* after the establishment of the PRC in 1949 was not passed until 1979. This law largely replicated the Soviet criminal justice and investigation structure. An example is the initial stage of 'putting the case on file' as the way of commencing criminal litigation prior to the investigation phase.

The CPL was substantially amended in 1996. The CPL has been interpreted in documents issued by the Supreme People's Court ("SPC"), Supreme People's Procuratorate ("SPP") and the Ministry of Public Security ("MPS"). The MPS *Decision on Procedures for Handling Criminal Cases* (1998, as amended in 2007) provides detailed rules for implementing the powers exercised by the public security organs in criminal cases. The procuratorate's powers under the CPL are interpreted in a number of documents including the *Criminal Procedure Rules for People's Procuratorates* (1999) and the SPC, MPS *Notice Issuing Regulations on the Application of the Compulsory Criminal Measures* 2000.

The 1996 CPL introduced a range of reforms. The 1996 reforms sought to rebalance the power between the police procuratorate and courts by removing from the procuratorate the power to find a person guilty of a crime but exempt them from punishment. The law provided that only a court was able to make a determination of criminal guilt, but at the same time removed from the court the power it previously enjoyed to carry out extensive investigations of its own. The law introduced some elements of an adversarial system. The adversarial features of the system introduced in 1996 mostly affected the procedures for filing a bill of prosecution and trial procedure. The reforms gave criminal suspects access to lawyers at an earlier stage of the criminal investigation process and removed the need for courts to carry out supplementary investigations of their own by placing the onus of proof on the procuratorate. However, particularly in relation to strengthening the role of lawyers in criminal proceedings, these reforms are widely seen now to have been unsuccessful.

Little was done to reform the structure of criminal investigation. The police remain responsible for imposing and enforcing the coercive powers of summons, detention, arrest, obtaining a guarantor and awaiting trial out of custody (bail) and residential surveillance, whilst conducting criminal investigations. However, the 1996 law did seek to introduce a number of reforms to provide stronger protections to criminal suspects during the investigation phase.

- Significantly for criminal investigation, the law prohibits the use of torture to extract confessions but it did not unequivocally render evidence and confessions obtained by torture inadmissible in trial proceedings.
- Another reform that had a potential impact on criminal investigation was the capacity of a criminal suspect to appoint a legal representative after the first interrogation. This power has the potential to act as a most important protection for a criminal suspect held in detention. However, the criminal investigation authorities have been reluctant to give full effect to this provision and have consistently hindered and restricted access of lawyers to their clients and to the evidence gathered as part of the prosecution file (Halliday and Liu 2007).
- At the same time the CPL was passed, the police administrative power of detention for investigation (*shourong shencha*) was abolished. This was seen as an important step as there had been widespread criticism of the extensive abuses of this power by the police. In practice this power was used as a substitute for the coercive measure of criminal detention. The maximum amount of time a person could lawfully be detained under *shourong shencha* was three months, but people were commonly held for periods far in excess of that. There were no effective measures for supervision of the exercise of this power and abuse was rampant. The

power to detain for questioning people committing crimes in different places, group crimes or whose identities could not be verified, which was one of the original purposes of *shourong shencha*, was incorporated into the CPL by allowing detention of this group of people for an extended period of 30 days.

- Maximum time limits were placed for the first time on the length of time a person could be subject to bail and residential surveillance.

Despite these reforms there remain many areas where the lawful rights of suspects are not well protected. An area of continuing concern is the frequent practice of extending the period of time a person is held in detention beyond the legal maximum and the continuing use of torture to extract confessions from criminal suspects.

A report by Reuters on 30 May 2010 announced that the SPC, SPP, MPS, MSS and the Ministry of Justice on 31st May jointly issued The *Regulations on Assessment of Evidence in Death Penalty Cases* and the *Exclusion of Illegally Obtained Evidence in Criminal Cases.* Amongst other things these guidelines prohibit the use of illegally obtained evidence to convict a defendant in death penalty cases and set out procedures by which a defendant may challenge. The full text of these regulations is not yet publicly available (Reuters, 2010b). (See also discussion on reform in Chapter 7).

2.3 Tasks and Functions

Allocation of investigators

Investigation of criminal offences within the jurisdiction of the public security organs will be carried out by investigators of the public security organ in the place where the criminal offence occurred. For criminal investigations within the jurisdiction of the police, allocation of investigator to the case will be determined by the criminal investigation division itself.

Putting a case on file

This is the first step in initiating a criminal investigation. Formal investigation of a criminal offence can only commence after the case has been put on file. CPL art 83 requires the public security organs or the procuratorate, within the scope of their respective investigatory jurisdiction, (see section 2.1 above) to place a case on file upon discovering the facts of a crime or criminal suspects. The procuratorate is responsible for putting a case on file in respect of matters where the procuratorate has direct power to investigate. The courts are responsible for putting a case on file in respect of the small number of private prosecutions initiated by victims of crime (art 88).

The procedure for filing a case provides the opportunity at the earliest stage for the investigation agency to make a preliminary evaluation of whether there is sufficient evidence to commence a formal investigation. This procedure enables the investigation agency to eliminate matters that clearly do not warrant a criminal investigation, for example, where there are insufficient facts to commence a criminal investigation. On the other hand the procedure is liable to abuse because the investigation agency may both improperly put cases on file and refrain from putting appropriate cases on file even where they should be investigated. The problem of the investigation agency not putting cases on file that should be has been put on file is the more serious of these problems and has been occurring for many years. Both the police and the procuratorate have been criticised for being reluctant to put certain categories of case on file, even after a complaint has been made. As the number of cases dealt with by the police is much greater than those directly investigated by the procuratorate, much of the criticism for this failing has been directed at the police. Historically the police have been reluctant to put on file types of cases that are difficult to solve and which

adversely affect their 'clear up' rate and so achievement of their performance targets (Biddulph, 2007).

The procuratorate exercises power under CPL art 87 to require the police to explain why they have not put a case on file when the procuratorate considers they should have done so and if not satisfied with the reasons given, may direct the police to put the case on file. In 2007 the procuratorate exercised its supervision over case filing in 19,172 cases in the following two situations. The first is where the procuratorate instructed that a case be put on file. The second is where the criminal investigation agency determined itself to put a case on file after being required by the procuratorate to explain why a case had not been put on file. There is no more detailed break down of the statistics as between these two categories.

One major shortcoming of this form of supervision is that the law only clearly extends to decisions by the police to put a case on file. The law does not clearly require the procuratorate to supervise decisions made by the procuratorate itself to put a case on file in matters where it has direct power to investigate. This shortcoming highlights a broader conflict between the investigative and supervision roles exercised by the procuratorate as the procuratorate in this situation would be required to investigate itself.

Whilst the police and procuratorate take the initiative in investigating criminal offences, the most common manner in which the police become apprised that a crime has been committed is through reports or complaints made by witnesses or victims. People may come to the police station to report the crime or make a telephone call. Many call the police hotline 110 to report an offence, in which case the police are obliged to go to the reported scene and investigate immediately. CPL arts 85 and 86 enable a person with knowledge of the facts of a crime or a victim to report the matter to the police or to the procuratorate either orally or in writing. If the matter does not fall within the jurisdiction of that agency they should refer the matter to the appropriate agency. Upon receiving information or a complaint the agency receiving the complaint is required to examine the materials or information provided and put the case on file if it meets the standards for putting a caser on file: that is, it believes that there are facts to show a crime has been committed and that criminal responsibility should be investigated (that is the matter is sufficiently serious to warrant investigation and prosecution) (CPL art 86). If the agency determines not to put the case on file, it must notify the complainant within 7 days and the complainant may ask for reconsideration of that decision (CPL art 86).

It is only after a case has been put on file that the public security organs are permitted to commence a formal investigation of the case, gather evidence, interview witnesses and interrogate suspects including to detain or arrest 'active' or 'major' suspects for interrogation. The public security agencies are required to determine whether a criminal offence has been committed and, if so, gather and evaluate the reliability of evidence going to show the nature and seriousness of the offence, the culpability of any suspects (CPL arts 89 and 90).

Custody and Interrogation

The police exercise extensive powers to detain a suspect for questioning. Whilst the law prohibits the use of torture to extract confessions, the police continue to be heavily criticised for continuing to use torture to extract confessions from suspects held in detention. In Imperial China, the confession played a central role in obtaining a conviction in criminal cases (Conner). Although the law now prescribes that a person may not be convicted of a criminal offence solely on the basis of their confession, confessions continue to play a very important role in obtaining a conviction. In recent years, a number of wrongful convictions obtained because the suspect was tortured into making

a false confession have received wide publicity and have provoked a storm of protest amongst Chinese citizens. In one recent case, Zhao Zuohai was convicted of the murder of his neighbour after an argument and the neighbour went missing. He was sentenced to death with a two year reprieve and had served over 10 years in gaol before his neighbour returned to his home village. Zhao alleged that he had been tortured into making a false confession (Wang Heyan, 2010b).

Whilst the procuratorate is responsible for supervising the lawfulness of police investigations, in practice the systems for accountability remain weak and there is little scope for supervision over the actual investigation process exercised by the police. Defence lawyers also may be reluctant to raise the use of torture to obtain a confession during trial because of the possibility that they will be prosecuted themselves for encouraging the defendant to falsify evidence if their client changes his or her testimony during the trial (Halliday and Liu, 2007).

Another serious, widespread and long term problem is that many detainees are held in custody for periods which exceed the legal maximum. This is a problem which is acknowledged by China's central authorities as being a very serious issue and which is urgently in need of rectification. In 2000, for example, the Internal and Judicial Work Committee of the NPC conducted a national investigation into problems with enforcement of the amended CPL, placing particular attention on detention in excess of legal time limits. In 2003, another investigation was conducted by the Internal and Judicial Work Committee of the NPC. Concern about the problem of detention for excessive periods reached the point where the SPC, SPP and MPS jointly issued a notice in the same year in which they required that criminal suspects and defendants must not be detained in excess of the legally specified time limits. (SPC, SPP MPS, *Notice on Strictly Enforcing the Criminal Procedure Law and Conscientiously Rectifying and Preventing Detention in Excess of the Time Limits*, 18 November 2003).A specialist campaign was also conducted in 2003 by the SPP to investigate and 'clean up' problems of excessive detention by the state's judicial organs (the police, procuratorates and courts). A large number of cases were rectified during that campaign. A Xinhua report cites figures released by the procuratorate asserting that it had corrected 33,398 cases involving excessive detention between January 2003 and September 2007. (Xinhua 2007) However, other commentators suggest that the problem of detention in excess of legal time limits continues to be a serious problem. (discussed in Biddulph 2008a) In 2010, the *State Indemnity* Law was amended to make clear that persons who are detained for periods in excess of the period permitted by the CPL are entitled to compensation.

The case of Yang Zhijie provides an illustrative, if extreme, example. Yang was detained on suspicion of setting fire to his neighbour's house in February 1991. He was not formally arrested until more than one year later. Under the rules current at that time, the maximum period of this type of detention, *shourong shencha*, including extensions, was three months. The formal public prosecution was not commenced until March 1998, without any applications having been made for extension of the period of detention. One 7 April 1998 Yang Zhijie was convicted of causing an explosion and sentenced to death with a two year reprieve. He appealed against the decision and, on appeal, the Henan Provincial High People's Court overturned the first instance judgment and remitted the matter to the original court for a retrial on the grounds that that the "facts were not clear and the evidence was insufficient". Two days before the retrial in the Baoding City Intermediate People's Court, the public security organs requested and obtained a stay on the grounds that a new person was handling the case and the matter required further investigation. It was not until December 2002 that the procuratorate issued a decision not to prosecute on the grounds that there was insufficient evidence. On 6 June 2003, more than twelve years later, Yang Zhijie was released.

These cases of gross abuse of power have received much media attention and led to very strong concern amongst China's citizens. (Ou Bing, 2005).

Interrogation

A criminal suspect may be interrogated after he or she has been detained or arrested (see discussion of the scope of these powers below), or may be summoned to a designated place for interrogation or interrogated at their residence (CPL art 92). Interrogation of criminal suspects may be carried out by no fewer than two officers from the public security organs or the procuratorate (CPL art 91) who have shown their identity cards (CPL art 92).

During interrogation, the law requires officers to ask the suspect whether he has committed a criminal act and allow the suspect to explain the circumstances of guilt or innocence before asking questions. A criminal suspect does not enjoy a right of silence or a right against self incrimination but is required to answer questions truthfully. He may only refuse to answer irrelevant questions (CPL art 93). A suspect may be interrogated when under summons for no longer than 12 hours (CPL art 92); however there is no statutory prohibition on conducting interrogations at night time. A record of interrogation shall be produced. The suspect is able to read it (or have it read to him or her), make additions or corrections and then sign it as an accurate record. The suspect may also write a personal statement (CPL art 95). The investigator does not sign the statement or amendments to it.

After a criminal suspect has been interrogated he or she may appoint a lawyer (CPL art 96). The lawyer or representative is not permitted to be present during the interrogation. There has been a great deal of resistance to giving full effect to the provision allowing the lawyer access to his or her client and it is not uncommon for lawyers to have difficulty in gaining access to their client in detention. From 2003 there have been some trials conducted in parts of China in which the interrogation is recorded. However, there is currently no legal requirement that this take place and video or audio recording is not common practice. (Fan Chongyi, 2007)

A person who should be arrested may be declared to be a fugitive and a wanted order issued for their arrest (CPL art 123).

Summons

A person summoned for interrogation may be required to attend a designated place or be interrogated at their residence. The time for interrogation may not exceed 12 hours and the criminal suspect may not be effectively detained by use of repeated summons (art 92).

Detention

CPL art 61 authorises the public security organs to detain (prior to arrest) a person who is 'an active criminal' or a major suspect' where the person is preparing to commit a crime, is in the process of committing a crime or is discovered immediately after committing a crime, is identified by an eyewitness or victim, is found with incriminating evidence, attempts to commit suicide or escape after committing a crime or is a fugitive, there is a likelihood the person will interfere with evidence or witnesses, the person does not tell their true address and their identity is unknown or the person is suspected of committing crimes in a gang or committing crimes in different places. When detaining a person the police must produce a detention warrant and then notify the person's family or work unit within 24 hours of the reason for arrest and the place of custody. There is no obligation to inform them where the police consider it would hinder the inquiry or there is no way of providing notification (CPL art 64). The police must interrogate the detainee within 24 hours of the detention. (CPL art 65).

Application for arrest

When the public security organ wishes subsequently to arrest a suspect, it must submit a written request of arrest and the case file and evidence to the procuratorate at the same level for examination and approval (CPL art 65).

The application for arrest must be submitted no later than 3 days after the person was detained. Where there are "special circumstances", the time limit for submitting the application may be extended between 1 and 4 days (CPL art 69) unless the detainee is suspected of committing crimes in a gang or committing crimes in different places in which case the period of detention may be extended to 30 days (CPL art 69).

As a matter of practice the Chinese police have been reluctant to release criminal suspects on bail or on residential surveillance, so the norm is for a person to be detained whilst interrogation is conducted and an application for an arrest is compiled. They were heavily criticised after national level inquiries into cases in which the time limits for detention were unlawfully exceeded held in 2000 and 2003 (see discussion in Biddulph, 2008).

Arrest

Arrest is usually effected by warrant, the procedures for which are set out below. A citizen is also authorised to seize a person caught in the act of committing a crime, or a person who has escaped custody and to deliver them to the police (CPL art 63).

CPL art 60 sets out the conditions for obtaining an arrest. The police may apply for approval for arrest from the procuratorate where they can produce evidence to support the facts of a crime and the suspect could be sentenced to a punishment of not less than imprisonment, if it is not suitable to place the person under residential surveillance or to allow them to apply for bail. A person who is seriously ill, a woman who is pregnant or breast feeding a baby may be allowed to apply for bail or be placed under residential surveillance.

The procuratorate must approve or reject an application for arrest within 7 days of receiving the application (CPL art 69). Where the procuratorate rejects the application for arrest the public security organs must release the person immediately. If the public security organ disagrees with a decision to refuse arrest they may ask for the decision to be reconsidered, and may request a review of the decision by the next higher level procuratorate (CPL art 70).

Where the arrest is approved the public security organs shall arrest the person immediately. If the procuratorate considers that the evidence is insufficient to approve an arrest, the procuratorate may return the file to the police for further investigation (CPL art 68).

When executing an arrest, the police must produce an arrest warrant and notify the detainee's family or work unit within 24 hours of the reasons for arrest and the place of custody (CPL art 71). A person who has been arrested must be interrogated within 24 hours of arrest and if it is discovered that the person should not have been arrested, released. (CPL art 72).

Where the time limits for imposition of coercive measures or detention during the investigatory phase have been exceeded, the detainee or an authorised person may apply for coercive measures to be cancelled and the person released (CPL art 75). In practice, this provision has proved ineffective and, as noted above, there are a number of documented cases where the period of detention has substantially exceeded the period allowed by law.

Obtaining a guarantor and awaiting trial out of custody (bail)

It is possible for a person suspected of committing a criminal offence to be released from custody whilst the criminal investigation is conducted, either on bail or under residential surveillance. The

law now provides detailed rules specifying the circumstances in which a person may be released and procedures for approving such release on bail or under residential surveillance, which are set out below. However, the public security organs retain a strong preference for keeping criminal suspects in custody whilst a criminal investigation is conducted. In this way the authorities can ensure that the suspect will not abscond before trial, will not interfere with witnesses and will not commit further crimes. Whilst there are no statistics publicly available, academic commentators estimate that in less than 20% of criminal cases will a suspect be granted bail or residential surveillance. (Li Changlin, 2009).

The preference to detain criminal suspects has been criticised on a number of grounds. The first is that there are many suspects who are eligible for bail and who will not abscond or interfere with witnesses if released pending trial but are not granted bail. The second is that the use of bail where an investigation cannot be completed in time, where there is not sufficient evidence for an arrest, or where the procuratorate requires further investigation before an arrest can be approved creates the potential for abuse of the use of bail and residential surveillance in circumstances where a person should be released. The third criticism relates to the condition of detention centres. The police have been strongly criticised for failing to prevent abuse of detainees in detention centres and failing adequately to ensure the safety of detainees. In recent years there have been a number of well publicised incidents when detainees have died in custody. The best known recent case is the 'hide and seek' case where a 24 year old man, Li Qiaoming, was beaten to death in detention. Originally the police sought to explain the death as an accident saying he bumped his head playing the game of 'hide and seek'. (Xinhua, 2009).

Bail may be granted by the public security agencies, procuratorate or courts in matters for which they are responsible. The maximum period for which a person may be subject to bail is twelve months (CPL art 58).

Police Bail may be granted to the following categories of person;

1. A person who may be sentenced to public surveillance, criminal detention or be subject to supplementary punishments (CPL art 51).
2. A person who may be subject to a punishment of fixed-term imprisonment but would not endanger society if he or she is allowed to obtain a guarantor pending trial or are placed under residential surveillance (CPL art 51).
3. A criminal suspect or defendant who should be arrested but is seriously ill, is a pregnant woman, or is a woman breast-feeding her own baby, may be allowed to obtain a guarantor pending trial or be placed under residential surveillance (CPL art 60).
4. If the public security organ finds it necessary to arrest a detainee when sufficient evidence is still lacking, it may allow the detainee to obtain a guarantor pending trial or place him under residential surveillance (CPL art 65).
5. If the procuratorate decides that further investigation is necessary before it can approve an application by the police for arrest, and if the released person meets the conditions for obtaining a guarantor pending trial or for residential surveillance, that person shall be allowed to obtain a guarantor pending trial or subjected to residential surveillance according to law (CPL Art 69).
6. If a case involving a criminal suspect or defendant in custody cannot be completed within the time limit stipulated by the Criminal Procedure Law for keeping the criminal suspect or defendant in custody for investigation, for conducting examination before prosecution, or for first or second instance procedure, and so further investigation, verification and handling are

needed, the criminal suspect or defendant may be allowed to obtain a guarantor pending trial or subjected to residential surveillance (CPL art 74).

7. If the public security organ considers that the decision not to initiate a prosecution is wrong, it may demand reconsideration, and if the demand is rejected, it may submit the matter to the People's Procuratorate at the next higher level for review (CPL art 144).

The following people are not eligible for bail:

Serial offenders, persons suspected of committing a violent crime, the leader of a criminal gang, a person who self harms or attempts to commit suicide in order to avoid the investigation, harming state security, and people suspected of committing other serious crimes (MPS CPL interpretation art 64).

Procuratorial bail

Procuratorates may decide to allow a person out of custody on bail in matters directly investigated by the procuratorate or during the investigation period after transfer of the matter by the police to the procuratorate for prosecution. The procuratorate may also grant bail where time limits for conducting examination before prosecution cannot be completed within the time limits (CPL art. 74)

Court bail

Courts may make a decision to grant bail to a person in the course of the trial or pending trial (Courts CPL interpretation art 63, 66) The court may also grant bail where time limits for completing first or second instance procedures cannot be completed within the time limits (CPL art. 74).

Types of bail and obligations of the guarantor and person on bail

Bail may take the form either of obtaining a guarantor or paying a guarantee (CPL art. 53).

A criminal suspect or defendant who has been released on bail must:

1. not leave the city or county where he resides without permission of the executing organ;
2. be present in time at a court when summoned;
3. not interfere in any form with the witnesses; and
4. not to destroy or falsify evidence or tally confessions. (CPL art 56)

A number of conditions must be satisfied for a person to be a guarantor. They must:

1. to be not involved in the current case;
2. to be able to perform a guarantor's duties;
3. to be entitled to political rights and not subjected to restriction of personal freedom; and
4. (to have a fixed domicile and steady income (CPL art 54).

The guarantor must:

1. ensure that the person under his guarantee observes the conditions of his or her bail; and
2. promptly report to the executing organ if the person released on bail violates the conditions of his or her bail.

If the guarantor fails to report promptly when the person under his guarantee has violated the conditions of bail s/he shall be fined. If the case constitutes a crime, the guarantor may be subject to criminal investigation.

If a person is eligible for bail but cannot provide a guarantor or a guarantee they may be subjected to residential surveillance instead.

Procedures for granting bail

A written request for bail must be made by the detainee, their legal representative or family member of a person who has been detained by the police, or is in custody under arrest. The police must make a decision whether or not to grant bail within 7 days of receiving the request. An application for bail must be approved by the police at county level or above.

Where the procuratorate or courts decide to allow a person to stay out of custody on bail, they will transfer the relevant documents to the county level public security bureau which will arrange for payment of the guarantee where the bail is by way of guarantee. The public order department of the county level public security bureau is responsible for administering bail and residential surveillance. They will also notify the police station located in the locality of the residence of the person subject to bail which is responsible for supervising the bail.

Residential surveillance

CPL art 57 requires that a person held in idential surveillance must not leave his domicile without permission, not meet with others without permission, not interfere with witnesses or destroy or falsify evidence and present themselves in court when summoned. The maximum period for residential surveillance is six months (CPL art 58).

CPL art 51 provides that the courts, procuratorate or public security organs may allow a suspect to obtain a guarantor and await trial out of custody, or impose residential surveillance where the person may be sentenced to a non custodial sentence or criminal detention, or if they may be subject to a term of imprisonment, they are not considered to be a danger to society. The public security organs are responsible for executing a decision to allow a suspect to obtain a guarantor or to impose residential surveillance.

Where the investigating agencies have been unable to complete investigation and the time limits for detention or arrest have expired, the police may release the suspect from custody either on bail or subject to residential surveillance (CPL art 74).

For greater ease of reference, the time limits for various different forms of detention, permissible extensions of time and circumstances where the coercive measure and investigation may be terminated are set out in the table below.

Time limits for various forms of custody and conditions for release

Coercive summons	Coercive measures
	Time limits and conditions for extending the time limits ● Interrogation of a person on a summons or coerced appearance shall not be for longer than 12 hours (art 92). A person shall not be subject to a continuous series of summons amounting in fact to detention If the police decide that a person summoned for interrogation should be subjected to a different coercive measure, the decision to impose the coercive measure must be made within the time limit for interrogation on summons, that is 12 hours (PS implementing measures art 62). ● In matters directly investigated by the procuratorate and during the investigation period, the procurator general may issue a notice of coercive summons which is executed by 2 procurators.

	Conditions for release ● The person must be released within 12 hours unless another coercive measure is imposed.
Obtaining a guarantor and awaiting trial out of custody (bail)	**Time limits and conditions for extending the time limits** ● May be imposed by the police, procuratorates or courts. ● Not exceeding 12 months (art 58) by each of the police, procuratorate and court.
	Conditions for terminating the measure ● If the organ responsible for investigating the matter (police or procuratorate) discovers during the investigation that bail should not have been given or the time limit expires the coercive measure should be terminated (art 58). ● In matters directly investigated by the procuratorate where the procuratorate decides bail should not have been given they can decide to cancel the coercive measure and the person should be released from bail (art 133). ● If the court, procuratorate or police find that a coercive measure taken against a suspect is incorrect they may cancel or modify the measure (art 73).
Residential surveillance	**Time limits and conditions for extending the time limits** ● Not exceeding 6 months (art 58)
	Conditions for terminating the measure ● If the organ investigating the matter (police or procuratorate) discovers during the investigation that the measure should not have been taken or the time limit expires the coercive measure should be terminated (art 58) ● In matters directly investigated by the procuratorate where the procuratorate decides residential surveillance should not have been given they can decide to cancel the coercive measure and the person should be released from residential surveillance (art 133) ● If the court, procuratorate or police find that a coercive measure taken against a suspect is incorrect they may cancel or modify the measure (art 73). The same provision applies for matters investigated directly by the procuratorate (art 133)
Detention (as a coercive measure as opposed to a criminal punishment imposed after conviction)	**Time limits and conditions for extending the time limits** ● The police must produce a detention warrant to detain suspects and notify their family within 24 hours (art 64). ● The public security organ must interrogate a person within 24 hours of the detention (art 65). ● There are two different time limits for detention prior to arrest: 1. The police must apply for an arrest within 3 days of detaining the suspect. This period may be extended for between 1 and 4 days = total of 7 days (art 69);

	2. Where the person is suspected of committing crimes in different places, committing many offences (more than 3), or committing gang crimes (more than 2 persons) the period of detention before the police must apply for an arrest is 30 days (art 69). ● The procuratorate must decide whether to approve or reject an application for arrest within 7 days. So the total time for detention is either 7+7=14 days or 30+7= 37 days (under art 69) In a matter directly investigated by the procuratorate, the procuratorate may make a decision to detain a suspect, transfer the relevant documents to the police who will issue a detention warrant and detain the suspect. The procuratorate must interrogate the detainee within 24 hours of their detention. ● In a matter directly investigated by the procuratorate, the procuratorate must make a decision to arrest the person within 10 days of detaining the suspect with possible extension of between 1 and 4 days (art 134) So a total time of 10+4= 14 days.
	Conditions for release from detention ● If the police discover that the person should not have been detained, they should be released immediately (art 65). ● Where the procuratorate refuses to approve an application for arrest and orders that supplementary investigation be carried out, the police must release the suspect unless they may be placed under residential surveillance or granted bail (art 68). ● If the procuratorate refuses the arrest warrant the suspect should be released immediately (art 69). ● The police may seek review of the decision to refuse arrest but must release the suspect immediately (art 70). ● In a matter directly investigated by the procuratorate, if the procuratorate decides that the person should be released, they must notify the police to release the detainee. ● If the court, procuratorate or police find that a coercive measure taken against a suspect is incorrect they may cancel or modify the measure (art 73).
	Time limits and conditions for extending the time limits ● Police must interrogate a person who has been arrested within 24 hours (art 72) The time limit for holding a person in custody during investigation after arrest is 2 months. An application for extension of 1 month may be approved by the procuratorate at the next higher level (art 124). ● If the case involves grave and complex crimes the People's Procuratorate at provincial and equivalent level may approve extension of the arrest for 2 months (art 126).

Arrest	● If a person may be sentenced to more than 10 years imprisonment and the investigation cannot be completed within the time extension granted under art 126, the procuratorate at provincial or equivalent level may grant an extra extension of 2 months (art 127). ● If a person's name and address is not clear, the time period for investigation will not start to run until the person's identity has been clarified (art 128). ● So the total under arts 124, 126, 127 and 128 = 6 months from the date the suspect's identity is clarified. ● If facts of another criminal offence are discovered during investigation (both by the police and investigations carried out directly by the procuratorates) the time limits for investigating the new offences will commence from the date on which the evidence of the other crime was discovered (art 128). ● In special cases the Supreme People's Procuratorate may apply to the NPC Standing Committee to approve longer extensions of custody (art 125). ● If the matter is one which is directly investigated by the procuratorate, the procuratorate may decide to arrest the suspect and the arrest shall be carried out by the police (art 132).
	Conditions for release ● If the police discover the person should not have been arrested, they must be released immediately (art 72). ● If the court, procuratorate or police find that a coercive measure taken against a suspect is incorrect they may cancel or modify the measure (art 73). ● During investigation if the police discover the person was not guilty, the police should release the person immediately and inform the procuratorate that approved the arrest (art 130). ● Where the person was arrested in a matter directly investigated by the procuratorate, that procuratorate may decide to release the suspect and instruct the police responsible for the custody of the person to release them or release them from detention and instead impose residential surveillance or grant bail.
	Detention during the period of investigation by the procuratorate
Written recommendation for prosecution	**Time limits** ● The procuratorate must decide whether to initiate prosecution within 1 month of receiving the written recommendation for prosecution from the police with possible ● extension of ½ month for major or complex cases (art 138) ● The procuratorate may remit the matter to the police for further investigation which must be completed within one month (art 140) ● The matter may be remitted for further examination a maximum of twice (art 140)

	● The procuratorate may decide to carry out the supplementary investigation itself (2000 MPS SPP regs art 35)
	Conditions for release ● If the investigation department of the procuratorate decides there is insufficient evidence to prove the crime it may decide not to prosecute (art 140) ● If the procuratorate decides not to prosecute the suspect shall be released immediately (art 143)

Withdrawal in cases of conflict of interest

CPL art 28 requires that any member of the investigatory personnel who has a relative involved in a case, or has an interest in a case, is acting as a witness, defender or agent ad litem in a case or has any relations with a party that might affect impartial handling of the case must voluntarily withdraw. Investigators are prohibited from receiving gifts or accepting dinner invitations from parties (CPL art 29). It is prohibited to collect evidence using torture, deceit, threats, enticements or other unlawful means (CPL art 43).

Investigation and gathering evidence

Witnesses

The investigating agency may question witnesses and victims at their place of residence, who are required to answer truthfully (CPL arts 97-100).

Searches and seizures

The investigating agency may examine sites, objects, people and corpses relevant to the crime (CPL art 101) the person, belongings and residence of the criminal suspect or someone suspected of harbouring the suspect (CPL Art 109) and carry out autopsies where the cause of death is unclear (CPL art 104). They may examine the person of the victim and suspect (CPL art 105) with a record of the examination to be signed by relevant parties (CPL art 106). A search warrant shall be produced before any such searches are conducted unless it is an emergency situation (CPL art 111). A record of the search should be made and signed by the person searched, their family or neighbours (CPL art 113) Articles and documents relevant to the inquiry may be seized (CPL art 114) and a list made and verified by the person from whom they are seized, investigators and bystanders (CPL art 115). Individuals or work units are required to hand over material evidence, documentary and audio visual evidence that go to show the guilt or innocence of the suspect (CPL art 110). After obtaining approval from the public security agency, investigators may seize the suspect's mail and telegrams (CPL arts 116, 118), and freeze assets and accounts (CPL art 117).

Experts

Experts may be called upon to conduct examinations and prepare reports (CPL art 119, 120) and the suspect shall be notified of the conclusion of the expert which will be used as evidence. The suspect may ask for a supplemental expert's report and is permitted to obtain a report from another expert (CPL art 121). (The power of the court to seek expert reports is dealt with in Chapter 4).

Investigation of a person under arrest

Within two months after arrest the police must complete their investigation of a criminal suspect

held in custody. However, there are many circumstances in which extensions of this two month period may be approved. Where the matter is complex the police may seek an extension of one month from the procuratorate at the next higher level (CPL art 124). A further two month extension may be approved by the procuratorate at provincial or equivalent level where the case is grave and complex involving criminal gangs, crimes committed in many places, where it is difficult to obtain evidence and where the transport is difficult (CPL art 126). Where investigation has not been completed within the periods of further extension specified in art 126, and the person is convicted may be sentenced to a term of imprisonment of more than 10 years, a further extension of 2 months may be obtained with approval of the procuratorate at province or equivalent level CPL art 127. With this extension the total period of detention in this type of case is 7 months. In other cases where the investigation has not been completed within the time limits the SPP may write a report to the NPC seeking approval to extend the period of detention (CPL art 125). During the course of investigation, if a new crime is discovered, the time limits for detention will be restarted. Where a person does not reveal their true name and address or their identity is not clear, the time period will commence running from the time that their identity is clarified (CPL art 128).

In its interpretation of the CPL, the MPS applied the provisions of art 128, that the time limit for investigation would not commence until a person's identity was clarified, to the running of the time limit for pre- arrest detention as well as detention after arrest. This interpretation has been criticised by many scholars, but the interpretation remains on foot, providing the public security organs with an opportunity to extend the period of both detention prior to arrest and detention after arrest in the case of people whose identity is unclear.

Recommendation for prosecution

After the investigation is complete and the investigatory agency forms the view that the evidence is sufficient, clear and reliable it will make a recommendation for prosecution, which together with the case file and supporting evidence is handed to the procuratorate at the same level (CPL art 129). In deciding whether to launch a public prosecution, the procuratorate should decide whether the facts are clear and evidence reliable and sufficient, whether the charge has been correctly determined, whether any crimes have been omitted or other people should be investigated, whether criminal responsibility should be investigated at all and whether the investigation has been conducted lawfully (CPL art 137). The procuratorate should decide whether to launch a public prosecution within one month of receiving the recommendation from the police, with an extension of half a month in the case of major or complex cases (CPL art 138).

The procuratorate may remit the matter back to the investigating organ for supplementary investigation no more than twice. The supplementary investigation should be completed within one month (CPL art 140). If, after supplementary investigation has been conducted, the procuratorate determines that the case does not satisfy the conditions to initiate a public prosecution it may decline to do so (CPL art 140). The police may ask for a reconsideration of this decision and then seek review of that reconsideration decision to the next higher level procuratorate (CPL art 144).

2.4 Relations

Relations between the Police and the Communist Party of China ('CCP')

In order to understand the enforcement priorities of the police in carrying out criminal investigations, it is important to examine the relationship between the police and the CCP.

Whilst police forces existed prior to establishment of the PRC, the institutional predecessor to the current police force was established as an internal security section of the (CCP) in 1927.

(Dutton) The primary function of the public security organs since their establishment in 1927 had been to protect the power of the CCP. Their organisation was transferred to the government from the Party in 1948. However, the public security organs remained primarily under the leadership of the CCP and drew on the army as their model. Prior to 1979, the police were a revolutionary force required primarily to resolve contradictions between the classes and to oppress and eliminate counter-revolutionaries. Adoption of the policy of economic reform and modernisation in 1979 required the police to undergo radical reform to transform themselves into a professional force for preserving law and order, subject to law. In 1979 a decision was made to revive the criminal investigation division of the police and strengthen local public order work (Biddulph 2007). The police continue to be subject to the leadership of the CCP and obey instructions from the CCP in respect of major policy decisions and individual cases, especially those which are considered to be major or important.

The CCP has established the Political-legal Committee, which is currently headed by Zhou Yongkang, the former Minister of Public Security. This committee is responsible for law and order policy and ensuring social stability. It coordinates the work of the state's justice organs; the courts, procuratorate, police, justice departments and security apparatus.

The Political-legal Committee has emphasised the fundamental importance of preserving social and political stability and cracking down hard on crime. From 1983 the CCP and the Political-legal Committee have launched series of 'Hard Strike' campaigns and 'specialist struggles' against serious crime. Enforcement priorities are determined by the Hard Strike. They are currently to strike hard against gang crime, serious violent crime and commonly occurring crimes such as robbery, theft and snatching.

During the period of a 'Hard Strike' judicial agencies are required to cooperate closely in order to punish targeted crimes severely and quickly. The police, procuratorates and courts are required to act co-operatively to achieve the objectives of the 'Hard Strike'. The public security agencies, and the criminal police in particular, comprise a major element in carrying out these hard strikes against crime, and the rate at which they "crack" cases is seen as an important indicator of their success. Whilst these hard strikes are required to be carried out according to law, in practice the demand to punish quickly and severely leads to many abuses of the legal rights of criminal suspects. The requirement that enforcement agencies cooperate to achieve the objectives of the hard strike undermines the willingness and capacity of the procuratorate to exercise rigorous and effective supervision over the conduct of the CID in investigation of suspected criminal offences.

Relations between criminal and administrative powers

As part of the division of function between the police, procuratorate and courts, the courts have the sole jurisdiction to determine criminal guilt. However, there are a number of circumstances when a person who has committed a minor offence may either not enter the criminal justice process at all, or may be exempted from prosecution and instead given an administrative sanction.

The border line between circumstances where a criminal sanction may be imposed and when an administrative sanction may be imposed is when unlawful conduct is not considered to be 'sufficiently serious' to constitute a criminal offence (see Criminal Law art 13, CPL art 15).

Where the conduct could constitute a criminal offence but it is considered to be too minor to warrant prosecution, the procuratorate may decide not to initiate a prosecution but to recommend that an administrative punishment or penalty be imposed or order illegally obtained property be confiscated (CPL art 142). This decision should be distinguished from a decision to terminate an

investigation or prosecution on the grounds that there is insufficient evidence to show the suspect committed the criminal offence.

In many cases an administrative sanction will be imposed directly by the police because the conduct is unlawful but does not constitute a criminal offence. However, there is often a fuzzy borderline between the types of conduct that are unlawful and those which are criminal offences.

The main administrative powers exercised by the police are:

- Questioning a person or detaining a person for questioning (liuzhi panwen) in relation to suspected committing a criminal offence for up to 24 hours (with a possible extension of up to 48 hours) under the People's Police Law
- Imposing a fine or administrative detention for up to 20 days under the Security Administrative Punishments Law 2006.
- Detaining drug addicts for two years in Coercive Quarantine for Drug Rehabilitation under the Drug Prohibition Law art 38. The decision to impose this form of detention is made by the police at county level or above. (art 38)
- Detention of prostitutes and clients of prostitutes for between 6 months and two years in detention for education (shourong jiaoyu). The decision to impose this form of detention is made by the police at county level and above (State Council Measures on Detention for Education of Prostitutes and Clients of Prostitutes art 8)
- Detention of people who have committed minor offences under re- education through labour. A decision to impose a term of re-education through labour is imposed in theory by a Re-education Through Labour Management Committee (a body comprising representatives of the police, labour bureau and civil affairs department) under the provisions of the NPC Standing Committee Supplementary Measures on Re-education through Labour 1979. However this approval power has in practice been delegated to the police (see discussion in Biddulph 2007) who make the decision and then apply the official seal of the Re-education through Labour Management Committee. The police may determine to impose a term of re-education through labour of up to three years, with the possible extension of one year. Whilst it is not legally permitted, it is not uncommon in practice for a person to be sent to re-education through labour in circumstances where the police have insufficient evidence to support a criminal conviction, or where they wish to detain the suspect to continue their investigation beyond the time limits for detention specified in the CPL.

Supervision of the lawfulness of the exercise of decision-making power is carried out by the courts. The courts may only review the lawfulness of the decision after it has been imposed. The procuratorate exercises supervisory functions through its power to supervise the lawfulness of the conduct of detention centres. However, neither of these forms of supervision places any effective controls on the exercise of these administrative powers by the police.

2.5 Mechanisms

Coordination

State Security agencies

There is a division of responsibility between state security organs, which are the primary foreign intelligence gathering agency and the domestic security departments, which are established within the Ministry of Public Security. The state security departments cooperate with the domestic security departments within their respective spheres of responsibility to protect state security as a whole.

The Ministry of State Security was established in 1983 as China's chief spy and intelligence agency. The State Security agencies are responsible for preventing foreign organisations or individuals from directly inciting or encouraging others to overthrow or split the state, overthrowing the political system and leadership of the CCP, from stealing buying or disclosing state secrets, inciting others to spy against China or encouraging or buying state officials to spy against the state (State Security Law 1993, art 4 and Criminal Law, arts 109 - 113). The Domestic Security Department, established as a division within the Ministry of Public Security and with offices within local public security organs, is responsible for collecting domestic intelligence and infiltrating domestic groups considered to be a threat to state security.

State security agencies have jurisdiction to investigate offences of endangering state security and breaches of the State Secrets Law. State security officials have power to investigate, including the use of covert and technical surveillance techniques, detain, interrogate and arrest suspected offenders. Where necessary the state security agency can ask for cooperation from border control and customs officials to search and detain people and property. Individuals and enterprises are not permitted to refuse to assist state security officers in investigating offences against state security and in gathering evidence. Refusal may lead to imposition of an administrative penalty, administrative detention of up to 15 days or criminal prosecution under Criminal Law art 162. Use of violence or threats to resist the performance of the state security's duties may be subject to penalty under Criminal Law art 157. A person dissatisfied with a decision to impose 15 days administrative detention may ask for review of the decision by the higher level state security department and if dissatisfied with that decision may commence litigation in the People's Courts under the Administrative Litigation Law. Criminal prosecutions for offences against state security are initiated at the level of the Intermediate People's Courts and so the Procuratorate at that level is responsible for examining and approving applications for arrest, accepting cases and initiating public prosecution.

If the police commence investigation of a matter which touches upon these areas, they are required to transfer it to the state security agencies. In other cases, a matter may be originally investigated as a state secrets matter but later transferred to the police for investigation as an ordinary criminal offence. A recent example of this type of situation was the detention by the state security agencies of four employees of Rio Tinto on suspicion of stealing state secrets amongst other things. At a later stage, but still prior to their official arrest, a decision was made to continue investigation only in relation to stealing commercial secrets and accepting bribes. The cases were then handed over the Shanghai CID to continue investigation (Barrowclough, 2009).

The definition of state security and state secrets is quite broad and vague so state security organs have broad discretion to determine what matters fall within its jurisdiction. As these are intelligence matters, the precise mechanisms for determining what matters fall in the jurisdiction of the state security organs are not made public.

Administrative

As discussed in section 2.1 above, the work of criminal investigation police, and the police departments is under the dual supervision of the people's government at the same level (called horizontal control) and the higher level police department in charge (called vertical control).

Vertical control mainly consists in supervision of technical and professional conduct, training, setting enforcement priorities and evaluating performance. This control is exercised within the police bureau by the chief and by the higher level department. For example an important oversight mechanism is the 'internal' supervision exercised by the higher level CID over the lower level

CID. Where the higher level CID discovers an error in the conduct of a criminal investigation or criminal prosecution, it may terminate or change the investigation or prosecution, or order a correction to be made. The overall size and composition of the police force is determined by central personnel authorities upon submission from the MPS.

Horizontal controls exercised by the local government over the police are particularly important because the annual budget of public security organs is included in the budget of the government at the same level. In the past in some areas there have been problems with the government not in fact paying the full amount of the budgetary allocation to the police, though it should be paid in full.

This supervision structure, coupled with payment of the local public security organ's budget by the same level government has given local government great power to influence policing priorities and decisions. It has also led to the well documented problem of local protectionism and abuse of power.

Oversight and Inspection

Measures for oversight of the police

There is a wide range of oversight and supervision mechanisms exercised over the police. They are fragmented, as they are exercised by a range of different bodies with different powers and as they all focus on different aspects of police work. Together and separately they have not been effective in preventing the worst abuses of police investigation powers; detention in excess of the lawful time periods and using coercive interrogation techniques including torture.

CCP Discipline Inspection Committee

The CCP Discipline Inspection Committee (DIC), which works jointly with the administrative supervision organs of state. The DIC is responsible for investigating breaches of party discipline and focuses in particular on corruption.

Supervision by the people's procuratorates

In addition to its role in investigation and prosecution, the people's procuratorate plays an important role in supervising the lawfulness of police investigations and the operation of detention centres

Investigation

The procuratorate exercises supervisory functions over the conduct of the police at each state of the investigation process, the details of which are set out above. This form of supervision is to ensure that the public security organs behave lawfully at each stage of the investigation process. This includes preventing the police acting unlawfully, for example from arresting a person where there is insufficient evidence. It also enables the procuratorate to require the police to take action where they may not have started an investigation. For example, if the police refuse to put a case on file (discussed above) the complainant may ask the procuratorate to review that refusal. The procuratorate is then required to inquire about the reason for the refusal and if not satisfied with the response to direct the police to put the case on file (statistics relating the use of this power are set out above).

The supervision function also gives the procuratorate an opportunity to terminate the investigation where it considers there is inadequate evidence to continue with the prosecution. For example where the procuratorate has refused a request to make an arrest, or an extension of detention during the investigation period, or determines that there is not sufficient evidence to commence a public prosecution, the police are required to release the detainee.

The procuratorate has responsibility for ensuring that the time limits for detention are not exceeded by the police and ensuring rectification of those cases where a person is held in excess of the legally prescribed time limits. Whilst the law appears to give the procuratorate very broad powers to supervise the lawfulness of police conduct, for the reasons discussed above in practice this form of supervision is very weak.

Detention

In addition to its powers to supervise each step in the investigation process the procuratorate also has responsibility for supervising the lawfulness of the operation of detention facilities. (This issue is discussed in the next chapter)

Supervision by people's congresses

In addition, police work in general is subject to supervision by the local people's congresses and may be the subject of supervision initiated by the NPC. This type of investigation is usually conducted by way of a special investigation into the implementation of particular laws. For example in

2000 and 2003 a nationwide investigation was conducted by the Internal and Judicial Work Committee of the NPC into problems of implementation of the CPL with particular focus on the chronic problems of detention of criminal suspects in excess of the mandated time limits. However these forms of supervision are fragmented and ad hoc.

Supervision by the courts and procuratorates over the use of unlawfully obtained evidence

The CPL art 42 prohibits extraction of confessions from criminal suspects using torture, or collecting evidence by threats, enticements, deceit or other unlawful means. However the law does not provide that evidence gained using these proscribed methods is inadmissible per se. Rather a much weaker provision provides that on appeal, the court at second instance may rescind the first instance decision and remit it for retrial where the litigation rights of the parties have been infringed which may affect the impartiality of the trial (CPL art 191). Extorting a confession from a criminal suspect by torture is itself a crime punishable by a term of imprisonment (Criminal Law art 247). In November 2009 the SPP issued the Regulations on Several Questions on the Investigation and Use of Evidence in Death Penalty Cases in which it prohibited procuratorates not only from obtaining evidence by torture, but also from putting a case on file, investigating or using evidence or confessions obtained by torture in death penalty cases.

Popular and media supervision

Citizens have a constitutional right to complain about unlawful conduct and abuse of power by public agencies and officials (Constitution art 41). Citizens may lodge a complaint about the conduct of criminal investigation police at the 'letters and visits' offices established within all state organs. Whilst there has been some further regulation of the work of the letters and visits office requiring that complaints be dealt with or referred to the relevant department within a certain period of time, a comparatively small proportion of complaints are effectively dealt with and people's experience with complaints lodged in this matter is generally unsatisfactory.

The CCP has repeatedly stressed the central importance of protecting social order and stability and promotion of social harmony through the Harmonious Society policy propounded by President Hu Jintao. These are amongst the central policy imperatives for officials in the exercise of their functions and increase official responsiveness to public opinion if it is seen as a matter that might undermine the 'Harmonious Society' policy or lead to social unrest (see Chapter 7).

The media plays an important, if inconsistent, role in supervision of the activities of the state's

justice agencies. A recent example is the case of Deng Yujiao, a pedicurist who in 2009 stabbed a local official who had allegedly sought sexual services from her and attempted to rape her when she refused. The local police arrested her and charged her with murder and refused her bail. However, there was a popular outcry on the internet, with people supporting her against what was portrayed as the advances of a corrupt official abusing his position and power. After the storm of protest, the charges were downgraded to the lesser charge of intentional assault and she was granted bail prior to the court hearing. Authorities claimed she had been granted bail because she had turned herself in to the police, though netizens claimed the decision was in response to the public outcry of the handling of the case. Whilst it is not clear what finally motivated the police to downgrade the charges and grant bail to Deng Yujiao, it is a matter of great concern if the administration of justice is so greatly influenced by public opinion as it undermines the foundations of the rule of law ideal; that like cases are dealt with alike and that criminal prosecution is based on the facts and circumstances of the case. (See Branigan,n 2009; Macartney, 2009). (See press reports including at: http://www.guardian.co.uk/world/2009/may/27/china-bails-deng-yujiao; http://www.timesonline.co.uk/tol/news/world/asia/article6513750.ece; http://en.wikipedia.org/wiki/Deng_Yujiao_incident)

2.6 Criminal Investigators

The People's Police Law regulates recruitment training and discipline of police officers. Police officers are recruited into the public security agencies through successfully sitting an entrance examination and meeting recruitment criteria. They must be over 18 years old, have excellent political and professional quality, respect the Constitution, be healthy, have completed high school and not have a criminal conviction or have been dismissed from work. Police are required successfully to complete training in the areas of politics, law and specialist technical areas of policing and pass an annual examination. The criminal investigation division is one division within the overall public security system and so investigators must also meet these basic requirements.

Police are considered to be public servants and so their remuneration is determined correspondingly. Salary is determined according to rank. Supplementary payments are made in respect of illness, disability, injury, death and contributions required by state law made to health insurance and pensions. No information is publicly available about actual salary levels.

Professionalization and legalisation of criminal investigation

As discussed above, criminal investigation divisions were only revived in 1979. In the same year the first Criminal Procedure Law was passed which provided the legal basis for investigation and prosecution criminal offences. The work of legalising police investigation techniques and developing a professional body of investigators started in 1979 and has been ongoing since then.

In 1997 reforms were implemented to facilitate increasing specialization and professionalization of criminal investigation work. By the end of 2007 there were 5,625 CIDs established with about 50% of criminal police working in these 'area of responsibility' (zeren chu) units. By 2007, 3,560 specialist technical investigation facilities had been established covering areas such as forensic medicine, DNA testing, document appraisal, chemical analysis, imaging technology, psychological testing and electronic evidence analysis.

According to information provided by the MPS, by the end of 2009, there were around 150,000 criminal police in China located at all four levels of police organisations from provincial level and equivalent to township level.(MPS website).

The ten years of reform have resulted in increased levels of professional and technical expertise in successfully conducting investigations which is reflected in improvement based on performance

criteria. In 2006 nationwide the rate of approval of arrest was 90.3%, up from 83.5% in 1997, the rate at which cases were accepted for public prosecution was 97.8%, up from 82.2% in 1997, and the rate at which recommendations for prosecution were returned for further investigation was 16.4% compared to 33% in 1997. (MPS website 2008).

Professional requirements are specified in respect of the different roles and levels of criminal police. A common requirement is that they be familiar with the relevant criminal laws and have successfully undertaken professional training on criminal investigation work and demonstrate competence in investigation techniques, have the capacity to respond flexibly to different situations and are able to manage information. Additional training and competencies must be demonstrated by those police working in specialist technical areas such as DNA testing, forensic medicine, imaging technology, intelligence and the like.

Police will be subject to discipline for unsatisfactory performance of their police tasks, failure in two years running to pass the police examination or perform their tasks to a satisfactory standard or taking extended leave without legitimate reason. Disciplinary sanctions include warning, demerit, serious demerit, demotion, removal from post and being sacked. Rewards are given for excellent service and bravery in the course of duty.

Conclusion

Since the introduction of reforms to the CID in 1997 there has been an expansion in the numbers of criminal police and a greater emphasis on improving professionalism and the technical competence of police in conducting investigations. After abolition of the administrative detention power of detention for investigation (shourong shencha) with the passage of the amended CPL in 1996, it became more difficult for the police to detain a suspect for an extended period in order to complete their investigations. Reforms in the 1996 CPL introducing time limits to police powers to detain and interrogate a criminal suspect required a move away from the almost exclusive emphasis on interrogation of the suspect for the purpose of obtaining evidence and a confession. The continuing problem of detention in excess of the time periods, under detention powers and after arrest during the investigation phase indicate, however, that there continues to be a strong reliance on interrogation of a criminal suspect to obtain a confession. The weakness of sanctions for using improper interrogation techniques to obtain a confession, discussed above, has resulted in a continuing problem of the use of torture and other illegal methods to extract confessions from suspects. As a result of these continuing problems there have been repeated investigations into and campaigns to address the problems of extended detention and interrogation techniques during the 2000s.

The CPL does not set out clear parameters differentiating between the circumstances requiring ordinary investigation, coercive investigation and covert investigation techniques such as phone taps, video and audio taping and covert surveillance, nor does it establish procedures for approving the use of covert investigation techniques. This thus allows the CID a broad discretion in determining how to conduct a criminal investigation.

The periodic campaigns of Hard Strikes that have been waged against targeted serious criminal offences have been very influential in determining the enforcement priorities of the CID. There is growing criticism both in the community and within the police force itself that continually responding to centrally or provincially initiated campaigns of Hard Strikes against targeted crime has diverted resources away from longer term crime prevention work. As police are constantly responding to policing priorities set by the central authorities, many consider this undermines local

capacity to define and implement enforcement priorities and has undermined efforts to improve professional and lawful exercise of criminal investigation powers.

The cases of wrongful conviction because the suspect was tortured into making a false confession and deaths of suspects in police custody have shocked and angered Chinese citizens. The police and central government realise that changes need to be made to ensure that these problems can be resolved. At the same time, the growth of organised crime and serious, violent crime has made the task of the criminal police more dangerous and difficult. Each year many police are killed in the line of duty. Efforts to improve the capabilities of the police, both technical and in terms of professional standards continue.

Drafting of further revisions to the Criminal Procedure Law has been underway. Part of that revision process has focused on enforcement problems in the criminal investigation stage. As part of that reform, a number of trials have been conducted to introduce video-recording of police interrogations. Whilst many academics support the introduction of measures such as this as a way of improving protection of the rights of a suspect during interrogation, there remain many unresolved issues before the revised law can be passed.

In addition to seeking to reform the Criminal Procedure Law, efforts have been made to reform the system of administrative detention powers. After passage of the Law on Legislation in 2000 (discussed in chapter 1 above), there has been increasingly a consensus view forming that re-education through labour in its current form is illegal. At least, it is necessary for a law to be passed by the NPC or the NPC Standing Committee which authorises deprivation of personal liberty. Another controversial issue is that currently the police make the decision to impose re-education through labour, with many arguing that such a decision should be made by a court. In 2003 drafting commenced of a law entitled the Law on the Correction of Misdemeanours which is designed to effect fundamental reforms to re- education through labour. As a number of fundamental issues, including which agency will exercise decision-making power to impose detention, remain unresolved, the law has not yet been passed.

3. Prosecution/Procuratorate

The People's Procuratorate exercises three distinct categories of powers and responsibilities. The first is to carry out direct investigation of certain categories of criminal offence including official corruption and misconduct and extracting confessions through torture. The second is public prosecution of criminal offences. The third is supervisory: to exercise supervision over the implementation of the law; the lawfulness of trials including criminal administrative and civil proceedings and the operations of prisons and detention centres. In many respects the procuratorate has been unable consistently and effectively to exercise its supervision powers especially in the area of criminal law and punishment, in part because it is required, during times of Hard Strikes against serious crime, to work cooperatively with the public security agencies and the courts to strike swiftly and severely against targeted crimes and offenders (discussed in chapter 2 above).

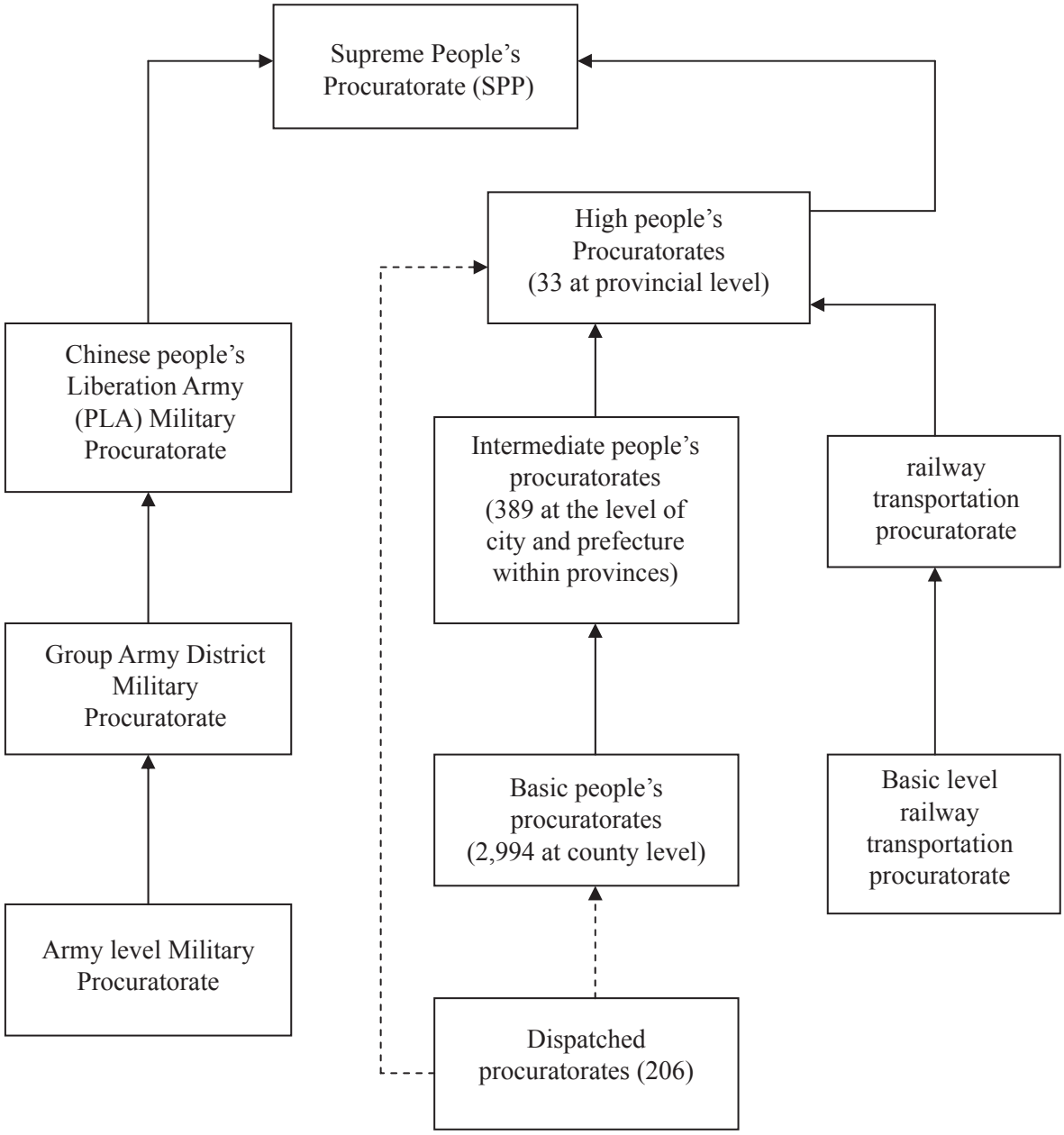
3.1 Organisation

The PRC Constitution establishes the Supreme People's Procuratorate (SPP), people's procuratorates at different levels, military procuratorates and special procuratorates (in addition to the military procuratorates that is the railway procuratorate) (art 130). It provides that the Supreme People's Procuratorate is established under and is responsible to the National People's Congress (art 133). It is established at the same level as the Supreme People's Court and the State Council (see also the discussion in Chapter 1).

The procuratorates enjoy a Constitutional guarantee that they can exercise procuratorial powers independently according to the law (art 131). It further specifies that they shall not be subject to interference by any administrative organ, social organisation or individual. CPL art 5 also protects the independence of the procuratorial organs in performing their functions in criminal proceedings. The procuratorates exercise legal supervisory powers by virtue of Constitution art 129 and SPP Organic Law of the People's Procuratorates 1999 art 1, including over criminal litigation (CPL art 8). The concept of independence seeks to guarantee independent exercise of procuratorial functions and does not establish a system of separation of powers. This is a legal guarantee that the procuratorate can exercise its powers free from interference from other organs or institutions. It also limits the capacity of the procuratorate to interfere in the lawful exercise of powers by other agencies, including the courts and police, unless authorised by law to do so.

The structure and powers of the procuratorial organs of state are set out in the Organic Law of the People's Procuratorates 1983 and the People's Procurators Law 1995 (as amended in 2001). The procuratorial organs of state are organised under the Supreme People's Procuratorate at the different administrative levels of state. The Supreme People's Procuratorate is at the pinnacle of the procuratorate's organisational hierarchy and leads the work of lower level people's procuratorates and special people's procuratorate (Constitution art 133). In criminal actions the higher level people's procuratorates have power to reverse or alter any decision of the lower people's procuratorate (Criminal Procedure Rules for People's Procuratorates 1999 art 7).

The organisational structure of the procuratorates is set out in the following diagram (from Zhu Jingwen). 2007).



In 2007 dispatched procuratorates included those established in mining areas (9), land reclamation areas (12), forest areas (57), prison and re- education through labour camps (74), oil fields (2), development zones (39) and others (13).

Within the SPP the different criminal justice related divisions include; investigation office, public prosecution office, anti corruption division, prison and detention centre office, criminal appeals office, accusation and complaints office, railway transportation procuratorial office, prevention of crimes by public servant office and the laws and policy research office. In 1989 the first specialist anti-corruption division was established in the Guangdong Provincial People's Procuratorate. By 1992 most provincial level had established a specialist anti-corruption division (Ye, 2002).

Each level of people's procuratorate is headed by a Procurator-General. Within the procuratorate at each level, different divisions are established. The investigation department conducts preliminary review of cases to decide whether a directly investigated matter should be put on file. (Criminal

Procedure Rules for People's Procuratorates, 1999, art 121) There is also an arrest examination department and a department for review and prosecution (Criminal Procedure Rules for People's Procuratorates,1999, art 5). Departments within the people's procuratorate report to the Procurator-General and the procuratorial committee for decision-making in respect of important matters and difficult issues (Organic Law of People's Procuratorates, 1983, art 3). In addition, procuratorates at each level appoint assistant procurators, clerks and judicial police (Organic Law of People's Procuratorates, 1983, art 27).

Specialist military procuratorial offices are established within the People's Liberation Army. These have jurisdiction with respect to crimes committed by armed forces personnel on active service and crimes committed in military districts. Jurisdiction is shared with police and civilian procuratorial organs where a service person and a civilian commit a crime in a military district, or outside a military district (in this case the civilian organs take the lead role).

3.2 Model

The Constitution art 135 sets out the model for the relationship between the courts, procuratorate and public security in handling criminal cases as one whereby each takes responsibility for its own functions, their work is coordinated and there is mutual checking and restraint to ensure the correct and effective enforcement of the law. In practice the emphasis has remained strongly on coordination. (This relationship is discussed in more detail in chapter 2 above.)

The basic principles for procuratorial work include; leadership of the CCP, observing the rule of law and professional disciplinary rules, ensuring procedural justice and equal treatment of all before the law. The procuratorate is also mandated to suppress treasonous activity, safeguard the unity of the state, strike against counter-revolutionary activity and crime, safeguard the proletarian dictatorship and the socialist legal system, maintain public order and protect property, educate the citizens to be loyal to the motherland, obey the law and actively fight against crime. (Organic Law of the People's Procuratorates, 1983, art 4).

History and institutional building

The people's procuratorate was established in 1949 based on models of civil systems and the Soviet Union in particular. Procuratorates thus exercised both public prosecution powers and legal supervision powers. Leadership of the procuratoratial offices at each level is exercised by the chief procurator and the procuratorial committee and the higher level procuratorate in order to ensure independence from the local government. However, the institution building of procuratorates in the early days of the PRC met a set back during the period 1957-1966 as a result of the Anti- Rightist movement and again between 1968 and 1978 when the procuratorate was abolished during the Cultural Revolution. From very weak foundations, the procuratorate has been undertaking the arduous task of re-establishing its institutional power and strengthening the professional quality of its procurators since its re-establishment in 1978. Procuratorial rebuilding and reform has taken place in several stages. From 1978 to 1987, the primary focus was on strengthening local level procuratorates and the fundamental task of institution building. From 1988 to 1992 its legal supervision work was expanded and it sought to strengthen its case handling capacity. Passage of the Administrative Litigation Law and the (trial) Civil Procedure Law during this period expanded the scope of legal supervision carried out by the procuratorate to include administrative and civil cases. In the period up to 1998 the power of the procuratorate in criminal cases was adjusted, with passage of the amended Criminal Law 1997 and Criminal Procedure Law 1996. This adjustment is discussed here in more detail.

Adjustments made by the amended Criminal Procedure Law 1996 (CPL)

The 1996 amendments to the CPL adjusted the relationship between the police, procuratorates and courts. It also enacted provisions that academics argued introduced the presumption of innocence into the Chinese criminal justice system. In practice these reforms achieve this objective weakly if at all due to a number of continuing problems in giving full effect to these provisions: the continuing preference of the police for the detention of suspects, continuing heavy reliance on confessions, difficulties faced by lawyers in gaining access to their clients whilst in custody and difficulty in obtaining access to all the evidence in the prosecution file, especially exculpatory evidence and the requirement that the police procuratorate and courts cooperate to impose 'swift and severe' punishment on offenders during Hard Strike campaigns.

The scope of matters that the procuratorate could investigate directly was reduced, for example, by the removal of the power to investigate taxation evasion or refusal to pay tax and the catch-all category of 'any other matter the procuratorate considers it should accept directly'. It was recognised that there is an inherent tension between the powers of investigation and supervision as it is difficult for any agency objectively and properly to supervise the cases it is investigating itself.

The CPL also increased the scope of cases of private prosecution that could be brought directly to court. Cases of private prosecution include those handled only on complaint, where the victim has evidence to prove a minor criminal offence, and where the victim has evidence to show that the accused has infringed upon her personal or property rights such that the matter should be investigated for criminal responsibility, but the public security organs or the procuratorate have not pursued criminal responsibility (art 170).

The power exercised by the procuratorate to convict a person of a criminal offence but to exempt them from punishment was removed in order to implement the basic principal that only the courts could find a person guilty of a criminal offence. The procuratorate instead has the discretion not to prosecute a person who has committed a minor offence. (CPL art 142).

Elements of the adversarial model of criminal justice were introduced at that time, removing the obligation of the courts to conduct their own investigations into the facts of the case and placing the onus on the procuratorates to prove the case on the basis of evidence adduced to the court. If the evidence adduced by the procuratorate is unclear or insufficient to prove the guilt of the defendant, the court may make a judgment of not guilty on the basis of art. 162(3). On appeal, the court may overturn a guilty verdict if it finds the evidence at first instance was insufficient and the facts do not support the accusation (Art 189(3)).

However, other elements of the adversarial system, such as allowing discovery prior to trial and requiring that witnesses present their evidence in court so that it can be tested by cross-examination were not introduced.

The capacity of the procuratorate to carry out legal supervision was strengthened by inclusion of powers to supervise police decisions to put a case on file (art 87 and see the discussion on this point in chapter 2 above), to review decisions that enforcement of a criminal sentence may be temporarily executed out of prison (art 215) and to review decisions to reduce sentences or grant parole (art 222).

Further institutional reform since 1999

The 15th Congress of the CPC mandated a five year program of judicial reform which included a reform agenda for the people's procuratorates. As part of this reform in 2000, the Supreme People's Procuratorate embarked on a broad-reaching three year reform program including improving

organisational structures and professionalism of personnel, strengthening the procuratorate's capacity to supervise case filing and investigations in criminal cases and strengthening higher level oversight of lower level procuratorial organs. At that time the Supreme People's Procuratorate issued the Opinion on Strengthening and Improving the Ideological and Political Work of the People's Procuratorates 2000, the Opinion on Further Promoting the Construction of the Basic Procuratorates (discussed at 3.6 below) and the Regulation on Supervisory Work of the People's Procuratorate (discussed at 3.5 below).

Particular elements of this reform included; strengthening criminal investigation, especially of official corruption and malfeasance, strengthening prosecution skills, strengthening systems for liaison and cooperation with the police and customs, audit, tax, finance and industry and commerce authorities, establishing a specialist task force to assist in dealing with serious, complex and difficult cases, introducing an individual responsibility system for management of criminal cases, strengthening leadership by higher level procuratorial organs over lower level organs, reforming and strengthening the case handling responsibility system and improving the professionalism of procurators and the quality of personnel system. In 2002 the Program of Building the Grassroots of the People's Procuratorates 2002 was launched which included a focus on the leading role played by the chief procurator in leading investigation prosuection and supervision activities and in professional development and strengthening the role of the procuratorial committee in strengthening and standardising procuratorial work. In 2005 at the same time as the SPC embarked on its second five-year reform program, the SPP issued an opinion on progressively deepening the three year procuratorial reform.

These reform programs remain ongoing. In October 2008, the current round of judicial reform was initiated by the issue of the CCP Central Committee's Political Commission's Opinions on Deepening the Reform of the Judicial System and Working Mechanism. (The comparable court reforms are discussed in chapter 7) In March 2009 the SPC issued the CCP Opinion to all procuratorial agencies and set out five specific tasks:

- optimise the organisation of procuratorial functions and powers; reform and perfect the scope, procedures and measures for legal supervision, strengthen legal supervision of litigation in order to protect judicial justice;
- reform the system for supervising procuratorial work, regularise enforcement activity in order to ensure that procuratorial power is exercised lawfully and justly;
- balance strict execution of criminal law with clemency; strengthen the ability to punish crime, protect human rights and protect the stability and harmony of society;
- enhance and perfect the organisational structure and systems for management of procurators, gradually improve the quality of procuratorial officials; and
- diligently implement the systems for guaranteeing the finances of political legal organs in order to ensure the finances and material resources of the procuratorial organs.

3.3 Tasks and Functions

Direct investigation of certain categories of criminal offence

The Criminal Procedure Rules for People's Procuratorates 1999 art 8 provide that the procuratorates exercise jurisdiction to put on file and investigate directly the following categories of crime: bribery and corruption (referred in Chapter VIII in the Specific Provisions of Criminal Law or other crimes or cases for which the person shall be convicted and punished according to the corresponding provisions in Chapter VIII); dereliction of duty by state personnel (set out in

Chapter IX in the Specific Provisions of Criminal Law), infringing the personal rights of citizens and infringing the democratic right of citizens committed by state personnel by taking advantage of their duties, including, false imprisonment, subjecting imprisoned persons to corporal punishment and maltreatment, extorting a confession by torture, carrying out retaliation and frame-ups, and unlawful search, and undermining elections.

Where the procuratorate is investigating a suspect who has committed a number of offences, if the primary offences are within the jurisdiction of the public security organs, the matter should be transferred to the public security organ with the procuratorate assisting in investigating and vice versa. The provisions of the CPL setting out the powers of public security organs to put a case on file, conduct an investigation, summons by force, interrogate, interview witnesses, seize mail, freeze assets and accounts, provide that these powers may be exercised by the procuratorate in cases directly investigated by the procuratorate (CPL art 131). Where the procuratorial officials conducting the investigation do not have sufficient expertise, they may appoint and supervise experts in the conduct of aspects of the investigation. (Criminal Procedure Rules for People's Procuratorates, 1999, art 168) Decisions made by the procuratorate to detain or arrest a criminal suspect are executed by the public security organs (CPL art 132). The Procurator-General of each procuratorate is responsible for approving the exercise of power to coercively summon a suspect, grant and monitor conditions for release on bail and any revocation or modification of it, and approve residential surveillance. The public security organs are responsible for executing the decisions to impose bail and residential surveillance.

The procuratorate is required to interrogate the detainee within 24 hours and release the person if it is discovered they should not have been detained (CPL art 133). A decision on whether to arrest a detainee should be made within 10 days with possible extension of between one and four days. (CPL, art 134). After arrest of a suspect, the same time limits for detention and other matters apply as those for matters investigated by the public security organs. The investigating procuratorate is responsible for approval of extensions of time periods for directly investigated crimes. After conclusion of investigation the procuratorate will make a decision on whether to commence a public prosecution. (CPL Art 135). These functions and powers have also been discussed in detail in Chapter 2 above.

Where a complaint is made to the procuratorate that a person detained by the procuratorate has been detained in excess of the legally prescribed time limits, the matter shall be investigated by the investigation department of the procuratorate which must report its findings within three days (Criminal Procedure Rules for People's Procuratorates, 1999, art 85).

Public prosecution

On receipt of the case file from the public security organs, the procuratorate reviews the adequacy and reliability of evidence supplied. Where necessary it will make further inquiries of the investigating officers or may re-investigate those matters and people before making a determination on whether to commence a public prosecution. It must make a decision on whether to commence public prosecution within one month of receipt of the file, with possible extensions of another 15 days (Criminal Procedure Rules for People's Procuratorates, 1999, art 272).

When the procuratorate has completed investigation it will present a bill of prosecution to the court. The standard for the court to accept the bill of prosecution under CPL art 150 is that it must contain clear facts, a list of evidence and of witnesses and append copies of the main evidentiary documents. Under the prosecution model introduced in the 1997 CPL, the prosecutor has the onus of adducing evidence that is 'reliable and complete' to prove the person committed a crime. The

court no longer conducts a substantive investigation of the evidence prior to trial. If the court considers that the facts are not clear, in particular if the evidence is insufficient, it may make a determination that the facts in support of the accusation are not clear and find the accused person not guilty under CPL art 162(3). The court may adjourn the matter for one month to allow the prosecutor to conduct a supplementary investigation (CPL arts 165, 166).

In theory, because the procuratorate bears the onus of proof, the accused person is not required to adduce evidence of innocence. However, the procuratorate is able to read out the testimony of witnesses who do not appear in court, so there is no opportunity for defence counsel to challenge the reliability of witness evidence adduced in this manner.

Supervision of the lawfulness of criminal investigations and trials

In addition to the specific heads of supervision discussed below, trial regulations passed in 2009 introduced a mechanism for supervision by issuing a procuratorial suggestion (Provisions on Procuratorial Suggestions by People's Procuratorates 2009). The scope of matters that may be the subject of a procuratorial suggestion is broad and includes signs of irregularities in courts, police, prison or re-education through labour camp in carrying out law enforcement.

Supervision of police investigation

The procuratorate has power to supervise police conduct of a criminal investigation at each stage of the investigation process.

The earliest is where a complainant disagrees with a police decision not to put a case on file for investigation, in which case the complainant may ask the procuratorate to review that refusal. The procuratorate shall ask the public security agencies for an explanation of why they have failed to put the case on file and if dissatisfied with that explanation can notify the public security agency to put the case on file (CPL art 87).

The next stage at which the procuratorate exercises supervision is through its power to approve or reject an application for arrest (CPL art 59). The procuratorate must determine whether the request demonstrates that there is evidence to support the facts of a crime and the suspect could be sentenced to a punishment of not less than imprisonment as the criteria for issuing the arrest warrant (CPL art 60). If the procuratorate considers that the police file does not meet the criteria it may return the file to the police for further investigation (CPL art 68). An application for arrest must be approved or rejected within 7 days (CPL art 69). Where the public security organs are dissatisfied with a determination to reject an application for arrest, they can appeal to higher level procuratorate which must reconsider the decision (Criminal Procedure Rules for People's Procuratorates, 1999 art 7, SPP, MPS Notice Issuing Regulations on the Application of Criminal Coercive Measures 2000 art 26) and respond in writing within 7 days of the appeal. During this process, if the procuratorate discovers illegalities in the investigation, it may require that the police 'make corrections' (CPL art 76).

The procuratorate is responsible for approving applications to extend the time for detention of a criminal suspect. Approvals of an extension for one month of detention after arrest are given by the procuratorate at next higher level (CPL art 124); the SPP must write to the NPC to apply for a long extension (CPL art 125) and the provincial level people's procuratorate may approve a two month extension under CPL art 126, where circumstances of the offence are grave and serious and a further two month extension under CPL art 127. The procuratorate is also responsible for ensuring that the time limits for detention are not exceeded by the police and ensuring rectification of those cases where a person is held in excess of the legally prescribed time limits (CPL arts 75, 76).

When the CID has completed its investigation it provides a recommendation for prosecution to the procuratorate together with the case file and evidence (CPL art 129). The procuratorate must decide whether the evidence is sufficient to support a public prosecution and whether the matter should be prosecuted (CPL art 138). If the procuratorate considers the evidence to be insufficient it may remit the file and request the police carry out further investigation not more than twice (CPL art 140). After that, if the necessary evidence has not been produced, the procuratorate may decide not to prosecute under CPL art 140(4). Both the police (CPL art 144) and the victim (CPL art 145) should be notified of this decision and have a right to appeal to the higher level procuratorate against the decision.

However, despite these apparently broad reaching supervision powers, the monopoly that the CID exercises over all stages of investigation and the fact that supervision is conducted after the fact makes effective supervision by the procuratorate very difficult to implement in practice. In the cases where the procuratorate considers the recommendation for prosecution contains inadequate evidence and asks the CID to conduct further investigation and remits the matter for further investigation, the outcome is likely to result in the extension of the period of detention of the accused person (Chen Dongfeng, 2009). In 2007, for example, the procuratorate exercised its supervisory powers over unlawful extension of detention in respect of only 57 detainees. (Law Yearbook 2008).

The procuratorate also exercises a separate power to act on complaints received by a defendant, their family members or legal advisor against legally effective decisions made in respect of criminal procedure such as: a decision not to put a case on file, a decision to not to arrest, not to prosecute a case, or a criminal judgment. The mechanism used by the procuratorate is to petition (shensu). In all these categories in 2007, 3,033 cases were accepted and in 475, the original decision was changed. (Law Yearbook 2008)

Supervision of the trial

Where a procuratorate discovers the court has breached the law in carrying out trial procedure it has the power to make recommendations to the court on how to rectify the breaches (CPL art 169). More importantly, where the procuratorate discovers errors in a court's decision, even where the decision is final, the people's procuratorate at the level higher than the court that made the decision may lodge a protest and require the court to rehear the matter (Organic Law of the People's Procuratorates art 18; see also section 4.6).

In practice there is a great deal of tension between the procuratorate and the courts in the exercise of the protest power. The 1997 amendments to the CPL enshrined the principle of centrality of the court's function in adjudication, which sits uneasily with the protest power. The mechanics of the rehearing and what role if any, the procuratorate plays in it remain contested (Chen Dongfeng, 2009). There is no guarantee that the outcome of the rehearing will give a different result from the first judgment. In 2007 the procuratorate protested in 2,766 criminal cases (including corruption and abuse of official position cases), of which 496 protests were withdrawn before the retrial was conducted. Upon the retrial where a protest had been lodged the original judgment was upheld in 568 cases and changed in 686 cases. (Law Yearbook 2008).

Supervision of legally effective administrative and civil judgments

Parties to administrative or civil litigation have the capacity to appeal against a judgment with which they disagree. The appeal is a method of trial supervision exercised by the parties to the litigation. In addition to this channel of supervision the law permits other modes for supervising the conduct of trials. One of those is the power of the procuratorate to protest against legally effective judgment or order of the people's court in both administrative and civil litigation.

The Administrative Litigation Law 1989 (which came into effect on 1 October 1990) art 10 provides that the procuratorate exercises supervisory power over administrative litigation. This supervisory power is exercised through the power to lodge a protest where it finds a violation of provisions of the law or regulations in a legally effective judgment or order of a people's court. (art 64) In 2007 the procuratorate protested in 467 administrative cases. 126 of these protests resulted in a changed judgment; in 13 cases, the original judgment was rescinded and the case sent for retrial; 233 caseswere mediated and in 139 cases the original judgment was retained. The proportion of cases which are the subject of supervision by the people's procuratorate is small as the total number of administrative litigation cases at first instance in 2007 was 100,683. (Law Yearbook 2008)

The Civil Procedure Law (as amended in 2007). art 14, provides that the procuratorate exercises supervisory power over civil litigation. Where the procuratorate finds that, in a legally effective judgment, there has been a breach of legal procedure that possibly affects the correctness of a judgment or ruling in the case, or a judicial officer has engaged in corruption or bribery, practiced favouritism or acted fraudulently, or perverted the law in trying the case or another matter listed in article 179 applies, including the finding of facts was not supported by the evidence, an error in applying the law and breach of trial procedure which could influence the correctness of the judgment, the procuratorate may lodge a protest (art 187).

The protest is lodged by the procuratorate at the level higher than the court issuing the judgment and may result in retrial of the case by the court at the lower level. When the case is retried, the court is required to notify the procuratorate so that it can send a representative to attend the trial. (art 190)

In 2007 the procuratorate protested in 11,817 civil cases, of which 7,745 were retried. At retrial in 3,313 there was a changed judgment; in 248 cases the original judgment was rescinded and the case sent for a new trial; 1985 cases were mediated and in 2,199 cases the original judgment was retained. The total number of civil cases heard at first instance in 2007 was 4,682,737. (Law Yearbook 2008).

In civil cases, in addition to the parties' capacity to lodge an appeal and the procuratorate's power to protest, trial supervision may also be exercised by requiring retrial of an effective judgment or mediation agreement in the following circumstances:

- Where the president of the court finds an error which is then referred to the adjudication committee of the court for decision; (art 177)
- Where the Supreme People's Court or the higher level people's court finds an error (art 177)
- A party to the action complains to the higher level people's court that there is an error in a legally binding judgment (art 178)
- An application for retrial must show that there is a breach of legal procedure that possibly affects the correctness of a judgment or ruling in the case, or a judicial officer has engaged in corruption or bribery, practiced favouritism or acted fraudulently, or perverted the law in trying the case (art 179).

Supervision of punishments

The procuratorate exercises power to supervise the execution of punishments in a number of different situations.

The first is to supervise the decisions made about enforcement of judgments for people subject to a term of imprisonment. They may review decisions that enforcement of a criminal sentence may be temporarily executed out of prison (art 215) and review decisions to reduce sentences or grant parole (art 222). In 2007 the procuratorate exercised its supervisory power in respect of 3,706

people in the two categories set out above. (Law Yearbook 2008). The second is to supervise the implementation of the death penalty.

Supervision of detention centres and prisons

The procuratorate exercises supervisory power over the implementation of judgments in criminal trials (Organic Law of the People's Procuratorates art 19). The procuratorate has responsibility for legal supervision of prisons and detention facilities operated both by the MPS and the Ministry of State Security (Organic Law of the People's Procuratorates art 19). State security agencies are required to report on the operation of the detention facility and where the procuratorate finds unlawful conduct, it can direct that this be rectified. The procuratorate is also responsible for supervising re-education through labour camps, which are operated by the justice departments. In 2007 it exercised supervision in this regard in respect of 5,788 people. (Law Yearbook 2008)

Statistics

	1998-2002	**2003**	**2004**	**2005**	**2006**	**2003-2007**
Approving the arrest of criminal suspects (person)	3601357	764776	811102	860372	891620	4232616
Initiating prosecution (person)	3666142	819216	867186	950804	999086	4692655
1. Fighting severe criminal offences against social order						
Approving the arrest of severe criminal suspects in crimes eg intentional homicide, setting fire and explosion, raping and kidnapping (person)	411379				47228	906947
Initiating prosecution (person)	410511				46607	931876
Approving the arrest on criminal suspect endangering state security (person)	3402	353				2404
Initiating prosecution (person)	3550					2451
Public servant taking advantage of their post and protect gangs (person)	554					101
2. Fighting crimes endangering market order and environmental resources						
Approving the arrest of criminal suspects endangering market order (e.g. production and sale of counterfeited and shoddy food and medicine, tax evasion, financial fraud, smuggling etc (person)	116932	19222	20425	21193	24211	113347
Initiating prosecution (person)	106910	1440	22179	24950	27728	129392
3. Intensifying investigation and prevention of crimes by taking advantage of duty						
Filing the case and investigating crimes by taking advantage of duty (e.g. corruption, bribery, neglect of duty) (case)	207103	39562	43757	41447	33668	179696

	1998-2002	2003	2004	2005	2006	2003-2007
Finalising the investigation and initiating prosecution (person)		22761	30788	30205	29966	116627
Corruption and bribery, value of more than 1 million (case)	5541		1275		623	35255
Filing the case and investigating public servants with the rank higher than the country level	12830	2728	2960	2799	2736	13929
At the bureau Level (person)		167	198	196	202	930
At the provincial level (person)		4	11	8	6	35
Arresting criminal suspects taking advantage of their duty (person)	5115	596	614	703	1670	5724
Malpractice and tort (case)	27416					34973
SOE staff that privately divide or embezzle state property and betray SOE interest (person)	84395	14844	10407	9117	10742	
4. Supervising slack law enforcement and ineffective punishment						
Urging investigation agency to file the case for crimes that meets the condition but are not filed (case)	36955	22575	20742	17940	16662	94766
Appeal against wrongful criminal decisions or awards (case)	16680	2906	3063			15161
Superadding the arrest in cases that should enact arrest but no application is submitted, or in cases that should be sued but not transferred to litigation	50863	9440	10660	12686	14858	63500
Superadding prosecution (person)	25297	5220	5670	8646	10703	42430
5. Supervising the lawful rights of parties involved in litigation						
Civil/ administrative appeal (case)	69392	13120		12757		63662
Deciding not to arrest when conditions are not met (person)	466357	58872	67904	29334	96382	255931
Deciding not to sue in cases of no criminal responsibility or lack of evidence (person)	106715	27957	21225	7366	7204	34433

Based on Supreme People's Procuratorate Annual Reports to National People's Congress.

3.4 Relations

Procuratorate and CCP Discipline Inspection Committee/Supervision Department ('DIC')

Often complaints about official malfeasance and corruption are made directly to the local office of the DIC located in each government work unit. In that case the DIC will be the first organisation to carry out interrogation often under the powers of Double Designation (shuang gui) which enable

the DIC to demand that the person present themselves at a designated time in a designated place to answer questions. Although this is not an authorised form of detention, it is de facto used to detain and interrogate (sometimes for extended periods) officials suspected of official misconduct and corruption. It is only after the DIC has determined that a Party disciplinary sanction is inappropriate and that the offending is sufficiently serious to warrant criminal investigation and prosecution that the matter is then handed to the procuratorate. The procuratorate is unhappy with this arrangement on a number of grounds. First, it removes the capacity of the procuratorate to decide in the first instance whether the conduct warrants criminal prosecution, rather than some lesser administrative or Party disciplinary sanction. Secondly after the suspect has been detained for a period, the likelihood that the evidence has been tampered with or destroyed is greatly increased. Finally, the matter might be transferred to the procuratorate after the person has attempted suicide or been interrogated using unlawful means, in which case the evidence obtained by the DIC is tainted and the procuratorate may have to recommence its investigation (Sapio, 2008).

Procuratorate and public security agencies

A number of the matters bearing on the relations between the police and procuratorate were set out at 3.3 above including the jurisdictional divide in investigating criminal offences and procuratorial supervision of CID investigations through approving applications for arrest warrants, extensions of detention periods and approval or otherwise of applications to initiate a public prosecution.

In addition, the police and procuratorate are required to cooperate in a number of areas of criminal procedure including in granting bail, imposing residential surveillance and detention and arrest of suspects in cases directly investigated by the people's procuratorates, where decisions made by the procuratorate must be enforced by the public security organs. For example, decisions by the procuratorate to impose residential surveillance are enforced by the local police station, though the procuratorate is required first to check the residential address of the target, or designate a place for enforcement of the residential surveillance order. Decisions to detain or arrest a suspect by the procuratorate in cases directly investigated by the procuratorate must be submitted to the public security organs for a detention warrant to be issued and enforced. (SPP, MPS Notice Issuing Regulations on the Application of Criminal Coercive Measures 2000) Where procuratorial officials conduct an investigation outside their own jurisdiction, the local people's procuratorate and police must be contacted to provide investigation assistance.

Procuratorate and courts

The role of the procuratorate in supervising the lawfulness of trials and its power to lodge a protest and require a retrial are discussed above at 3.3. The exercise of the procuratorate's power to supervise the courts has been the cause of a great deal of tension between the courts and the procuratorates. The power of the procuratorate to petition the court to reconsider legally effective civil and criminal judgments (discussed at 3.3 above) has been used much more commonly since the introduction of reforms emphasising the need to strengthen the procuratorate's supervisory power. However, increased use of this power could also be seen as undermining the independence of the courts and so is the source of much tension between them (see Peerenboom, 2002, 313-314).

Prior to the 1997 reforms to the CPL, the procuratorate exercised a power to determine that a person was guilty of committing a criminal offence but could exempt them from punishment (mianyu qisu). This power was abolished in the 1997 CPL as it offended the principle that the courts had sole jurisdiction to determine criminal guilt, a change which represented diminution of the power of the procuratorate vis a vis the court. The discretion previously exercised under this power was subsumed by CPL art 142 within the discretion of the procuratorate to determine not

to prosecute the matter at all where the criminal act is minor and in circumstances where, prior to 1997, the procuratorate could have exempted a person from punishment.

Procuratorate and the CCP, justice policy

The current criminal justice policy is to combine leniency and severity in order to achieve the objectives of the 'harmonious society', to establish a socialist rule of law system and to ensure social order (This policy is discussed in chapter 7). In particular the policy requires that serious crime be dealt with harshly and that leniency be shown in cases where the offence is minor. The types of serious crime that fall into the former category and that should be dealt with severely include organised crime, terrorist crime, drug crime, murder, rape, causing explosions, robbery, kidnapping, seriously harming the financial order, serious breaches of intellectual property, manufacturing counterfeit goods that cause serious damage to personal security and health, official corruption and serious official malfeasance. Juvenile offenders and first time offenders whose crimes are minor should be treated leniently. In implementing this policy, the procuratorate is required to strengthen cooperation with the public security organs, courts and justice departments and establish mechanisms for regular collaboration and cooperation (SPP Several Opinions on Implementing the Criminal Justice Policy of Combining Leniency and Severity in Procuratorial Work December 2006).

3.5 Mechanisms

Prosecutorial Oversight

Please refer to section 3.3.3 above.

Administrative Management

The people's procuratorates operate under the dual leadership model of vertical leadership by higher level procuratorates and horizontal leadership by the people's congresses and their standing committees at the same level. As budgetary allocations are made by the local governments, the horizontal level controls tend to be strong.

The salary level of procurators is set according to a nationally designated standard according to rank. Procurators appraised as being excellent in their work are entitled to be paid at a higher level. Procurators are paid a nationally designated procurators allowance, a local allowance and other insurance and social security benefits, People's Procurators Law chapter 12. After retirement they are entitled to receive retirement and other social security insurance benefits pursuant to the People's Procurators Law art 46.

In 1998, the CCP Central Committee forbade all political-legal organs (which include the courts, procuratorates and police) from engaging in revenue raising activities and from retaining amounts raised by way of imposing fines or fees. As a result these organs became entirely reliant upon budgetary allocations to meet salary and other expenses. Central and local finance and planning departments increased allocations, but in general failed to allocate sufficient funds to meet this shortfall. Increased allocations from the central budget over time have gone some way to addressing this problem. In general, primary budgetary allocations are made at the local level, with the exception of impoverished areas, where the provincial government and local government negotiate a sharing of budgetary items (SPP Opinion on Strengthening the Work of Protecting the Funding of Peoples' Procuratorates 2002).

Within each procuratorial organ leadership is exercised by the chief procurator and the procuratorial committee. There is a professional cohort comprised of procurators from the different functional

departments (discussed at 3.1 above) and the support staff. Since re-establishment of the procuratorate in 1978 the internal organisational structure of the procuratorial office has been in a constant state of flux. The internal organisational structure was reformed again in 2000.

Within the procuratorate, specific decisions are supervised by the Procurator-General, the Procuratorial Committee and the general office of the procuratorate. For example, a decision not to commence a public prosecution must be reported to the general office of the procuratorate for scrutiny. There is some concern that the procuratorial committee system tends to emphasise the administrative and political nature of procuratorial work, in that it is a forum for review and collective decision-making of the important cases and other matters referred to it (Zhu Jingwen, 2007, pp269-270).

Oversight and Inspection Mechanisms

Higher level procuratorates

The higher level procuratorates exercise supervision over the conduct of lower level procuratorates. The higher level procuratorate is authorised to reverse or alter any decision of the lower level procuratorate if it discovers an error has been made.

As part of the procuratorial reform program, improving transparency of procuratorial decision-making and strengthening supervision of procuratorial work has been mandated. The supervision department established within each level procuratorate is responsible for carrying out internal supervision by investigating breaches of discipline and unlawful conduct and for receiving and investigating complaints about unlawful conduct in the exercise of procuratorial functions. (SPP, Regulations on Supervisory Work of People's Procuratorates 2000, SPP Temporary Regulations on Procuratorial Supervision Work 2007).

People's Congresses

The people's congresses exercise supervisory power over the procuratorates, in the form of the annual work report presented to the congress, but also through exercise of their general supervision power in respect of complaints about procuratorial work made to the congress. (This point is discussed in more detail at Chapter 7.8.)

The peoples congresses exercise leadership over the procuratorates established at the same level. So, for example, the Standing Committee of the NPC is authorised to supervise the work of the Supreme People's Procuratorate and Supreme People's Court (Constitution art 67). One of the important ways in which the people's congresses exercise leadership over the procuratorates is through the power of the congress to appoint and remove the chief procurator at the same level. So, for example, the Procurator-General is appointed by the National People's Congress (Constitution art 62) which may also remove him or her (Constitution art 63). The NPC Standing Committee has the power to appoint or remove, at the recommendation of the Procurator-General of the SPP, the Deputy Procurators-General and procurators of the Supreme People's Procuratorate, members of its Procuratorial Committee and the Chief Procurator of the Military Procuratorate, and to approve the appointment or removal of the chief procurators of the people's procuratorates of provinces, autonomous regions, and municipalities directly under the Central Government. However, as with all senior appointments to organs of state, the CPC Organization Department first vets and selects appropriate candidates to be nominated for appointment by the congresses.

Where the procuratorate detains a member of the congress at county level and above for committing crime, the procuratorate at the same level as the congress must report the matter to the Presidium or the Standing Committee of that People's Congress.

3.6 Career and Transparency Issues

The chief procurator is appointed and removed by the people's congress at the same level and the deputy chief procurator and members of the procuratorial committee by the standing committee of that congress (Organic Law of People's Congresses arts 21-25).

The People's Procurators Law (1995 and amended 2001) regulates the appointment, ranking, assessment, training, rewards, discipline, dismissal and retirement of procurators. People's procurators must have Chinese citizenship, be over 23 years old, be in good health, have a good political background, respect the Constitution, not have a criminal conviction or have been previously dismissed and, subject to a number of exceptions for those with work experience, have a law specialist qualification (People's Procurators Law art 10). Initial recruitment of law graduates and others to the procuratorate is conducted through the unified national judicial examination (People's Procurators Law art 13; see also section 6.3). An assessment committee is established within the people's procuratorate with responsibility for training and performance appraisal (People's Procurators Law arts 51, 52).

The ranking of procurators is governed by the People's Procurators Law and the Temporary Regulations on Procuratorial Ranks, 1997. Procurators are divided into 12 grades. (People's Procurators Law art 21). The Procurator- General is the first grade. Under that level, principal procurators are divided into two grades, senior procurators into four grades and procurators into five grades.

In the Supreme People's Procuratorate, the deputy procurators general are first or second grade principal procurator, the procuratorial committee are between second grade principal procurators and second grade senior procurators, procurators are between second grade senior procurators and second grade procurators, and procuratorial assistants are between first and third grade procurators.

In the provincial and equivalent people's procuratorate, the chief procurator is a second grade principal procurator, the deputy procurators are between first and third grade senior procurator, the procuratorial committee are between second and fourth grade senior procurators, procurators are between first and fourth grade senior procurators, and procuratorial assistants are between first and fourth grade procurators.

At provincial and equivalent branch procuratorates the chief procurator is between a first and third grade senior procurator, the deputy procurators are between second and fourth grade senior procurator, the procuratorial committee are between second grade senior procurator and first grade procurator, procurators are between third grade senior procurators and third grade procurator, and procuratorial assistants are between second and fifth grade procurators.

At county and equivalent people's procuratorates the chief procurator is between third and fourth grade senior procurator, the deputy procurators are between fourth grade senior procurator and first grade procurator, the procuratorial committee are between fourth grade senior procurator and second grade procurator, procurators are between fourth grade senior procurators and fourth grade procurator, and procuratorial assistants are between second and fifth grade procurators.

Assessment of a procurator's grade is based on the functions of his or her post, ethics, professional abilities, performance in procuratorial work and years of work experience. Procurator performance is subject to annual appraisal which is rated as excellent, competent or incompetent.

Below the rank of second grade procurator promotion is primarily based on years of service. In addition, those who are appraised as performing well will be elegible for promotion after the designated period of service, those who do not will suffer postponement in their promotion and

those appraised as having excellent performance will have promotion accelerated. First grade procurators and above are selected for promotion and must satisfactorily complete additional training. Procurators may be demoted for breach of discipline.

As part of the procuratorial reform program launched in 2000, enhanced qualification and training requirements for procurators, especially at the local levels, were specified in the Opinion on Further Promoting the Construction of the Basic Procuratorates including: introducing three year staff training plans with a focus on professional skills, admitting procuratorial officers to full time training programs for half a year at procuratorial colleges and training centres, improving the quality teaching personnel and introducing continuing education and skills programs in procuratorates. This Opinion also mandated that promotion for law and other positions should be obtained through open competitive processes that reward professional skills and work excellence (not including leadership positions). The program of construction of the grass roots procuratorial organs was continued in 2002, with emphasis on evaluation and commendation of excellent performance by procurators and the responsibility system where procurators in leading positions and at the higher level are responsible for development and performance.

The educational and professional levels of procurators started from a low base in 1978 when the procuratorate was re-established. By 1985 only 10.1% of procurators had training above secondary level. By 1993 that number had increased to 63%. (Zhu Jingwen, 2007, p35).

Programs to improve the professional and educational levels of procurators continue. By the end of 2008 it was reported that 90% of procurators had tertiary level qualifications including 60% with a university bachelor degree and a further 2.4% with masters' level qualification and above. However, those with higher level qualifications were concentrated in the eastern and economically developed areas of China (SPP, 2004-2008 Plan for the Development of the Nationwide Corps of Procurators 2004.

In 2007 there was a total of 223,135 personnel in procuratorial organs. Of this 3,623 were chief procurators, 10,750 were deputy chief procurators, 14,777 were members of the procuratorial committee, 91,906 were procurators and 18,076 were assistant procurators. Another 26,221 were clerks (shujiyuan) and 13,678 were judicial police. (Law Yearbook 2008). The proportion of procurators to non-law specialist personnel is very high. For example in 2004 it was 2.22:1. The proportion of female procurators has increased over the years from 12% in 1998 to 23% in 2004. The age distribution of procurators sees the majority as being between 36 and 45 years old, comprising 40%, with those between 26 and 35 comprising 26.9% and those between 46 and 55, comprising 25.9% (Zhu Jingwen, 2007, pp273-4).

Conclusion

The procuratorates are still in a stage of institutional rebuilding and strengthening the professional and technical expertise of procurators. The educational level of procurators has increased dramatically since introduction of the requirement that procurators must pass the national judicial examination.

Whilst legally, the procuratorate exercises very broad powers of legal supervision over the investigatory functions of the police and their associated coercive powers, the conduct of trials by the courts and enforcement of judgments in prisons, in practice procuratorial powers in this respect continue to be severely constrained. At the broadest level, the procuratorate comprises one of the 'judicial organs' of state with responsibility for fully implementing hard strikes against targeted serious criminal offences. At this time judicial agencies are required to cooperate to achieve the

objective of ensuring full enforcement and striking hard and fast against the targeted crimes. During periods of hard strikes the emphasis of criminal justice agencies is to collaborate to achieve these objectives, not to hinder or slow down prosecution and conviction. At a more practical level, the supervisory powers of the procuratorate can be exercised only after the event and as a result the procuratorate can exercise little effective control over the conduct of the CID in investigating criminal offences and interrogating suspects. The relationship between the procuratorate and police is complicated by the fact that the procuratorate requires the cooperation of the police to enforce bail conditions, residential surveillance, detention and arrest warrants in respect of matters directly investigated by the procuratorate. The relationship between the procuratorate and courts is complicated by the fact that the procuratorate exercises supervisory powers over trials through exercise of its protest powers.

The work of improving professional standards of procuratorial work, both in terms of investigation, management of evidence, performance at trial and in exercise of its supervision function is ongoing. The appointment of Cao Jianming as Procurator-General of the Supreme People's Procuratorate in 2008 suggests that the emphasis on professional development remains strong, as he is a former Vice-President of the Supreme People's court and an international lawyer and academic of some note.

4. Court system

4.1 Role and Position

Legislation

The basic legislation relating to the court system in China, particularly in relation to criminal justice, can be found in the Constitution , the Organic Court Law (a law of the National People's Congress, which was first passed in 1979, and amended in 1983, 1986 and 2006) and the CPL. However, the power to interpret laws or to deal with inconsistencies between legislative instruments issued by different entities within the Chinese government is not granted to the courts, but to the Standing Committee of the NPC or the various enacting agencies (Constitution, arts 67(1) and (4); Law on Legislation, 2000, arts 42, 85 and 86). The question of interpretation and the structure of legislation in China is discussed in 1.3 above. These laws are supplemented by administrative regulations issued by the State Council (for example, on legal aid, as discussed in 6.2) and Judicial Interpretations issued by the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP). In addition, the SPC and the SPP may jointly issue notices or instruments in conjunction with other government department which have related responsibilities. These may include the Ministry of Justice and the Ministry of Public Security and, when appropriate other ministries such as the Ministry of Finance or the Ministry of Health.

Role of Courts

As explained in more detail in 4.2 below, there are 4 levels of people's courts, corresponding generally to the different levels of Chinese government. The basic provisions relating to the courts are contained in the Constitution and the Organic Court Law. The Supreme People's Court is the highest level court, and is answerable to the National People's Congress. Lower level courts (the People's High Courts, Intermediate Courts and Basic Level Courts) are also, strictly speaking, created by and answerable to a people's congress at a lower level of (generally provincial, municipal and county), although each higher level court is also responsible for the supervision of justice carried out by courts at lower levels (Constitution, art 127). The unclear demarcation lines between vertical and horizontal supervision of the activities of courts provides an additional level of complexity in the administration of the criminal justice system.

The Constitution (Art 3) sets out the basic principle that all administrative, judicial and procuratorial organs are created by, responsible to and supervised by the people's congresses to which they are responsible. Art 123 provides that the People's Courts are the judicial organs of the State and, pursuant to Art 124, the People's Republic of China establishes the Supreme People's Courts, the people's courts at local levels, military courts and other special people's courts. The basic rules relating to the organizations, functions, powers and personnel of the courts are set out in the Organic Court Law.

Art 126 of the Constitution sets out the principle that the courts exercise power independently, and are not subject to interference by any "administrative organ, public organization or individual." Pursuant to Arts 65 and 103, no member of the Standing Committee of the National People's Congress or a standing committee of a local people's congress may hold office in an administrative, judicial or procuratorial organ.

Under arts 3 and 128 of the Constitution, the Supreme People's Court is responsible to the National People's Congress and courts at various levels are similarly responsible to the people's congresses at the same level. The State Council is responsible for judicial administration (art 89(8)), as are the local people's governments (art 107).

The appointment of judges is controlled by the people's congress at the same level of government as the relevant court. The Constitution provides that the President of the Supreme People's Court is elected by the National People's Congress (art 62 (7)). The President's term is the same as that of the Congress, and he may not serve more than 2 terms (art 123). Similarly, local people's congresses may appoint and recall the president of the court at the corresponding level (art 101). The Standing Committee of the National People's Congress has the power to appoint and dismiss the Vice-Presidents and Judges of the Supreme People's Court, members of its Judicial or (Adjudicatory) Committee (discussed below) and the President of the Military Court, on the recommendation of the President of the Supreme People's Court. Similarly, the judicial committees and judges of lower level courts are appointed and dismissed by the standing committees of the relevant level of government (Organic Court Law, arts 11 and 35).

The Constitution (arts 125 and 134) also establishes the principle of open trials, the right of an accused person to have a defence and of Chinese citizens of all nationalities to have a trial in their own language, or, at a minimum, a right to translation.

As discussed in Chapter 3, art 135 requires the courts, the procuratorate and the public security organs to divide their functions in the administration of criminal justice and to work together in relation to the enforcement of the law.

Relationship with Procuratorate

The Constitution defines the procuratorate as a state organ for judicial supervision (art 129; see also Chapter 3). There is no distinction made in the ranks of the SPP and the SPP, and the Constitution suggests that they are of equal importance. For example, in the summary of government structure on the official Chinese government website, the organisations making up the Chinese government are listed as the National People's Congress, the President, the State Council, the Central Military Commission, the Supreme People's Court and the Supreme People's Procuratorate. See 2.2 for a more detailed summary of the relationship between the courts and the procuratorate.

Communist Party

The Communist Party does not play a formal role under the Constitution in the government or court system. However, officials with significant responsibility almost invariably hold a CCP position with similar responsibilities to their civil service positions Wang Shengjun is both the president of the SPC and a member of CCP Central Committee; Cao Jianming, the current Procurator-General, is also a member of the Central Committee of the CCP, as well as being an eminent legal academic. The role of the CCP in the formal judicial system is discussed in more detail below.

Other agencies

Other agencies with involvement in the criminal justice system include the Ministry of Justice ("MOJ",), the police, the MPS, and the Ministry of State Security. The different roles played by these agencies under Chinese law and in practice are discussed in more detail in chapters 2 and 3.

4.2 Organisation

Chinese courts are divided into four levels: the Supreme People's Court, the High People's Courts, the Intermediate People's Courts and the Basic (or Grassroots) People's Courts. There are 32 High People's Courts (including a military court), 409 Intermediate People's Courts and 3117 Basic People's Courts, with 190,000 or so judges, of whom 7,000 work in the High People's Courts, 16,000 in the Intermediate People's Courts and 146,000 in the Basic People's Courts. Of these, 24.6% are women. (SPC website, 2010). Art 3 of the Organic Court Law describes the functions

of the courts as follows: to try criminal and civil cases; through judicial means punish criminals and settle civil disputes so as to safeguard the dictatorship of the proletariat, maintain the socialist legal system and public order, protect socialist, collective and private property and citizens' rights and ensure the progress of the socialist revolution and socialist construction, as well as educate citizens in loyalty to the motherland and observe the Constitution and the law.

Supreme People's Court

The SPC is both a court and an entity with responsibility under the Constitution for supervision of the administration of justice and various other functions. According to the PRC Government website, the SPC has 6 main functions, which can be summarized as follows:

Court cases

The SPC is predominantly an appeal court, but also has original jurisdiction. The SPC tries at first instance those cases assigned to it by law and which it considers should be tried by it (see also Organic Court Law, art 32). In the case of criminal cases, the SPC hears at first instance major criminal cases that pertain to the whole nation (CPL, art 22). Such a trial will be heard by a collegiate panel of 3 to 7 judges (CPL art 147). All judgments and orders of the SPC, whether on appeal or at first instance, are final (art 197; Organic Court Law, art 12). In the case of civil cases, the SPC hears at first instance cases which may have a major impact on the whole country and cases which it decides should be heard by itself (Civil Procedure Law, art 21). All judgments by the SPC are legally effective (Civil Procedure Law, art 141). The SPC also has jurisdiction over "grave and complicated administrative cases in the whole country" (Administrative Litigation Law, art 16).

A primary responsibility of the Supreme People's court is to hear appeals of criminal and civil cases from the High People's Courts and special people's courts, as well as protests lodged by the SPPIn 2008, the SPC accepted a total of 10,553 cases, an increase of 29.53% over the previous year (possibly attributable to the referral of death penalty cases to the Supreme People's Court in 2006) (2009 SPC Report). In 2009, the SPC accepted 13,318 cases and concluded 11,749 cases, up 26.2 percent and 52.1 percent year on the previous year, respectively (2010 SPC Report).

Death penalty cases

The SPC now reviews all death penalty cases (Organic Court Law, art 13, Criminal Procedure Law, part IV). In late 2006, the Organic Court Law was amended to ensure that all death penalty sentences were either issued or reviewed by the SPC. This decision was implemented by the SPC in the Decision of the Supreme People's Court on the Exclusive Exercise of the Power to Review Death Penalty Cases.

Supervision

The SPC supervises trials by the different levels of local people's courts and special people's courts. Superior courts hear appeals from lower level courts. In addition, difficult or complex issues may be referred to a higher court for advice pursuant to the qingshi system (see 4.14 and discussion of appeal system below).

Review

The SPC may re-open and review cases at its own instance, or require a hearing of lower court decisions which has already been enforced.

Approval of verdicts

The SPC is responsible for approving verdicts on cases not specifically stipulated in the criminal law. (Art 3 of the Criminal Law provides that only an act expressly defined in the law as a criminal act may be punished as such. However, China is, among other things, a party to international treaties requiring the punishment of certain matters as a crime, which may not be listed in the Criminal Law.)

Interpretations

The SPC issues interpretations to lower level courts providing explanations for the concrete application of laws during the trial process. As noted above, the SPC issues numerous interpretations, regulations and other instruments relating to the conduct of trials in relation to particular types of laws. Since China is a civil law system, precedent does not play a role in case determinations, although the courts may publish model judgments or sample cases in order to assist judges in their determinations. Theses interpretations or opinions often elaborate on obscure sections of the law and may be very comprehensive in their scope. A recent example is the 2009 Regulations on the Five Strict Prohibitions, which deal with the prevention of corrupt behavior by judges.

High People's Courts

The High People's Courts are generally created at the level of a province, autonomous region or municipality directly under the central government (Beijing, Shanghai, Tianjin and Chongqing) (Organic Court Law, Art 26). Like the SPC, the High People's Courts are both appeal courts and courts with original jurisdiction in a relatively limited number of cases. They handle cases of first instance assigned to their jurisdiction under the law, cases of first instance transferred from lower people's courts, appeal and protests lodged against judgments and orders of people's courts at lower levels and cases of protests lodged by the people's procuratorates in accordance with procedures of judicial supervision. They also hear appeals from maritime courts if located in an area where there is a maritime court (Ministry of Justice legalinfo website).

Art 21 of the CPL provides that the high courts have original jurisdiction over criminal cases involving an entire province, autonomous region or municipality directly under the central government. However, art 25 of the Organic Court Law allows an Intermediate People's Court to request that cases be transferred to a High People's Court for trial if the Intermediate People's Court considers that a criminal (or civil) case it is handling is of major importance. In 2008, the SPC issued a set of the standards (Supreme People's Court, 2008e) which set out the jurisdiction of the various courts in relation to civil and commercial matters, based on two main criteria – the size of the action and whether there is a foreign element in the litigation. Thus, in the case of Beijing, the High People's Court is the court of first instance for cases where the subject-matter of the case is RMB 200 million or more, or RMB100 million if the case involves a party domiciled outside the jurisdiction of the court or a foreign, Hong Kong, Macau or Taiwan party. The Intermediate People's Court is the court of first instance for cases where the subject-matter of the case is RMB 50 million or more, or RMB20 million if the case involves a party domiciled outside the jurisdiction of the court or a foreign, Hong Kong, Macau or Taiwan party. Different levels are set for different provinces. Thus in the case of Guizhou, the limits for the High People's Court to take jurisdiction are set at a minimum of RMB50 million, or RMB20 million if the case involves foreign elements.

Intermediate People's Courts

The Intermediate People's Courts are established in prefectures of a province or autonomous region, in municipalities directly under the central government and in municipalities directly under

the jurisdiction of a province or autonomous region or in autonomous prefectures. (Pursuant to the 1984 Law on Regional National Autonomy, autonomous regions, prefectures and countries may be established in areas where minority nationalities live in concentrated areas, Art 12.) The Intermediate People's Courts handle cases of first instance assigned to their jurisdiction under the law, cases of first instance transferred from basic people's courts, appeal and protests lodged against judgments and orders of basic people's courts and cases of protests lodged by the people's procuratorates in accordance with procedures of judicial supervision. It also has jurisdiction over certain intellectual property cases, customs suits, and administrative cases and so on. Art 21 of the Organic Court Law allows a Basic People's Court to request that cases be transferred to an Intermediate People's Court for trial if the Basic People's Court considers that a criminal (or civil) case it is handling is of major importance.

Art 20 of the CPL gives jurisdiction to the Intermediate People's Courts in relation to criminal cases of endangering State security, ordinary criminal cases punishable by life imprisonment or the death penalty and criminal cases in which the offenders are foreigners. (Crimes of endangering State security are covered in Part 2, Chapter 1 of the Criminal Law and include offences relating to treason, sedition, colluding to overthrow the State or the socialist system, defection, espionage and theft of State secrets.) As noted above, the limits relating to civil and commercial cases are determined for each province and autonomous region on the basis of the size of the case and whether a foreign element is involved (Supreme People's Court, 2008e). In relation to administrative cases, the SPC took action in 2008 to allow litigants suing local government to bring their cases in the intermediate court rather than the grassroots or local court where the local government is located or where a case involves a foreign element, or is complicated or material (Supreme People's Court, 2008d). It should be noted, however, that the number of administrative cases in China continues to be very low. In 2009, there were only 121,000 administrative cases (2010 SPC Report), an increase of 10.5% over the previous year, but a very low percentage of the more than 11 million cases overall in that year.

Basic or Grassroots People's Courts

The Basic People's Courts are established in counties or municipalities, autonomous counties and districts of municipalities (Organic Court Law, Art18). The Basic People's Courts handle cases of first instance, as well as civil disputes and misdemeanors which do not need a formal trial and guide local mediation or arbitration committees. Art 20 of the CPL gives jurisdiction to the Basic People's Courts in relation to ordinary criminal cases other than cases which, pursuant to law, should be handled by higher courts. The Basic People's Courts may also set up so-called people's tribunals (Organic Court Law, Art 20), which are not trial courts, but may hear general civil matters, guide the work of mediation committees and handle petitions.

Special courts

The Chinese court system also includes a number of special courts. Their basic structure and function is summarized below. (Summary based on information in Ministry of Justice legalinfo website.)

The special courts include the military courts, the railway courts and the maritime courts. These are set up under separate legislation and will not be discussed in detail here, although the military courts in particular have jurisdiction over certain criminal matters involving the military. There are three levels of military courts set up in the army, provincial military regions, the navy and air force, dealing primarily with crimes committed by military personnel.

The maritime courts hear maritime or sea-shipment cases of first instance, including maritime

damages and liability claims, pollution of waterways, commercial cases, port operations cases, maritime fraud, offshore development and exploitation and cases involving vessels, as well as enforcement claims.

The railway courts (grassroots and intermediate) deal with criminal cases investigated by railway public security authorities and filed by railway prosecutors, as well as economic and commercial cases relating to cargo, collaboration contracts, torts and other economic disputes.

4.3 Model

Each court in the Chinese system has a President, one or more Vice- Presidents and judges (including chief judges and associate chief judges of divisions of the court). As noted above, the President is appointed and may be removed by the people's congress at the same level, while other appointments of judges are made by the standing committee of the people's congress. The recommendation of the President of the court in relation to the appointment and dismissal of judges is highly significant in these appointments. Courts may also appoint and remove assistant judges (Organic Court Law, Art 37) who may, in certain circumstances, provisionally exercise the functions of a judge. The Judges Law, art 14, provides that if a higher level court discovers that an unqualified person was appointed to be a judge, it shall propose that the appointment be rescinded by the lower level people's congress. In areas where there are no qualified persons able or prepared to fill the role, this can clearly cause considerable difficulties and ongoing disputes.

Each court is divided into a number of divisions. Art 31 of the Organic Court Law refers to the SPC setting up a criminal division, a civil division, an economic division and such other divisions as may be deemed necessary. Provisions relating to the other levels of courts are similar. In fact the SPC has 23 divisions, including the first and second registration divisions; five criminal divisions; four civil law divisions (including the specialist intellectual property division); administrative divisions and so on. Other offices include the research office, personnel, judicial and administrative affairs offices, foreign affairs bureau and so on. (See Government of the PRC website; SPC website). Other courts may be constituted slightly differently depending on individual requirements. For example, enforcement divisions are likely to play a greater role at lower levels of the court system.

4.4 Tasks and Functions

The basic division of functions between the different courts within the Chinese court system is outlined above. Cases may be heard in different courts in a variety of ways. The discussion below focuses on the criminal law system.

Single judge

Generally, criminal cases, including cases at first instance, must be heard by a panel of judges. However, in a limited number of cases, the CPL (arts 174 to 179) allows for a summary procedure to be tried by a single judge. This applies only in cases before the Basic or Intermediate People's Courts (art 147) and applies only in cases where the penalty is limited to imprisonment of no more than 3 years or a lesser penalty such as criminal detention, public surveillance or a fine; the facts and evidence are clear and sufficient and the Procuratorate agrees to the application of a summary procedure; the case is handled upon complaint under Art 89 of the Criminal Law (that is, when the victim or someone acting on the victim's behalf brings a complaint) or it is a minor case prosecuted by the victim directly. The 2003 Several Opinions concerning Application of the Summary Procedures in the Trial of Public Prosecution Cases issued by the SPC, SPP and Ministry

of Civil Affairs also allows for the summary procedure to be applied under limited circumstances in a case where the defendant has entered a guilty plea.

Panel of judges Other cases at first instance in the Basic and Intermediate People's Courts must be heard by a panel of 3 judges, or a tribunal of 3, including judges and assessors (also known as "jurors"). (The assessor system is discussed in more detail below). Cases at first instance in the High People's Courts or the SPC must be heard by a collegiate panel of 3 to 7 judges, or a combination of judges and assessors. Appeal cases must be heard by a panel of 3 to 5 judges (CPL; art 147). The number of members of the panel must be in any case be odd. The President of the court or the chief judge of the relevant division of the court will serve as presiding judge, or if not sitting, will nominate the presiding judge (art 147). Decisions are made on the basis of a majority ruling (art 148).

The following chart gives an indication of the number of first instance and appeal cases in China in the period 2004 to 2007.

	2004	**2005**	**2006**	**2007**
Total number of cases first instance	5,040,184	5,139,888	5,178,838	5,504,086
First instance criminal cases	644,248	683,997	701,379	720,666
Total number of cases second instance	500,529	518,143	529,527	544,369
Second instance criminal cases	96,204	96,776	94,092	92,364
Criminal cases judgment altered on appeal	12,730	13,031	13,157	13,177
Criminal cases remitted for rehearing	6,198	6,571	6,484	6,698
criminal cases	3,331	3,227	3,101	2,862
Judgment altered on petition	1,371	1,400	1,332	1,238
Judgment remitted for rehearing	308	41	49	50

Civil litigation

	2005	**2006**	**2007**
First instance cases accepted	4,360,184	4,382,407	4,682,737
Judgments	1,732,302	1,774,092	1,804,780
Mediation	1,399,772	1,426,245	1,565,554
Second instance cases	392,191	406,381	422,041
Judgment upheld	186,555	190,193	198,363
Judgment changed	60,326	58,840	56,560
Sent back for a new trial	30,203	29,825	29,986
Withdrawn	43,830	49,009	51,841
Mediated	33,492	38,232	46,083
Petition	41,461	42,255	38,786
Judgment upheld	13,484	14,376	13,414
Judgment changed	13,965	13,758	11,569
Withdrawn	548	560	577
Mediated	3,967	4,504	5,008

- Items omitted orders comprising: rejecting the litigation, withdrawal
- *Civil cases includes 3 categories: contract, tort and family and inheritance*
- *2004 stats not included because civil cases include intellectual property cases and maritime cases which are counted separately from 2005*

Administrative litigation

	2004	2005	2006	2007
Total number of first instance administrative cases	92.192	95.707	95.052	100.683
Original decision upheld	16.393	15.769	16.779	16.832
Original decision rescinded	11.636	11.764	9.595	8.600
Case withdrawn	28.246	28.539	31.801	37.210
Total number of second instance cases	27.273	29.176	29.054	29.964
Upheld	15.581	16.416	16.376	16.064
Judgment changed	2.942	3.082	2.692	2.441
Withdrawn	1.810	1.953	2.199	2.437
Administrative petition	1.852	1.780	1.870	2.035
Uphold	671	634	806	876
Judgment changed	435	502	459	386
Withdrawn	12	49	20	84

Note: upheld+rescinded+withdrawn does not add up to 100% as some categories were left out eg instruction to perform duty, compensation, rejecting the litigation

Source: China Law Yearbook 2005, 2006, 2007, 2008.

Judicial or adjudicatory committee

A feature of the Chinese judicial system is the judicial or adjudicatory committee (shenpan weiyuanhui). Art 149 of the CPL allows a collegiate panel to refer to a case to the judicial committee for discussion and decision in the case of a difficult, complicated or major case. Under the Organic Court Law (art 11), the judicial committee practises "democratic centralism". The meaning of "democratic centralism" is discussed briefly in 1.3. Generally, it means a system whereby the centre holds power, but engages in a form of decentralization through central delegation of authority. While it is not completely clear what the use of this general organizational concept means in the Organic Court Law in the specific concept of the judicial committee, art 11 further provides the judicial committee consolidates judicial experience in discussing important or difficult cases and other issues relating to judicial work. Its role, therefore, is to call upon that collective experience and judicial knowledge in deciding cases which were heard before a different panel of judges. As noted above, the appointment of members of the judicial committee is made by the standing committee of the relevant people's congress on the recommendation of the President of the court (Organic Court Law, Art 11). The President of the court presides over meetings of the judicial committee; the chief procurator of the Procuratorate at the same level may attend such meetings but does not have a vote.

The judicial committee is also responsibility for determining whether the President of a court should withdraw from a particular case on the basis of bias (CPL, art 30). In addition, in a case where the President of a court finds an error in the determination of the facts or application of law

in a case where his court has issued a legally effective judgment or order, he must refer the matter to the judicial committee for handling (CPL, art 205).

The role of the judicial committee in relation to ongoing cases is a controversial one, as the referral of difficult or complex cases to the committee has the effect of taking the decision over a case away from the collegiate panel which heard the case. This raises questions as to the meaning of the concept of 'judicial independence" as set out in the Constitution, since the judges assigned to a case do not ultimately take responsibility for the final decision. Some changes were made to this system when the CPL was significantly revised in 1996. Most materially, whereas prior to 1996, all major and difficult cases were submitted to the judicial committee, under the current version of the law, cases are transferred to the judicial committee only if the collegiate panel is unable to make a decision (art 149)(Chen Jianfu, 2008, pp319-320). One view of this system is that it acts as a measure to ensure quality control of the decisions of the court, since senior, more experienced judges will be reviewing the case. On the other hand, it potentially opens the door to corruption and Party interference in decisions in particular cases (Peerenboom, 2002, pp323-325). Since there is an appeal system, arguably the appeal court should be responsible for correcting any errors in the judgment by the collegiate panel. Similarly, the steps taken to improve the quality and standard of education of judges should ensure that judges with the competence to decide on difficult cases sit on those cases.

Nevertheless, the system of the judicial committee is well entrenched in the Chinese legal system. Reform (but not abolition) of the judicial committee system was incorporated in the Second Five Year Judicial Reform Plan and improvement of the system was also mentioned in the Third Five Year Judicial Reform Plan. In January 2010, the SPC issued the Implementing Opinions on the Reform and Improvement of the Judicial Committee System, which reiterate (based on the 2007 CCP Opinions on Deepening the Reform of the Judicial System and Working Mechanism) the importance of the judicial committee, but aim to ensure the quality of its members and clarify its functions.

Appeals

The Chinese judicial system is based on a two-tier appeal system - that is, a party to a case has only one appeal to a higher court, which is made to the court directly above the court which heard the case at first instance (Organic Court Law, Art 12). In tandem with the appeal system, the Procuratorate may also protest a decision to the people's court at the next level (Organic Court Law, Art 12; see also 3.3). These processes are discussed in greater detail below.

CCP – Politico-legal Committees

The CCP does not have a formal role in the decisions reached by courts or the court process. Nevertheless, it does have an impact both on judicial policy and potentially on individual cases through its political and legal affairs (politico-legal) committees. At the central level of the CCP, the Political and Legal Affairs Committee of the CCP, headed by Zhou Yongkang, issues documents on policy relating to the legal system and the judiciary, and may also inspect and supervise the investigation process and the conduct of major legal cases (Chinapeace website, 2010). Similar committees exist at the level of each province, city and county. The role of the committees is to lead, supervise, coordinate, administer, instruct and serve politico-legal working and enforce law by improving the CCP's supervision system over judicial organs through the people's congress and legal procedures (1982, Opinions of Central Committee of CCP on Reinforcing and Improving the Leadership of the CCP on Politico-legal Work). The role played by these committees in the judicial process may vary from area to area and it is not possible to determine the extent to which

these committees have an impact on individual decisions. Nevertheless, the possibility of direct interference in particular cases must be taken into account.

4.5 Relations

The main agencies involved in the court system are the judiciary and court staff, the Procuratorate, the public security bureau and potentially the state security bureau. In addition, the Disciplinary and Inspection Committees of the CCP may also play a parallel investigatory and disciplinary role which may have an impact on the court process (in addition to the role played by the politico-legal committees).

The division of functions between the three main agencies are set out in Art 3 of the CPL. Pursuant to this provision, the public security organs are responsible for criminal investigation, detention of suspects, execution of arrests and pre-trial examination in connection with criminal cases. The Procuratorate is responsible for procuratorial work, approving arrests, and the investigation and initiation of public prosecution in connection with cases accepted directly by them. The people's courts are responsible for the conduct of the trial. Art 3 goes on to preclude any other organ, organization or person from exercising any such powers in the absence of express legal provision (see Chapters 2 and 3). In practice, the relationship between the main agencies suffers from the vertical structure of the Chinese administrative system, which tends to discourage cooperation between government agencies and may lead to competition between the various responsible government bodies (Liu and Halliday, 2009).

Investigation Agencies

Investigation of criminal cases may be carried out by the public security agencies or the Procuratorate, depending on the stage of the investigation and the nature of the offence (CPL, Art 82). In both cases, the CPL sets out controls and constraints on the manner in which investigatory powers are exercised.

Police within the Ministry of Public Security, and the CID in particular, are the primary investigatory agencies referred to in the CPL. The CPL regulates the conduct of investigations and in particular the right of the police or the investigating body to detain suspects (see Chapters 2 and 3).

Security Agencies

The State Security Bureau may also have a role in relation to investigation pursuant to Art 4 of the CPL in relation to criminal cases endangering State security (see Chapter 2).

Prosecution Agencies

Prosecution of cases is the responsibility of the procuratorate. The circumstances in which the procuratorate will decide to pursue the prosecution of a case are discussed in more detail in Chapter 3. It is also possible for a private person to institute a private prosecution in a criminal case in cases where a charge may be brought only by complaint by a private person (for example, criminal insult or defamation; Criminal Law, art 246), minor crimes for which the victim provides the evidence or cases where the accused has infringed on the property or person of the victim and the public security agency or Procuratorate has failed to investigate (CPL, art 170).

State Agencies

Overall responsibility for the justice system is allocated to the Ministry of Justice (*sifa bu*), which is in charge of the prison system, legal educations, lawyers, foreign relations relating to lawyers, international legal work and the nationwide administration of the legal system (Ministry of Justice

website). It does not, however, have direct supervisory responsibility over the activities of the courts or judges.

The Ministry of Supervision and supervisory organs at lower levels of government have responsibility under the 1997 *Administrative Supervision Law* for supervision of adherence of administrative organs to the law, administrative discipline and meting out administrative punishments in respect of administrative organs, state functionaries and personnel appointed by administrative organs (art 18).

Running parallel to the supervisory system, the Disciplinary and Inspection Commission of the CCP has responsibility for investigations of members of the CCP who may have breached internal discipline. The Disciplinary and Inspection Commission of the CCP may impose penalties ranging from warnings to probation and suspension to expulsion from the CCP. The role of the Disciplinary and Inspection Commission is significant, because the ability of this Commission to investigate cases of corruption involving Party members may overlap with and supersede the role of the Procuratorate in the exercise of one of its main functions, that is, the investigation of corruption. For example, when the Party Secretary of Shanghai, Chen Liangyu, was investigated for massive fraud and corruption, he was first investigated by the CCP. Only when the process was completed and he had been expelled from the CCP were criminal charges brought (Xinhua, 2008; see also discussion in 3.4). It should be noted that there is a similarity of membership between members of the Disciplinary and Inspection Commission of the CCP and the Ministry of Supervision. For example, the current Minister of Supervision, Ma Wen, is also Deputy Secretary of the CCP Disciplinary and Inspection Commission and Chair of the National Corruption Prevention Bureau (National Bureau of Corruption Prevention of China Time, 2009).

Legislative Branches

There are a number of entities that play a role in relation to the promulgation of laws, regulations and other administrative instruments. The ability of the people's congresses and standing committees, and government agencies, to issue legislation is regulated by the Constitution and the 2000 *Law on Legislation*. As noted above, the SPC and the SPP may also opinions, interpretations and other documents that are binding on the courts. This range of potentially inconsistent and conflicting legislation presents significant issues for the courts in determining what legislation it is bound to apply in a particular case.

Executive Branches; other

In addition to the Ministry of Justice and the Ministry of Supervision, it is important to note the role of the CCP politico-legal committees in the administration of justice despite their lack of a formal role. There are politico-legal committees at each level of government, under the Central politico-legal committee of the Central Communist Party, with responsibility for leading, supervising, coordinating, administering, instructing and serving the politico-legal function. They therefore monitor and supervise the judicial bodies and may play a role directly in deciding or changing the decisions in particular cases. The central CCP politico-legal committee is comprised of the Presidents of the SPC and the SPP, and the Ministers of Public Security, Justice and State Security, among others (Greenpeace website; Delgado, 2008).

4.6 Judicial Education and Training

Role

Chinese judges are not given the specific power to strike down a law or regulation for inconsistency with a piece of legislation passed at a higher level. However, the *Law on Legislation* (arts 78 to 83)

does set out principles to be followed in relation to the priority of laws where two laws or pieces of legislation conflict. In event of a discrepancy which cannot be resolved, however, the matter is to be resolved by the Standing Committee of the National People's Congress or the local enacting body, rather than by the courts making a determination and striking down the offending item of legislation (*Law on Legislation,* 2000, arts 85 to 88). In practice, however, the courts may have to deal with this issue in the absence of guidance from the relevant legislative authority. The courts therefore do not necessarily make a determination on the invalidity of the conflicting law, but may choose simply to apply the law which they consider applies (Bath, 2008).

With the exception of this difficult issue of conflicting legislation, the courts are required to apply the law to each case on its merits. Assistance is provided both by the interpretations and opinions provided by courts at a higher level and by model cases and judgments made available on internal and external websites and through internal documents and manuals issued to judges. (Liebman, 2007) In addition, in event of a particularly difficult case, a lower level court may refer (*qingshi*) a case to a higher level court for advice and instructions.

Education and Training

After 1979, a variety of factors contributed to what was agreed to be the generally low quality of the judges who were appointed – the lack of qualified graduates, the poor conditions in which judges worked and poor remuneration (Zhang, 2003). The *Judges Law*, which was first passed in 1995, was amended in 2001 to raise academic and professional requirements for judges. Art 9 now provides that a candidate for a judgeship must be a Chinese national, have reached the age of 23, endorse the Constitution, have fine political and professional qualities, have good conduct and good health, and have worked for at least two years in the case of graduates in law specialities or non-law graduates with professional knowledge of law; for one year in the case of graduates with a Bachelor of Laws or have a Masters or Doctorate of Laws. Judicial personnel without these qualifications must undergo specialist training. Judicial training, at both the basic level and throughout a judge's career is provided by the National Judges College, an entity under the Supreme People's Court. A judge can be removed if he/she ceases to be a Chinese citizen, transfers out of the court system, has no need to maintain his post after a change in position, is determined to be incompetent through appraisal, fails to perform his duties through ill-health, retires, resigns or is dismissed or is unsuitable for continuing appointment because of a violation of discipline or law (art 35). The *Judges Law* provides that judges will be graded into 12 levels (art 18). The President of the SPC is Level One, and is the only judge to hold that position. Other judges are classified as Grand Justices, Senior Judges and Judges (art 18) and hold grades 2 to 4 (*Interim Provisions on Grades of Judge*s, 1997). The SCP, for example, has one Grand Judge of the first rank, and 11 Grand Judges of the second rank (SPC, 2010). The President of each court is appointed and removed by the People's Congress at the same level; the vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges are appointed and removed by the standing committee of the people's congress at the same level, on the recommendation of the President of the court; assistant judges are appointed or removed directly by the President of the court (*Judges Law*, art 11).

In practice, therefore, the President has considerable power in relation to the appointment of judges in the court. First-time and assistant judges are selected through a combination of public examination and "strict appraisal" from the persons best qualified for the position and must have both ability and political integrity (art 12). Other judges must also have practical experience. Judges are assessed on the basis of achievements in judicial work, their ideological level and moral characters, their competence in judicial work and their mastery of law theories, their attitude in and

style of work (*Judges Law*, art 21). Judges may be promoted based on their years in the requisite position and their performance in the position (*Interim Provisions on Grades of Judges*, 1997). It is not necessary for a judge to have served in a lower court before an appointment to a higher court, although the position may vary from court to court. The Beijing People's High Court, for example, does not appoint graduates straight from law school to the court, and instead appoints judges from lower courts (Liu, 2005; Beijing People's High Court, 2005).

Since 2002, new candidates for a judicial position must sit the National Judges Examination, a stringent examination with a high failure rate (Peerenboom, 2009a). Art 2 of the 2008 *Implementing Measures for the National Judicial Examination* (issued jointly by the SPC, SPP and MOJ) requires all persons assuming judicial office or a procurator's position for the first time, and persons who wish to practise as lawyers and as notaries, to pass the examination.

Efforts have also been made through the *Judges Law* and by other means to improve the career structure of judges, as well as pay and conditions in order to deal with some of the major problems in the judiciary. These include social status, pay and conditions, competence, independence, bias and corruption. (Gechlik, 2005), as well as crippling work load. Accordingly to the 2010 SPC Report to the NPC, there were 190,000 judges in 2009, handling 10.54 million cases. Despite a 25% increase in the number of cases since 2005, the number of judges has not been increased (Ng Tze- wei, Reuters, 2010a). In relation to the terms of judges' employment, it should be noted that the financial position of the courts varies substantially depending on the location of the court and the wealth or poverty of the particular area (He Xin, 2009).

4.7 Career Issues

N/A

4.8 Guarantee of Tenure

N/A

4.9 Judicial Interpretation

N/A

4.10 Adjudication

The procedure for a criminal trial is set out in the CPL, Chapter II. Chapters 2 and 3 of this Report discuss the pre-trial investigation and the legal provisions relating to the decision of the procuratorate to proceed with prosecution.

Summary Procedure

As noted above, criminal trials must generally be held by a collegiate panel, except in cases where the summary procedure can be utilized, in which case the trial can be held before a single judge. Pursuant to the 2003, *Several Opinions on the Application of Summary Procedures in the Trial of Criminal Cases,* a summary trial may be held where (a) the facts of crime are clear and the evidence is reliable; (b) the defendant and the lawyers do not raise objection against main facts of crime charged; and (c) the defendant may be sentenced to a fixed term of imprisonment for not more than three years, criminal detention, public surveillance or exclusive fines. The summary procedure may be applied either by decision of the court with the consent of the procuratorate or upon request by the procuratorate. A private prosecution may also be brought under this procedure (art 176). The procurator is not obliged to appear in such a case, and the procedures applicable in the case of a full

trial relating to interrogation of the defendant, questioning of witnesses, presentation of evidence or court debate do not apply (art 177). However, the defendant shall be given the opportunity to make a final statement before judgment is given. The court must conclude the case within 20 days and give a judgment within 5 days (CPL art 178 and 2003 *Several Opinions*).

Trial Procedure

The court will examine a case in which a prosecution has been initiated and try the case if the bill of prosecution contains clear facts, a list of evidence, photocopies or photos of major evidence and a list of witnesses (art 150). This provision substantially decreased the amount of pre-trial review conducted by the court under the 1979 Criminal Procedure Law and was intended to stop the court from effectively making a decision before it actually heard the case (Chen Jianfu, 2008, p319). The court should then appoint the collegiate panel (that is, a different panel hears the case); deliver a copy of the bill of prosecution to the defendant at least 10 days before the case is to be heard and notify the defendant that he is entitled to a lawyer; notify the procuratorate of the time and date for the court hearing at least 3 days before the trial; summon the witnesses, notify the parties, including the defendant and his agent, at least 3 days before the date of the trial; and announce in advance the name of the trial, the subject-matter and the date and place where the trial will be heard (CPL, art 151). It will be noted that the time limits allowed for the defendant to prepare his case are quite short. In the Stern Hu case, for example, the defendants' lawyers commented that they were given only a few days notice of the trial and little specific information about the proceedings (Lubman, 2010).

Cases should be heard in public unless they involve state secrets or the private affairs of individuals (art 152). In addition, cases involving minors should generally not be held in public. The SPC issued the *Several Opinions of the Supreme People's Court concerning Reinforcement of Open Trial of People's Courts*, which emphasized the importance not only of open courts but also of courts ensuring that all materials provided to the parties are complete (art 7). However, the provisions relating to the right of the public to attend the trial provide for the public to attend "with an appropriate certificate" (art 15). Similarly, although the CPL does not refer to business secrets as a basis for closing the trial to the public, the 2007 Opinions do appear to allow a party to apply for the trial to be closed on this basis and, in fact, in the Stern Hu trial, the portion of the trial relating to business secrets was in fact closed to the public (see discussion by Clarke, 2010). The concept of "state secrets" is vague and potentially far-reaching, as they involve "information concerning state security and interests and, if leaked, would damage state security and interests in the areas of politics, economy and national defense, among others." Government authorities are responsible for classifying matters as state secrets. The *State Secrets Law* was recently amended to raise the level of government which can classify a matter as a state secret, but also impose additional restrictions and responsibilities on internet operators (Cohen and Daume).

The court will then open the case, check that all parties are in attendance, inform the parties of their right to apply for the withdrawal of any member of the collegiate panel, the court clerk, the prosecutor, expert witness or interpreter, and inform the defendant of his right to defence (art 154). (Pursuant to (Art 28 provides that a member of the panel, the prosecutor or investigator must withdraw if he or a relative is a party or has an interest in the case; he has served as a witness, expert witness, defender or agent in the case or has any other relations with a party that could affect the fair handling of the case. If he fails to do so, the matter will be decided by the President of the court, the chief procurator or the person in charge of the public security organ, or if such person is himself involved, the judicial committee or the procuratorial committee (art 30)). The prosecutor reads out the charge, the defendant and the victim may present statements, and the prosecutor and the judges,

if they so wish, may interrogate the defendant (art 155). The victim and plaintiff and defendant in an incidental private action may also question the defendant with the consent of the court.

Witnesses who appear in court may be cross-examined by the prosecutor, the parties, the defendant and agent ad litem and by the judicial panel (art 156). Art 47 of the CPL provides that "[T]he testimony of witnesses must be questioned and cross-examined in the courtroom by the public prosecutor, the victim, the defendant and the defenders, and only when the testimonies of witnesses of all sides have been heard and verified can they be used as the basis for settling the case." However, witnesses often do not appear in court in criminal trials, which means that their statements are not subject to testing by cross-examination, a practice which has often been criticized (Ye Doudou, 2009). In this case, art 157 requires that the parties should present their evidence to the court and have the parties to identify it. Written records of testimony of witnesses who fail to appear, conclusions of expert witnesses, written records of inquests and other documents should be read out in court.

"Evidence" is defined in CPL, art 42, which provides that "All facts that prove the true circumstances of a case shall be evidence." Evidence includes material or documentary evidence, testimony of witness, statements of victims, statements and apologia of crime suspects and defendants, conclusions of expert witnesses, written records of inquests and examinations and video and audio materials. All of the categories of evidence must be verified before they can be used to decide a case. Art 43 strictly forbids the use of torture or coercion in obtaining evidence. Art 46 warns against the use of oral confessions and provides that a defendant cannot be convicted purely on the basis of his own confession. Art 43 does not forbid the use of illegally obtained evidence, such as confessions obtained by means of torture. The Ministry of State Security, Ministry of Public Security, the Supreme People's Procuratorate and the Supreme People's Court recently presented drafts *of Regulations on examining and evaluating evidence in capital cases and Regulations on the exclusion of illegally obtained evidence in criminal cases* to the plenary meeting of the CCP Central Politico-legal Committee, apparently at least partly in response to the case of Zhao Zuohai, who was tortured into admitting he had murdered a man who some years later turned up alive and well (Wang Heyan, 2010b). A report by Reuters on 30 May 2010 announced that the SPC, SPP, MPS, MSS and the Ministry of Justice on 31st May jointly issued *The Regulations on Assessment of Evidence in Death Penalty Cases* and the *Exclusion of Illegally Obtained Evidence in Criminal Cases*. Amongst other things these guidelines prohibit the use of illegally obtained evidence to convict a defendant in death penalty cases and set out procedures by which a defendant may challenge. The full text of these regulations is not yet publicly available (Reuters, 2010b).

The court has considerable powers to verify evidence, or conduct its own inquiry and interrogations (art 158) and can adjourn the trial if it is not satisfied with the evidence. Any party can request the court that new witnesses be summoned and material evidence obtained in the course of the trial (art 159).

With the permission of the presiding judge, all parties may state their views on the evidence and the case and "debate with each other" (art 160). The defendant has the right to present a final statement at the end of the trial.

The court may either deliver judgment at the conclusion of the case, after an adjournment, or at a later time (arts 162 or 163). Judgment must take one of the following three forms: guilty "if facts of the crime are clear, the evidence is reliable and sufficient, and the defendant is found guilty according to Law", innocent, or not guilty due to lack of evidence. The announcement must be

made in open court and a written judgment delivered within 5 days or, if the verdict is delayed, handed down when the verdict is delivered.

A postponement may be granted in order to obtain new evidence or if the procuratorate applies to conduct further investigations (but for not more than one month)(arts 165 and 166). A written record of the case must be made (art 167) and there are strict time limits imposed for conclusion of the case (art 167).

Private prosecutions

The CPL also allows for private prosecutions to be brought under limited circumstances (see art 4.5). The court will open a court hearing if the facts are clear and the evidence is sufficient, but will otherwise persuade the prosecutor to close the case (art 171). The evidence may be reviewed under art 158 (see above). Art 172 of the CPL favours court-run mediation in such a case. The defendant may also bring a counter-claim, which will be dealt with as a private prosecution (art 173).

Procedure at second instance

As discussed above, the defendant or his legal representative, a private prosecutor, or a party to an incidental civil action may bring an appeal against the judgment of a case of first instance, or a ruling by the court. In addition, the procuratorate may lodge a protest at its own instance or on request by a victim (arts 179 to 183). Time limits are short in such a case – 10 days for an appeal or protest relating to a judgment and 5 days for a ruling, in each case after the written judgment or ruling is issued. In the case of an appeal, the appeal petition and the courts documents and evidence should be sent to the court of second instance (art 184). A protest, however, is submitted through the original court, and the procuratorate at the higher level may withdraw it (art 185). The court of second instance is obliged to carry out a comprehensive review of the facts of the case and application of the law and is not restricted by the scope of the written appeal (art 186). A collegiate panel will be appointed to determine the appeal, which has discretion to decide whether or not to open a court session after it has examined the court files and conducted its own interrogation of the parties, defenders and agents. In the case of a protest by the procuratorate, however, it is obliged to open a court session (art 187). The court of second instance has a number of options: to reject the appeal or protest and reaffirm the original judgment; revise the judgment if the facts were correct, but there was an error of law or the sentence was inappropriate; revise the judgment if the facts were unclear or the evidence was insufficient or remand the case to the original trial court for retrial. It may not, however, increase the sentence in the case of an appeal lodged by the defendant (arts 189 and 190). This limitation does not apply if the procuratorate lodged a protest. A retrial will be ordered if there has been a breach of the litigation procedures set out in the CPL (art 191). The original court must establish a new collegiate panel in the case of a retrial (art 192). Where it is a ruling that is appealed, the court of second instance may reject the appeal or protest, or cancel or revise the ruling (art 193).

4.11 Jurors/People's Assessors

Role

China does not have a jury system in the way in which it is understood in a western or common law system. Nevertheless, it does have a system of involving persons from the community other than lawyers in court proceedings through the system of lay assessors or people's jurors. Assessors (or jurors) should constitute not less than one-third of a collegiate bench in cases of first instance which have a substantial social impact and have the same rights as judges (other than a

presiding judge) (*Decision on Improvement of the People's Juror System*, 2004 arts 2and3). A person selected as a people's juror should be over 23, a Chinese citizen with good health and good behaviour, and should generally have at least a junior college level of education (art 4). A person involved in the judicial system in any capacity, with a criminal record or a record of discharge from public service may not serve (arts 6 and 7). Appointment is for 5 years (art 9). The decision regarding appointment is made by the standing committee of the relevant people's congress, on the recommendation of the court after discussion with the judicial and administrative authorities (art 8). Training is provided and the juror is entitled to travel costs and remuneration (*Implementing Opinions on Selecting, Appointing, Training and Examining People's Jurors*, 2004, arts 10, 11, 12 and 14). The juror's work place may not cut his or her wages during training or the trial of case and may be penalised for doing so (art 21).

In relation to the utilization of the people's juror system, according to the 2009 Supreme People's Court Report, in 2008, there were 55,681 people's jurors, who participated in the adjudication of 505,412 cases (an increase of 34.05% over the previous year). It should be noted that courts accepted more than 10 million cases during the year, which indicates that the vast majority of cases were resolved without the use of people's jurors. These numbers also suggest that each juror sits on a substantial number of cases during his or her term of appointment and therefore, in addition to training, potentially acquires a substantial amount of practice experience. Issues that have been highlighted in relation to the people's jury system relate to remuneration and selection. A draft regulation of the SPC required random selection of jurors, in response to suggestions that courts often select the jurors to sit on particular cases. In a recent intellectual property case, it has been suggested that judges may select an expert juror to sit on a case where technical expertise is required (Lam, 2009)

Appointment and Training

See comments above in relation to the manner of selection and the period of training for jurors.

Relationship with Judges

As noted above, a people's juror formally has the same rights and powers as a judge, other than the presiding judge in a case. As is the case with a judge, however, the collegiate panel can be by-passed by a decision of the court to refer the matter to the adjudicatory panel (which may make a decision other than that of the collegiate panel). Decisions are made by majority on a Chinese court, and the people's juror can, like a judge, be outvoted by his colleagues. Similarly, a party can appeal against a verdict issued by a collegiate panel including one or more people's jurors. Despite the training or qualification process, a people's juror sits for a limited term, has less professional training and sits on many fewer cases than the judges. Although it is not possible to form a uniform view of jurors' experiences, it seems fair to say that the impact the jurors may have on a decision varies (Landsman, 2008).

Oversight

People's jurors are subject to the same controls as judges in relation to their ability (or inability) to sit on cases.

4.12 Regional Delimitations

As noted above, courts are distributed on the basis of China's political and administrative regions (that is, provinces, municipalities and districts). This means that a local court should be available to residents of each region of China. In areas where there are autonomous prefectures or counties, which will generally be where there are minority groups, a court may be established for that

particular area. In addition, the Constitution guarantees that national groups will be entitled to a trial in their own language, or, at a minimum, that translation will be provided (*Constitution*, 134).

4.13 Judicial Independence

Art 126 of the *Constitution* provides that the people's courts exercise judicial power independently and are not subject to interference by any administrative organ, public organization or individual. This concept is, however, subject to other provisions of the *Constitution* and the *Organic Court Law*, which provide first that the SPC supervises the lower level courts and, secondly, that the courts are responsible for the organs of the State power which created them. Institutionally, the existence of the judicial committee means that "independence" is not intended to mean the independence of a particular judge. Conversely, the judicial committee can serve a useful function by ensuring that particular judges are not subjected to criticism or retaliation for decisions which can be directly attributed to them and can thus be regarded as a way of both ensuring a well-considered verdict is delivered and of protecting the overall independence of the courts to make their own decisions. There are, however, a number of ways in which the independence of the courts is not protected from outside interference. First, the local CCP polito-legal committee may intervene in a particular case. Secondly, the fact that the courts are directly funded by the local people's congress and the people's congress and standing committee control judicial appointments means that a decision which is unfavourable to local interests may subject the court to retaliation. In addition, courts may be subject to strong pressure from local officials and local interests. The difficulty for judges in making decisions which directly criticize local government has been implicitly recognized by the SPC in its 2008 *Rules on Some Issues concerning the Jurisdiction over Administrative Cases and Rules of the Supreme People's Court on Some Issues concerning the Withdrawal of an Administrative Suit.* The effect of these rules was to move first instance administrative cases brought against local government under the Administrative Litigation Law to intermediate courts rather than require the plaintiffs to bring those cases in the same locality as the government entity which the plaintiffs aim to sue. The extremely low number of administrative cases and the high withdrawal rate of these cases (see court statistics above) when compared to the ever-increasing growth in civil cases gives some indication of the difficulty for plaintiffs in bringing this sort of action. The fact that, as noted above, there were still only 121,000 administrative cases in 2009 (2010 SPC Report) suggests that this legislation has not had the required effect. Thirdly, judges are assessed on their performance, an assessment which may include a view on the correctness of decisions which they have made. Fourthly, judges are subject to social pressures from the Chinese system of "guanxi", described as "the network of interpersonal relations of mutual protection, benefit and dependency that is one of the enduring hallmarks of Chinese society" (2010, Cohen), which makes it difficult for judges to act independently of the expectations placed upon them. All of these factors make it difficult for judges to be truly independent and the mechanisms which are in place are not adequate to protect judges and courts from outside interference of this kind. (Clarke, 2009)

Reconsideration and Review

The appeal and rehearing procedure for criminal cases is discussed below. A procedure also exists in the case of administrative decisions made by government departments for a party to appeal the decision, not only through the medium of the *Administrative Litigation Law*, but by requesting the government department for a reconsideration pursuant to the *Administrative Reconsideration Law (1999 (also known as the Administrative Review Law)*. Since administrative law in China also involves administrative punishment in the case of minor offences which are not considered to be

criminal, the ability to bring an administrative law case in the courts, or to seek reconsideration, is potentially an effective way of dealing with administrative abuse. In practice, however, the SPC Reports in previous years indicate that administrative cases have not become a standard part of law enforcement in China, as they constitute only 1%-2% of all cases in the Chinese court system.

In addition to the administrative law system, it is also possible for parties to seek a remedy to what they consider an unjust verdict by lodging a petition. The relationship of the petition system and the court system is not clear, although there is legislation which attempts to regularise the way in which petitions are lodged and the manner in which they are handled (State Council *Measures on Letters and Visits,* 2005). What role should be played by the petitions system as the courts continue to develop is the subject of considerable controversy. On one argument, the petitions system is still needed because of the difficulty for complainants in receiving justice in the courts (Xie, Zhuoyan, 2009). Towards the end of 2009, the SPC announced that it had set up a new petitions office and that 80% of courts around the country had separate petitions offices (Xinhuanet, 2009).

4.14 Appeal and Adjudication

Chinese law contemplates a two-tier system, in which a dissatisfied party can appeal only once (see above in relation to the trial procedure). In fact, as outlined in more detail below, there are a number of different mechanisms through which a court decision can be challenged. The *Civil Procedure* Law provides for the procuratorate at a higher level to lodge a protest (*Civil Procedure Law* art 187). The grounds were revised in 2007 and are the same as those for which a dissatisfied litigant can apply for a retrial (art 179). They are: problems with the evidence (new evidence, insufficient evidence, forged evidence, evidence that was not submitted to cross-examination, court failed to investigate evidence upon request); error of law; improper exercise of jurisdiction, improper formation of the trail organization, omission of claims in original judgment, or issue or a judgment which covered claims not made, cancellation of a legal document on which the judgment was based, violation of procedure affecting the accuracy of the judgment or embezzlement, bribery, favoritism, or twisting of the law in rendering judgment. Under art 177, if the President of a court considers that there is definite error in a judgment, he may refer the matter to the judicial committee; a higher court may also intervene of its own instance in such a case.

In relation to criminal cases, the CPL (art 180) provides that a defendant or private prosecutor may appeal to the court at the next level. Defenders or near relatives of a defendant may also lodge an appeal, with the consent of the defendant. In addition, if there is an incidental civil action associated with a criminal case, a party to that action may appeal in relation to the civil actionThe local procuratorate may lodge a protest if it considers that there is a "definite error" in the judgment or order in the case (CPL art 181). A victim who is dissatisfied with a verdict may also request the procuratorate to lodge a protest (CPL art 182). A protest by a procuratorate is, however, subject to review by the procuratorate at the next level, which may withdraw the protest if it considers it inappropriate (CPL, art 183). The higher level court may respond in a number of ways (CPL art 189). If the court agrees with the original judgment in relation to the determination of facts, the application of the law and the punishment, it will affirm the original judgment and reject the appeal or protest. If it considers that the determination of facts was correct but the application of law was incorrect or the punishment was inappropriate, it may revise the judgment (although it cannot increase a punishment if it was the defendant who appealed: art 190). If it considers that the facts were unclear or the evidence insufficient, the court may revise the judgment after making its own determination on the facts or rescind the original judgment and remand the case to the original court for retrial. If there are procedural improprieties such as violating the provisions of the law

regarding a public trial or restriction of the defendant's rights which impinge on the impartiality of the trial, the court will rescind the judgment and remand the case for retrial (art 191). An appeal may also be brought against the decision of the court of first instance on retrial (art 193). (See also Chapter 3.)

A special procedure applies for death sentences, which must be reviewed by the SPC. The SPC had previously delegated this power, but reclaimed it in 2007. Reports indicate that the number of death penalties has declined since that time, although since China does not publish statistics on executions, it is not possible to obtain exact figures. Policy in relation to review of death penalty cases has been issued by the SPC. The standards applied by the court in relation to the death penalty in practice, however, continue to be unclear. Most recently, the Chinese courts were subject to international criticism when a British citizen was executed, allegedly without any attempt being made by the courts to determine whether he was mentally ill (Ramzy, 2009). Pursuant to the Criminal Law (Art 18), a person who is unable to recognize or control his own conduct is not criminally responsible for a crime he commits. Art 49 provides that a person who was not 18 at the time he or she committed a crime cannot be executed, nor can a pregnant woman. In February 2010, the SPC issued a policy of "tempering justice with mercy" in relation to the death penalty (Xinhua, 2010).

In addition to these procedures, there are a number of other ways in which the decision in a case can be challenged. The first of these is the process of trial or adjudicative supervision (CPL, arts 203 to 207; also possible in the civil and administrative systems). This allows a party or his legal representative or near relative to petition a people's court or Procuratorate in relation to a legally effective judgment or order (which is, however, not suspended while the petition is heard). A retrial will be ordered if there is new evidence showing that the finding of facts was wrong; the evidence was unreliable or conflicting; the application of law was "definitely" incorrect or the judges were corrupt or otherwise bent the law (art 204). In addition, the President of a court may refer a matter to the judicial committee if he finds a definite error in a judgment of a lower level court, in which case the case may be retried by the higher level court or sent for retrial to the original court. A procuratorate may also bring a protest to a court at the same level if it finds an error in a case at a lower level (or at any level, in the case of the SPP). In this case, the court that accepts that protest will either retry the case or refer it to the lower court for retrial if the facts were unclear or the evidence insufficient (art 205). A case which is retried is subject to appeal (art 206). Art 223 also empowers the prison or organ executing a punishment to refer the matter to the People's Procuratorate or court that pronounced the original judgment if it believes that there was an error in the judgment or the criminal lodges a petition.

A court which is reluctant to decide on a case which is difficult or controversial may also use the *qingshi* system of referring a difficult question to a higher court. Although the SPC has been trying to discourage the unnecessary use of this practice (Supreme People's Court, 2003), the fact that judges may be penalized or criticized for "incorrect" decisions means that many courts may prefer not to make decisions on these cases.

Other bodies may also intervene in ongoing cases, however, including the local people's congress (pursuant to its power to "supervise" the courts), the politico-legal committees and other officers or members of the CCP, the press or members of the public through the active internet community. (Peerenboom, 2008; Liebman, 2007). Although there is considerable discussion on the impact of these different forms of intervention, particularly, in the case of individual case review, on whether this system is necessary because of the lack of independence and competence of the judiciary, it is clear that the result of this system is that there can be many different parties involved in the final

decision, which both impinges on the independence of the judiciary, and potentially results in expensive and drawn-out litigation.

4.15 Positioning

The discussion above in relation to adjudicative review, the role of the judicial committee and what is known as individual case supervision highlights some of the difficulties in the Chinese system in ensuring that the court - particularly the collegiate bench which hears a particular case - does indeed play the central role in controlling the conduct of a criminal case. Lawyers for the defence complain that they have insufficient access to defendants during the investigation and detention period, insufficient access to court materials and an insufficient opportunity to put their case in court. Trials, including criminal trials, are very short and, as discussed in more detail below, conviction rates are very high. The statements of witnesses are often read out in court, despite the provisions in the CPL which suggest that witnesses should be available for cross-examination, and the ability of the lawyer for the defence to mount an aggressive defence and test fully the evidence which is put before the court is therefore limited. The well-publicised criminal trial of the Australian Stern Hu and his three Chinese colleagues before the First Intermediate People's Court of Shanghai serves as a good illustration of these issues (Lubman, 2010). If the reports on the case are correct, the trial in that case took less than 3 days to complete, although it involved 4 defendants, each of whom was charged with taking bribes and infringing on business secrets. The case of each defendant involved separate facts and a complex fact situation. The judgment which was issued by the court - a very short time after the conclusion of the hearing - was over 70 pages long, which illustrates the factual complexity of the case (available at Sainsbury, 2010). The court was not open to the foreign press, although an Australian consular representative was allowed to attend the "public" part of the trial. He was not allowed to attend that portion of the trial which related to business secrets. One of the defendants complained that he was not permitted to cross-examine a person who had made a very serious allegation against him in the trial, the factual accuracy of which was disputed in the trial (Garnaut, 2010).

4.16 Judicial Administration

The local people's congress is in charge of funding for the courtsEach court is responsible for its own budget, but the court budget is very dependent on the budget allocated by local authorities and thus on the resources which local authorities have available to fund courts In general, urban courts are better funded than rural courts, which are often unable to balance their budgets and may be substantially in arrears in paying judges and other court personnel. The question of court funding is the subject of considerable discussion in China, and making improvements to the funding system has been included in the Fifth Five-Year Reform Plan. There are a number of significant problems which are related to the funding issue. The first is the question of funding - can the courts pay their staff and carry out their functions? He Xin's interesting study on two courts in China indicates that the existence (or lack) of adequate funding has an impact on the way in which the courts organize their operations and on what cases they are able to accept and deal with (He, Xin, 2009a). Secondly, the ability of the local government to control funding (as well as appointments) raises serious questions about the on-going independence of the judiciary (Liu, Yan, 2010). Thirdly, the different sources of funding results in considerable disparities between the courts.

Funding for courts comes from a variety of different government sources. The courts are no longer directly entitled to receive and retain funds from fees and fines. These must be collected by the court and paid to the local government, which is responsible for reallocating funds to the courts. The issue for courts in poorer areas tends to arise in relation to the system of re-allocation of the funds to the

court system, which are substantially deprived of funds either as a result of an insufficient allocation from local government or due to the fact that local government itself is unable to make an adequate allocation to fund the ever-increasing load of the court system (He, Xin, 2009a; *Interim Measures on the Financial Management of the People's Courts, 2001*). He Xin's very interesting study of two courts in different areas, one of which, in 2003, had a budget of RMB1.3 million (less than half of what it required) and the other of which, in the same year, had a budget of RMB70 million – so much, in fact, that it was able to offer assistance to a court in a rural area.

It is this system which the changes in 2009 and the Five Year Reform Plan aim to improve by establishing a system of shared costs between local and higher levels of government. The government at the same level as a particular court is responsible for funding personnel costs, daily running costs, basic administrative facilities and maintenance costs. The central government can transfer funds to assist with the personnel costs. Central, provincial and local governments share responsibility for the funding of case handling costs, and professional facilities costs and reportedly contributions from central and provincial governments substantially increased from 2007, with a particular increase in 2009 (South West University of Political Science and Law Justice Research Centre, 2010; He, Xin, 2009a). The outstanding issue, however, is whether the complicated system of allocating responsibilities between the 3 levels of government constitutes a long-term resolution to the problems of localisation. The authors of the South West University of Political Science and Law Justice Research Centre report (South West University of Political Science and Law Justice Research Centre, 2010) express the view that notwithstanding the change of the system into one in which responsibility is shared by different levels of government, personnel and funding should be handled by the Central Government in order to encourage unity, independence and justice.

4.17 Oversight and Inspection

The performance of judges and court personnel is assessed on a number of bases, which are set out in the *Judges Law*. Pursuant to art 23, "The appraisal of judges shall include their achievements in judicial work, their ideological level and moral characters, their competence in judicial work and their mastery of law theories, their attitude in and style of work. However, emphasis shall be laid on the achievements in judicial work." The SPC has recently enacted the 2009 *Measures of the Supreme People's Court on Discipline of Court Personnel,* which replaces previous legislation and sets out comprehensive penalties and disciplinary consequences resulting from failure to comply with the standards set out in the Measures.

In addition, Chinese courts and judges are subject to the cadre responsibility system, and therefore have targets which they may be required to meet. These may include individual requirements for judges, as well as targets which the court must meet, such as resolving a certain percentage of cases, conducting a certain number of mediations and case closures, conducting a set number of political meetings and so on. Rewards for the senior judges of the courts (or punishments) may be handed out for having more than a certain number of cases overturned on appeal, being the subject of a too many petitions, failing to enforce judgements and so on (Minzner, 2009). The requirements of the cadre responsibility arguably conflict with the principles in the *Judges Law* that a judge is entitled to be free from interference in the performance of his or her duties from interference from administrative or other organs (art 8). The possibility of disciplinary action if a judge is subsequently held to be incorrect in making a particular judgment potentially has a chilling action on both the judge and the court, and leads to judges refusing to accept cases which may be controversial or trying to refer difficult questions to higher courts rather than take responsibility for a decision which is subsequently held to be incorrect.

Judges may be identified and rewarded for particularly meritorious performance. In January 2010, for example, Chen Yanping, a judge from Jiangsu Province, who tried more than 3100 cases correctly and was not the subject of a single petition or complaint by a dissatisfied litigant (Li Bin, 2010).

4.18 Other Court Staff

Clerks

Pursuant to the Organic Court Law (Art 40), in addition to judges and people's jurors, a court also has secretaries (or clerks) who keep records of court proceedings and take charge of other matters concerning trials (Art 39). Prior to the amendments to the Judges Law in 2001, it was possible for a court clerk or secretary to progress to the position of assistant judge and then judge. However, in 2003, a combined directive of the CCP Central Committee Organization Department, State Ministry of Personnel and SPC made clear (Interim Measures for Management of Clerks of the People's Courts, 2003) that clerks should be employed in a separate managerial structure within the court, on a clerk's contract, and that it would no longer be possible for clerks to advance to the position of a judge. The Interim Measures require that clerks be Chinese, more than 18, professional skills as clerk and a university qualification (although this requirement can be relaxed to a high school qualification)(art 3). The clerk is appointed on a contract, on civil service rates, by the secretary of the relevant court.

Marshals or bailiffs

Art 41 of the Organic Court Law provides for the appointment of marshals or bailiffs of local courts who are responsible for carrying out execution of judgments and orders in civil cases and, in criminal cases, parts of the judgments and orders relating to property.

Forensic physicians

Art 41 also provides that people's courts at various levels may have forensic physicians or medical examiners.

Judicial police

Courts also have judicial policemen. These policemen have the following primary responsibilities: court security and order; in cases transmit witnesses and evidentiary materials; serve legal instruments; implement summons, warrants and detention orders; escort and hold in custody the accused or offender; participate in activities related to seizure or freezing of property; implementation of the death penalty and other duties as required by law (1997, Provisional Regulations of the Supreme People's Court on the Judicial Police, art 7).

Conclusion

The Chinese court system has been the subject of constant revision and improvement since 1979. As a result, it has a strong formal structure established by legislation passed at a national level and implemented by directives, opinions and interpretations issued by the SPC and other bodies. Stringent efforts have been made to improve the qualifications and quality of judges, as well as the system for recruitment, and to introduce an element of public participation in the system through the use of people's jurors. In addition, training for new judges and for the jurors is also aimed to improving the standard of the courts and raising public confidence in their activities. The legislative changes made to the *Criminal Law* in 1997 and thereafter, and to the CPL in 1996, were aimed at providing a system which created definite offences, and a transparent and open court

procedure, in which the defendant would be able to have access to information and to conduct a defence. In addition, there have been some responses to public and international concerns in the form of a more stringent review of death penalty cases and repeated attempts to deal with issues of corruption and bribery within the judiciary. Recent SPC opinions reiterate the importance of open trials and the independence of the judiciary. In addition, attempts have been made to facilitate access to justice by providing a legal aid system which, although limited, has expanded in scope over the last 10 years, and to waive court fees for indigent parties. Recent moves against the use of torture to obtain convictions in the criminal system also indicate that the courts are responsive to public protests.

There are, however, a number of weak points in both the legislation and the overall structure. In particular, the multiplicity of parties which are able to play a role in the administration of justice significantly undermines the stated aim of the system to provide an open and equitable system of justice. The underfunding of the courts in some regions and their dependence on local government for funding of their activities, the ability of politico-legal committees, higher courts, the procuratorate, local congresses and other entities to interfere in the conduct of particular cases, as well as the pressure put on individual judges and the courts to comply with Party and government directives, make it difficult for the judicial system to make and enforce decisions based solely on the law. The legislation itself is not specific in relation to the allocation of roles between the various potentially competing parties within the system – the police, the procuratorate, the courts, and the lawyers. In particular, there has been a failure of the legislation and the courts to give lawyers sufficient access to their clients and the ability to conduct a robust defence in court by cross-examining witnesses and having access to materials, combined with occasional victimisation of defence lawyers by prosecuting them for their actions in courts. Despite protests against torture, the CPL itself does not prevent the introduction of evidence which has been obtained by torture and the very high conviction rate indicates the difficulty for defendants in bringing an active defence. According to recent news reports, the Supreme People's Court, the Supreme People's Procuratorate and the MPS, MSS and MOJ has recently attempted to deal with this issue by issuing regulations which focus on death penalty trials. (Reuters, 2010b). It is, however, possible that the question of illegally obtained evidence will be dealt with when the CPL itself is amended, an outcome that would be preferable to the use of regulations issued at ministry and court level. Above all, the weakness of the courts within the system, combined with pervasive problems of corruption in the courts, and lack of confidence by the public in their decisions, means that the criminal justice in China still needs significant improvement.

5. Civil and Criminal Judgement Enforcement

Enforcement of judgments in civil and economic matters is carried out by the enforcement divisions of the courts. Compulsory enforcement of arbitral awards is also the responsibility of the courts. The poor rate of compulsory enforcement of judgments and arbitral awards is considered to be one of the intractable problems facing the people's courts. In the case of civil matters, the rate of voluntary compliance with court judgments and arbitral awards is very low, thus necessitating initiation of compulsory enforcement procedures through the enforcement division of the people's courts. Some estimate that the rate of judgments that cannot be enforced is as high as 50%, with other estimates being even higher. (Li Yuwen, 2002) In addition to the problem of a party being completely unable to enforce a judgment in its favour, there is also a problem of delay in enforcement and a party being able to recover only a portion of the amount of the award. (Chen Jianfu, 2002).

Reform of the capacity of people's courts to carry out enforcement of judgments is one of the key aspects of the 5 year judicial reform programs, the first of which was launched in 1999. In an effort to improve the enforcement work of the courts, the SPC has issued a number of special regulations on enforcement work, with the most recent being the amendments to the *Civil Procedure Law* made in 2007 and the SPC *Interpretation on Several Issues on the Application of the Execution Procedure of the PRC Civil Procedure Law 2008*. (The program of judicial reform is discussed in chapter 7).

5.1 Types of Enforcement

Civil

The vast majority of the cases enforced by the enforcement division are civil cases, on average comprising 81.2% of all enforcement cases (Zhu Jingwen, 2007, p. 244). Enforcement of civil judgments and judgments issued by the maritime courts is governed by the provisions of the 1991 *Civil Procedure Law* as amended in 2007 (the "Civil Procedure Law") and subsequent interpretation documents.

Courts in the place where the property subject to execution is located, or the domicile of the person against whom enforcement is sought, have jurisdiction to enforce legally effective civil judgments and rulings, judgments against property in criminal matters and 'other legal documents' (*Civil Procedure Law, 2007*, art 201). When making the application, the applicant must provide proof that there is property available for execution in that jurisdiction (SPC *Interpretation on Several Issues on the Application of the Execution Procedure of the PRC Civil Procedure Law*, 2008, art 1).

The definition of executable documents was set out in more detail in the SPC *Rules on Issues on Execution Work of the People's Court 2000* at art 2 and includes: civil and administrative judgments and orders, mediation agreements, written decisions on civil penalties, payment orders, written judgments, orders and mediation agreements in civil actions incidental to criminal proceedings made by the people's court; decisions by the people's courts imposing administrative punishments and administrative dispositions; arbitral awards and mediation agreements made by domestic arbitration bodies; court orders for property and evidence preservation under the PRC *Arbitration Law*; compulsorily enforceable notarised documents for debt and property recovery; judgments and orders of foreign courts and arbitral bodies that are recognised by the people's courts; and other legal instruments executable according to law.

Where property is located outside the enforcing court's jurisdiction it may entrust the court in the location of the property to carry out the enforcement (*Civil Procedure Law*, art 206). If that court

does not carry out enforcement within 15 days of receipt of the letter of entrustment, the enforcing court may request the higher level court to carry out the enforcement (art 206) after execution. If the judgment upon which the execution was based is annulled because it contains a 'definite error' the enforcing court shall order that the parties who obtained possession of the executed property return it (art 210).

The limitation period for commencing enforcement proceedings is two years from the date specified for performance (*Civil Procedure Law* art 215). The court will send a notice requiring performance of the judgment to the party against whom enforcement is sought, and if they fail to comply within the time specified, compulsory measures are to be taken (*Civil Procedure Law* art 216).

If the court fails to carry out execution within six months of receiving the application, the applicant may apply to the next higher level court for enforcement. The next higher level court may enforce itself or instruct a lower level court to carry out enforcement within a designated period of time *(Civil Procedure Law* art 203). Enforcement is to be carried out by an enforcement officer (*Civil Procedure Law* art 205).

The person subject to execution is required to provide a statement of assets, but if they fail to do so the court has power to investigate, freeze and transfer amounts held in accounts with banks, credit cooperatives and other deposit taking entities (*Civil Procedure Law*, art 218). The court may issue a garnishee order in respect of income, though it must allow the person who is subject to the order sufficient for daily living expenses and support of dependents (*Civil Procedure Law* art 219). The court may also freeze, distrain and sell by public auction all or part of the assets of the person against whom enforcement is being executed. (*Civil Procedure Law*, art 220). Where property and assets are concealed, the court may issue and execute a search warrant (*Civil Procedure Law* art 224) or summons parties to hand over negotiable instruments or other property transferred by document (*Civil Procedure Law* art 225). Upon giving prescribed notice the court may evict a person from buildings or land (*Civil Procedure Law* art 226). A person who delays in making monetary payments or transferring property may be charged double the amount of interest payable on the amount of the debt or fined for the delay (*Civil Procedure Law* art 229). Where a person refuses to comply with compulsory execution, the court may notify relevant agencies to restrict capacity to leave the country, put a record on the credit system, or publicise the failure of compliance in the media (*Civil Procedure Law*, art 231).

The courts have the coercive power to summon a person or their representative against whom enforcement is sought if they fail to appear twice when summonsed (SPC *Rules on Issues on Execution Work of the People's Court, 2000*, art 97). The length of the period of inquiry under summons may not exceed 24 hours (SPC *Rules on Issues on Execution Work of the People's Court*, 2000, art 98) Where hindrance of court execution is serious, such as acts involving destroying evidence or property, hindering execution by force, or use of violence or threats against the court or other parties, the court may impose a fine (up to RMB 10,000 for individuals and RMB 10,000-300,000 for entities), detain a person for up to 15 days, or remit the matter for investigation where the conduct constitutes a criminal offence (SPC *Rules on Issues on Execution Work of the People's Court art 100, referring to Civil Procedure Law* arts 102, 104). Whilst the courts have coercive powers to enforce judgments, scholars have documented a long standing reluctance to use those powers fully (Clarke, 1996, Chen Jianfu, 2002).

Courts also exercise jurisdiction to order property preservation measures be taken prior to final determination of a dispute both in relation to litigation and arbitration proceedings (*Civil Procedure Law* arts 92, 93, 249).

A foreign court may request judicial assistance for service of documents, investigation and gathering evidence on the basis of reciprocity, either under the auspices of bilateral or multilateral treaties such as the *Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, or diplomatic channels (*Civil Procedure Law*, arts 260, 261) Applications for recognition and enforcement of foreign judgments and rulings may be made on the basis of reciprocity (Civil Procedure Law art 265). China has not acceded to the Hague Convention, so judicial assistance and recognition and enforcement of foreign judgments can, in practice, only take place on the basis of a bilateral agreement.

Criminal

The CPL governs enforcement of different stages of criminal investigation, prosecution and trial. The enforcement powers of each of the public security organs, procuratorates and courts has been set out in detail in Chapters 2, 3 and 4 above. The enforcement division handles a small number of criminal enforcement cases, which in 2004, comprised 3.4% of its case load, usually where a property punishment, such as a fine, has been imposed (Zhu Jingwen, 2007, p 245).

Criminal & Civil

A victim who has suffered material loss as a result of the alleged crime may lodge an ancillary civil compensation claim during the course of the criminal proceeding (CPL art 77) which will be heard at the same time as the criminal matter unless delay in the criminal prosecution would cause unreasonable delay in determining the liability to pay civil compensation (CPL art 78). A party to any civil action ancillary to a criminal prosecution who disagrees with the court's judgment at first instance may appeal to the next higher level court against that finding (CPL art 180). However, the rates at which defendants convicted of a criminal offence and sent to a term of imprisonment are willing to pay civil compensation that might be ordered as part of an ancillary civil proceeding is very low.

Recent reforms under the policy of 'balancing leniency and severity' to prosecution decisions and sentencing procedure in respect of minor crimes have had an impact on this low rate of enforcement. An SPP document issued to implement the policy of balancing leniency and severity provides *inter alia* that minor offences in which the suspects admits the offence, apologises or agrees to pay compensation to the victim will not be prosecuted. This reform removes both the criminal prosecution and the ancillary civil action from the courts and enables an offender to avoid prosecution in minor cases by agreeing to pay compensation to the victim (see discussion in Trevaskes, 2010, pp 83-88).

Administrative

Courts have jurisdiction under the *Administrative Litigation Law* 1989 ("ALL") to accept and hear complaints that a specific decision of an administrative agency is unlawful. In 1987 the SPC issued an instruction to courts to establish specialist administrative divisions in the court to hear challenges to administrative decision-making. Establishment of administrative divisions accelerated after the *Administrative Litigation Law* came into effect in 1990, with nearly all courts now having an administrative division. Courts do not have jurisdiction to hear complaints about administrative decisions and rule-making which fall outside the scope of those matters enumerated in the ALL. The court may determine to uphold, quash or partly quash the act, remit the matter to the decision-maker to make a new decision, order the administrative agency to perform its duties or, if a punishment is manifestly unjust, to vary an administrative punishment (ALL art 54). ALL art 65 requires that applicant and the administrative defendant perform the judgment issued by

the court and enables the court to take coercive enforcement measures in the event of failure to comply.

Where a citizen or organisation fails to perform the court's judgment or order, the administrative agency may bring an action to enforce the judgment (ALL art 65). The court will carry out the execution by reference to the enforcement provisions of the *Civil Procedure Law*. Where the administrative agency fails to perform the court's judgment or order the court may take the following measures: instruct the bank to transfer the amount of fine or damages from the administrative organ's account; impose a fine the responsible officials and parties of RMB 50-100 for each day the administrative agency fails to perform the judgment or order, put a judicial proposal to the higher level administrative organ in charge of the defendant; or if the circumstances of refusal to comply with the order are sufficiently serious to constitute a criminal offence, then commence a criminal investigation. See also SPC *Interpretation on the Implementation of the Administrative Litigation Law*, 2000, art 96.

Where an action is commenced in a higher level court under the provisions of the SPC *Regulations of the Supreme People's Court concerning Several Issues on Jurisdiction of Administrative Cases* (2008) and it is considered to be the court of first instance, it will be responsible for enforcement (SPC *Interpretation on the Implementation of the Administrative Litigation Law* 2000 art 85). A court at first instance may request the court at second instance (where there has been an appeal) to enforce a judgment, though the second instance court can either agree to carry out the enforcement or remit the matter back to the first instance court (SPC *Interpretation on the Implementation of the Administrative Litigation Law*, 2000 art 85).

Whilst the court possesses quite strong enforcement powers in theory, in practice courts are very reluctant to take coercive measures against administrative agencies. One reason is that the courts funding is provided primarily by the local government and so the court must retain good relations with the local government and government departments. Another is that the police have jurisdiction to investigate criminal conduct and may be unwilling to accept a reference from the court, especially if the complaint is against the police themselves.

The courts have jurisdiction to enforce administrative decisions at the behest of the administrative decision-maker under ALL, art 66. Where an administrative agency makes a binding order or decision or a determination for compensation or concludes a mediated compensation agreement and the obliged party does not perform within the specified time limits the administrative agency may apply for compulsory enforcement under ALL, art 66. The administrative agency can bring the action where it either has no capacity to enforce the decision itself, or if it does, the law also permits an application for enforcement to be made (SPC *Interpretation on the Implementation of the Administrative Litigation Law*, 2000 arts 83, 87). After accepting an application for enforcement of a specific administrative act, the administrative division of the court will first determine whether the administrative act was lawful and if so transfer the matter to the enforcement division for enforcement (SPC *Interpretation on the Implementation of the Administrative Litigation Law*, 2000, art 93). This category of case, the so called administrative non-litigation cases, are the second most common category of cases dealt with by the enforcement division, comprising on average 12.9% of their overall case load (Zhu Jingwen, 2007, p 244).

A private party must commence enforcement action within one year and the administrative agency must commence the action within 180 days of the decision becoming effective (SPC *Interpretation on the Implementation of the Administrative Litigation Law*, 2000, arts 83 and 84).

Labour

Disputes concerning labour issues are dealt with by specialist labour disputes regime which, with some exceptions, is distinct from the handling of other civil disputes under the *Civil Procedure Law*. The labour dispute resolution system is regulated by the *Labour Disputes Mediation and Arbitration Law* 2007("LDMA"). With the exception of claims for an uncontested liquidated sum in respect of unpaid wages, labour disputes must first be submitted to mediation and labour arbitration for resolution. If a party is dissatisfied with the decision of the mediation committee they may apply for arbitration under Labour Arbitration Committee, and if dissatisfied with the arbitration award they may appeal to the courts (LDMA art 5). Where the claim relates to unpaid wages and the amount is not contested, the courts exercise first instance jurisdiction to determine the dispute.

Where a party fails to perform a mediation or arbitration award, the other party may commence enforcement proceedings in the people's court which will carry out enforcement in accordance with the provisions of the Civil Procedure Law (LDMA, art 51). An arbitral organ may make an order for advance enforcement of an order to pay labour remuneration, medical expenses for an occupational injury, economic indemnity or compensation where the rights between the parties are clear and failure to make the advance award would seriously affect the livelihood of the employee (LDMA, art 44, SPC *Interpretation on Several Issues on the Application of Laws in Hearing Labour Disputes* (II) 2006, art 8). Where a labour arbitration organ or a people's court makes an award for custody of property an application for enforcement of that award must be made within three months of the award or decision taking effect (SPC *Interpretation on Several Issues on the Application of Laws in Hearing Labour Disputes* (II) 2006 art 15).

Arbitration awards

Domestic arbitral awards are enforced with reference to the civil enforcement procedures noted above. A court may determine not to accept an arbitral award for enforcement where the party against whom enforcement is sought can prove that; there was no valid arbitration agreement, the matter falls outside the scope of the arbitration agreement, the composition of the arbitration panel or other procedural matters breached the arbitration rules, the main evidence for making the findings is insufficient, there is a definite error in the application of the law, the arbitrators engaged in embezzlement or accepted bribes or committed malfeasance for personal benefit, or the award is against the social and public interest (*Civil Procedure Law* art 213, *Arbitration Law* 1994 art 63,).

Where an arbitral award is issued by an arbitration body within the PRC in respect of a matter involving a foreign party, a party may commence enforcement proceedings in the intermediate people's court in the domicile of party who has failed comply with the award or the location of that party's property (*Civil Procedure Law* art 257). The collegiate bench of the people's court shall refuse to enforce an arbitral award where it finds that; there was no valid arbitration agreement, breaches of arbitration procedures occurred including failing to notify the party to appoint an arbitrator, to give notice of the commencement of the arbitration, or to have an opportunity to present its case, the composition of the arbitration panel breached the rules of arbitration, or the arbitration was outside the scope of the arbitration agreement (*Civil Procedure Law* art 258).

Foreign arbitral awards

China is a party to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (the New York Convention), which provides for mutual recognition and enforcement of arbitral awards issued by arbitration bodies in member states. A party may apply directly to the Intermediate People's Court in the place of the domicile of party against whom

enforcement is sought or the location of its assets (Civil Procedure Law art 267). A Chinese court cannot refuse to recognize a foreign award without review by the SPC (SPC *Notice Concerning the People's Court Dealing with Issues of Foreign-related Arbitration and Foreign Arbitration, 1995).*

Notary certificate of debt (gongzheng zhaiquan wenshu)

The court's jurisdiction to enforce 'other legal documents' referred to in *Civil Procedure Law* art 201 includes the obligation to enforce a notarised document evidencing a liquidated debt (art 214).

5.2 Organisation

The principles of court organisation require that three types of separation within the court be instituted: separation of accepting cases and trial, separation of trial and supervision and separation of trial and enforcement. The Enforcement Division is thus established as a separate division of the Supreme People's Court and is established in the courts at different levels.

The chief judge of the Enforcement Division is responsible for the work of the enforcement division and sits within the court's internal hierarchy under the chief judge of the court. Part of the first *Five Year Reform Plan for the People's Courts,* adopted in October 1999 by the Supreme People's Court, required that the courts at all levels separate the divisions in the court responsible for registration of cases, trial of cases and enforcement of judgments. In addition, courts were required to ensure proper staffing levels and allocate well educated officials to the enforcement division, with a requirement that the educational level of enforcement division judges not be lower than that of the other divisions of the court *(SPC Several Opinions on Progressively Strengthening and Regularising the Enforcement Work 2009)*. This reform was intended to improve the status, efficiency and professionalism of the enforcement division.

Higher level courts are required to establish a division with responsibility for exercising supervision over the management of case enforcement in lower level courts. Within the enforcement division, there is a separation of responsibility for different aspects of enforcement work, in contrast to the old system which allocated the entire responsibility for enforcement of a particular case to a single individual.

As addressing the problem of enforcement remains a priority, the CCP branches within each court continue to play an active role in participating in and coordinating the liaison between enforcement division and other state organs. The SPC also issued the *Several Opinions on Gradually Strengthening and Regularising Enforcement Work* in 2009 which reiterated this requirement.

5.3 Model

See discussion at 5.2 above.

5.4 Tasks and Functions

The enforcement division is established as a separate division within the people's courts at each level. The enforcement division is further divided into different offices which take responsibility for the different functions performed by the enforcement division.

For example, in the Guangzhou Intermediate People's Court, the enforcement division is divided into three offices. Office 1 is responsible for; researching and devising city wide plans for the enforcement work of the courts, management of meetings, investigation, research into legal problems, dealing with differences and objections in relation to enforcement work, letters

and visits work, liaising with government departments and chief judges of basic level people's courts. Office 2 is responsible for enforcing civil and administrative judgements issued by the Guangzhou Intermediate People's Court that have already become effective, cases entrusted by different courts, enforcing non-litigation administrative decisions, judgments and orders issued by foreign courts and foreign arbitral organs and organising the unified campaigns on enforcement work of courts in the Guangzhou municipality. Office 3 is responsible for management of liaison between Guangzhou and other places in respect of entrusted cases, handling disputes concerning enforcement between local Guangzhou courts and between those courts, liaising with other government organs where there is a dispute about enforcement, overseeing cases that have been entrusted to lower level courts which have not been enforced for an extended period and correcting cases of incorrect enforcement in the lower level courts (*Introduction to Guangzhou Intermediate People's Court*, 2010).

Criminal punishments

The death penalty

The number of death sentences each year is a state secret, but some estimated that it is up to 10,000 each year (Trevaskes 2008, 394). The number of offences for which a person may receive the death sentence has increased since passage of the 1979 *Criminal Law* which prescribed 28 offences for which the death sentence could be given, of those 15 were characterised as counter-revolutionary offences. The number of offences that could be punished with the death penalty was expanded to 68 with the amendment of the Criminal Law in 1997. (Note that this number of 68 is an estimate, with writers such as Chen Jianfu estimating the actual number to be as high as 76 (Chen Jianfu, 2008, p296). Those amendments replaced the category of counter-revolutionary offence with that of endangering national security and extended the death penalty to many nonviolent crimes such as economic crime and official corruption (Lu and Zhang, 2005, p369).

The death penalty may be imposed either for immediate execution or with execution suspended for two years. For those given a death with a two year suspension, it was not uncommon for their sentence to be commuted to a period of imprisonment at the end of the two year period (art 50). Minors under 18 and pregnant women may not be given the death penalty. However academics point out that a high proportion (50%) of young people (aged between 18 and 25) do receive the death penalty (Lu and Zhang, 2005, p371).

Under the *Organic Law of the People's Courts* and the 1979 *Criminal Procedure Law* any death sentence had to be finally approved by the Supreme People's Court. In 1983 as part of the first Hard Strike against serious crime, final approval of the death sentence was delegated to the High People's Courts (established at provincial and equivalent level). During Hard Strike campaigns the use of the death penalty increased and the time between arrest, conviction, final approval and execution truncated.

Over a number of years there was increasing concern that the number of death sentences handed down each year was too high. Part of the judicial reform policy to 'balance leniency and severity' included a resolution to strengthen procedures for review of the death sentence and to limit the use of the death penalty. In October 2006 the NPC amended art 13 of the *Organic Law of the People's Courts* to remove the power to carry out final review of all death sentences back to the Supreme People's Court.

Another aspect of this reform is to reform laws of evidence to reduce the instances of wrongful conviction based on unlawfully obtained evidence (discussed in chapter 2). Regulations were issued on 31 May 2010 (see chapter 7 for a discussion).

Prison system

A term of criminal detention may be imposed for a period of between one and three months. It is served in a detention centre operated by the police and not in a prison. A person sentenced to criminal detention is able to return home for a day or two every month (Criminal Law art 43).

Fixed term imprisonment, life imprisonment and a commuted death sentence are served in prison. The 1994 *Prison Law* changed all reform through labour camps into prisons. The 1994 *Prison Law* retains the objective of combining education and reform of prisoners. Prisoners are obliged to work if they are physically able to do so.

Non-custodial sentences

A person convicted of a minor offence may be given a non-custodial sentence such as supervision for a period between three months and two years. A person sentence to a term of supervision remains out of custody with the sentence supervised by the police (*Criminal Law* art 38).

A prisoner who has expressed repentance, demonstrated good behaviour and served more than half their term of imprisonment (or more than 10 years of a life sentence) may be granted parole (*Criminal Law* art 81). A person may also have his/her prison sentence commuted where the prisoner has performed major meritorious service (*Criminal Law* art 78). In the case of commutation of a sentence and parole, the prison shall make a recommendation to the People's Court at or above intermediate level which shall form a collegial panel to examine the proposal (*Criminal Law* art 79). Recent policies encourage the expansion of non-custodial sentencing where possible. In August 2003 the SPC, SPP, MPS and Ministry of Justice jointly issued the *Notice on Carrying out the Trial Work of Community Correction* which launched a pilot program permitting five categories of prisoners to serve their sentence out of custody under community correction. These were people sentenced to control, (*guanzhi*), those permitted to serve their sentence out of prison, those given a suspended sentence, those granted parole and those punished by deprivation of political rights.

5.5 Relations

An important aspect of the reform of the organisation and practices of the enforcement division has been to strengthen the relationship between and cooperation with other state agencies with involvement in any part of the enforcement process.

During compulsory execution of a civil or commercial judgment involving the transfer of property, the court can require the assistance of other government agencies in producing necessary transfer documents (*Civil Procedure Law*, art 227) by requiring delivery of the documents of title into the possession of the court (SPC *Rules on Issues on Execution Work of the People's Court* art 41). The court may also issue a notice to agencies responsible for registration of patent, trademark and copyright prohibiting the person against whom enforcement is sought from transferring their intellectual property rights. (SPC *Rules on Issues on Execution Work of the People's Court* art 50) The court also exercises powers to freeze, prevent the transfer or sale, or the right to receive dividends or payments with respect to property and to notify relevant regulatory authorities to cooperate in implementing these coercive measures (SPC *Rules on Issues on Execution Work of the People's Court*, 2000, arts 51-56).

In 2000 the SPC and the People's Bank of China jointly issued a *Notice on Standardisation of Execution by the People's Court and Assistance in Execution by Financial Institutions* in an attempt to streamline and improve cooperation between financial institutions and courts in carrying out

enforcement work. Where a financial institution improperly transfers funds that have been frozen by the court, attempts shall be made to recover the funds and if they cannot be recovered the financial institution will be liable for the amounts improperly transferred (SPC *Rules on Issues on Execution Work of the People's Court, 2000*, art 33). Deposits and payments made by institutions and agencies to the person against whom enforcement is being sought in breach of garnishee and other payment orders, shall recover the monies paid, and if unable to do so will be liable to pay those amounts to the party seeking enforcement (art 37).

Where an administrative agency fails to perform a court judgment or order made under the ALL, ALL art 65 empowers the court *inter alia* to inform the bank to transfer the amount awarded from the administrative agency's account.

Similarly the SPC, Ministry of Land and Resources and the Ministry of Construction in 2004 issued the *Notice on Several Issues on Enforcement by the People's Courts and Assistance in Enforcement by the Administrative Department of Land Resources and Real Estate* which set out detailed mechanisms for cooperation in court enforcement work by the land administration bureaux and providing for penalties for dealing with land in contravention of coercive measures taken against land and buildings in the course of enforcement.

One of the longstanding complaints about the difficulty of enforcement is that local government officials do not co-operate and even act to hinder enforcement against local enterprises. As the performance of local governments and local officials is measured by GDP and the financial performance of the local area, local officials have a strong incentive to prevent execution against the assets of local enterprises, especially where they have limited assets and depend for their daily operation on bank finance (Li Yuwen, 2002).

5.6 Process

Enforcement of civil judgments

The reforms to and work priorities of the enforcement division are discussed in sections 5.2 and 5.5 above.

The SPC *Rules on Issues on Execution Work of the People's Court* art 7 provide that the executing agency shall be equipped with necessary means of transport, communication equipment, audiovisual equipment and police weapons for guaranteeing the timely and effective performance of their duties. When on official business the execution officials shall show their work identity card and official letters of authorisation and may be accompanied by judicial police as necessary (art 8).

5.7 Mechanisms

Administrative

The enforcement division of the people's court is subject to the same constraints as the people's courts in respect of budgetary allocations from the local government discussed in section 4 above. Section 5.2 discusses the requirements in respect of staffing and educational level of judges and officers appointed to the enforcement division.

The court's judicial police also play a role in enforcement. As they fall within the broad definition of police within the meaning of the *People's Police Law* art 2, they are authorised to exercise coercive powers. The *Interim Rules on the Judicial Police of the People's Courts* 1997 art 3 require the judicial police to prevent, deter and punish illegal and criminal acts disturbing trial activities

and at art 7 authorise them to participate in activities to seal up, detain, freeze or seize property that is the subject of execution. Upon receipt of a written authorisation issued by the judge responsible for enforcement, the judicial police can conduct investigations in respect of property, protect the enforcement site and take coercive measures against property.

Oversight and Inspection

The primary mechanism for internal oversight and supervision of the work of the enforcement division of the people's court at lower levels is carried out by the higher level people's courts. The SPC *Rules on Issues on Execution Work of the People's Court* art 6 provides that the higher level execution divisions of people's courts exercise supervisory power over the work of lower level execution divisions.

In addition to strengthening internal supervision, courts are required to become more responsive to public scrutiny, through implementing the policy of openness in decision- making and strengthening the work of 'letters and visits' in relation to enforcement work. The 'letters and visits' office is responsible for receiving and handling complaints about the court's enforcement work.

Supervision is also exercised over the work of the courts as a whole by the NPC and local people's congresses through constitutionally designated institutional supervision, supervision through specialised investigations into law enforcement practice and through individual case supervision, discussed in Chapter 4 above. The procuratorate also exercises supervisory powers discussed in Chapter 3 above.

To augment the work of the supervision department (discussed in Chapter 4) within the courts, in February 2009 the Supreme People's Court issued the *Trial Measures for Implementing Placement of Clean and Honest Government Supervisory Personnel within the Trial and Law Enforcement Departments of the People's Court,* which permits appointment of a judge who is an independent monitor to be placed within the enforcement division. This person operates under the dual supervision of the court's supervisory department and the head of the division. The monitor is responsible for; assisting the head of the division research and prevent corruption, ensure judges in the division observe the law and discipline, assist the supervision department carry out supervision work as requested and help to nip any potential discipline problems in the bud.

Conclusion

The poor rate of enforcement of judgments, especially civil and commercial judgments has been identified as one of the most serious and longstanding problems for the courts and the administration of justice in China. It has been the subject of ongoing high level concern and efforts to remedy the problem. In 1998 the Beijing courts launched a campaign to deal with the backlog of unexecuted cases (Xing Chunying, 2004). 1999 was designated the 'Year of Enforcement' (Chen Jianfu, 2002). The *Rules on Issues on Execution Work of the People's Court* were issued by the SPC as part of a systematic attempt to address some of the barriers to achieving better rates of enforcement of judgements. Amendments were made to the Civil Procedure Law in 2007 to address problems of enforcement yet again, followed in July 2009 by the *Several Opinions on Gradually Strengthening and Regularising Enforcement Work*.

Despite these periodic campaigns to improve enforcement, a number of structural issues remain as impediments to improving the court's performance in this respect. Although recent studies suggest that there has some improvement in the enforcement of judgments in urban areas, there are still considerable problems with enforcement, particularly in rural areas (Xin He, 2009b). The most important issue is opposition from the local government to enforcing judgments that adversely

affect local enterprises or see funds and resources transferred to enterprises in other localities. (Xin Chunying, 2004). As court finances are still predominantly provided by the local government, and local government has substantial control over court appointments, courts are particularly vulnerable to pressure from local governments in respect of administrative litigation and enforcement of judgments and orders that the local government perceives is inimical to their interests and economic development imperatives. In the long-term, if changes are made to remove control over funding completely from local control and the steps taken to improve the qualifications of the judiciary are successful in rural areas, this issue relating to enforcement may be mitigated. The issue of local protectionism is, however, a major problem, as indicated by specific provisions in such laws as the Anti-Monopoly Law designed to deal with administrative monopolies and protectionist measures taken by local government (*Anti-Monopoly Law* 2007, Chapter 5).

Courts also have a complex relationship with the local agencies with which they are required to cooperate such as in the prosecution of the periodic Hard Strikes against serious crime where cooperation between the police, procuratorates and courts is emphasised. The requirement that the courts, procuratorates and police cooperate is set against the inherent tensions that arise between these agencies because of the different roles each organ plays in the processes of justice. Ongoing tensions exist in the relationship between:

- the courts and the procuratorate as a result of the procuratorate's power to supervise trials,
- the procuratorate and police as a result of procuratorate power to supervise arrest, interrogation, police investigation and detention centres; and
- the courts and police where the police are brought before the courts as defendants in administrative litigation.

In the criminal justice sphere, the local government does not have the same institutional interest in obstructing enforcement of judgments in the way it does in civil and commercial matters. In the criminal justice sphere, therefore, strengthening cooperation between the police, procuratorate and the judicial police in carrying out enforcement is one way of overcoming the impediments that might arise in the administration of justice. However, over-emphasis on cooperation may also undermine realisation of the values of substantive justice and procedural fairness with efficiency being placed ahead of rights protection.

6. Lawyers and Other Legal Services

6.1 Organisation

The development of Chinese lawyers under the People's Republic of China has paralleled the development of the legal system itself. From 1957 to 1979, the development of the Chinese legal profession was halted, the Ministry of Justice (MOJ) was closed and Chinese lawyers were persecuted. However, with the Open Door policy, it was considered necessary to encourage the development of the profession, and the law schools were reopened along with the courts (Peerenboom, 2002, Chapter 8). The current legislative framework for the regulation of lawyers is based on the 1996 *Law on Lawyers* (amended in 2001 and 2007), supplemented by measures issued by the MOJ relating to legal practice and the operation of law firms, as well as by controls of Chinese bar associations or law societies. A number of entities are involved in the supervision and regulation of lawyers, primarily the MOJ and its various local counterparts (generally referred to in the legislation as the "relevant judicial administration") and the All- China Lawyers Association and the local lawyers' associations.

Lawyers can practise law in 3 ways – as individually owned law firms; partnerships and firms with state investment. At least 70% of law firms in China are now set up as partnerships; state-funded law firms are now generally required to take responsibility for their own finances and paying their own debts (Chen Jianfu, 2008, p164). In each case, lawyers must pass the national judicial examination and hold a practising certificate. New provisions relating to the administration of practising certificates were issued by the MOJ in 2009 *(Measures for the Administration of Practising Certificates of Lawyers and Law Firms, 2009)*. The national judicial examination was discussed above in relation to the judiciary in China. Since it was introduced in 2001, only the younger generation of lawyers has been required to sit for the examination. It should be noted that the discussion below does not cover the regulation of foreign lawyers and foreign law firms operating in China, which are regulated separately, primarily by the MOJ. See Godwin, 2009 for a more detailed analysis of the issues relating to the regulation of foreign law firms.

6.2 State Regulation

The *Law on Lawyers* has been amended several times since its adoption in 1995. It covers all practising lawyers, defined as those who hold a practising certificate and provide legal services to clients (Art 2). The law sets out a number of basic principles.

Art 1 of the *Law on Lawyers* states that the law is made "to improve the lawyer system, standardize the conduct of lawyers in practice, safeguard the practice of law by lawyers, and bring into play the functions of lawyers in the building of a socialist legal system." Art 3 indicates that in practising, a lawyer must accept the supervision of the state, the public and his or her clients. More specifically, supervision and guidance for law firms, lawyers and their professional associations will be provided by the judicial administrative authorities (art 4).

Chapter II deals with regulation of practising lawyers. A lawyer who wishes to practise must apply for a practising certificate. In order to obtain such a certificate from the local judicial administrative authority, the person must uphold the *Constitution*, pass the uniform national judicial examination, complete a one-year internship at a law firm and have "good character and conduct" (arts 5 and 6). The 2008 *Measures for the Administration of the Practice of Lawyers* expand on this provision by adding a requirement that a lawyer undertake training organised by the local lawyers' association (art 6). A person who has limited legal capacity, has a criminal record (other than for criminal negligence), has been dismissed from public office or has had his practising certificate revoked,

may not receive a practising certificate (*Law on Lawyers*, art 7). Civil servants may not practise law; similarly, a lawyer who is a member of a standing committee of a people's congress may not represent clients during his membership (art 11).

Chapter III of the *Law on Lawyers* deals with the establishment and operation of law firms, provisions further elaborated on by the 2008 *measures for the Administration of Law Firms*. Law firms may be formed as individually owned firms, partnerships or law firms in which there is state investment. In each case, a law firm must submit an annual report on its annual practising information and lawyer practising assessments to the local judicial administrative authority (art 24).

Chapter IV deals with the practice, rights and obligations of lawyers. A lawyer may represent clients in litigation, mediation and arbitration and non-litigious matters. The *Law on Lawyers* provides for personal protection for the lawyer in carrying out this role, but also requires the lawyer to keep state secrets and trade secrets, as well as client matters, confidential (art 38). He is, however, required to divulge facts and information on serious crimes which a client is preparing to commit. This chapter also sets out basic ethical requirements in relation to the conduct of lawyers (arts 39 and 40). These requirements include not representing both parties in the same case, and not taking on a case in which he or a close relative has a conflict of interest; taking kickbacks from a client; accepting bribes; engaging in bribery of a judge; providing false evidence or disrupting the court or arbitration. A lawyer who has served as a judge or procurator may not represent a defendant for two years after leaving the court (art 41). In addition, art 42 requires that lawyers and law firms perform obligations of legal aid, provide legal services and assistance to persons represented. The regime in relation to legal aid is discussed in more detail below.

Chapter V deals with lawyers associations. The All-China Lawyers Association is the national level body, with local associations formed at local levels. Lawyers are required to belong to the local lawyers' association (Art 45). The role of the lawyers' associations is to safeguard the practice of law and protect the rights and interests of lawyers, formulate a professional code and disciplinary rules, organize professional training for lawyers, deal with complaints regarding lawyers and so on. Despite the provisions in the *Law on Lawyers* in relation to the lawyers' associations, it has been suggested that the links between the lawyers' associations and the MOJ and its local counterparts continue to be very strong, as a result of which the lawyers' associations cannot be considered to be independent bodies representing their lawyer constituents (Peerenboom, 2002). This relationship is illustrated by Clarke (Clarke, 2009), who describes a challenge in 2008 by a number of lawyers to the undemocratic procedure for election of members of the Beijing Bar Association, which was followed by the closure of the law firm most closely associated with the protest and the withdrawal of several lawyers' licences to practice by the Beijing Justice Bureau.

Chapter VI deals with legal liabilities of lawyers (see below 6.5 in relation to discipline of lawyers).

Legal Aid

Relevant provisions in relation to the provision of legal aid are set out in the 2003 *Legal Aid Regulations* issued by the State Council and the SPC. *Regulations on the provision of legal aid for parties in straitened circumstances*, 2005, SPC and MOJ *Regulations on Legal Aid in Civil Actions,* Supreme People's Court, the Supreme People's Procuratorate, 2005 and SPC (SPP. MPS and *MOJ Regulations concerning Legal Aid in Criminal Procedure*, 2005). Legal aid is supervised at a central level by the MOJ. Provincial, municipal and above-county level Justice Bureaux are responsible for the management and supervision of legal aid at the local levels. The National Legal Aid Centre (NLAC) *(xifabu falü yuanzhu zhongxin*) below the Ministry of Justice holds specific responsibility for supervising management of legal aid; local legal aid centres deal with legal aid

applications from applicants and arranging for legal assistance. The NLAC was established in 1996, and is responsible for drafting legal aid policies and laws, regulations and other regulatory documents, supervising local legal aid work, conducting educational work, managing funding, conducting research and organizing foreign cooperation relating to legal aid and so on. In the first half of 2009, 98.6% of the total funding for legal aid was provided by the various levels of government and donations by the community and the legal profession made up less than 1%. Of the total amount, 45.1% is contributed by the level of government at which the aid is provided. Services in relation to legal aid are provided by operational staff (average of 324 RMB each), lawyers (average of 650 RMB each), legal service workers (average of 334 RMB each), social organization workers (average of 248 RMB each) and registered volunteers (average of 568 RMB each). In total, salaries and wages constitute 45.9% of total expenses. (Legal Aid Center of MOJ of the PRC website, 2010). Comprehensive statistics produced by the MOJ relating to the provision of legal aid in the period 1999 to 2006 are set out below. In 2008, there were 3,268 legal aid institutions in China; and a total of 546,000 legal aid cases (Invest in China, 2009). It should also be noted that legal aid services are provided by other government or non-government organizations. For example, the All-China Federation of Trade Unions provides legal aid services in relation to employment matters pursuant to the 2008 Measures for Legal Aid of Trade Unions. According to its website, "5,335 trade unions above the grassroots level across the country set up legal aid and service organizations, with 113,000 consultations and written complaints on workers' behalf being provided in 2006 and 47,000 legal aid cases being handled" (All-China Federation of Trade Unions website, 2010). Other groups providing legal aid include the All-China Women's Federation and the Migrant Workers Legal Aid Station in Beijing (supported by the All-China Lawyers Association and the United Nations Development Program (United Nations Development Program, 2007), university groups such as the Center for Women's Law and Legal Services of Beijing University (see Lee and Regan, 2009. This group recently lost its affiliation with Beijing University, allegedly due to its involvement in a number of high profile cases involving women, (see Anonymous, 2010, Blog Topics, The Revocation of Women's Legal Center of Beijing University). Lawyers and law firms also provide legal aid services on both a remunerated and a pro bono basis (Liebman, 1999). Art 42 of the Lawyers Law provides that the provision of legal aid is a mandatory obligation of lawyers. The 2003 *MOJ Opinions on Implementing the Regulations on Legal Aid and Promoting and Standardizing Legal Aid Work* provide that local associations may set annual requirements for the provision of legal aid by lawyers. Article 24 of the *Legal Aid Regulations* provides for the payment of a case-handling allowance determined by the provincial level authorities to the lawyer or social organization that was appointed to handle a case. In many cases, however, it appears that lawyers are expected to contribute their services on a pro bono basis. Lawyers' responses to this requirement vary, although some law firms are, according to reports, happy to accept this obligation (See Regan, 2001).

Legal Aid centres	1.235	1.890	2.274	2.418	2.774	3.023	3.129	3.149
Ad hoc centres				3.065	3.154	3.246		
Employees	3.920	6.109	8.458	8.285	9.457	10.458	11.377	12.038
Legal professionals	2.801	4.253	5.837	6.537	7.643	8.468	7.419	8.032
Cases	91.726	114.287	147.269	135.748	166.433	190.187	253.665	318.514
Civil	42.438	62.671	79.815	65.791	95.053	108.323	147.688	204.945

Criminal	41.597	48.293	57.838	60.693	67.807	78.602	103.485	110.961
Administrat ive	1.806	2.240	3.595	3.291	3.573	3.262	2.492	2.608
Aid recipients	190.545	231.288	260.355	286.616	293.715	294.138	433.965	540.162
Disabled	10.298	25.396	32.374	30.484	29.899	27.950	32.897	37.941
Aged	21.181	31.835	42.850	38.821	38.584	39.797	53.259	60.198
Juvenile	15.642	27.439	37.206	37.664	45.981	54.421	66.667	83.131
Migrant workers							75.917	125.290
Women	21.907	41.107	55.994	56.250	64.518	57.289	76.257	94.712
The poor	43.269	77.641	103.577	85.174	105.762	89.637	128.172	158.775
Enquiries	787.277	836.791	1.133.718	1.231.571	1.936.675	1.919.440	2.663.458	3.193.801
Funding (‘000 MB)	27.580	19.410	52.060	84.440	164.560	245.770	280.520	370.290
Govern- ment funds	18.690	15.960	45.040	78.040	152.110	217.120	262.200	334.790

Source: China Legalaid website , 2007

6.3 Lawyers

Criminal Role

The role of the lawyer in criminal proceedings is to protect the legal rights and interests of the suspect of defendant by presenting materials and arguments proving that he is innocent or “less guilty” than charged or to present arguments in mitigation of penalties (*Law on Lawyers*, Art 31). The amendments made to the CPL in 1996 were designed to create a system in which the responsibilities of the various parties involved in an action (the investigators, the prosecutors, the lawyers and their clients and the court) were clearly set out. In particular, the changes made clear that the defendant had the right to be assisted by a defender, who may be a lawyer, both before the trial and during the trial. Where the defendant is indigent, blind, deaf or dumb or a minor, or accused in a death penalty case, and has no counsel, the court will appoint a lawyer as a legal aid representative (CPL, art 38). Thus, both the CPL and the *Law on Lawyers* make that clear that a suspect has the right to legal representation and that the court will ensure that it is provided in certain cases. Legal aid is discussed in 6.2 above. In addition, the *Law on Lawyers* grants lawyers specific rights in relation to their work and provides (art 3) that no individual or organization should infringe upon those rights. In particular, the *Law on Lawyers* provides that lawyers have the right to meet the suspect in a criminal case from the date of first interrogation of the subject (art 33), and that the lawyer shall not be under surveillance when doing so.

In addition to the right to meet his client, the lawyer has the right to “consult, extract and duplicate” litigation documents and materials (CPL, art 34) and to apply to the court and procuratorate to gather, investigate and take evidence or apply for a witness to appear to testify in court (CPL, art 35). Pursuant to CPL art 37, the lawyer may, with the consent of the relevant unit or witness, gather materials and evidence or request the procuratorate or the court to gather material. The defence lawyer also needs the consent of the procuratorate or the court as well as the consent of the victim or a near relative to obtain evidence from the victim or relatives. The lawyer may apply to the court to call witnesses for the case.

In practice, however, it appears that despite the reforms to the CPL in 1997 and the provisions of the *Law on Lawyers*, lawyers still find it very difficult to obtain access to the suspect, to obtain copies of the procurator's files and materials in order to prepare an adequate defence, or in a timely fashion and to collect evidence and cross-examine witnesses at trial (2009, Liu).

The lawyer is protected from prosecution on the basis of representation or defence opinions presented in court by a lawyer, except for "speeches compromising the national security, maliciously defaming others or seriously disrupting the court order." However, pursuant to art 306 of the Criminal Law, a lawyer may be subject to prosecution for the fabrication of evidence and in a number of well-publicised cases, lawyers have been prosecuted where their clients have changed their stories, allegedly in order to intimidate the lawyers from the aggressive defence of their clients (2009, Liu).

Civil Role

The role of lawyers in civil trials is considerably less problematic than the role of lawyers in criminal cases, although they experience many of the same difficulties in relation to evidence. The 1997 *Civil Procedure Law* (art 58) allows a party to appoint a lawyer as his or her representative in litigation. The litigation representative (so-called) has the right to collect materials and evidence and investigate matters relevant to the case (art 61). Most lawyers in China are in fact engaged in civil law of various kinds, particularly corporate law (source). In addition, Chinese lawyers often engage in arbitration as well as litigation, most of which involves civil or corporate matters.

Protection of Lawyers and Lawyers' Rights

The *Law on Lawyers* grants a number of specific rights to lawyers, as follows:

> *Article 36: Where a lawyer serves as an agent ad litem or defender, his right of debate or defense shall be protected by law.*
>
> *Article 37: The personal rights of a lawyer in practicing law shall not be infringed upon.*
>
> *The representation or defense opinions presented in court by a lawyer shall not be subject to legal prosecution, however, except speeches compromising the national security, maliciously defaming others or seriously disrupting the court order.*
>
> *Where a lawyer is legally detained or arrested for any suspected criminal involvement during participation in a legal proceeding, the detention or arrest organ shall notify the relative, the law firm and the lawyers' association of the lawyer within 24 hours after the adoption of detention or arrest.*

However, a more significant focus of the Law on Lawyers, and Chinese practice, is on punishing lawyers for breaches of their professional obligations or duties rather than on the question of protection for their rights. Similarly, the Criminal Procedure Law grants rights, but does not contain any provisions as to consequences if these rights are breached. The Procuratorate issued in 2006 several notices: the *Several Regulations on Further Strengthening the Right of Lawyers to Practise in Criminal Litigation and Normalising Lawyers' Professional Work* and the *Notice on further Strengthening the work of Protecting Lawyers' Rights to Practise,* both of which recognized the right of lawyers to practise in criminal litigation and requiring the various procuratorates to abolish all regulatory documents which did not comply with the CPL or the Law on Lawyers, to protect the rights of lawyers and comply with the requirements of the CPL. Although these notices may indicate an intention by the SPP to create an attitude of compliance with the requirements relating to lawyers and lawyers' rights, they do not in themselves create a legally enforceable mechanism

by which lawyers can enforce the rights to documents, materials, access to clients and so on which they are granted under the legislation.

This lack of enforceability, combined with the tendency of local authorities to take disciplinary action or other steps against lawyers individually (Wang Heyan, 2010) means that lawyers in China may find it difficult to obtain access to clients or otherwise enforce rights under the laws, as well as being personally vulnerable. Both lawyers and their clients need additional assurance that representation will be provided in a fashion which allows clients to have a fully prepared defence presented by a lawyer who does not need to be concerned that he will be subjected to personal or professional retribution. This is an issue which is the subject of ongoing discussion both inside and outside China. The role of lawyers and the issue of the relationship between the *Law on Lawyers* and the CPL, may be clarified when the CPL is finally amended (possibly in 2011)(Liu Chang, 2010).

6.4 Education and Training of Lawyers

As noted above, in order to obtain a practising certificate, it is necessary for a would-be lawyer to sit the national judicial examination. The prerequisites for the examination are discussed above in relation to the judiciary. Since 2001, a candidate has required a 4 year undergraduate degree in law or another discipline. The examination is coordinated by the MOJ, the SPC and the SPP, but is primarily the responsibility of the MOJ, which coordinates the logistics of applications, registrations, examination procedures and marking, and the drafting committee comprised of scholars, practitioners and researchers who prepare the examination questions. The numbers of students sitting the examination hovers in the range of 170,000 to 300,000 (Weiners, 2007; Peerenboom, 2009a). The pass rate for the examination is reportedly extremely low, and was in the range of 7%-14% for the periods 2002 to 2006 (Weiners, 2007) and 22.4% in 2007 (Peerenboom, 2009a).

There has also been substantial development in the area of legal education at the tertiary level since 1979 when the law schools were reopened, with numerous universities, old and new, setting up legal faculties and training courses. In 2005, there were 559 law schools and 450,000 students studying law (Peerenboom, 2009a). Students studying law can study law as a bachelor's course (LLB), a master's course (LLM) or a Juris Master program (J.M.) (2007, Meiners). The quantity of legal graduates and the proliferation of law schools means that the quality of lawyers is inconsistent (He, 2005). The national judicial examination therefore serves as the ultimate arbiter of the standard of lawyers permitted to enter the legal profession.

6.5 Disciplining Lawyers

The question of disciplining lawyers is dealt with briefly in the *Law on Lawyers*. Notwithstanding the role of lawyers' associations in disciplining lawyers, as set out in art 46 of the *Law on Lawyers*, it is primarily the judicial administrative authority of the local people's government (under the MOJ) which is responsible for punishing lawyers by the imposition of fines or suspension or revocation of practising certificates for breach of a requirement of the law. Penalties may be imposed on an individual lawyer or on a law firm.

In addition, recent cases in which lawyers have been deprived of their practising certificates by the local Justice Bureaux, apparently for taking on cases which might highlight government deficiencies, suggest that government authorities take a restrictive view in relation to lawyers who prosecute cases which may be embarrassing to political interests, particularly lawyers in criminal cases (Clarke, 2009). Regulations relating to the punishment of lawyers for disciplinary offences

have recently been revised and reissued (Ministry of Justice, 2010). In a recent case, two lawyers representing members of the banned Falungong organization have lost their licences to practise law on the grounds that they disrupted "court order". The lawyers themselves claim that they were videotaped during the trial, repeatedly interrupted by the judge and ultimately ordered out of the courtroom. They see this case as an attempt to intimidate Chinese lawyers from taking on sensitive human rights cases (Olesen, 2010).

6.6 Dispute Resolution

Chinese policy relating to the law strongly favours informal methods of dispute resolution. Thus arbitration and conciliation/mediation (which are not distinguished to any great extent in China) are supported through the media of separate institutions specialising in the areas of arbitration and mediation and through the formal legal system itself. As a result, legal support can be provided for decisions reached through the mediation or arbitration process by the provision of enforcement mechanisms.

There are a wide range of institutions involved in these processes. This discussion focuses on the institutions which receive formal cognizance from the court and legal system.

Arbitration

The *Civil Procedure Law* recognizes arbitration as an acceptable alternative method of dispute resolution by requiring courts to refuse to accept cases where the parties have signed an agreement to arbitrate and providing for enforcement of arbitration awards (*Civil Procedure Law*, Art 111(2) and 213), reiterated in the 1994 *Arbitration Law* (art 9). The *Arbitration Law* also provides for the enforcement of arbitral awards by the courts (see Chapter 6) and for orders to be made for the preservation of property (art 28). China is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), which has facilitated the use of arbitration as a method of resolution of international disputes.

There are many arbitration commissions in China, as China, through the medium of the Arbitration Law, favours institutional arbitration over ad hoc arbitrations (art 6; Chapter II (which deals with the establishment of arbitration associations and arbitration commissions)). Of these, the largest and best known outside China is the China International Economic Arbitration Commission (CIETAC), which heard 1,230 cases in 2008, reportedly the highest number of any arbitration commission worldwide (CCPIT. 2009). CIETAC has jurisdiction to hear international, domestic and foreign-related disputes (including disputes relating to the Special Administrative Regions of Hong Kong and Macau)(2005, CIETAC Rules, Art 3). The CIETAC Rules, in addition to setting out procedures relating to arbitration of disputes, also encourage and permit conciliation or mediation of disputes, either prior to arbitration or in the course of arbitration, with the participation of an arbitrator (Art 40). In either case, the agreement between the parties reached through the mediation process, the arbitrator will issue an award in the terms of the conciliation agreement. This will therefore be recognized as an arbitral award, and be enforceable in the courts as an award. According to CIETAC, in 2008, almost one-third of CIETAC cases were resolved by a mixture of conciliation and arbitration (Euromoney, 2009).

Mediation is also encouraged through the *Civil Procedure Law*, art 16 of which recognizes the existence of People's Mediation Commissions, and through the medium of the courts themselves, which may encourage the parties to mediate a dispute even though a case has been brought before the courts (*Civil Procedure Law*, arts 85 to 91). More detail on the courts' role in encouraging the parties to reach an agreement through mediation is provided in the 2004 *SPC Regulations*

concerning Several Issues on Civil Mediation in People's Courts. Mediation is conducted by a range of other entities including the local level police, people's mediation committees and arbitration commissions.

Conclusion

There can be no doubt that the progress in China over the last 30 years in relation to legal training and lawyer education has been remarkable. Efforts are being made to improve the standard of legal education which is offered within these institutions, principally to adopt a method of learning which is less based on rote learning than on clinical education. Nevertheless, the requirement that a student pass the National Judicial Examination as the basic standard for new lawyers to practise means that lawyers' skills in acting as lawyers must be obtained from training in practice – these skills are in no way a precondition to practising. From a position in the 1980s where most lawyers were employed by state-owned enterprises, the private bar in China is now extremely strong, and includes not just small firms, but substantial and internationally respected commercial law firms. There are, however, a number of issues which should be raised in relation to lawyers in China.

First, the majority of lawyers are engaged in commercial areas. There is a shortage of lawyers prepared to work in poorly paid rural areas, and the concentration of lawyers in these areas is therefore very low. In addition, few lawyers are willing to work in the areas of criminal and labour law, both because of the relatively low remuneration and because of the risks of working in these areas. As noted above in relation to the judicial system, lawyers in criminal cases are conscious of intimidation and the threat of prosecution if they take on cases which are particularly controversial. In addition, a number of legal activists have been prosecuted for a variety of offences, and in other cases essentially deprived of the right to practise, allegedly as a result of taking on cases which confront local authorities or which raise political issues. This highlights the ambiguous role of the lawyer associations, which act more as State offices than as representatives of the lawyers themselves. Indeed, in a well-publicised argument, a number of independent lawyers tried, but failed, to have the officers of the Beijing Lawyers Association elected in an open election. It is clear from various statements and actions of the CCP and the MOJ that there is a gap between the expectations of the CCP that lawyers should act in accordance with directives of the CCP and the MOJ and the acts of those lawyers who ascribe to a most western theory of independence of the legal profession (Clarke, 2009).

Arbitration and mediation in China are both accepted and encouraged parts of the justice system. In addition, the petitions system provides an informal (though rarely effective) method of complaint for persons dissatisfied with or unable or unwilling to seek redress through the formal system. Mediation has been encouraged as part of the "harmonious society" (the policy objective of President Hu Jintao) to such an extent that concerns have been raised that the emphasis of mediation by or instead of the courts constitutes a threat to the formal justice system and that litigants have been pressured to deal with mediation rather than litigation. In practice, the numbers of cases set out in the annual SPC Report continue to rise, although they do include cases which have been mediated. In view of the substantial increase in caseload in the courts, accompanied by a relatively minimal increase in personnel, there is almost certainly practical pressure on judges to deal with cases through mediation rather a formal court hearing in order to try to clear their dockets in a timely fashion.

7. Justice Sector Reform

Whilst this report has focussed primarily on the criminal justice system, it is important to bear in mind that the Chinese justice system comprises both criminal and administrative justice. An outline of administrative powers and debates about reform to them is set out in chapter 2 at 2.4 and in this chapter. The criminal justice system is mostly defined by the *Criminal Law* and the CPL. While the *Criminal Law* has been formally amended 7 times since the current version of the law was promulgated in 1997, the operation of the CPL has been modified not by legislation but by interpretations and rulings issued by the SPC, the SPP and other government agencies. In China and internationally there have been calls for further reform of both the criminal and administrative justice systems.

Judicial reform programs

Judicial reform programs in China have been ongoing, in particular since 1997. Many of the important statements of directions and priorities for reform have been issued by the Politburo of the CCP or through policy pronouncements made at the CCP Congress, held every five years. For example, in October 2008, the current round of judicial reform was initiated by the issue of the *CCP Central Committee's Political Commission's Opinions on Deepening the Reform of the Judicial System and Working Mechanism,* the contents of which are to a large extent reflected in the judicial reform plans issued by the SPC and the SPP (see Qin Xudong, 2009, for summary).

In the 1980s and 1990s the primary focus of judicial reform was on courtroom trials and adjudication. With the passage of the *Judges Law* and *Procurators Law* in 1995 and the *Law on Lawyers* in 1996 emphasis was placed on professionalization of judges and procurators, as well as legal practitioners.

Impetus to undertake wide-ranging reforms was provided by the resolution of the 15th National Congress of the CCP in 1997 to rule the country according to law (Xin Chunying, 2004). This resolution prompted the first five year judicial reform program initiated by the SPC setting out 39 tasks for court reform (Chen Jianfu, 2008, p155 *et seq*). In 2000 the Supreme People's Procuratorate announced a three year procuratorate reform program (discussed in chapter 3).

In 2002, after the 16th CCP Congress, judicial reform programs were expanded to reform of the work of justice agencies. The 16th Congress of the CCP articulated the requirement that the socialist justice system be fair and just. Party leadership of these elements of judicial reform was instituted with establishment by the CCP Central Committee of a Central Judicial System Reform Leadership Small Group. At the end of 2004 this group issued a preliminary opinion on reform of the judicial system and its work mechanism. In 2005 the SPC issued its second five year judicial reform program and the SPP issued an opinion on progressively deepening the three year procuratorial reform. One aspect of these reforms was to create a clearer separation of judicial and administrative functions. These reforms sought to strengthen the professional standards of judges and procurators through introduction of the national unified judicial examination (discussed in chapters 3 and 4), separation of case filing, adjudication, enforcement and supervision functions of the courts (discussed in chapter 5) and reform of final review of the death penalty (discussed below).

The 17th CCP Congress, held in 2007, further emphasised the need to deepen and continue judicial system reform to establish a 'just, efficient and legitimate socialist judicial system'. This was followed by the *CCP Central Committee's Political Commission's Opinions on Deepening the Reform of the Judicial System and Working Mechanism,* which set out four major policy priorities:

optimising the configuration of judicial functions, implementing the policy of combining leniency and severity, strengthening the political-legal corps, and guaranteeing the finances of political-legal organs. The main elements of these policies are discussed below.

Court reform

As the amount of civil and administrative litigation increased, the demand from litigants that the courts resolve disputes fairly and in a timely manner has also increased. The revelation in the press of a number of gross miscarriages of criminal justice in the wrongful convictions for murder of a person who turned out not to be dead raised public concern (Wang Jinqiong, 2010). There has been growing dissatisfaction with the way in which courts conduct civil and commercial trials, not least because the prevalence of local protectionism and widespread corruption amongst the judiciary has led to many unjust outcomes and threatens to undermine legitimacy of the program of administration of justice by law. The well- publicised corruption case of Huang Songyou, formerly Vice-President of the SPC, is an illustration of the problem, despite attempts to present his trial and lengthy sentence as a triumph for the campaign against corruption (China.org.cn, 2010). Court reform has been ongoing in the reform era. From the end of the 1980s the courts undertook reforms. These included: to place greater onus on the parties to provide evidence, rather than the court conduct investigations itself, to decrease the role played by the adjudication committee in deciding cases and returning that power to the collegiate bench, increasing the number of trials open to the public, attempting to strengthen the enforcement system and improving the professionalism of judges (Li Yuwen 70-74).

The first of the five year programs to implement wide-ranging reforms was issued by the SPC in 1999 in the Outline of a Five-year Reform Plan for the People's Courts. It sets out 39 specific measures for reform that fall into seven broad categories:

- Further reform of the trial process, including separation of acceptance of cases and trial, supervision and trial and enforcement and trial, improving judgment writing;
- Reorganising trial organs, including competitive appointment of the chief and deputy chief judges who must also try cases in addition to their administrative work, and further reduce the role of the adjudication committee in deciding cases;
- Further reorganisation of internal court organisation including increasing the number of staff in the enforcement division;
- Reforming personnel management including selection of judges;
- Speeding up modernisation of the courts including building more courtrooms and improving court room equipment;
- Improving the supervision system and improving judicial justice;
- Exploring more in-depth reform of court organisation (see Li Yuwen 74-76).

As part of the move to strengthen the professional qualification of judges and procurators, in 2001 reform to the *Judges Law*, the *Procurators Law* and the *Law on Lawyers* required that judges, procurators and lawyers pass a unified judicial examination.

The second five year reform plan was introduced to run between 2004-2008. This plan reiterated many of the reforms of the first five year reform program, in particular the goal of improving justice and efficiency (Chen Jianfu, 2008, p157). The second five year reform program also included:

- Reform of adjudication, in particular removing final approval of death penalty cases back to the SPC; improving the system of evidence

- Standardisation of sentencing practice and guidance, through cases and interpretations given to lower courts on sentencing and applicable law
- Reform and strengthening of the enforcement system and practice
- Further reform of the role of the judicial committee, the role of lay assessors and strengthening of the capacity of judges to adjudicate independently according to the law
- Improvement of judicial management of cases, including putting cases on file, use of simplified procedure, allocation of cases, statistics
- Strengthening the administration of judicial personnel and judges professionalism including training
- Strengthening court supervision mechanisms, both internal and external.

For discussion of the judicial reform programs see (Grimheden, 2008; Cabestan, 2005; Chen Jianfu, 2008).

Though the judicial reform program had been underway since 1999 under the leadership of the SPC, the effectiveness of the reforms had been hindered because of lack of authority of the SPC to implement the reforms at the local level and because it lacked authority to require the inter-agency cooperation required to implement the reforms. The lack of authority of the SPC to ensure local implementation of these reforms led to unevenness in their adoption. This problem was overcome to some extent in 2003 when the CCP Central Committee established a Central Judicial System Reform Leadership Small Group headed by Luo Gan, who was at that time the head of the Central CCP Political-legal Committee (Zhu Jingwen, 2007, 190).

After the retirement of SPC President Xiao Yang, who had been instrumental in seeking to improve the professionalism of judges and judicial procedure under the previous two five-year judicial reform programs, the third five- year judicial reform program (2009-13) (Supreme People's Court, 2009j) was initiated under the new SPC President Wang Shengjun who was appointed in 2008 The appointment of Wang Shengjun has provoked a deal of international comment, as he is not legally trained but comes from the party's political- legal apparatus (Cohen, 2008). Wang has echoed the need to adhere to the 'Three Supremes' (that is, the supremacy of the Party's cause, the interests of the people and the Constitution and the law) first set out by President Hu Jintao at the CCP Central Political-legal committee's national conference on Political Legal Work. This formulation has caused concern amongst reform minded academics who fear that the adoption of these concepts suggest that in judicial work, adherence to the Constitution and law ranks third behind adherence to the Party's cause and the interests of the people (Cohen, 2008). The third five-year judicial reform program makes some reference to the previous priorities of strengthening institutional development, but places more emphasis on strengthening the training and disciplinary oversight of judicial personnel and improving the financial security of courts and judges. It reflects the 4 priorities for judicial reform identified in the 2008 CCP Opinion referred to above: optimizing the distribution of judicial functions and powers; balancing strict execution of criminal law with clemency; enhancing the quality of officials in the judicial system; ensuring a healthy budget for China's courts and adds the aim of perfecting a system of administration of justice for the people. However, it diverges from the previous five year judicial reform programs in its emphasis on implementation of political programs of 'combining leniency and severity' and the 'administration of justice for the people' as opposed to improving the technical and professional standards of adjudication. (Procuratorial reform programs are discussed in more detail at chapter 3.2).

Enforcement

Reform of the capacity of people's courts to carry out enforcement of judgments is one of the key aspects of the 5 year judicial reform programs, the first of which was launched in 1999. The effort to improve the enforcement work of the courts is ongoing. The most important issue impeding enforcement of civil and commercial judgments is opposition from the local government to enforcing judgments that adversely affect local enterprises or that see funds and resources transferred to enterprises in other localities. (Xin Chunying, 2004).

The SPC has issued a number of special regulations on enforcement work, with the most recent being the amendments to the Civil Procedure Law made in 2007 and the SPC *Interpretation on Several Issues on the Application of the Execution Procedure of the PRC Civil Procedure Law* 2008.

Justice policy: balancing leniency and severity

The policy of balancing leniency and severity which has been given prominence in the third five year judicial reform program is the latest incarnation of the longstanding policy of the same name. After the first Hard Strike campaign in 1983, the emphasis has been on harsh punishment, but the effectiveness of a continual reliance on harsh punishment has increasingly been questioned (discussed in chapter 2 and Biddulph, 2007).

The initial reinterpretation of the way in which 'leniency and severity' would be balanced was seen in the reform articulated by Xiao Yang to reduce use of the death sentence. Subsequently, areas in which lenient punishment would be imposed have been articulated. The court's most recent interpretation of the policy was issued in February 2010 in the SPC *Several Opinions on Implementing the Criminal Policy of Balancing Leniency and Severity*. It requires severe punishment of very serious crimes, lenient punishment of minor crimes and provides guidelines on how to distinguish between the two. There is a consistency of approach to this category between the courts and procuratorates as the categories of matters set out in this document as warranting lenient punishment, coincide with those listed by the procuratorate (below) as possibly being too minor to warrant prosecution.

Minor offences

One part of the policy of balancing leniency and severity has been to decriminalise some minor offences. The SPP issued new standards for indictment in 2007 which exclude the flowing categories of offences:

- offences committed by juveniles or people over 60 which are not serious of malicious
- minor offences arising from family or neighbourhood disputes where the person apologises or compensates the victim
- first offences where there is no malicious intent
- an offence of committing more than one theft where the offence was driven by poor material circumstances and the actions did not harm the victim
- minor offences committed during a mass demonstration (set out in Trevaskes, 2009 pp 83- 4)

In these cases the procuratorate can use its discretion not to commence a criminal prosecution at all.

Death penalty reform

As foreshadowed in the second five year judicial reform program, in December 2006 the President of the SPC Xiao Yang announced reforms to the review of death sentences and to place limits on

imposition of the death sentence through the policy of 'kill fewer, kill cautiously'. The elements of reform include a decision that the death penalty would be reserved for only the most serious crimes- so as to limit the number of people given the death sentence (Trevaskes, 2008, p404), those sentenced to death suspended for two years would have their sentence commuted to life automatically at the end of the 2 year period and final review of the death sentence would be removed to the SPC. This reform was seen as a way of improving the judicial decision-making in imposing the death sentence at provincial and intermediate court level by the awareness of these judges that their decision-making on death penalty cases will be reviewed. (Trevaskes, 2008, p 396).

In March 2007 the SPC, SPP and the MPS jointly issued a document which defined those categories of offences that should be characterised as 'most serious'.

The reforms to the death penalty reflect growing discomfort amongst highest levels of police and courts about the impacts of the Hard Strike policy on numbers of death sentences given (Trevaskes, 2008, pp396, 401). Although estimates of the numbers of crimes for which the death penalty may be imposed vary from 68 to 76 (Chen Jianfu, 2008, p296), it is clear that there are a substantial number of offences which may result in a death sentence, including economic crimes such as fraud and corruption, as well as crimes of violence (Cha, 2007; Chen Jianfu, 2008).

Procedural fairness and the reform of evidence rules

In September 2009 the Supreme People's Procuratorate revised the procedures for approving arrest in cases put on file and investigated directly by the procuratorate. It acknowledged that in the cases of crimes committed by officials, that are directly investigated and prosecuted by the procuratorate, there was an overconcentration of power in the hands of the lower level procuratorates in deciding to put a case on file, approve and carry out arrest and then investigate. It thus required that arrest be approved by the next higher level procuratorate than the one responsible for putting the case on file and investigating the case (SPP, 2009c).

The use of evidence obtained by unlawful means

The failure of the *Criminal Procedure Law* to prohibit the use of evidence obtained by torture in a criminal trial (compared to the prohibition of using torture to obtain evidence- which is outlawed in the CPL) has been discussed in chapter 2. This failure has been heavily criticised over a number of years. However, recent reports state that at the 13th meeting of the Central Political-legal Committee of the CCP two proposed regulations to exclude the use of unlawfully obtained evidence in criminal trials and regulating the evidence that can be used to obtain a conviction in death sentence cases were discussed (Wang Heyan, 2010b). A report in Reuters on 30 May 2010 announced that the SPC, SPP, MPS, MSS and the Ministry of Justice on 31st May jointly issued *The Regulations on Assessment of Evidence in Death Penalty Cases* and the *Exclusion of Illegally Obtained Evidence in Criminal Case* (Reuters, 2010b). Amongst other things these Regulations prohibit the use of illegally obtained evidence to convict a defendant in death penalty cases and set out procedures by which a defendant may challenge. The full text of these regulations is not yet publicly available.

The Harmonious society policy

These court reforms have been undertaken against the backdrop of policies to promote administration of justice and to alleviate social contradictions that have led to increasing social disorder and unrest. The overarching policy in this respect is that of promoting the development of the Harmonious

Society. The policy of the harmonious society was proposed by the President Hu Jintao and has emerged since over several years before being adopted by the 16th CCP Congress which passed the resolution on Resolution of the CCP Central Committee on Major Issues Concerning the *Building of a Socialist Harmonious Society* was adopted at the Sixth Plenum of the 16th Party Congress, October 11, 2006 addressing problems of increase in social contradictions. The Harmonious Society (*hexie shehui*) policy reflects the state's recognition of the need to address the most egregious instances of inequality and disadvantage. An important component of this program is to improve education, health services and other social services. A related strategy has been to improve the administration of justice. Whilst efforts to improve the administration of justice and the quality of police enforcement work precede the Harmonious Society policy, the components of this policy have been applied to recent formulations of 'administration according to law'. In particular, the call for democracy and rule of law, fairness and justice, sincerity and friendship, stability and order, a balance of power and responsibility, the central slogans of the Harmonious Society, are reflected in the primary policy document on implementing 'administration according to law' the *Outline for Promoting Law-based Administration in an All-round Way* issued by the State Council in June 2004. (Biddulph 2008).

Legislative reforms

Reform to major legal instruments is ongoing. In 2007 the amended *Civil Procedure Law* was passed which, amongst other things, sought to strengthen the powers of the enforcement division of the court.

Criminal procedure reforms

In 2003 reform of the CPL was entered into the 5 year legislative plan of the NPC. Drafting of reforms to the CPL are ongoing and a final draft has not yet been produced. Drafters have identified a number of problems in the current administration of justice requiring reform. The first is imposition of excessively long periods of detention, both at the pre-arrest and at the investigation stage. The second is the continued use of torture to extract confessions with there being no clear rule to exclude unlawfully obtained evidence and the continued over- reliance on confessions by the police and procuratorate to establish criminal guilt. The third is the severely circumscribed capacity of lawyers to gain access to and mount a vigorous defence of an accused person. The use by authorities of Criminal Law art 306 to prosecute defence lawyers for perverting the course of justice where their client changes their testimony is well documented (Chapter 6; Liu Sida, 2009).

Administrative law reforms

Another of the projected major legislative reforms is to broaden the scope of administrative decision-making that can be challenged under the *Administrative Litigation Law*, including a proposal to enable challenges to be brought about the lawfulness of lower level rules.

Where unlawful conduct is not considered sufficiently serious to warrant a criminal sanction, an offender may have an administrative sanction imposed (as discussed in chapter 2.4). Administrative sanctions for such types of unlawful conduct are primarily administered by the police and include warnings, fines, administrative detention of up to 20 days, detention of between six months and two years for prostitutes and clients of prostitutes, community supervision orders or detention of two years for drug addicts and detention under re-education through labour for up to three years.

Recent reforms to the administrative system were enacted in the PRC *Drug Prohibition Law* 2007. This law introduced community supervision orders for drug addicts and rearranged pre-existing administrative detention for drug addicts by combining coercive drug rehabilitation (of between

3 and 6 months) and re-education through labour for drug addicts (between 1 and 3 years) into a single detention power of quarantine for coercive drug rehabilitation (art 38). Detention under this new power is for two years with the possibility of release after one year if the person reforms well and the possibility of extension for a further year if the person has not (art 47).

A more difficult area of reform is that of administrative powers of the police to impose punishments for minor infringements that are not considered sufficiently serious to warrant a criminal sanction (discussed in chapter 2.4). In order to reform the power of re-education through labour, which is now widely believed to be unlawful as it is not properly authorised by a law passed by the NPC or its Standing Committee, drafting of a law entitled the *Law on the Correction of Misdemeanours* has been underway since 2003. Finalisation and passage of this law has been placed on the legislative plan of the NPC Standing Committee for this year (2010) but it is not clear whether the necessary consensus between interested actors can be achieved in order to secure passage of the law.

7.1 Initiation

There are a variety of actors within the Chinese system who play a role in relation to reform. Main policy initiatives are decided or approved by the CCP, often through its Central Committee or the Political-legal Committee. The main institutional actors are the CCP, the SPC, the SPP, the MPS and the MOJ. In addition, the Chinese legal profession and legal academics and the small Chinese non-government organisation community are active in making suggestions and proposing reforms to the legal system, backed up with the press and the public, through the medium of the internet. Academics in particular have been active in reform of criminal and administrative laws as many participate in committees preparing drafts of legislative reforms. In addition, the international community, primarily the international legal and judicial communities, which have a strong interest and involvement in rule of law and other projects in China, as well as human rights non-government organisations, takes a strong interest in engaging in training programs for judges and lawyers, assisting in the development of Chinese legal education and commenting on and suggesting changes to the Chinese justice sector.

Formally, as noted above, legislation in the Chinese context takes a variety of forms. Laws must be adopted by the National People's Congress or its Standing Committee, and thus amendments to the *Criminal Law* or the CPL must be drafted by, or at the behest of, the Legislative Affairs Office of the NPC and run through at least 3 readings in the NPC (see below).

Legislation is generally publicised in advance for public comment and it can be expected that any changes to the criminal system will receive commentary from interested parties and the public alike. Since passage of the *Law on Legislation* in 2000 an increasing number of legislative drafts have been issued for public comment. In some cases there is extremely strong public interest in draft legislation. For example the controversial draft *Labour Contract Law* received almost 200,000 comments (Karindi, 2008).

Although, as noted above, the Criminal Law has been amended 7 times since its inception, the CPL has not been amended at all. There has been publicity about proposed changes relating to the handling of the death penalty, and the possibility of changes in order to bring China into compliance with the procedural requirements of the International Covenant on Civil and Political Rights. However, whilst there have been no major amendments to major legislation since 2005, the SPC and on occasion the SPP have been active in issuing Opinions and Interpretations which have an impact on the implementation of the judicial system. Most notably, the SPC itself decided to recall death penalty cases to its own jurisdiction. It has also been instrumental in issuing interpretations in relation to such issues as open trials and mediation. This process whereby entities such as the

SPC and the SPP issue multiple administrative documents is, however, far from desirable. They result in a multiplicity of documents which arguably lack the status to ensure compliance by employees of other ministries or agencies, such as the MPS, MSS and other enforcement agencies. Comprehensive amendments to the CPL would therefore be more effective in achieving real change to the existing system.

7.2 Responsibility

As noted above, in practice the CCP keeps a firm hold on questions of judicial operation and reform. Policy documents issued by the CCP set out the parameters for operation of the judicial system, followed by policy documents on implementation issued mainly by the SPC and by the SPP. In particular, the SPC has issued 3 five year plans relating to the reform of the judicial system (discussed above). As noted above in connection with the third judicial reform plan, the SPC reforms follow the policy guidelines set out by the CCP. The SPC cannot, however, implement judicial and justice system reforms on its own. Legislation must be passed by the NPC or its Standing Committee, and must therefore go through the process of State Council review set out in the Law on Legislation. In March, 2010, Wu Bangguo, chairman of the NPC Standing Committee, announced that the goal of formulating a socialist legal system would be completed by the end of this year (Xinhua, 2010b).

In 2008, the Politburo of the CCP issued the *CCP Central Committee's Political Commission's Opinions on Deepening the Reform of the Judicial System and Working Mechanism*. According to Caijing magazine (Qin Yudong, 2009), "[T]he new reforms have taken four tasks as primary: optimizing the distribution of judicial functions and powers, balancing strict execution of criminal law with clemency for certain situations, enhancing the quality of officials in the judicial system, and ensuring a healthy budget for China's courts. Meanwhile, the Supreme Court and the Supreme Procuratorate also publicized respective roadmaps for reform that contain, respectively, a set of ten and five additional goals."

In response, the SPC issued its third five year plan for reform of the judicial system, which on the one end reaffirms the concept of effecting reform while looking at other countries but using existing Chinese conditions at the departure point for reforms, while effecting "technical reforms that target criminal, civil and administrative law, the juvenile justice system and enforcement issues." (Peerenboom, 2008b).

7.3 Design

In a speech made in 2007, the Vice-President of the SPC, Wan Exiang, described the design of the reform process as follows. First, China has signed a number of international treaties on such matters as the environment, human rights and the environment as part of its aim to join the international community. Secondly, as part of its accession to the World Trade Organisation, China has adopted such principles as transparency and consistency of the application of law. In addition, it has entered into a number of bilateral agreements relating to legal matters, such as extradition and judicial assistance treaties. Thirdly, domestic reforms and economic improvement have led to a greater need for protection of legal rights, as evidenced by the "litigation explosion" since 2000. In summary, judicial reform is an outcome of political reform.

In terms of implementation, judicial reforms have been effected through the legislature, in the form of such laws as the *Judges Law, Administrative Litigation Law* and *Administrative Supervision Law*. The SPC also plays a major role in implementation of the criminal justice system, through the issue of interpretations which lower courts follow in applying the law.

7.4 Review

Legislation is issued in draft form so as to allow for public comments before it is passed into law. As noted above, the draft of the *Labour Contract Law* received almost 200,000 comments from the public when it was first publicised. Both the *Enterprise Bankruptcy Law* and the *Real Property Law* were the subject of stringent public review and criticism before they were passed by the legislature (in amended form). Similarly, the SPC has also started to circulate some of its opinions and interpretations in draft form for comment before they are finalised. In some cases, this has resulted in a significant delay before the final form of the document is agreed upon. In the legal sphere, as noted above, it can be expected that the public, academics, lawyers and international and domestic non-profit organizations will all have, and express, views on the form of the reform proposals. In contrast, although reform proposals within the CCP go through an internal review and discussion process, the document, once issued, forms the policy basis for future reforms. Since CCP and SPC documents are often quite vague, it can be difficult to foresee how they will be implemented. The impact of such policies as the policy to encourage the "harmonious society" through mediation, however, can be seen in the issue of opinions by the SPC which encourage the courts to use non- litigious means of dispute resolution *(Several Opinions Concerning the Establishment of a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation Proceedings, 2009).*

7.5 Implementation

Art 8 of the *Law on Legislation* makes clear that only "national Law" may be enacted in respect of matters relating to state sovereignty, the establishment and operation of people's congresses, governments, courts and procuratorates, crimes and criminal law, the deprivation of political rights or personal freedom of a citizen, expropriation of non-state assets, fundamental civil institutions, economic system, tax, customs, financial and foreign trade systems and litigation and arbitration systems. The NPC has a number of special committees, including the nationalities committee, law committee, finance and economic committee and so on (*Constitution*, art 70), which draw up relevant bills and draft resolutions for consideration by the NPC. A variety of bodies can propose bills to the Presidium of the NPC or the Standing Committee, including the presidium, the Standing Committee and various special committees of the NPC, the State Council, the Central Military Commission, the SPC, the SPP and 30 or more delegates to the NPC. A major bill which has been put on the agenda of the Standing Committee may also be submitted to the public for comments (Art 35). This procedure has been followed in a number of cases.

In addition to the NPC and its Standing Committee, the State Council, which is the highest organ of state administration (Constitution, art 85), not only submits proposals to the NPC and its standing committee, but adopts administrative measures, administrative rules and regulations (*xingzheng fagui*) and regulations and issues decisions and orders. If a ministry or agency under the State Council, such as the MOJ, wishes to draft an administrative regulation, it must obtain permission from the State Council to do so, and submit the final version to the legislative affairs office of the State Council for approval (Arts 57 and 59 of the Law on Legislation). The process in respect of laws and administrative regulations is therefore quite strictly controlled, in order to prevent inconsistency.

As noted above, much of the practical implementation of the reform program in relation to the judicial system is done by the SPC, through opinions, interpretations and regulations, the SPP and the MOJ (through regulations).

7.6 Evaluation

The formal process for evaluating reform in China is opaque, although there is, as noted above, considerable discussion in the press, across the internet, and by academics and legal professionals in relation to particular items of legislation and policies. The issue of five-year plans by the SPC, following on from statements of policy by the CCP, separately and at the five-year CCP Congress, indicates what changes in direction are to be made in relation to the reform program. On occasion, the issue of implementing legislation following on from the passage of the original law indicates a fine-tuning or adjustment (in some cases quite major) of the underlying policy. In terms of public participation, the internet and the growth of a well-educated and active legal profession (both practising and academic) has made a major contribution to the development of public comment and discussion of the legal and judicial reform process.

7.7 Remedies

The Criminal Law was originally passed in 1979, as was the CPL. Both of these laws were fundamentally revised and amended in 1996 and 1997 in order to establish basic principles which offered more protection. For example, the offence of being a "counter-revolutionary" was abolished and the principle in the Criminal Law established that a person can be convicted only of a crime constituted under law. The CPL moved towards an adversarial system in which the accused was entitled to a legal defence. Other changes to the system include the removal of death penalty reconsiderations to the SPC in 2006 after the delegation of these cases to the lower courts. All of these changes can be seen as either additional reforms or as changes in order to deal with failures of earlier reforms. Since the Chinese judicial system really dates from 1979, the Chinese authorities, and other commentators, tend to see it as a system which is constantly undergoing reform and development, rather than a system in which reforms have failed. It is far from a static system and the process of constant review means that there are frequent changes. Many of these changes, however, do not indicate a change in policy. For example, the constant reiteration and elaboration of principles relating to judicial corruption may be taken to show that earlier legislative and practice attempts to reform the judiciary have failed, but also demonstrate a consistent policy aimed at preventing and punishing corrupt behaviour.

7.8 Oversight

Communist Party

The CCP, through its Politburo and its legal and political committee, plays a defining role in setting policy in relation to legislative, judicial and other reform in China. This may be done by issuing ad hoc policy statements, such as the 2007 *Opinions on Deepening the Reform of the Judicial System and Working Mechanism* issued by the Politburo of the CCP (discussed above) or through policy pronouncements made at the CCP Congress, held every five years. In addition, the CCP may play a role in the enactment of subordinate legislation or in the issue of guidelines or opinions, as well as an indirect role through the widespread Party membership in the judiciary and the executive. The Political-legal Committee is established at each administrative level and is responsible for formulating and guiding justice policy. In practice, at the local level this leadership is exercised through coordinating the work of the police, procuratorate and courts in implementing hard strike campaigns and occasionally intervening in the handling of particular cases, especially those which are of importance or have caused a public outcry. The involvement of the CCP in the judicial system at both the policy and the implementation level raises obvious issues relating to

the role of the judiciary itself, and, in particular in relation to the question of the independence of judges hearing cases in which the CCP has taken an interest.

National People's Congress/Parliament

The National People's Congress meets only once a year in order to pass legislation (discussed in more detail in the Introduction). The Standing Committee also passes legislation, which is thoroughly reviewed before it is passed.

Parliamentary committees

As noted above, specialist committees of the NPC and the State Council may play a role in formulating legislation and legislative changes. In all cases, it can be expected that the legislation will be in accordance with CCP policy. The NPC Committees, in particular the Internal and Judicial Work Committee, have periodically launched investigations into various aspects of law enforcement. For example in both 2000 and 2003 this committee conducted a nationwide investigation into problems in enforcement of the revised CPL. Following this investigation, the SPP launched a specialist campaign to clean up problems of justice agencies keeping criminal suspects in detention for excessive amounts of time. (Biddulph, 2008).

Under the *Law on Supervision by Standing Committees of People's Congresses at Various Levels* 2006, standing committees of people's congresses at various levels exercise supervision over the work of the government, courts and procuratorates at the same level through requiring preparation and consideration of special work reports on matters of public concern including law enforcement (arts 8, 9, 22), through conducting special investigations into those matters (arts 10, 24) and then preparation of an evaluation report which contains suggestions for reform and improvement (arts 26, 26) The standing committee may also determine to investigate specific issues and cases where it considers necessary (art 39).

The Ombudsman

China does not have an ombudsman.

Local Government

Local government and local courts may issue implementing legislation as long as it is not inconsistent with superior level legislation. They may also make submissions or present opinions on particular legal issues.

Provincial Government

The provincial government and courts may issue implementing legislation as long as it is not inconsistent with superior level legislation. They may also make submissions or present opinions on particular legal issues.

Central government

See the Introduction for a summary of the legislative process and above for a description of the roles played by various actors in the central government in relation to the reform process.

Foreign actors

As noted above, foreign actors also play a role in the Chinese reform system. China's accession to international treaties, particularly the World Trade Organisation, affects the content of its laws; foreign investors, traders and industry groups have an interest in legal and judicial reform and are willing to express and lobby for their views; foreign lawyers and academics of all types study

China and the Chinese legal and judicial system and express their opinions; the foreign press takes an active interest in legal and other matters, not just in trials involving foreign nationals, but in all aspects of the judicial system, and international and foreign governments and organisations conduct training programs of all kinds in order to assist with the education of Chinese judges, lawyers, prosecutors, students and other persons in order to assist with the development of the rule of law in China. Chinese legislators and administrators look to international practice and foreign laws and legal systems for ideas in a completely pragmatic fashion (Chen Jianfu, 2008).

Conclusion

In summary, the reform process in China is led by the CCP and the government, although interested parties, including academics, legal professions, the courts, international lawyers, international commentators and the public all have the opportunity to present opinions which may assist to shape reform. The reform process is firmly under the control of the central authorities, which attempt to shape opinion and the process through education and training, as well as through the press. However, the development of the internet and the growth of academics, professionals and industry groups means that the public generally now have many more opportunities to contribute to and attempt to shape the reforms which are instituted. The factors which shape change, however, may reflect different forces within Chinese society. Criticism of China's approach to the death penalty internationally and within China, for example, may be countered by public indignation in respect of corruption and particular offence which lead authorities to respond with harsher penalties and crackdowns on crime. The global financial crisis which resulted in the insolvency and closure of many companies and related loss of jobs provided stresses in society which undermined the implementation of the *Enterprise Bankruptcy Law*, which sets out a policy of allowing the market to determine the survival of companies, not the government (Wang Biqiang, 2009). Attempts by lawyers to test the independence of the courts and the impartial enforcement of the law may be met by institutional resistance from the CCP and local interests (Clarke, 2009). As a result, the reform process may be delayed and its content disputed as different groups within the Chinese government and society put forward their own views on the content of the reform process.

8. Conclusions

8.1 Strengths and Weaknesses

In assessing the Chinese justice system, it is important to acknowledge the substantial progress that has been made since 1979 in establishing a comprehensive system of law and a justice system from a minimal base. The strengths in the system lie in the existence of a relatively comprehensive national system of legislation and implementing legislation that creates a judicial structure for all courts in China, sets out clear criteria governing the qualifications and training for judges and lawyers and imposing the aim of a high standard for legal education, creates a relatively consistent legislative framework for the criminal, civil and administrative law systems and allows for ongoing modification and improvement through revisions to the legislation and opinions and interpretations issued mainly by the SPC. The system for reform is also relatively efficient and now allows for input and contributions on the content of the regulatory system from a wide variety of actors from Chinese and international society. In developing the system and legislation, the CCP and other decision-makers on policy have been quite flexible and pragmatic in looking at a broad range of regulatory and legislative systems across the world in order to assess and adopt measures which they feel would be suitable for use in China. This ability to incorporate features of systems with a completely different ideological underpinning is a considerable strength in the Chinese method of reform.

In terms of implementation, China has established a comprehensive system for the investigation, prosecution and trial of cases. This is, as noted above, backed by legislation and regulated by a combination of legislation and rules issued by a number of different entities. Requirements for the qualifications of judges and other participants in the system have been implemented which will ultimately result in a highly educated and qualified judiciary and procuratorate, as well as formally qualified lawyers. Review of the system is conducted on a regular basis and some steps have been taken to deal with major problems such as death penalty cases, the underfunding of the court system in certain areas of China and so on. The legal profession has grown in competence and in confidence and plays an active role in attempting to enforce the law and the principles behind it, as well as publicising the performance of the courts.

There are, however, a number of weaknesses in the system in relation to the legislative structure and in the implementation of the system. First, the *Constitution* grants equal status to the SPC and the SPP. Although it requires them to work together, this separation of functions which should be closely linked creates a structural difficulty in the administration of the judicial system. This is further complicated by the fact that the State Council, which generally issues the implementing regulations for important legislation, does not play a major role in the administration of the judicial system. Instead, separate ministries, such as the MPS, MSS and MOJ, have authority over different parts of the system. Any concerted action which is not legislatively mandated therefore requires the cooperation of a substantial number of government bodies, each of which has a stake in protecting its own position. In addition, although China is a unitary system, the power of local government in relation to the courts and procuratorates (and other agencies) at the same level means that there is a constant tension between the vertical control exercised by the SPC and other higher level government bodies and local government which, since it is geographically situated in the same area as the court and other bodies, clearly has an advantage in terms of its influence. The fact that the CCP has refused to give up its influence in relation to day to day operation of the legal system means that it is difficult for the courts and the procuratorates to resist interference in the conduct and even the result of cases.

Secondly, in relation to policy, although the participation of multiple actors is a strong point in the system, due to the multiple levels of legislative instruments, including laws, regulations, interpretations, regulations, Ministry rules, codes of conduct, local rules and decrees and so on which can affect the legal system, the legislative regime can be incoherent and conflicting. Currently the NPC Standing Committee is responsible for supervising lower level regulation making and the Legislative Affairs Commission of the State Council supervises rule making by lower level administrative agencies. Courts do not exercise jurisdiction to supervise the lawfulness of lower level rules and regulations which means that the question of lawfulness of a particular rule or regulation cannot be resolved by litigation.

The ongoing conflict between the approach taken by the investigation agencies and courts and lawyers to the relationship between the *Law on Lawyers* and the CPL demonstrates the importance of having a higher level of legislative authority issue mandates on matters of importance. There needs to be a concerted and consistent approach to legislation rather than an ad hoc response to criticisms and to particular crises. Another feature of this is the role of the CCP and other actors playing a role in policy. It is preferable, in our view, for policy to be set at a higher level and reflected in the legislative structure, and then implemented in a neutral and impartial fashion within the system. The interpretation and application of particular laws should not require the participation of the CCP; decisions in individual cases should not be subject to interference by the CCP or by local authorities. High level policy pronouncements made by senior officials, such as statements emphasising mediation as an alternative to litigation, arguably undermine the rule of law.

The third issue is implementation. At a practical level, the siloed nature of law enforcement means that there is a constant conflict between the police, the procuratorate, the CCP and the courts. The courts do not have the ability to call investigators to account for their actions during the investigation period or to conduct effective oversight of their operations. The investigators have little incentive to cooperate with other parties. The CCP Disciplinary and Inspection Committee exercises a jurisdiction in relation to corruption cases which significantly undermines the functions of the Procuratorate and means that major players in the judicial system often answer to the CCP rather than to the ordinary legal system if they commit an offence. Even if interference is minimal in practice, this undermines confidence in the judicial system and discourages judges and other participants from pursuing the duties of impartiality and independence. The confirmation of the importance of the judicial committee underlines the difficulties for individual judges in finding an independent and valuable role. A related issue is the competence and honesty of the judiciary, which is under challenge notwithstanding the efforts by the SPC and other government and legislative bodies to outlaw and prevent corruption. The arrest of a Vice-President of the SPC itself in 2008 illustrates the extreme difficulties in the system in this regard and the reason why the public in China does not have general confidence in the courts. A related issue is that enforcement of court judgments is weak, for a variety of reasons discussed in this Report. Lawyers who take up causes which are unpopular with local or higher level political interests may not only be unsuccessful in the courts, but subject to prosecution, disbarment and other punishments directed at them personally. This reflects a broader problem, which is the lack of commitment of higher level government to ensuring that the judicial system works and its failure to make effective attempts to control abuses by lower level authorities.

8.2 Challenges and Controversies

The first of these is the role of the CCP and government in the legal system. On the one hand, the authorities emphasise the distinctly Chinese characteristics of the Chinese justice system as

a socialist judicial system which operates under the leadership of the Party. On the other hand, many observers (both western and Chinese) consider that the lack of separation between the Party, the State and the judicial system makes it extremely difficult, if not possible, to establish the rule of law in China. It is unrealistic in present circumstances to propose that the CCP should remove itself from the development and implementation of the law and the judicial system in China, which is a fundamental part of the overall government system. However, the lack of formal recognition of its role means that there is little definition of its scope and, consequently, citizens and institutions alike are unable to challenge encroachments on their activities which are made in the name of the CCP, even if these encroachments in no way reflect CCP policy. The challenge is to find a formal role for the CCP which allows it to continue to define policy and to shape the higher level legislation and administration regime without permitting or encouraging lower level entities or CCP members to interfere in the day to day operation of the judicial system.

The second of these challenges is improving the quality of the investigators, procurators and judges in the judicial system. This involves improving cooperation between these agencies, improving oversight of investigators and preventing such abuses as torture of suspects, increasing the professionalism and independence of judges and reducing the prevalence of corruption. Steps to do so might include a number of factors. In the long-term, court funding should not be so closely tied to local government, and the appointment and removal of judges and procurators should not be in the hands of local people's congresses. The many different ways in which cases can be protested, supervised or overruled should be substantially reduced. Other forms of outside interference in specific cases should be reduced.

Thirdly, although significant advances have been made in terms of transparency, more openness would assist in a number of important respects. Notwithstanding the CPL and the various interpretations issued by the SPC, the courts are not fully open to public scrutiny. In sensitive cases, the courts are often closed. Decisions which are taken by the judicial committee should also be open to public discussion – the names of the committee should be disclosed and the reasons for the decision should be publicly available.

In terms of trial process, a number of issues have been highlighted by commentators inside and outside China, which still need to be resolved. These include better access by the defendant to the court papers, a better opportunity to prepare his case, stronger powers to require witnesses to appear and to collect evidence, and enforcement of a requirement that witnesses appear in court to be cross-examined.

Other issues relate to extra-judicial or legal acts which infringe upon the rights of individuals and should be brought within the formal judicial system. In particular, these include improving the rights of petitioners to protection against maltreatment and abuse, including bans on "black gaols" where petitioners are held illegally in order to prevent them from embarrassing local officials. The reform of administrative powers, such as re-education through labour, though long promised, has not yet eventuated. In view of the reforms to the criminal justice system, which have seen some minor criminal offences decriminalised or punished by non-custodial sentences, it is inconsistent that infringements that are not sufficiently serious to warrant a criminal punishment can still be punished by detention up to three years.

8.3 Current Reforms

Current reforms to the judicial system are outlined in more detail in chapter 7. The third five-year reform plan reflects the following priorities for judicial reform: optimizing the distribution of judicial functions and powers; balancing strict execution of criminal law with clemency; enhancing

the quality of officials in the judicial system; ensuring a healthy budget for China's courts and adds the aim of perfecting a system of administration of justice for the people and political programs of 'combining leniency and severity' and the 'administration of justice for the people'. It is reported that the CPL will be amended in 2011 and draft regulations are apparently under consideration relating to evidence which will, it is hoped, make evidence extracted under torture inadmissible.

8.4 Issues for Future Reform

The issues highlighted in the third five-year plan are not the only issues which scholars and commentators consider should be considered. Some of these have been partially addressed; others are still awaiting effective implementation, ideally through reforms to the CPL and the establishment of an effective monitoring and enforcement regime. Other issues include the following: abuse of powers of arrest by police and other authorities and pre-trial detention (2008, Yi); torture of persons in custody; lack of transparency in relation to such issues as the methodology for reviewing death penalty cases and the number of sentences imposed and executions carried out each year in China (2009, Chen); formal exclusion of illegally obtained evidence, the introduction of principle of not being obliged to incriminate oneself and clarifying the standard of proof in criminal cases (2007, Chen). Protection of lawyers who act for clients in controversial or politically-sensitive cases should also be considered, as should structural reform to resolve the issues of outside interference in the judicial process and the siloed structure of the system which results in a lack of cooperation between agencies and an imperfect system of monitoring and oversight of abuses. On a regulatory basis, reduction, simplification and clarification of the many overlapping regulations and other documents issued by the many participants in the system should also be undertaken.

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Supreme People's Procuratorate, 2006c. *Notice on further Strengthening the work of Protecting Lawyers' Rights to Practise*

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Supreme People's Procuratorate, 2009b *Regulations on Several Questions on the Investigation and Use of Evidence in Death Penalty Cases*

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Chinese legislation sources in English

Note: This summary concentrates on non-subscription services. Some useful subscription services are also listed.

Useful Websites

The International Law Pathfinder at:http://www.library.usyd.edu.au/libraries/law/pathfinders.html

Worldlii – the World Legal Information Institute at: http://www.worldlii.org

Other information and links to articles can be obtained through such databases as Google Scholar

Chinese government websites (English available on site):

The Central People's Government of the PRC http://english.gov.cn/ China International Economic and Trade Arbitration Commission http://www.cietac.org
China International Economic Commerce Network http://www.ec.cn/

China Internet Information Center http://www.china.org.cn

Intellectual Property Protection in China http://english.ipr.gov.cn

Invest in China http://www.fdi.gov.cn

Ministry of Commerce of the People's Republic of Chinahttp://english.mofcom.gov.cn

Ministry of Public Security http://big5.mps.gov.cn/SuniT/www.mps.gov.cn/English/index.htm
State Intellectual Property Office of the People's Republic of China http://www.sipo.gov.cn

Supreme People's Court of the People's Republic of China http://en.chinacourt.org

Other specialist sites provide English language information on investment in particular provinces or regions, with information on the regime in special economic or development zones. Note that information on sites should be cross-checked to make sure that it is up to date – various sites which purport to provide legislation in English, for example, are not regularly updated and you should therefore check whether the most recent version of the relevant legislation is available on the site before you rely on it.

Other useful materials

Caixin onlinehttp://english.caing.com/politics_law/

Caixing Magazine http://english.caijing.com.cn/politics_law/ Congressional Executive Committee on China http://www.cecc.gov/ Globalex – Finding Chinese Law on the Internet (Joan Liu) http://www.nyulawglobal.org/globalex/China.htm Law Library of Congress: Guide to Law Online http://www.loc.gov/law/guide/china.htm

LLRX.com Law and Technology Resources for Legal Professionalshttp://www.llrx.com/features/prc.htm

New York University School of Law Libraryhttp://www.law.nyu.edu/library/foreign_intl/china.

htm

US-China Business Council http://www.uschina.org/ (although a significant amount of the information is restricted to members).

Newsletters and articles on current matters of interest are issued by law firms and accounting firms with interests in China. Lists are also available on the internet.

The following law and accounting firms, among others, issue regular newsletters and other publications relating to Chinese legal developments:

Baker & McKenzie http://www.bakernet.com/BakerNet/Resources/Publications

Ernst & Young http://www.ey.com Freshfields Bruckhaus Deringer http://www.freshfields.com/places/china/newsletters/en.asp

KPMG http://www.kpmg.com/cn/en/issuesandinsights/articlespublications/new sletters/Pages/default.aspx

Lehman Brown (links on site contain a useful list of Chinese government websites) http://www.lehmanbrown.com/library.htm

O'Melveny & Myers http://www.omm-china.com/digest

Orrick http://orrickchinalaw.com

Price Waterhouse Coopershttp://www.pwccn.com/home/eng/libraryindex.html

Subscription services

China Law and Practice (periodical) [issues from 2002 available online]

China Legalwatch (CCH Hong Kong; periodical) [provides updates from CCH] CCH Laws of China [loose-leaf – laws in Chinese and English]

China Business Review http://www.chinabusinessreview.com/public/1007/feuling.html (some articles generally available; others restricted to subscribers).

INDONESIA

FINAL REPORT

Contributor:
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TABLE OF ABBREVIATIONS

AAI	*Asosiasi Advokat Indonesia*	Indonesian Advocates Association
AKHI	*Asosiasi Konsultan Hukum Indonesia*	Association of Indonesian Legal Consultants
DPD	*Dewan Perwakilan Daerah*	Regional Representatives Council
DPR	*Dewan Perwakilan Rakyat*	People's Representative Council (the House of Representatives)
GAM	*Gerakan Aceh Merdeka*	Free Aceh Movement,
HAPI	*Himpunan Advokat & Pengacara Indonesia*	Association of Advocates & Lawyers of Indonesia
HIR	*Herziene Indonesisch Reglemen*	Civil Procedure Code applying in Java and Madura
IKADIN	*Ikatan Advokat Indonesia*	Association of Indonesian Advocates
IPHI	*Ikatan Penasehat Hukum Indonesia*	Institute of Indonesian Legal
KHN	*Komisi Hukum Nasional*	National Law Commission
KHPM	*Himpunan Konsultan Hukum Pasar Modal*	Association of Capital Markets Legal Consultant
KPK	Komisi Pemberantasan Korupsi	Anti-Corruption Commission
KRHN	Konsorsium Reformasi Hukum Nasional	National Legal Reform Consortium
KUHAP	*Kitab Undang-undang Hukum Acara Pidana*	Code of Criminal Procedure
KUHP	*Kitab Undang-undang Hukum Pidana*	Criminal Code
LBH	*Lembaga Bantuan Hukum*	Legal Aid Institute)
LeIP	Lembaga Kajian dan Advokasi untuk Independensi Peradilan	Indonesian Institute for an Independent Judiciary
LPHN	*Lembaga pembinaan hukum national*	National Legal Development Agency
Mahkumjapol	Mahkamah Agung, Departmen Hukum dan HAM, Kejaksaan, Polisi	Supreme Court, the Law and Human rights Department, the Attorney General's Office and the National Police Force
MaPPI	*Masyarakat Pemantau Peradilan Indonesia*	Indonesian Court Monitoring Community
MK	Mahkamah Konstitusi	Constitutional Court
MKH	*Majelis Kehormatan Hakim*	Judges' Honour Council
MPR	*Majelis Permusyawaratan Rakyat*	People's Consultative Council
OPM	*Organisasi Papua Merdeka*	Free Papua Organisation
PBHI	*Perhimpunan Bantuan Hukum Indonesia*	Indonesian Legal Aid and Human Rights Association

PSHK	*Pusat Studi Hukum dan Kebijaksanaan Indonesia*	Centre for Indonesian Law and Policy Studies)
RBg	*Reglement Buitengewesten*	Civil Procedure Code applying outside of Java
SPI	*Serikat Pengacara Indonesia*	Indonesian Lawyers' Union
TGPTK	*Tim Gabungan Pemberantasan Tindak Pidana Korupsi*	Joint Anti-Corruption Team
YLBHI	*Yayasan Lembaga Bantuan Hukum Indonesia*	Indonesian Legal Aid Foundation

1. Political, Cultural, Historical and Socio-economic Context

1.1 Major historical events

Islam

From the 13th Century, Islam began to take hold as Muslim traders travelled through Southeast Asia, including Indonesia. Islam became the dominant religion in Indonesia by the end of 16th Century. Islam, as received, was not, however, necessarily in its 'purest' form; rather, it was said to have merged with pre-existing beliefs and practices, including those inspired by Hindu-Buddhism and animism (Geertz, 1960; Ricklefs, 1993).

Dutch colonialism

The Dutch were involved in Indonesia – the 'Dutch East Indies' as it was then known – for approximately 350 years. Initially, the main Dutch's presence was as a trading company – the Dutch East India Company, or the VOC – established in the early 1600s. After uprooting Portuguese traders who had controlled the Spice Islands in eastern Indonesia from the early 1500s, the Dutch VOC gradually expanded its hold over the rest of the archipelago. After around 200 years, the VOC went bankrupt and the Dutch government declared the Dutch East Indies to be a nationalised colony. Significantly, the Dutch did not gain control over most of what we now call Indonesia until the early 20th Century. Although some parts of Indonesia – such as Java – were effectively under Dutch control for 300 years, other parts were held by the Dutch for only a few decades before Indonesia's independence.

After centuries of exploitation, particularly forced cultivation causing mass poverty, the Dutch, in an effort to meet their so-called a 'debt of honour' to Indonesia, initiated, from 1901, what was referred to as the 'Ethical Policy'. The policy provided for a number of improvements to the lot of Indonesian 'natives' as the Dutch called them, including improvements to indigenous education and some political reforms. At least partly as a result of this policy, a small class of western-educated, urban Indonesian intellectuals emerged, who could conceive of a united Indonesia, made of up of the territory controlled by the Dutch (Anderson, 1991). Their resentment towards Dutch rule saw the emergence of several nationalist groups. Significantly, in 1927, a group of Dutch-educated nationalists led by Soekarno – the man who would become Indonesia's first president – founded the Indonesian Nationalist Party (*Partai Nasional Indonesia*).

Concerned at the rise of these associations, the Dutch clamped down on indigenous politics in the 1930s, imprisoning many members of nationalists groups and parties for their political activities.

Japanese occupation

Dutch colonial rule was interrupted when Holland was occupied by Germany during World War II. With the Dutch weakened, the Japanese were able invade and occupy Indonesia relatively easily. Though its brief reign was, like Dutch rule, brutally exploitative, the Japanese encouraged the nationalist movement within the so-called Japanese 'Greater East Asia Co-Prosperity Sphere', within which Indonesia was promised a measure of independence, albeit ultimately under Japanese control. Two days after the Japanese surrender, Soekarno declared Indonesia's independence and became the nation's first President.

After the end of World War II, the Dutch attempted to return to Indonesia and resume control. They met stiff resistance from Indonesians and much diplomatic disapproval from the United Nations. After years of armed struggle and in the face of international pressure, the Dutch finally recognised Indonesia's independence in 1949.

The Sukarno years: 1950 to 1965

In July 1945 when Indonesia's first (and most enduring) constitution was being drafted, an important issue of debate was whether to abolish or retain Dutch law. Nationalists argued that colonial law had been designed to protect Dutch interests and was thus contrary to the principles of independence. Nevertheless, pragmatic considerations prevailed. A substantial period of legal chaos could have resulted from the legal vacuum that would have existed before Indonesia's newly established Parliament could pass legislation. To prevent this, the 1945 Constitution provided that all existing institutions and regulations would continue to function until new ones were set up in conformity with the Constitution. Therefore, on independence (August 17, 1945), Indonesia inherited Dutch law, largely as it stood in Holland at the time of independence. The new Indonesian Republic had more pressing problems to resolve than to completely review the legal system. In particular, it had to sustain four years of military struggle against the returning Dutch until 1949 when the Netherlands finally acknowledged Indonesia's independence.

Although Indonesia inherited the Dutch legal system and Dutch laws, it did not, in the early years of independence at least, adopt many of its repressive structures. Indeed, under the 1950 Interim Constitution, Indonesia enjoyed, for most of the 1950s, a liberal democratic polity. Although corruption most certainly existed, as it does everywhere, it was not nearly as conspicuous a problem as it is in Indonesia today. The courts were largely independent and general elections held in 1955 were largely free and fair. Yet, Indonesia is an amalgamation of diverse ethnic and religious groups and this was reflected in the election results, with no party obtaining a clear majority, requiring parties to form coalitions in order to govern. Parliament was so divided that it had trouble making even the most important of decisions. There were also rebellions in several regions, which were said to be threatening the stability and integrity of the nation. These included some outer islands which, rich in natural resources, objected to channel the spoils through the central government; and parts, such as West Java, which pushed for an Islamic state.

In 1955 a constitutional assembly (*Konstituante*) had been established by popular election under the 1950 Provisional Constitution to draft a permanent Indonesian constitution, but after several years of debate, could not decide on an appropriate model, let alone specific provisions. The debates conducted in the constitutional assembly were, however, very significant because, in them alternative bases of state for Indonesia were canvassed. We will discuss some of these bases in a few minutes.

In the face of parliamentary disunity, the failure of the constitutional assembly to complete its work after years of debates, and regional rebellions, Soekarno proclaimed martial law in March 1957. On 5 July 1959 he revoked the Provisional Constitution of Indonesia and reverted to the 1945 Constitution. He simultaneously abolished the Indonesian Constituent Assembly which had been duly elected 5 years earlier, and created two new State institutions: a Provisional People's Assembly (MPRS) and a Supreme Advisory Council. What followed was a period of virtual authoritarianism, which Soekarno called 'Guided Democracy' (*Demokrasi Terpimpin*). He described the system as follows:

the key ingredient is leadership. The Guider…incorporates a spoonful of so-and-so's opinions with a dash of such-and-such, always taking care to incorporate a soupcon of the opposition. Then he cooks it and serves his final summation with 'Ok my dear brothers, it is like this and I hope you agree'…It's still democratic because everybody has given his comment.

Soekarno's rule witnessed the emergence of two potent political competitors – the army and the communist party (Feith, 1964). On 30 September 1965, a coup attempt was made, but was

successfully countered by the army, led by Soeharto. The Coup was later blamed on the Indonesian Communist Party. An Anti-communist purge followed, in which between 500,000 and two million people were allegedly killed (Cribb, 1990).

Soeharto was formally appointed President in March 1968. He built a strong military state, described below in 1.3, remained in power for more than 30 years. Economic development under his rule was impressive (see discussion of economic system below at 1.2), but democracy and human rights suffered as he moved to control the parliament and stamped down heavily on dissenters. His legitimacy was arguably built upon the economic successes he brought, so when from 1997 Indonesia was crippled by the Asian Financial Crisis, his hold on power was significantly weakened. Protests and riots forced his resignation on 21 May 1998.

Soeharto's fall marked the beginning of the so-called *reformasi* (or reform) era. Soeharto was replaced by his deputy BJ Habibe, who served in Soeharto's Cabinet since 1978 as Minister for Research and Technology. He was not a particularly popular president given his close associations with former-President Soeharto. Yet, he initiated a number of very important legal and political reforms, including the following.

- Habibie ordered the re-writing of election laws to make election processes fairer. In particular, these laws ended Soeharto's three- party system, allowing other parties to participate in elections. These new laws resulted in a flurry of political activity: nearly 150 parties announced a desire to participate in the 1999 elections. Many of these failed to meet minimum party size requirements. Only 48 of these were authorised to participate in the elections.
- A raft of new statutes relating to good governance were enacted. While these laws themselves were aspirational, vague and required no real concrete reforms, they at least formed the legal foundations for subsequent laws that have been more successful and targeted.
- East Timor was allowed to hold a referendum on the issue of whether it should secede from Indonesia – something that would have been unthinkable under Soeharto's rule. Approximately ¾ of East Timorese voted for independence, although the vote was marred by widespread violence that ensued, allegedly led by the Indonesian military and pro-Indonesia militias, in which around 2000 people were killed and much of the country's infrastructure was destroyed.
- He initiated reforms aimed at removing the military from politics.
- Finally, he also set in motion decentralisation reforms, culminating in a statute enacted in 1999.

In 1999 Indonesia held its first relatively free and fair elections since the 1950s. Megawati's PDI-P (led by Megawati, one of Soekarno's daughters) won more votes than any other party, but she was not appointed as President.

At this time, the MPR still held power to appoint presidents. Now they are directly elected. The MPR had appointed Wahid as a 'compromise' President, despite his party winning only 13 percent of the votes in the 1999 election, clearly behind Megawati's Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia – Perjuangan*, PDIP), which garnered 36 percent of the vote, and Golkar, which received 24 percent of the vote. As Lindsey has noted, Wahid's presidency was, therefore, marked by 'instability and administrative paralysis', largely because Wahid never controlled a significant minority, let alone a majority, in the newly-strengthened legislature. Instead he was forced to extraordinary lengths to piece together weak coalitions to implement even routine decisions or pass laws. By mid-2001, the government had virtually ceased to function (Lindsey, 2002: 257).

Also facing allegations of involvement in high-profile corruption scandals, Wahid was called by the MPR to account for his actions and the condition of the state. Wahid then attempted to dissolve both the MPR and the DPR by declaring a state of emergency (Lindsey, 2002: 257). However, the military refused to support the declaration. In 2001, the MPR then quickly convened to dismiss him and appointed Megawati to replace him.

Under Megawati, the process of democratic reform begun under Habibie and Wahid continued, albeit slowly and erratically. Megawati appeared to see her role mainly as a symbol of national unity, and she rarely actively intervened in government business. The military, disgraced at the time of Suharto's fall, regained much of its influence. Corruption continued to be pervasive, though Megawati herself was seldom blamed for this.

Although by 2004 Indonesia's economy had stabilised and partly recovered from the 1997 crisis, unemployment and poverty remained high, and there was considerable disappointment at Megawati's presidency.

Megawati was defeated in Indonesia's first direct presidential election, held in 2004, by SBY (Susilo Bambang Yudhoyono). Again, although heralded as a reformist, his administration also appears to have lost some momentum, as is discussed below.

1.2 Economic system

Indonesia is a member of the G-20 major economies. It has the largest economy in Southeast Asia. Indonesia has a market-based economy in which the government plays a significant role, primarily through the participation of state owned enterprises and subsidies. Efforts were made in 2007 to attract greater foreign investment.

The constitutional basis of Indonesia's economic system is contained in Article 33 of the Constitution, which reads:

1. The economy shall be structured as a common endeavour based upon the family principle.
2. Branches of production which are important to the state, and which affect the public's necessities of life, are to be controlled by the state.
3. The earth and water and the natural resources contained within them are to be controlled by the state and used for the greatest possible prosperity of the people.

The 'family principle' (*asas kekeluargaan*), as commonly described, takes a paternalistic view of the nation as a family and the state as head of that family. Reflecting a broad mix of Leftist, nationalist and anti-colonial ideals that were influential at the time the Constitution was first drafted in 1945, Article 33 grants the state exclusive control over natural resources and essential industries, with the expectation that the Indonesian people (rakyat) – particularly the poor – will benefit from them.

By reference to Article 33, well over one hundred State-Owned Enterprises (*Badan Usaha Milik Negara,* BUMN) have been established. Although purportedly established to provide essential goods and services at an acceptable cost (see Law No 19 of 2003 on State-Owned enterprises), in effect, they reserved monopolies in key industries and the exploitation of natural resources for the state – particularly Soeharto and his inner circle – allowing them to amass great wealth, without distributing the benefits in the way Article 33 seems to require.

When Soeharto stepped down in May 1998, Indonesia was in the midst of economic and monetary crisis and social and political unrest. The economic calamity – a flow-on from the collapse of the Thai baht in July 1997 that had caused many foreign investors to re-evaluate their portfolios in

Indonesia – unravelled much of the economic development achieved during Soeharto's time in power. Indonesia lost 13.5% of its GDP in 1997 alone, and its currency plummeted from Rp 2,000 per US dollar to almost Rp 20,000 by February 1998.

Prior to Soeharto stepping down, the Indonesian government had sought foreign financial assistance – primarily from the International Monetary Fund (IMF). As a condition for the injection of more than $US 10 billion from the IMF,1 the Indonesian government was required to commit to 'far-reaching' reforms, the content of which was effectively dictated by the IMF, leading a group of other multilateral financial institutions. These so-called 'conditionalities' required Indonesia to commit to restructuring and a range of key state enterprises so as to make them more efficient, including through privatization. Some of these attempted reforms have, however, been thwarted by the Constitutional Court, which has held that[1] laws purporting to allow the privatization of aspects of the electricity sector, for example, breached Article 33.[2]

Efforts have been made to improve the economy by enhancing legal infrastructure for investment, both foreign and domestic. In particular, in 2007 Indonesia's parliament enacted Law No 25 of 2007 on Capital Investment, which replaces a 1958 Investment Law and aims to make Indonesia more attractive so as to better compete with other countries in the region.

A key feature of the Law is its provision of 'facilities' or incentives, such as tax breaks and import duties exemptions and reductions, for particular types of investments. These include activities that employ large numbers, target undeveloped parts of Indonesia, protect the environment, involve technology transfer, and relate to high priority fields, such as infrastructure. The Law also attempts to make investment easier by allowing foreigners to hold land rights for longer periods than previously permitted (although the Law stopped short of allowing foreigners to obtain full ownership rights). The Law also provided for the Indonesian Investment Coordination Board (Badan Koordinasi Penanaman Modal) to become a 'one-stop shop' for investors seeking investment approvals, although as yet it is unclear whether this has been successful.

An oft-cited obstacle to increased foreign investment in Indonesia is legal uncertainty. As discussed below, many Indonesian courts are notoriously unreliable and said to be corrupt; and many Indonesian laws are poorly drafted and inconsistent with other laws (Thoolen, 1987). These, it is claimed, are obstacles that deter investors who also fear that courts will favour Indonesian parties in the event of disputes or will be otherwise unreliable in their decision-making.

Indonesia has bounced back remarkably from the economic crises. Although it has not yet returned to its average growth of around 7% from 1987–1997, it has weathered the Global Financial Crisis remarkably well and the world Bank projects Indonesian economy to near 6% growth in 2010-2011.

[1] See the IMF's website: <www.imf.org>.

[2] The text of this paragraph draws on (S Butt & Lindsey, 2010a; S Butt & Lindsey, 2010b).

Key economic indicators

GDP (2007): $433 billion; (2008 est.): $511 billion.

Annual growth rate (2007): 6.3%; (2008): 6.1%; (2009 est.): 3.5%. Inflation (2007): 6.6%; (2008): 11.1%; (2009 end-February): 8.6%. Per capita income (2008 est., PPP): $3,900.

Natural resources (11.0% of GDP): Oil and gas, bauxite, silver, tin, copper, gold, coal.

Agriculture (14.4% of GDP): *Products*--timber, rubber, rice, palm oil, coffee. *Land*--17% cultivated.

Manufacturing (27.9% of GDP): Garments, footwear, electronic goods, furniture, paper products.

Trade: *Exports* (2008)--$136.8 billion including oil, natural gas, crude palm oil, coal, appliances, textiles, and rubber.

Major export partners-- Japan, U.S., Singapore, China, Malaysia, and Republic of Korea. Imports (2008)--$128.8 billion including oil and fuel, food, chemicals, capital goods, consumer goods, iron and steel. *Major import partners*--Singapore, China, Japan.

Source: The World Bank.

1.3 Political system

Indonesia was an authoritarian state during most of Soeharto's 32 years in power (1966-1998). Components considered essential for democracy (see, for example, Dahl, 1971) were absent. National parliamentarians were either selected through tightly-controlled, rigged elections or directly appointed by the executive. Parliament was, therefore, beholden to the executive and little more than a rubber stamp for government – particularly Presidential – policy (Schwarz, 1994). The government, often with military support and by violent means, strictly confined activities of opposition parties, restricted political freedom (Lubis, 1993), controlled the media (Hill, 2009) and repressed dissent from civil society (Budiman, 1994).

There were also virtually no checks on the exercise of government power: government was, for the most part, not by law. Formally, a Constitution bound the state, but no judicial institution had power to hold the government to account for breaching it (Lev, 1978). In any event, most judges were corrupt and lacked independence from government (S Butt & Lindsey, 2010a). The result was a dysfunctional legal system that consistently failed citizens but served the government well, providing legal impunity for state actors, including military personnel who perpetrated human rights abuses.

The role of military deserves special note. The military held what was referred to as dwifungsi – or dual functions. The first was a military function. The second was a political function. Although in a political compromise Soeharto banned military personnel from voting in elections, he set aside 100 seats in the parliament for military personnel. The military became intricately involved in the affairs of the executive, at both central and regional levels.

This dual function was often justified by over-glorifying the role that the military had during the revolution against the returning Dutch. The argument, fostered by Soeharto was that the military deserved a role in politics because it had performed so well during the revolution. In fact, it was often claimed that, had the army not been so effective during the revolution, independence might have happened much later.

Since Soeharto's fall in 1998, however, radical electoral and constitutional reform has taken place, much of it successful. Indonesia has, by most accounts, transformed from one of Southeast Asia's most repressive and centralised political systems to its most decentralised, free and democratic (see www.freedomhouse.org). Indonesians now vote in more free, fair and highly-competitive elections than citizens of 'nearly any other democracy' (Ramage, 2007, p.136). In 2004 and 2009 more than 150 million citizens voted for two legislatures (their local parliament and the national parliament); a national-level regional representative body (the *Dewan Perwakilan Daerah*, or DPD); and the President and Vice-President.

Citizens have, from 2005, also participated in direct elections of heads of local governments in hundreds of cities and provinces.

With around 40 parties vying for several hundred national legislative seats, Indonesia's political landscape is highly fragmented. Parties must form factions and coalitions in order to obtain the majorities they need to pass legislation (Lindsey, 2002). Seats are at a high premium, making elections particularly competitive. Many electoral disputes have been brought by parties and candidates before Indonesia's Constitutional Court. After the 2004 and 2009 national legislative elections, for example, almost all competing political parties filed, between them, hundreds of objections with the Court, which reallocated around one dozen seats in each election. Most complaints alleged that 'irregularities' had taken place – from the deliberate and illegal (such as fraud) to the inadvertent and unavoidable (such as counting errors and logistical problems)). Yet, despite this heavy competition and contestation, and the questionable competence of Indonesia's Electoral Commission, Indonesia's post-Soeharto elections were widely considered free and fair, and took place without significant violence (Sukma, 2009).

Significant judicial reforms have also been made: in 2004, the courts were made institutionally independent of government. (Although credible allegations of widespread judicial corruption and incompetence persist as strongly and as sustained as ever.) A key component of the overhaul of the Indonesian polity was, in 2003, the establishment of a Constitutional Court. Although not itself immune from criticism, the Constitutional Court has proved itself to be Indonesia's most professional judicial institution, perhaps in Indonesian legal history (S Butt & Lindsey, 2010a). The Court has built a deserved reputation for being largely competent, reliable and impartial in its decision-making and in its independence from government.

The Constitutional Court it exercises 'constitutional review', that is, it ensures that the laws passed by Indonesia's national parliament comply with the Constitution, including rights commonly considered prerequisites to democracy, including freedom of speech and association. Using this power, the Court can also review laws which purport to prevent particular classes of candidates from competing in elections and can hear complaints about the constitutionality of electoral laws. It is the first Court in Indonesia's history to perform constitutional review and, by most accounts, has done so with professionalism and integrity unmatched by Indonesia's other judicial institutions. Its decisions seem to have been largely respected by government – a significant achievement in a political environment in which many politicians are still unaccustomed, some even openly hostile, to subjecting their laws to review of any sort.

Decentralisation[3]

In 1999, the year following President Soeharto's resignation amidst social, political and economic unrest, Indonesia embarked upon an ambitious program of decentralization, or 'regional autonomy'

[3] This section draws on Butt (2010).

(*otonomi daerah*) as it is commonly described. Soeharto's successor – his former Vice-President, Bacharuddin Jusuf Habibie – set in motion a process that, in little over one year, took Indonesia from being one of the world's most authoritarian and centralised states to one of its most democratic and decentralised.

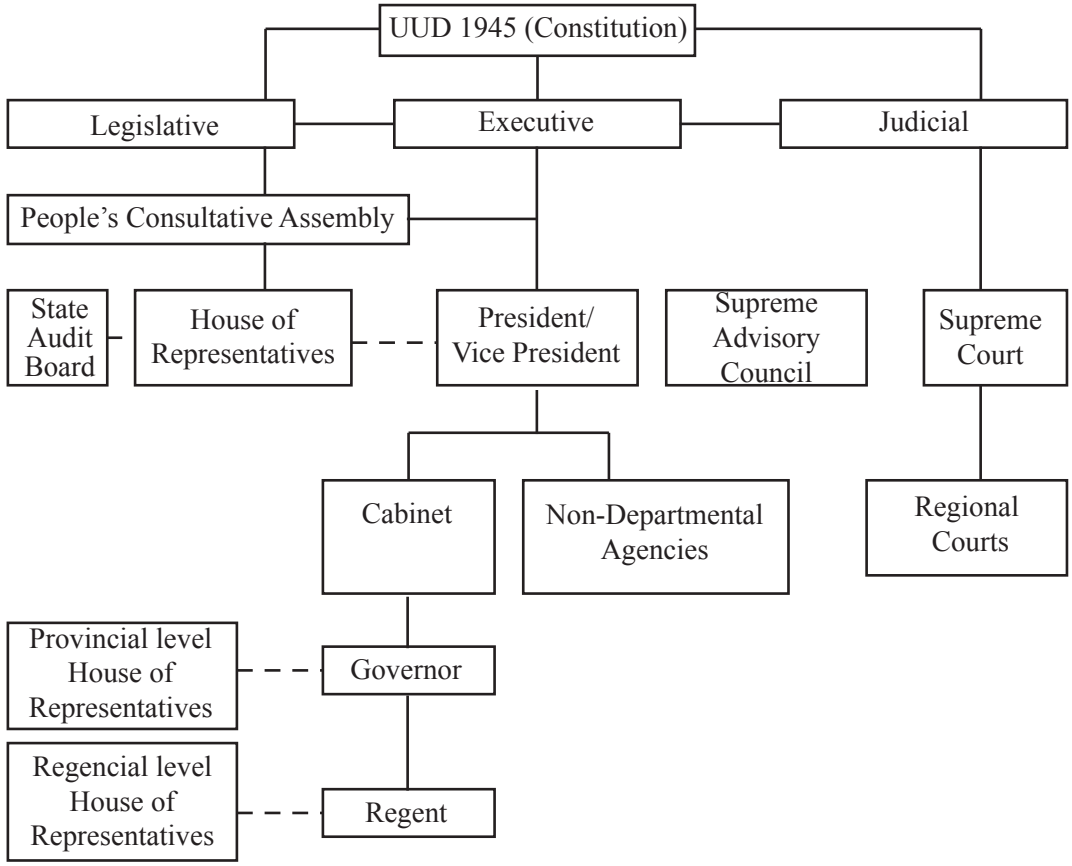
Under Soeharto, political power had been strongly concentrated within the pemerintah pusat (the central government); and the primary function of local governments – provincial, municipal, city and village – was to loyally support and implement national policies and directives. Well before Soeharto's resignation, this system had become deeply unpopular. Many provinces had long complained that Jakarta's economic, military and bureaucratic controls were excessive and that the fruits of Indonesia's natural resources, largely located in outer regions, were channeled almost entirely to the centre – particularly to the Soeharto family (Lindsey, 2004). Other provinces, such as West Papua and East Timor, claimed on historical grounds that they should never have been brought under the banner of the Indonesian state. Some provinces, including Aceh, West Papua, East Timor and Bali, claimed that they were so ideologically, culturally or religiously distinct from the rest of Indonesia that they should not be part of it. Resistance to central control – such as by the Free Papua Movement (*Organisasi Papua Merdeka*, or OPM) and the Independent Aceh Movement (*Gerakan Aceh Merdeka*, or GAM) – was often met with military force, leading to decades-long bloody civil wars.

The Soeharto regime was largely able to contain these objections to the parasitic and often brutal centralist state. But with Soeharto's fall, they could no longer be supressed. They became so strong and sustained that, without regional autonomy, Indonesia faced serious threats of separatism and, ultimately, disintegration. On one view, the only way the central government could retain any power at all was to put autonomy into effect (Ferrazzi, 2000).

Under decentralisation laws, power was granted to three levels of regional government – provinces (propinsi), districts or regencies (kabupaten) and municipalities (kota) – to make their own policies and local laws, usually referred to as Perda (Peraturan Daerah, or regional regulations). All of tiers of local government received both legislative and executive lawmaking powers. One result of regional autonomy was, therefore, an almost immediate proliferation of lawmaking bodies. Their numbers have continued to increase. In 1998 – the year before the first batch of decentralisation laws were passed – Indonesia had approximately 292 local governments outside Jakarta (Fitrani et al., 2005). Smaller government units, such as villages, were granted regulatory powers, albeit limited. In subsequent years, the number has grown as various provinces, municipalities and cities split into two or more. In 2003 – the year before a second batch of decentralisation laws – this number had grown to around 440 municipalities and districts. By 2009 there were 33 provinces and 484 municipalities and districts.[4] At time of writing, then, over 1000 bodies and individuals had lawmaking powers – at least 50% more than when regional autonomy was designed and put into place. This number is likely to increase further as provinces, municipalities, districts and other tiers of government are carved out from existing regions.

[4] see www.depdagri.go.id

Leadership and Authority



Source: http://www.abc.net.au/ra/federasi/tema1/indon_pol_chart_e.pdf

Aims, Objectives and Visions for the Justice Sector

While the author is unaware of specifically-declared objectives and visions for the justice sector, Article 1(3) of the Indonesian Constitution declares that Indonesia is to be a *Negara Hukum* (literally 'law state'). To the knowledge of the author, *negara hukum* has never been formally defined in regulation or by a court. It has, however, been variously articulated in a range of different contexts to require legality, that is, that the state (including government officials and institutions, the military and local governments) must itself comply with the law when performing their functions; that there must be an independent judiciary; and that fundamental human rights must be protected.

Institutions of State

The 1945 Constitution establishes a number of 'Superior Institutions of State'. These include the following:

President

The President is the Head of State and the Head of the Government and is assisted by the Vice President and his Ministers.

The President and Vice-President are directly elected as a pair and hold office for five years. Under the First Amendment to the Constitution, they can be elected for a maximum of two five-

year terms. The President has the power to submit draft legislation to the National Parliament for consideration and potential approval. Further, the President has broad law- making powers to issue government regulations (*peraturan pemerintah*) and presidential regulations (*peraturan presiden*) to implement legislation.

Before the fourth Amendment to the Constitution, the President could seek advice on matters of state from the Supreme Advisory Council (*Dewan Pertimbangan Agung*, or DPA). Now the equivalent institution is the Presidential Advisory Council (*Dewan Pertimbangan Presiden*), which is governed by Law No 19 of 2006 on the Presidential Advisory Council. On 25 January 2010, President SBY appointed new members to the Council, including former Constitutional Court Chief Justice Jimly Asshiddiqie.

People's Consultative Council

The 695-member People's Consultative Council (*Majelis Permusyawaratan Rakyat,* or MPR) includes all 550 members of the People's Representative Council (DPR) (the House of Representatives) plus 130 'regional representatives' elected by the twenty-six provincial parliaments and sixty-five appointed members from societal groups. It meets very irregularly, mainly to inaugurate and impeach the President, and to amend the Constitution.

The MPR used to be able to pass decrees (*Ketetapan MPR*) which had authority second only to the Constitution itself. Now it no longer has these 'lawmaking' powers.

National parliament

The national parliament (*Dewan Perwakilan Raykat,* or DPR) is the premier legislative institution. It has 550 members and now consists entirely of elected representatives. Its members are automatically also members of the MPR. In addition to enacting legislation, it also reviews the actions of the Executive and holds the President and ministers accountable for their actions and policies. Statutes are enacted by the Parliament (DPR) and signed into law by the President. Recent constitutional amendments prevent the President from refusing to approve a DPR-approved Bill. The amendments provide that if the President does not sign a Bill approved by the DPR within 30 days, the Bill is automatically passed into law.

Regional Representatives Council

The Regional Representatives Council (*Dewan Perwakilan Daerah* (DPD) was established during the third round of amendments to Indonesia's Constitution in 2001. It is primarily concerned with representing the interests or aspirations of sub-national governments. The DPD can suggest laws to the DPR on issues relating to regional autonomy, centre-region relations, financial balance and natural resource management. The DPD can be involved in DPR deliberations about laws that fall within its jurisdiction, set out above. It can also monitor the implementation of DPR legislation relating to regional affairs. DPD members are locally elected. Each of Indonesia's 34 provinces is represented by 4 people. DPD members are also members of the MPR.

However, the DPD's powers are limited in three important ways. First, any Bills the DPD submits must deal with regional autonomy, central-regional government relations, formation, delineation and mapping of regions, natural and other economic resource management, and other matters relating to the balance between central and regional governments. It cannot propose legislation on issues falling outside these issues. Second, although the DPD can suggest Bills to the DPR for approval, it cannot ask the DPR to draft and discuss a Bill. Only a Plenary Session of the DPR can determine whether a draft can formally be put to the DPR in line with the DPD's suggestion. Third, the DPD cannot block legislation.

State Audit Board

Under Article 23E of the Constitution, the State Audit Board (*Badan Pemeriksa Keuangan*) is to conduct official examinations of government financial accounts. The findings of the Board are submitted to the House of Representatives, the Regional Representative Council, and the Regional House of Representatives in accordance with their respective authorities.

Judicial institutions

Indonesian Constitution (1945), as amended.

Chapter IX. Judicia Power

Article 24

The judicial power is the independent power to maintain a system of courts with the objective of upholding law and justice.

The judicial power is exercised by a Supreme Court and the courts below it in the respective environments of public courts, religious courts, military courts, administrative courts and by a Constitutional Court.

Other bodies with functions that relate to judicial power are regulated by law.

Article 24A

The Supreme Court has the authority to hear matters at the level of cassation, to review regulations that are below legislation against the legislation, and it has other authority as determined by law.

Justices of the Supreme Court must possess integrity and irreproachable character and be just, professional, and have experience in the field of law.

Candidates for Justices of the Supreme Court shall be submitted by the Judicial Commission to the National Parliament for approval and then be confirmed by the President.

The Chief Justice and Deputy Chief Justice of the Supreme Court shall be elected from and by the Justices of the Supreme Court.

The structure, position, membership and procedures of the Supreme Court and the legal bodies below it shall be regulated by law.

Article 24B

An independent Judicial Commission shall have the authority to suggest the appointment of Justices of the Supreme Court and shall have further authority to protect and uphold the honour, dignity and the good behaviour of judges.

The members of the Judicial Commission must possess knowledge and experience in the field of law, integrity, and irreproachable character.

The members of the Judicial Commission are appointed and removed by the President with the agreement of the Dewan Perwakilan Rakyat.

The structure, position and membership of the Judicial Commission shall be regulated by law.

Article 24C

The Constitutional Court has the authority to hear matters at the lowest and highest levels and to make final decisions in the review of legislation against the Constitution, the settlement of disputes regarding the authority of State bodies whose authority is given by the Constitution, the dissolution of political parties, and the settlement of disputes concerning the results of general elections.

The Constitutional Court has the duty to adjudicate on the opinion of the National Parliamentregarding allegations of misconduct by the President and/or the Vice President in accordance with the Constitution.

The Constitutional Court is comprised of nine constitutional judges who are appointed by the President, of whom three are proposed by the Supreme Court, three by the National Parliament, and three by the President.

The Chairperson and Vice Chairperson of the Constitutional Court are elected from and by the constitutional judges.

Constitutional judges must possess integrity and irreproachable character, be just, be statespersons who fully understand the Constitution and administrative law, and must not hold government office.

The appointment and removal of constitutional judges, the procedural rules of the Constitutional Court and other provisions regarding the Constitutional Court shall be regulated by law.

Translation source: Lindsey (2002).

Constitutional Structures

The Japanese allowed and facilitated the establishment of a Committee for the Preparation of Indonesian Independence (*Panitia Persiapan Kemerdekaan Indonesia*), a primary task of which was to devise Indonesia's first constitution. The Committee hosted vigorous debate, represented by three strains of opinion, as to what should be the nature of the new Indonesian state (Yamin, 1959; Nasution, 1992). As is discussed below, these strains of opinion re-emerged in constitutional debates from 1955-59, when a new constitution was being drafted, and again in 1999-2002, when constitutional amendments were made.

The first was that Indonesia should have a very strong state – an 'integralistic state' – in which the state and the people were one 'organic whole'. Although not explicitly labelled as such, this notion strongly resembled authoritarianism: it required that citizens to unquestioningly obey state instruction. In such a conception there was no room – indeed no need – for mechanisms to challenge state action, including through judicial review by an independent judiciary (Lubis, 1993). The second was that Indonesia should be an Islamic state, or that, at the very least, Indonesian Muslims should be required, by the Constitution, to adhere to Islamic law (Hosen, 2007; Salim, 2008). The third strain of opinion was that Indonesia should adopt Western-style liberal democracy, within which, for instance, state action would be subject to judicial review, the judiciary would be independent, and human rights would be protected (Lev, 1966; Feith, 1962).

Soekarno declared Indonesia's independence and became the nation's first President. The following day, he announced Indonesia's 1945 Constitution. In the event, the constitutional model chosen was somewhat ambiguous. On the one hand, the general Elucidation of the 1945 Constitution states that 'Indonesia is a State based on law (*Rechsstaat*), not on power (*Machtsstaat*)'. On the

other hand, the Constitution did not clearly provide for the mechanisms often considered essential to the rule of law, such as an independent judiciary. Further, intended as a document that would give significant power to sufficient authority and flexibility to defend the new nation-state against its enemies, particularly the returning Dutch colonial ruler (Liddle, 2002).

As for Islam, in the lead-up to the declaration of independence, Muslim groups had successfully lobbied for the inclusion of the so-called 'Jakarta Charter' (*Piagam Jakarta*) in the final Draft of Indonesia's first independent Constitution. This Charter required Muslims to follow Islamic law (*Syariah*). The Charter was, however, quietly dropped from the final version of the Constitution of 1945, apparently to appease non-Muslim groups – including Christians in Eastern Indonesia – who threatened to break away even before the state was formally established if the Charter was retained; and also to allay concerns about the wholesale imposition of Islamic law held by Indonesia's more moderate Muslims, said to constitute a clear majority. The Charter's rejection, however, was, and is still, seen by some Muslim groups as 'the' great betrayal of Islam since independence.[5]

With the dropping of the Charter, Indonesia did not, however, become an entirely secular state. *Pancasila* – Indonesia's state philosophy of five principles – was included in the preamble to the 1945 Constitution, partly to appease those who advocated in favour of the Jakarta Charter. *Pancasila* has as its first principle *Ketuhanan Yang Maha Esa* (Belief in a Unitary Deity). *Pancasila* is the state philosophy and 'the source of all sources of law,' (Lawmaking Law No. 10 2004, art. 2) and, therefore, requires government and citizens alike to give effect to this principle. The very founding principles of the state, therefore, appear to establish adherence to one's religious beliefs as both a right and an obligation of Indonesian citizenship. They also appear to compel the government to not only safeguard religious freedom but to utilise the machinery of the State to encourage and promote the exercise of faith, including Islam. Because *Pancasila* mandates such a role for religion in matters of state, the ideological door has remained ajar for some Muslim groups to continue seeking a more prominent place for Islamic principles in government and law. Furthermore, many Indonesian Muslims regard Islamic doctrine as having independent legal potency, regardless of its recognition, or lack thereof, by the state.[6]

Debates over the place of Islam within the Indonesian state, and calls for the reintroduction of the Jakarta Charter, have, therefore, continued since 1945. For example, Indonesia's Constituent Assembly (*Konstituante*) - established in the mid-1950s to devise a new Indonesian Constitution - was consumed with the issue. More recently, in 1999-2000, when Indonesia's People's Consultative Council was deliberating proposed amendments to the 1945 Constitution, some Muslim members pushed, again unsuccessfully, for the entrenchment of provisions resembling the Jakarta Charter.[7]

Post-Soeharto Constitutional Reform[8]

The demise of President Soeharto, and the advent of Indonesia's *reformasi* movement, has paved the way for constitutional reform. From 1999 to 2002 Indonesia's People's Consultative Council (MPR) passed four rounds of amendments – one each year. The substance of the constitutional amendments was extensive. The result was a radically revised constitution and a liberal-democratic political system.

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[5] This paragraph draws on Butt (2010).

[6] This paragraph draws on Butt (2010).

[7] This paragraph draws on Butt (2010).

[8] This section draws on Lindsey (2002).

The first amendment

The First Amendment was passed on 19 October 1999 following the 1999 elections – which were widely considered to have been free and fair. Importantly, the MPR which sat after these elections, therefore, was one of the most democratically elected in Indonesian history. It thus had a strong mandate to introduce constitutional reforms that would prevent the emergence of another dictatorial Presidency.

Prior to the amendments, the 1945 Constitution did not clearly establish either a parliamentary or a presidential political system but instead created a blended and vague hybrid that relied on the notion of 'distribution of powers' from the MPR (as the superior institution of state), through the President to the bureaucracy and to the DPR. The separation of powers and its system of checks and balances between the judiciary, legislature and executive necessary for a democratic political system was absent.

Also, under the old 1945 Constitution, the President was formally subservient to the MPR: the MPR appointed the President. But the MPR met only every 5 years and had little else to do than appoint the President, which under Soeharto involved little more than rubber stamping. The MPR also proclaimed the general course of the state, as we discussed earlier. But this was in very vague, wafty, terms.

In practice, then, the President had lots of power. He was both head of state and head of government, had an unlimited number of 5 year terms, could make statutes and the regulations to implement them, could form a Cabinet and had broad emergency powers. The President and his ministers were not accountable to the DPR – only to the MPR which, as I said, met only every 5 years.

This President-heavy system was tempered in the first round of amendments of 1999. Article 7 limits any future president from holding office for more than two 5-year terms (Article 7). This was clearly a response to the 23 year reign of Soekarno and the 30 years enjoyed by his successor, Soeharto.

Amendments also restricted the president's legislative powers in favour of the legislature. The old provision gave the President power to '…make legislation with the agreement of the DPR'. The President now has power only to '…introduce Bills into the DPR' – a power that the President now shares with all DPR members.

The second amendment

On 18 August 2000, the Second Amendment was enacted. Under this amendment, the President's so-called 'Legislative powers' were further curtailed. The new Article 20 provides that bills come into force automatically 30 days after being passed by the DPR, even if the president does not endorse them.

Significantly, it was also agreed that the appointment of members of the DPR would be completely abolished over time, thus ending the longstanding practice of reserving seats for the military first permitted by Soeharto.

The second amendment involved also the dramatic expansion of human rights provisions in the Constitution to embrace most of the Universal Declaration of Human Rights. Chapter XA of the constitution, which contains these rights, is a lengthy and impressive passage, granting a full range of protections extending well beyond those guaranteed in most developed states. These range from the right to have a family; the right to self- development; the right to collective action; the right to education; a right against violence and discrimination; a right to equal opportunity; a right to access to information and so forth. The new Article 28I(1), however, permits the human rights of some to be set aside in order to protect the human rights of others.

The second Amendment also strengthened the post-Soeharto regional autonomy process through the grant of formal constitutional status for local governments with elected parliamentary bodies. These were given new and broad law-making powers restricted only by the reservation of a few residual powers for the national government (Article 18).

The third amendment

The Third Amendment, enacted a year after the Second Amendment, was also very significant. It:

Outlines the impeachment processes – that is, processes to dismiss the president. Curtailed the MPR's powers to pass decrees and set state policy. Established the *Dewan Perwakilan Daerah* (DPD), discussed above. Provided for the establishment of the Constitutional Court and the Judicial Commission.

The fourth amendment

The Fourth amendment was the final set of amendments, and, according to some members of parliament, will be the last until at least 2012.

In the Fourth Amendment, the MPR voted to strip itself of its power to appoint the President. Now, the President and Vice-Presidents directly elected by the people from pairs of candidates proposed by political parties, on the basis of a minimum requirement that the winners score more than 50% of the vote, plus at least 20% of the votes in at least half of the Provinces of Indonesia. It was agreed that if none of the candidates receive an absolute majority in the first round of a direct election, then a second direct election would be held between the two highest scoring candidates.

The national ideology and 'source of all sources of law': Pancasila

This is the Indonesian state ideology, which embodies a commitment to the following principles:

1. *Ketuhanan Yang Maha Esa* (Belief in Unitary Deity);
2. *Kemanusiaan Yang Adil dan Beradab* (A Just and Civilised Humanity);
3. *Persatuan Indonesia* (The Unity of Indonesia);
4. Demokrasi; and
5. *Keadilan Sosial* (Social Justice).

Soekarno introduced *Pancasila* before the Investigating Committee for the Preparation for Independence in early June 1945. The Constitution does not refer to *Pancasila* by name, but sets out its five principles. Largely because these five principles are contained in the Preamble, many Indonesian legal scholars and successive governments have claimed that the philosophy has more authority than the Constitution itself and is the 'source of all sources of law'. This claim is made even in the Law which sets out the hierarchy.

Pancasila is said to be the ultimate source of legal authority and legitimacy, or the grundnorm of Indonesian law. According to Daman (1993), *Pancasila* is the theoretical determinant of the validity of law, and Indonesian laws are required to adhere to it in spirit, content, and implementation. Most Indonesian jurists consider *Pancasila* unalterable by way of contemporary legal process.

There are real problems with *Pancasila* occupying this glorified position within Indonesia's legal structure. *Pancasila* is a vague set of precepts; its wording is 'long on rhetoric and sentiment, but short on specific prescriptions' (Morfit, 1981). To use it effectively, someone – preferably a court – would need to set out in some detail the implications of each *Pancasila* principle. This might be a difficult task because *Pancasila*, has been open to subjective interpretation by governments since its inception. As such, it has been used to justify very different laws, policies and government actions. To apply Pancasila, then, the Court first needs to choose which version of the philosophy to adopt.

For example, *Pancasila* has formally underpinned all three post-independent Indonesian constitutions. Yet, despite sharing the same grundnorm, these constitutions have established substantially different systems of government. Both the 1949 and 1950 Provisional Constitutions were 'liberal democratic' and formally guaranteed a substantial number of human rights. However, despite also having *Pancasila* in its Preamble, the pre-amended 1945 Constitution was certainly not 'liberal-democratic'. It provided almost unfettered executive power and discretion, particularly to the President, and contained very few human rights provisions. In short, it established an authoritarian system.

At best *Pancasila's* vagueness gives it flexibility, enabling its interpretation to change legitimately as economic, social and political conditions develop over time. Yet its flexibility renders it so lacking in certainty that its application is unpredictable, making it unreliable as a basis of state without further embellishment.

Second, in practice, *Pancasila* has been primarily of political, not legal, importance. Pancasila was *primarily* used as an instrument to justify government action rather than as a genuine determinant of the validity of law and government action. And because it lacked precision, its five principles were rarely, if ever, explicitly applied in government policy, law or judicial decisions. Government officials, judges and lawyers rarely discussed what *Pancasila* meant in practice for law and decision-making. Rarely, if ever, did they attempt to explain how a particular law or government practice reflected *Pancasila* principles, nor argue that it did not. *Pancasila* was thereby obscured and mystified, leaving the government with the exclusive power to determine its substantive meaning and to use it for its own purposes (Lubis, 1993: 8). Indeed, in most cases, the courts tended to avoid a substantive discussion of *Pancasila.*

The fading of Pancasila since reformasi

Since the fall of Soeharto, important structural reforms have been made to Indonesia's judicial system. These judicial reforms have accompanied a range of statutory and constitutional amendments, apparently aimed at establishing a liberal democratic system which embraces the separation of powers. These include lifting the formal status of the parliament from below that of both the President and the MPR to above them. This has been achieved largely by strengthening parliament's role from that of a rubber- stamp to an instigator of lawmaking, and by reducing the President's legislative powers; abolishing unelected military and police appointees to the DPR; and introducing mechanisms for direct presidential and vice- presidential elections.

The effective allocation of the power of the state to a number of sources – particularly a democratically-elected parliament and the judiciary – has dismantled the key feature of the integralistic state: political power concentrated in the hands of the President and his elite. Further, with the demise of the Soeharto regime and the consequent breakdown of the integralistic state, *Pancasila* has almost totally disappeared from political discourse due to a 'degradation of credibility'. It now appears accepted that the New Order 'betrayed' the values of *Pancasila*, rendering the ideology nothing more than political rhetoric used to promote conformity and to stifle dissent. As President Susilo Bambang Yudhoyono has himself stated:

Nowadays, if we discuss *Pancasila*, the 1945 Constitution, and unity of Indonesia, most people will quickly associate us with the New Order regime, which limited human rights and was an anti-reform movement (Jakarta Post, 2 June 2006).

Although *Pancasila* is still recognised as having formal legal prominence, the 'fading' of *Pancasila* from public discourse has been accompanied by some reduction in its standing in formal legal

documents – something that would have been unthinkable during the Soeharto era. For example, as I mentioned earlier, during his brief time as President in 1998-1999, Habibie had the 1985 'sole foundation' statutes rescinded. Further, for the first time in Indonesian history, an Indonesian state institution – the 'highest' state institution at the time, the MPR, no less – was openly critical of *Pancasila*. In MPR Decree No V of 2000 on Stabilising National Unity, the MPR noted that one of the causes of the post-Soeharto 'crisis' was that *Pancasila*, the ideology of state, was interpreted unilaterally by those in power and was misused to maintain power (Chapter II, Clause 2).

Later in the Decree (Chapter IV, Clause 2), the MPR stated that one way to 'effect reconciliation to stabilise national unity', would be to make *Pancasila* 'an open state ideology' by allowing public debate and dialogue so that *Pancasila* can 'respond to the challenges of Indonesia's future'. In another Decree, the MPR decided to stop the indoctrination of *Pancasila* in schools and universities, because the ideology was said to be 'no longer consistent with developments'.

The discarding of the integralistic state concept through the new constitutional separation of powers has, therefore, been reinforced by the decline of *Pancasila*, through which the integralistic state ideology itself was conveyed by the Soeharto regime. Arguably, then, reformasi's democratic and institutional reforms, and the consequent dismantling of the ideological competitors that propped up Soeharto's opposition to the rule of law, have helped create a climate in which the arguments in favour of judicial independence and of judicial review could not be dismissed by the government as simply a disruptive folly.

1.4 Other Actors

See 1.3, above.

Conclusion

Indonesia has made great progress in the past few years towards reform of its legal system – particularly its judicial system. However, this progress has been made from a low base and Indonesia is still struggling with the effects of a number of legacies that have undermined the functioning of the legal system. Emerging from colonialism with an inherited system of Dutch law, arguably ill-suited for the new Indonesian state, the efficacy of the legal system was systematically eroded by Soekarno and Soeharto. The result was underfunded, largely-corrupt, low-competence and dependent legal institutions that served the government well, but citizens poorly, particularly in disputes against the government.

In this context, many of the post-Soeharto reforms have been nothing short of remarkable. A functioning Constitutional Court, a truly independent judiciary, true electoral democracy, the formal removal of the military from politics and radical decentralisation would have been unthinkable a decade ago.

2. Criminal Investigation

Indonesia's Code of Criminal Procedure (KUHAP or *Kitab Undang-undang Hukum Acara Pidana* (Law No 8 of 1981)) is the primary law dealing matters of criminal procedure, including the respective roles of the police and prosecutors, the law on arrests, warrants, detention, searches, legal aid and challenging illegal arrests and detentions. There are, however a number of other laws that are relevant to criminal investigations. A number of 'special' criminal laws regulate specific crimes and give police and prosecutors greater investigative powers to pursue those specific crimes. Law No 2 of 2002 on the Police Force and Law No 16 of 2004 on the Prosecution.

The Indonesian police are responsible for the majority of investigations under Indonesia's Criminal Code (the KUHP). Police will usually begin their investigations by determining whether a crime has in fact been committed (referred to as the *penyelidikan* stage) (Article 4 of the KUHAP).

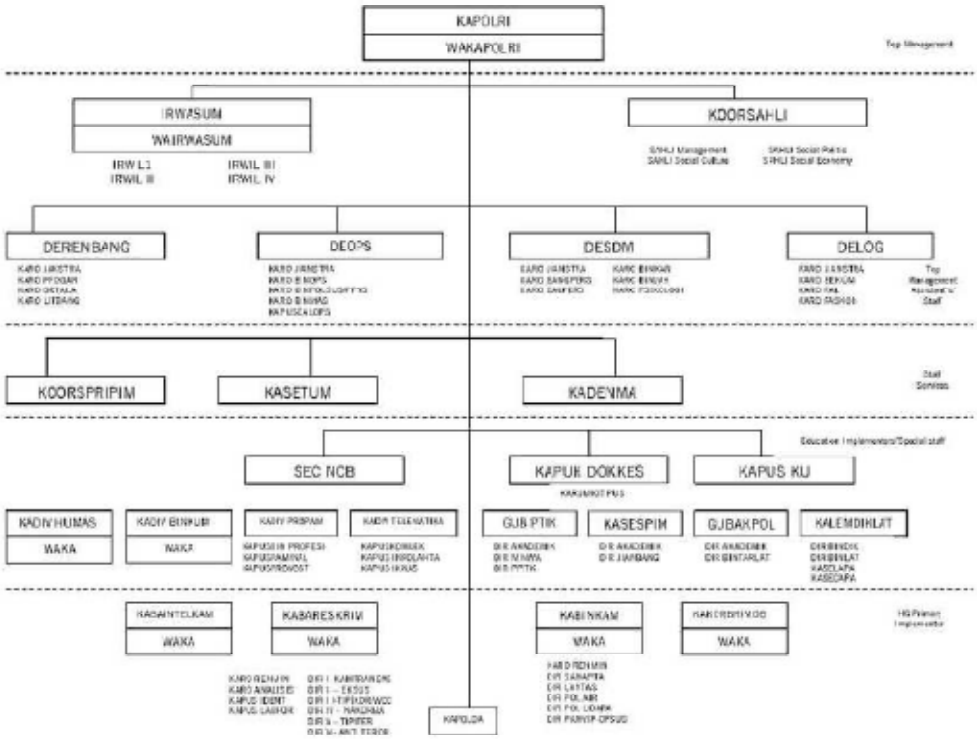
Further investigations (*penyidikan*) to gather evidence and witness statements may be conducted by the police and/or other civil servants (including prosecutors) (Article 6(1)) (Assegaf, 2002). The role of civil servant investigators (PPNS – *Penyidik Pegawai Negeri Sipil*) is discussed below at 2.6 Criminal Investigators.

2.1 Organisation

Levels, units, investigation agencies

Government Regulation No. 23 year 2007 on the Jurisdiction of the National Police sets out the relative jurisdiction s of different levels of the police force. The national police headquarters (*kepolisian markas besar*) has jurisdiction over the whole of Indonesia; the regional police force (*kepolisian daerah*) have jurisdiction at the provincial level; the resort police force (*kepolisian resort*) have jurisdiction over districts/cities; and the sectoral police force (*kepolisian sector*) have jurisdiction at the sub-district level (Article 4 of Government Regulation No. 23 year 2007).

Appendix: 1: INP Organisational Structure



KA	CHIEF/HEAD
WAKA	DEPUTY
KARO	HEAD OF BUREAU
KADA	HEAD OF BODY
KADIV	HEAD OF DIVISION
KAPOLRI	CHIEF OF INP
WAKAPOLRI	DEPUTY CHIEF OF INP
IRWASUM	GENERAL SUPERVISION INSPECTOR
WAIRWASUM	DEPUTY GENERAL SUPERVISION INSPECTOR
IRWIL	REGIONAL INSPECTOR
KOORSAHLI	EXPERT STAFF COORDINATOR
SAHLI	EXPERT STAFF
DEREMBANG	DEPUTY OF PLANNING & DEVELOPMENT
KARJAKSTRA	HEAD OF POLICY & STRATEGY BUREAU
KARJPROGAR	HEAD OF PROGRAM & BUDGET BUREAU
KARJ ORTALA	HEAD OF ORGANISATIONAL PROCEDURES BUREAU
KARJ LITBANG	HEAD OF RESEARCH & DEVELOPMENT BUREAU
DEOPS	DEPUTY OF OPERATIONAL
KARJ JIANSTRA	HEAD OF REVIEW & STRATEGY BUREAU
KARJ BINOPS	HEAD OF OPERATIONAL MANAGEMENT BUREAU
KARJ BINPOLSUS/PPNS	HEAD OF SPECIAL POLICE/CIVILIAN EMPLOYEE INVESTIGATOR BUREAU
KARJ BINMAS	HEAD OF COMMUNITY MANAGEMENT BUREAU
KAPUSDALOPS	HEAD OF OPERATIONAL CONTROL CENTRE
DESDM	DEPUTY OF HUMAN RESOURCES
KARJ JIANSTRA	HEAD OF REVIEW & STRATEGY BUREAU
KARJ BANGPERS	HEAD OF PERSONNEL DEVELOPMENT BUREAU
KARJ DALPERS	HEAD OF PERSONNEL CONTOL BUREAU
KARJ BINKAR	HEAD OF CAREER MANAGEMENT BUREAU
KARJ BINJAH	HEAD OF WELFARE MANAGEMENT BUREAU
KARJ PSIKOLOGI	HEAD OF PYCHOLOGY BUREAU
DELOG	DEPUTY OF LOGISTICS
KARJ JIANSTRA	HEAD OF REVIEW & STRATEGY BUREAU
KARJ BEKUM	HEAD OF GENERAL SUPPPLIES BUREAU
KARJ PAL	HEAD OF EQUIPMENT BUREAU
KARJ FASKON	HEAD of CONSTRUCTION FACILITY BUREAU
KOORSPRIPIM	TOP MANAGEMENT PERSONAL ASSISTANT COORDINATOR
KASETUM	HEAD OF GENERAL SECRETARIATE
KADENMA	HEAD OF HQ DETACHMENT
SES NCB	NCB SECRETARY
KAPUS DOKKES	HEAD OF MEDICINE & HEALTH CENTRE
KARJMKIT PUS	HEAD OF CENTRAL POLICE STATION
KAPUS KU	HEAD OF FINANCE CENTER
KADIV HUMAS	HEAD OF PUBLIC RELATIONS DIVISION
KADIV BINKUM	HEAD OF LEGAL MANAGEMENT DIVISION
KADIV PROPAM	HEAD OF PROFESSION AND SECURITY DIVISION
KAPUSBIN PROFESI	HEAD OF PROFESSION MANAGEMENT CENTER
KAPUSPAMINAL	HEAD OF INTERNAL SECURITY CENTER
KAPUSPROVOST	HEAD OF PROVOST CENTER
KADIV TELEMATIKA	HEAD OF TELECOMMUNICATION & INFORMATICS DIVISION
KAPUSKOMLEK	HEAD OF ELECTRONICS COMMUNICATION DIVISION
KAPUS INFOLAHTA	HEAD OF INFORMATION & DATA PROCESSING CENTER
KAPUS IKNAS	HEAD OF NATION CRIMINAL INFORMATION CENTER
GUB PTIK	GOVERNER OF POLICE SCIENCE COLLEGE
DIR AKADEMIK	DIRECTOR OF ACADEMICS
DIR MINWA	DIRECTOR STUDENT ADMINISTRATION
DIR PPITK	DIRECTOR OF POLITICAL SCIENCE & TECHNOLOGY REVIEW CENTER
KASESPIM	HEAD OF STAFF AND LEADERSHIP SCHOOL
DIR AKADEMIK	DIRECTOR OF ACADEMICS
DIR JIANBANG	DIRECTOR OF REVIEW AND DEVELOPMENT
GUBAKPOL	GOVERNER OF POLICE ACADEMY
DIR AKADEMIK	DIRECTOR OF ACADEMICS
DIR BINTARLAT	DIRECTOR OF CADET &TRAINING MANAGEMENT
KALEMDIKLAT	HEAD OF EDUCATION & TRAINING INSTITUTION
DIR BINDIK	DIRECTOR OF EDUCATION MANAGEMENT
DIR BINLA	DIRECTOR OF TRAINING MANAGEMENT
KASELAPA	HEAD OF OFFICER ADVANCED SCHOOL
KASECAPA	HEAD OF THE OFFICER'S CADET SCHOOL
KABINTELKAM	HEAD OF INTELLIGENCE & SECURITY BODY
KABARESKRIM	HEAD OF CID
KARO RENMIN	HEAD OF PLANNING & ADMINISTRATION BUREAU
KARO ANALISIS	HEAD OF RESEARCH BUREAU
KAPUS IDENT	HEAD OF IDENTIFICATION BUREAU
KAPUS LABFOR	HEAD OF FORENSICS LABORATORY CENTRE
DIR KAMTRANSAS	DIRECTOR OF SECURITY AND TRANSNATIONAL CRIMES
DIR EKSUS	DIRECTOR OF FINANCIAL AND SPECIAL CRIMES
DIR TIPIKOR/WCC	DIRECTOR OF CORRUPTION & WHITE COLLAR CRIMES
DIR NAKOBA	DIRECTOR OF NARCOTICS
DIR TIPITER	DIRECTOR OF SPECIFIC CRIMES
DIR ANTI TEROR	DIRECTOR OF ANTI-TERROR
KABINKAM	HEAD OF UNIFORMED POLICE
KARO RENMIN	HEAD OF PLANNING & ADMINISTRATION BUREAU
DIR SAMAPTA	DIRECTOR OF PATROL
DIR LANTAS	DIRECTOR OF TRAFFIC
DIR POL AIR	DIRECTOR OF MARINE POLICE
DIR POL UDARA	DIRECTOR OF AIRFORCE POLICE
DIR PAMVIP-OPSUS	DIRETCOR OF VIP SECUROTY-SPECIAL OPERATIONS
KAKORBRIMOB	HEAD OF MOBILE BRIGAE CORPS
KAPOLDA	HEAD OF REGIONAL POLICE

Amnesty International (2008: S. 72-73).

Kotak 3 **Struktur Organisasi dan Kepangkatan Polri**

Anggota Polri kini berjumlah sekitar 250 juta, yang mana rasio jumlah Polri dengan penduduk adalah sekitar 1:675. Hal ini belum mencapai pada tataran ideal yang digariskan PBB yakni 1: 500. Berikut adalah perubahan kepangkatan Polri sebelum reformasi dan sekarang beserta lambang pangkatnya.

Polisi Dulu	Polisi Sekarang	
Perwira Tinggi		
Jenderal Polisi	Jenderal Polisi	
Letnan Jenderal Polisi	Komisaris Jenderal Polisi	
Mayor Jenderal Polisi	Inspektur Jenderal Polisi	
Brigadir Jenderal Polisi	Brigadir Jenderal Polisi	
Perwira Menengah		
Kolonel	Komisaris Besar	
Letnan Kolonel	Ajun Komisaris Besar Polisi	
Mayor	Komisaris Polisi	
Perwira Pertama		
Kapten	Ajun Komisaris Polisi	
Letnan Satu	Inspektur Polisi Satu	
Letnan Dua	Inspektur Polisi Dua	
Bintara Tinggi		
Pembantu Letnan Satu	Ajun Inspektur Polisi Satu	
Pembantu Letnan Dua	Ajun Inspektur Polisi Dua	
Bintara		
Sersan Mayor	Brigadir Polisi Kepala	
Sersan Kepala	Brigadir Polisi	
Sersan Satu	Brigadir Polisi Satu	
Sersan Dua	Brigadir Polisi Dua	
Kopral		
Kopral Kepala	Ajun Brigadir Polisi	
Kopral Satu	Ajun Brigadir Polisi Satu	
Kopral Dua	Ajun Brigadir Polisi Dua	
Prajurit Kepala	Bhayangkara Kepala	
Prajurit Satu	Bhayangkara Satu	
Prajurit Dua	Bhayangkara Dua	

Sumber: Surat Keputusan Kapolri No. Pol: Skep/1259/X/2000, Survei atas Kinerja Polisi: Layanan Membaik, Citra Masih Buruk dari http://www.freelists.org/post/ppi/ppiindia-Layanan-Membaik-Citra-Masih-Buruk dan http://jogja.polri.go.id/index.php?menu=profile&sub=kepangkatan

Source: Bambang Widodo Umar (2009) Reform of the Indonesian Police (Reformasi Kepolisian Republik Indonesia), IDSPS and DCAF, available at: http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=104827&nav1=5.

Translation table

Ajun Brigadir Polisi	Adjutant to Police Brigade
Ajun Brigadir Polisi Dua	Adjunct to Police Brigadier II
Ajun Brigadir Polisi Satu	Adjunct to Police Brigadier I
Ajun Inspektur Polisi Dua	Adjunct to Police Inspector II
Ajun Inspektur Polisi Satu	Adjunct to Police Inspector I
Ajun Komisaris Besar Polisi	Adjunct Lead Commissioner of Police
Ajun Komisaris Polisi	Adjunct Commissioner of Police
Bhayangkara Dua	Private II
Bhayangkara Kepala	Head of Privates
Bhayangkara Satu	Private I
Bintara	Petty officer
Bintara	Officer
Bintara Tinggi	Warrant officer
Bintara Tinggi	Warrant officer
Brigadir Jenderal Polisi	Brigadier General
Brigadir Jenderal Polisi	Brigadier General
Brigadir Polisi	Police Brigadier
Brigadir Polisi Dua	Police Brigadier II
Brigadir Polisi Kepala	Police Chief Brigadier
Brigadir Polisi Satu	Police Brigadier I
Inspektur Jenderal Polisi	Inspector General of Police
Inspektur Polisi Dua	Police inspector II
Inspektur Polisi Satu	Police Inspector I
Jenderal Polisi	Police General
Jenderal Polisi	Police General
Kapten	Captain
Kolonel	Colonel
Komisaris Besar	Lead Commissioner
Komisaris Jenderal Polisi	Commissioner General of Police
Komisaris Polisi	Police commissioner
Kopral	Corporal
Kopral	Corporal
Kopral Dua	Corporal II
Kopral Kepala	Head Corpral
Kopral Satu	Corporal I
Letnan Dua	Second Lieutenant
Letnan Jenderal Polisi	Lieutenant General of Police

Letnan Kolonel	Lieutenant colonel
Letnan Satu	First lieutenant
Mayor	Major
Mayor Jenderal Polisi	Major-General of Police
Pembantu Letnan Dua	Assistant to the Second Lieutenant
Pembantu Letnan Satu	Assistant to the First Lieutenant
Perwira Menengah	Field officer
Perwira Menengah	Field officer
Perwira Pertama	First officer
Perwira Pertama	First officer
Perwira Tinggi	Flag officer
Prajurit Dua	Soldier II
Prajurit Kepala	Head of Soldiers
Prajurit Satu	Soldier I
Sersan Dua	Second Sergeant
Sersan Kepala	First sergeant
Sersan Mayor	Sergeant major
Sersan Satu	First sergeant

The Vision of the Police Force

Polri is capable of protecting and serving the community and is always close to and together with the community. It is a law enforcer that is professional and proportional and always upholds the supremacy of the law and human rights. It maintains security and order and ensures domestic security in democratic national law and in a prosperous community.

The Missions of the Police Force

Based on the Vision as mentioned above, what follows is a description of the Missions of Polri into the future:

- To protect and serve the community (including aspects of security, surety, safety and peace) so that the community is free from physical and psychological interference.
- Assist the community in respect of pre-emptive and preventative efforts that can increase awareness and force and community adherence to the law (law abiding citizenship)
- Uphold the law professionally and proportionally by upholding the supremacy of the law and human rights, towards legal certainty and justice.
- Maintain security and order in the community, whilst still maintaining religious norms within the framework of the jurisdiction of the Republic of Indonesia.
- Manage the human resources of Polri professional to achieve the aims of Polri – to ensure domestic security so as to increase work motivation to achieve community prosperity.
- Increase efforts at internal Polri consolidation to bring the visions and missions together in the future.
- Maintain the solidarity of Polri in the face of external influences that greatly damage the organisation.

- Continue operations to restore order in several conflict regions so as to ensure the integrity of the Republic of Indonesia
- Increase the legal awareness and the national awareness of the community which is unified in diversity.

Source: http://www.polri.go.id/

2.2 Model

Indonesian National Police (Kepolisian Negara Republik Indonesia or POLRI) has undergone significant reform in the post-Soeharto era. Under Soeharto, the police had virtually became a wing of the army. In April 1999, however, under Habibie's presidency, the police were, by MPR Decrees, formally separated from the the police from the Armed Forces.[9] The division of authority between the police and the Army were drawn, albeit vaguely. The Indonesian National Police were were to be responsible for 'security and order', largely domestic. The army was entrusted with national 'defence'.

In 2000, the Third Amendment to the Constitution confirmed the reconfiguration. Article 30 of the Constitution provides as follows:

Article 30

1. Each citizen has the right and duty to participate in national defence and security.
2. National defence and security is carried out through a system of universal people's defence and security by the Indonesian National Military and the State Police of the Republic of Indonesia, as the primary force, and the people, as supporting forces.
3. The Indonesian National Military is comprised of the Army, the Navy, and the Air Force as instruments of the State with the task of defending, protecting and preserving the unity and sovereignty of the State.
4. The State Police of the Republic of Indonesia is an instrument of the State that safeguards the security and order of the community, with the task of protecting, sheltering, and serving the community, and upholding the law.
5. The structure and position of the Indonesian National Military and the State Police of the Republic of Indonesia, the relationship of authority between the Indonesian National Military and the State Police of the Republic of Indonesia in carrying out their tasks, the requirements for the participation of citizens in national defence and security, and matters relating to defence and security shall be regulated by law.

Yet the police force is still widely regarded as being largely corrupt and mistrusted – to the same degree as other law enforcement institutions, such as the Courts.

Illegitimate payments are even said to be requried to be recruited into the police force (Goodpaster, 2002). Similar reasons are often put forward – lack of training, low operational budgets, poor salaries, and very little chance of being accused of and punished for impropriety.

[9] MPR Decree No VI of 2000 on the Separation of the Police and the Army; MPR Decree No VII of 2000 on the Roles of the Police and the Army.

2.3 Tasks and Functions

2002 Police Law

The 2002 Police Law contains the following relevant provisions.

Article 4:

The Indonesian National Police aims to create domestic security, including the maintenance of community security and order, to ensure legal order and enforcement, to protect and serve the community and to develop community peace by upholding human rights.

Article 13:

The primary tasks of the Indonesian National Police are to:

a. Ensure the security and order of the community
b. Uphold the law; and
c. Protect and serve the community

Article 14

In performing the primary tasks referred to in Article 13, the

Indonesian Police Force is to:

a. Carry out regulation, guarding, supervision and patrolling in respect of the activities of the community and government, as needed.
b. Perform all activities to guarantee the security, order and smooth-flowing of street traffic.
c. Encourage the community to increase community participation, community awareness of the law and community adherence to law and state regulations.
d. Participate in the development of national law. e) Maintain order and guarantee public security.
e. Coordinate, supervise and develop the capacity of the special police, public service investigations, and forms of private security.
f. Investigate all crimes in accordance with criminal procedural laws and other laws.
g. Carry out or run police identification, police medicine and forensic laboratories and police psychology in the interests of policing tasks.
h. Protect life, property, the community and the environment from threats to the peace and/or disasters, including providing assistance by upholding human rights.
i. Serve the interests of citizens temporarily before they are handled by the responsible agency or person.
j. Serve the community in accordance with its needs within the scope of police duties and
k. Perform other duties as required by law. Article 15

Within the framework of performing the tasks referred to in Articles 13 and 15, the Police, in general, have the power to:

a. Receive reports and/or complaints;
b. Assist in the resolution of disputes between citizens that can interefere with public order.
c. Prevent the spread of illnesses.
d. Monitor particular groups that could create division or threaten national unity and integrity.

e. Issue police regulations relating to police administration issues.
f. Carry out special investigaions as part of preventative police action.
g. Carry out initial actions at incident scenes.
h. Take fingerprints and other forms of identification, and to photograph, people.
i. Seek testimony and evidence.
j. Run the National Crime Information Centre.
k. Issue permits and or letters necessary to serve the community.
l. Give security assistance during court trials, for the implementation of judicial decisions, the activities of other institutions, and community activities.
m. Receive and temporarily hold lost property.

The Indonesian National Police, in accordance with other laws, have power to:

a. Grant permission for and supervise public events and other community activities.
b. Carry out the registration and identification of motorised vehicles.
c. Grant driving licenses for motorised vehicles.
d. Receive information about political activities.
e. License and supervise firarms, explosives and sharp weapons.
f. License and supervise enterprises providing security services.
g. Provide guidance, educate and train special police apparatuses and private security offiers in policing.
h. Cooperate with other police in investigatinng and eradicating international crime.
i. Supervising the policing of foreigners within the territory of Indonesia, coordinating with relevant institutions.
j. Represent the government of Indonesia in international police organisations.
k. Exercising other powers falling within the scope of policing.

Article 16

Within the framework of performing tasks referred to in Articles 13 and 14 in relation to criminal process, the National Police have the power to:

a. Perform arrests, detentions, searches and confiscations.
b. Prevent people from leaving or entering a crime scene for the purposes of investigation.
c. Take or bring people before investigators within the framework of investigations.
d. Stop suspects, question them and examine their identification.
e. Examine and confiscate documents.
f. Call people to be heard and investigated as defendants or witnesses.
g. Bring in expert witnesses as necessary in connection with the investigation of a case. h) Stop investigations.
h. Hand over case files to public prosecutors.
i. Lodge requests directly with immigration officials in pressing situations to prevent a person suspected of a crime from leaving.
j. Give guidance and assistance to civil servant investigators and receive the results of investigations from civil servants to be handed over to public prosecutors and
k. Perform other actions in accordance with the law and which are responsible.

Powers to launch and conduct investigations

The police have authority to investigate almost all crimes on their own initiative. However, the KUHAP prohibits police from conducting investigations into a number of crimes without first being officially asked by an 'interested party' to take action against the person who allegedly committed the crime (Article 1(25) of the KUHAP). After such a report or request is made, the police can investigate the crime as they would any other crime. These crimes are referred to as *delik aduan* (literally, 'complaint crimes') and include a number of family law matters (Articles 72, 73, 278, 284, 287 of the KUHP); crimes of defamation, libel and minor defamation (Articles 310, 311 and 315 of the KUHP); and disclosure of confidential information (Article 322 of the KUHP).

After concluding their investigations, the police are to give the case brief of evidence (*resume / berkas perkara*) to prosecutors (*penuntut umum*). Prosecutors should examine the file within seven days (Article 138(1) of the KUHAP).

Police have the authority to make arrests. If police catch the accused committing a crime (*tertangkap tangan*), then they can arrest the accused on the spot without a warrant (*surat penangkapan*) (Article 18 of the KUHAP). A warrant will usually be required if the accused is not caught in the act and is alleged to have committed a serious crime (Article 17 of the KUHAP).

The warrant does not have to be issued by a court – an order from a superior officer will usually suffice. For less serious crimes, an arrest may be made only if the suspect has been called several times for questioning, but has failed to attend and has no lawful excuse (Article 19(2) of the KUHAP).

To obtain a warrant, the police must be able to show that a serious crime has taken place, and must have sufficient 'initial evidence' upon which to make the arrest (Article 17 of the KUHAP). Police can detain suspects during their investigations; prosecutors can detain suspects when preparing their cases; and judges can detain suspects during court proceedings involving those suspects (Article 20 of the KUHAP), provided that sufficient evidence indicates that the accused will attempt to flee, to damage or destroy evidence, or to re-offend (Article 21(1) of the KUHAP). For the purposes of their investigations, Indonesian police can perform house, clothing or body searches (Article 32).

Time limits for investigations

The KUHAP appears to urge police, prosecutors and judges to deal swiftly with the their cases. Suspects and accuseds have the rights to be interrogated by police investigators 'without undue delay' (*segera*) (Article 50(1)) and to have their cases brought 'without undue delay' (*segera*) before a court by the public prosecutor (Article 50(2) of the KUHAP). An accused also has the right to be tried by the court 'without undue delay' (*segera*) (Article 50(3) of the KUHAP).

However, there are no stipulated time limits within which police investigations must be completed. A taxi driver challenged this very lacuna was in the Constitutional Court in 2008. He had been charged with fraud and, after five years the investigation into him remained open, even though the police did not appear to be actively continuing the investigation.

In 2008, the Chief of Police, however, declared that investigations should begin within seven days of a complaint being made. Minor cases should be investigated within 30 days, normal cases within 60 days and complex/difficult cases within 120.[10] These are, to the knowledge of the author, not binding, however. They are guidelines to which no sanctions attach for breach.

In respect of time limits, the Code of Criminal Procedure appears to focus on detention. Police can detain suspects during their investigations; prosecutors can detain suspects when preparing their

[10] Kinerja Polri Paling Dikeluhkan
(http://www.ombudsman.go.id/Website/detailArchieve/146/id), 3 January 2009).

cases; and judges can detain suspects during court proceedings involving those suspects (Article 20 of the KUHAP), provided that sufficient evidence indicates that the accused will attempt to flee, to damage or destroy evidence, or to re- offend (Article 21(1) of the KUHAP).

The police can detain only suspects who have been accused of committing, or assisting in the commission of, a crime for which a punishment of five or more years would apply if he or she was convicted (Article 21(4)(a) of the KUHAP) or of a crime that is listed in Article 21(4)(b) of the KUHAP.

Police can issue detention orders themselves. The detention order must identify the accused, and specify the reasons for the detention, the alleged criminal act and the place of detention (Article 21(2) of the KUHAP). The detention order must be provided to the accused and a copy given to his or her family (Article 21(3) of the KUHAP).

Police can detain suspects for 20 days for the purposes of their investigations (Articles 20 and 24(1) of the KUHAP). A prosecutor can approve a further 40-day extension if the police investigation has not been completed within the initial 20 days (Article 24(2) of the KUHAP). The suspect must be released from detention if the investigation has concluded (Article 24(3)) or if the suspect has been detained for the entire 60 days (Article 24(4) of the KUHAP).

Prosecutors can detain suspects for up to 20 days for the purposes of preparing the prosecution of cases involving those suspects (Articles 20 and 25(1) of the KUHAP). A district court chairperson can extend the detention period by a further 30 days if the investigation is not completed within the initial 20 days (Article 25(2) of the KUHAP). The suspect must be released if the prosecutor's investigation has concluded (Article 25(3)) or if the suspect has been detained for the full 50 days (Article 25(4) of the KUHAP).

A district court judge can detain an accused for the purposes of the trial of that accused for a maximum of 30 days (Article 26(1)) and a district court chairperson can extend this period by a further 60 days (Article 26(2) of the KUHAP). If the trial is concluded within this period, or if the 90 days expire, then the accused must be released (Articles 26(3) and (4) of the KUHAP). The relevant high court has the power to initially detain for the same number of days (Article 27 of the KUHAP). With one extension, the Supreme Court can detain accused for a maximum of 110 days (Article 28 of the KUHAP). The authorities are said to generally respect these limits in practice.

The KUHAP provides for three types of detention: house, city and state (Article 22(1) of the KUHAP). Police, prosecutors and judges can determine the type of detention applied to the suspect and can change the type of detention being applied to a suspect (Article 23(1) of the KUHAP) without providing a reason.

Investigation statistics

In 2008, the Indonesian police force handled a total of 251,223 cases and was able to complete its investigations into 130,621 cases (around 51.99%).[11]

Type of crime	Number of cases		Trend
	2007	2008	
Serious theft	61162	48130	down 21.30%
Motor vehicle theft	32704	19304	down 40.97%
Violent theft	9770	7473	down 23.51%
Aggravated Assault	16630	11541	down 30.6%

[11] Polri Kejar Target *Trust Building* 2010, *Hukumonline*, 1 January 2009.

Murder	1370	1081	down 21.1%
Rape	2696	1976	down 26.7%
Counterfeiting	331	272	down 17.8%
Gambling	12225	9770	down 20.08%
Fraud	27498	19787	down 28.04%
Embezzlement	18515	13893	down 24.96%
Vandalism	6198	5448	down 12.10%
Extortion	**5671**	**4099**	**down 27.72%**

2.4 Relations

By Presidential Decree No 89 of 2000, responsibility for and authority over the police was transferred from the Department of Defence to the President's office. As mentioned, the Indonesian Police have long been part of the Armed Forces, but were removed from under its wing soon after Soeharto's fall.

There are, to the knowledge of the author, no formal relations between police, prosecutors and the courts during criminal investigations. However, it is well known that police, prosecutors and judges often speak to each other and are, in fact, notorious for conspiring to fix the outcome of particular cases in which bribes are suspected to have been paid and shared between them.

Further, there is concern now that with the establishment, in early May 2010, of the Mahkumjapol forum – at which the Supreme Court, the Law and Human rights Department, the Attorney General's Office and the National Police Force met – that improper 'deals' between these institutions might be facilitated. A particular concern here is that judicial independence will be compromised by such a forum. This forum is discussed in more detail below at 4.5 Relations.

2.5 Mechanisms

Coordination

Weak cooperation between police and prosecutors undermines the efficacy of the Indonesian criminal process. It is often said that this lack of cooperation causes inefficiencies and sometimes results in acquittals that should have been convictions. Institutional rivalry between the police and prosecution has traditionally existed, at least partly because a number of statutes covering their relative jurisdictions to conduct investigations has been unclear. Recent reforms have not addressed these problems. For example, Law No 2 of 2002 on the Police Force makes no mention of prosecutors at all; Law No 16 of 2004 on the Prosecution does not mention police.

Police and prosecutors are said to often fail to communicate with each other during police investigations and when prosecutions are being prepared. Because the police are not always aware of the evidence prosecutors will need to prove their cases in court, they sometimes overlook key evidence that no longer exists by the time the case is handed over to prosecutors. Prosecutors sometimes also send back case files to police for further investigation without identifying exactly what types of additional evidence they are seeking. Police then might waste limited resources on conducting further investigations without a clear purpose.

The KUHAP requires only minimal interaction between police and prosecutors. It provides that, after concluding their investigations, the police are to give the case brief of evidence (*resume / berkas perkara*) to prosecutors (*penuntut umum*). If prosecutors believe that the file contains

insufficient evidence to proceed against the accused, they can hand back the brief to the police and request the police to investigate further (Article 138(2) of the KUHAP).

Administration

Up until 1999, the Indonesian police was part of the Indonesian armed forces.

The Indonesian Police budget in 2010 is 27 trillion rupiah, up 9.8 percent from the 2009 budget (24.8 trillion). Of this, Rp 17,690,961,564,000 is allocated to staffing, and Rp 5,817,047,933,000 for equipment.[12]

To be appointed as a police officer, candidates must be an Indonesian citizen, believe in One Almighty god; be loyal to the Republic of Indonesia, based on Pancasila and the 1945 Constitution; have at least a Junior High School education; be at least 18 years of age; be physically and mentally healthy; have not been convicted of an offence; be honest, just and of irreproachable character; pass police education and training (Article 21(1)). In addition to passing this police training, candidates must also take an oath (Article 22(1)), in which they pledge allegiance to the state and promise to obey its laws (the full text of the oath is contained in Article 23).

Police can be honourably discharged and dishonourably dismissed (Article 30(1)). The mandatory retirement age is 58 years (60 years for those who particular expertise) (Article 30(2)).

The grounds and process for removal are provided in Government Regulation No 1 of 2003 on the Removal of Members of the National Police Force. They can be dishonourably dismissed if they commit a crime or misdemeanour or are derelict in their duties (Articles 11-14). Lower-ranking officers can be removed by the Chief of Police; higher-level officers are discharged by the President (Article 15).

Oversight and Inspection

The 2002 Police Law requires police to follow police discipline codes (see, for example, Article 27) and anticipates further governent regulation. This was provided by Government Regulation No 2 of 2003 on Police Discipline and Police Regulation No 7 of 2006 on the Code of Ethics.

Government Regulation No 2 of 2003, for example, requries that police are professional and respect human rights and do not behave in a manner that undermines the authority of the state or the national police. A Commission of Ethics is established to determine whether the Code has been breached (Police Regulation No 8 of 2006 on Procedures of the Ethics Commission). Violation of the Code can lead to disciplinary measures or punishments, including physical exercises, attending school for a year, salary and/or promotion freeze, dismissal or detention.

A number of Commissions can provide external oversight mechanisms for police conduct, including the Anti-Corruption Commission, the National Ombudsman, the National Human Rights Commission (Komnas HAM) and the National Police Commission (Kompolnas) (Amnesty International, 2008):

Ombudsman

The primary function of the Ombudsman is to monitor the administration of public services provided by state and public services at the national and local levels (see Article 6) and to receive complaints about maladministration in the administration of public services. It can conduct its own investigations and seek to cooperate with other law enforcement institutions. Its powers are, however, limited to making reports, recommendations and complaints (see Articles 35, 37, 38). In recent times, citizens have complained to the Ombudsman about the police more than they did

[12] 'Anggaran Polri 2010 Capai Rp 27 Triliun', *VivaNews*, 23 February 2010.

about any other institution. In 2008, of the 1244 complaints the Ombudsman received, more than 30% were about the police.[13]

Anti-corruption Commission

The Anti-Corruption Commision has jurisdiction to investigate police for corruption. At time of writing, it had investigated only a handful of police.

For more information about the Anti-Corruption Commission, see sections below entitled 'Corruption Court' and 'Recent controversy: the KPK and Anti-Corruption Court under attack'.

National Police Commission

The National Police Commission deserves special note. The National Police Commission was established by Presidential Regulation No 17 of 2005. Responsible to the President, it has the power to collect and analyse data in order to make proposals to the President about the police force's budget, human resource development and infrastructure. It can make proposals to the President about the appointment and dismissal of the Police Chief (Article 38(1)(b) of the National Police Law (2002)). It is also to receive suggestions and complaints from the public about the performance of the police force and to convey them to the President.

The National Police Commission is, however, widely considered to be ineffective in its supervision of the performance of police and its reach does not extend to the regions. In particular, it lacks power to conduct investigations itself. This is clearly an impediment to the performance of its functions. Further, the National Police Commission is not formally independent of the police force. Indeed, it is chaired by the Coordinatin Minister for Politics and Law Djoko Suyanto. Its Deputy Chairperson is the Minister for Home Affairs Gamawan Fauzi and included amongst its members is the Minister for Law and Human Rights Patrialis Akbar.

There are a handful of examples of collaboration between Komnas HAM (the national human rights commission) and the National Police Commission.[14]

Internal supervision

Internal supervision of the police force is conducted by the General Supervisory Inspectorate (*Inspektorat Pengawasan Umum*). Its effectiveness is, however, highly doubtful given that it operates from within the police force itself.

Nevertheless, in a cleanup of the police conducted internally in 2008, 8836 personnel were found to have broken disciplinary rules, 198 were found to have breached the code of ethics and 440 were prosecuted.[15] data was available on the precise punishments issued and the types of breaches perpetrated, but it is suspected that 'breach of discipline' refers to breach of internal police guidelines.

Punishment	Number punished
Breach of discipline	8836 persons
Code of ethics punishment	198 persons
Dishonourable dismissal	161 persons

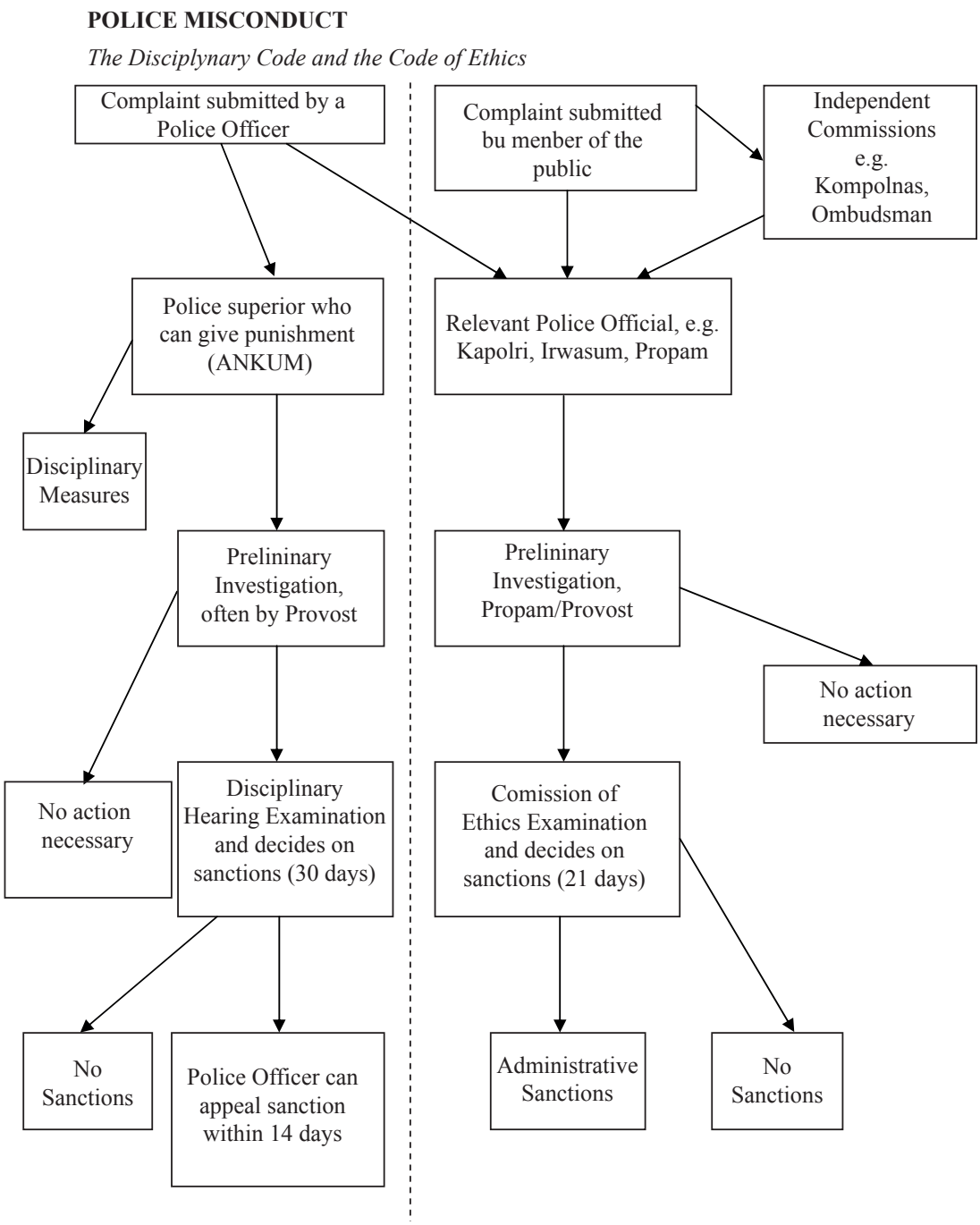
[13] Kinerja Polri Paling Dikeluhkan (http://www.ombudsman.go.id/Website/detailArchieve/146/id), 3 January 2009).

[14] Kompolnas-Komnas HAM Lanjutkan Pengusutan', *Hukumonline*, 28 May 2008; 'Kompolnas-Komnas HAM Telusuri Prosedur Pengamanan Demo', *Hukumonline*, 27 May 2008.

[15] Polri Kejar Target *Trust Building* 2010, *Hukumonline*, 1 January 2009.

Honourable removal	1 persons
Tour of duty	5 persons
Tour of area	13 persons
Re-professionalisation	5 persons
Apology	6 persons
Reprehensible act	7 persons
Criminal punishment (for use of narcotics, assault, reprehensible act, theft, gambling, fraud)	440 persons

Source: Amnesty International (2008: S. 43).



Challenging arrest and detention

Article 77 of the KUHAP provides the general courts with jurisdiction to review the validity of arrests and detentions in a pre-trial hearing (*praperadilan*). Suspects, accused, their families or their legal counsel may lodge the request for a *praperadilan* hearing (Articles 79 and 124 of the KUHAP). If the court finds that the arrest or detention was or is unlawful, then it is to immediately release the detainee and determine the amount of any compensation (Article 82(3) of the KUHAP). There is no avenue of appeal against this decision (Article 83 of the KUHAP).

When determining whether an arrest was lawful, the court should investigate whether a warrant was obtained and, if so, whether the warrant fulfilled the formal requirements mentioned above. It is unclear whether the court can invalidate an arrest on the ground that sufficient initial evidence did not exist at the time of the arrest as is required by Article 17 of the KUHAP.

Many of the problems that plague the Indonesian judiciary discussed below – such as corruption, incompetence and a lack of independence – adversely affect the efficacy of these pre-trial hearings. Fitzpatrick (2008) adds that there are no regulations governing non-appearance by government officials at pre-trial detention hearings. It appears to be common for this to happen, thereby leading to postponement of the hearing to the point where the pre- trial procedure is no longer available because the trial itself has begun... [A]pproximately only 5 - 10 per cent of pre- trial detentions applications are successful.

According to the State Department of the United States, defendants rarely won pre-trial hearings and almost never received compensation after being released without charge.[16]

2.6 Criminal Investigators

In addition to police and prosecutors, there are two further institutions with investigative functions: Civil Servant Investigators and the Pamong Praja Police.

Civil Servant Investigators (PPNS)

Article 6(1) of the Code of Criminal Procedure defines 'investigators' as police officers and civil servant investigators (PPNS – *Penyidik Pegawai Negeri Sipil*). This report deals primarily with the respective roles of the main actors in the criminal investigation process – police, prosecutors and judges. For completeness, however, some mention must be made of PPNS.

PPNS are civil servants with some experience who, by law, are granted powers to assist police with their functions. Their functions and powers differ, depending on the rules issues by the Department in which they work. Generally speaking, however, PPNS are granted power to receive complaints about crimes, to conduct initial investigations, seize items and documents, call in suspects and witnesses for questioning.[17]

It must be emphasised, however, that the PPNS are clearly subservient to police. They must coordinate with police during their investigations (Article 7(2) of the KUHAP): they must inform the police that they are investigating and must hand over their findings to police for further action. They police are generally entitled to ignore any or all PPNS findings. Indeed, police may proceed without seeking the assistance of the PPNS at all.

For example, Forestry Civil Servant Investigators, the powers of which are provided for in Article 77 of Law No 41 of 1999 on Forestry, carry out investigations into forestry crimes, report on

[16] 'Indonesia: Country Reports on Human Rights Practices', US State Department, 28 February 2005 (http://www.state.gov/g/drl/rls/hrrpt/2004/41643.htm).

[17] Department of Law and Human Rights website: www.dephumham.go.id.

their investigations to the police, inform prosecutors that investigations have commenced, and can cease investigations. Police are to assist the PPNS and receive investigation reports from them. They can pass on the findings of the investigation to prosecutors.

Polisi Pamong Praja

The *Polisi Pamong Praja* (pamong praja police) also deserve note. These are regional government instrumentalities found in Indonesia's provinces and districts/cities. Their main functions are to assist regional heads to uphold law and order in Indonesia's regions and upholding regional regulations (Perda) issued by their local legislative and executive governments (Articles 148 and 149 of Law No 32 of 2004 on Regional Government). (Perda are discussed in more detail below at 4.12 Regional delimitations.) Government Regulation No 32 of 2004 on Guidelines for Pamong Praja Police Units reasserts that these are the primary functions of the pamong praja police (Article 3). The Regulation emphasises that Pamong Praja Police must coordinate and cooperate with the national police and PPNS (Article 4(d)).

In provinces, pamong praja police are generally responsible to the Governor, through the regional secretariat. In districts/cities, pamong praja police units report to the Regent/Mayor through the regional secretariat.

Some commentators, including NGOs such as Impartial and the National Legal Aid Institute, have complained that many Pamong Praja units overreact and overreach their powers and should, therefore, be disbanded.

Conclusion

There is little to commend in Indonesia's system of criminal investigation. The competence of police and other investigators is said to be low, and corruption is commonly said to be rife. (It is commonly alleged, for example, that some police accept bribes to drop investigations or 'lose' incriminating evidence, or manufacture evidence to support convictions (see ICW (2001)).

Worse, Indonesia's main criminal laws – the Criminal Code and the Code of Criminal Procedure (which governs the investigative powers and responsibilities of criminal investigators) are vague and out of date. The backbone of Indonesian criminal law – the Criminal Code (KUHP) – is the Code inherited from the Dutch, largely unamended, but supplemented by a growing number of criminal laws. It is out of date and it does not reflect the spirit of independent Indonesia. Significant reform of both the KUHAP and KUHP is, therefore, urgently needed. Fortunately, such change is on the agenda, with new draft Codes having been prepared, although far from finalised. The Indonesian legislature must, however, make time to consider and enact those Codes.

Too much reliance should not, however, be placed simply on the enactment of new laws. Despite separating from the army, the police, it seems, has yet to fully transform its outlook and procedures from an 'internal security' approach to the 'protect and serve' model it claims to follow. In this regard, stricter oversight, both external and internal, might assist to change this perspective. As this Chapter has shown, however, there is a lack of effective oversight and inspection within Indonesia's system of criminal investigation, perpetuated by the KUHAP's failure to mention sanctions for its non-compliance by law enforcement officials. Without more detailed rules for police and stronger monitoring to ensure that they are complied with, significant police force reform seems a long way off.

A significant impediment to an effective justice system is the failure of law enforcement institutions to cooperate and coordinate, where appropriate. This severely limits the capacity of criminal

investigators to fight crimes. This should also be remedied through legal reforms – if not by statute, then by binding government regulation or internal institutional guidelines.

On a more positive note, it should be noted that Indonesian police have recently received much praise for excellent results in investigating specific crimes. In particular, 'Detachment 88' has been very successful in its investigations into terrorism, as the following recent Reuters report describes.

Ed Davies and Olivia Rondonuwu, 'U.S.-funded Detachment 88, elite of Indonesia security', Reuters, 18 March 2010, http://www.reuters.com/assets/print?aid=USTRE62H13F20100318

JAKARTA (Reuters) - Indonesia has won praise for cracking down on Islamist militants behind a string of deadly attacks and at the core of the fight have been the heavily armed black-clad officers of its anti-terrorism unit -- Detachment 88.

A symbol of improved security cooperation with Western nations, the unit has gained somewhat of a cult status among many Indonesians, particularly after live television images of dramatic sieges ending in a hail of gunfire.

"They've been pretty good on the investigative side and intelligence side and being able to crack down on these rings," said Ken Conboy, a Jakarta- based security analyst and author.

Police have succeeded in killing or capturing hundreds of suspected militants in recent years. Last week, Detachment 88 officers shot dead Dulmatin, a wanted militant with a $10 million bounty on his head who was tracked to a Jakarta Internet cafe.

The unit has been monitoring Islamist networks for potential threats ahead of a visit by U.S. President Barack Obama next week. It has also joined security training exercises at key strategic sites such as five-star hotels and airports.

Detachment 88 was established after the 2002 Bali bombings carried out by militant network Jemaah Islamiah, which firmly placed Indonesia as a frontline state in the U.S.-led "war on terror."

But the Western funding of an anti-terrorism unit in the world's most populous Muslim nation can be sensitive. There have been reports of U.S. intelligence officers in Jakarta helping tap cell phones and reading SMS text messages of Indonesian civilians.

A U.S. embassy spokesman in Jakarta declined to comment, but a U.S. government document showed the unit had received technical support, training and equipment under the State Department's Anti-Terrorism Assistance (ATA) program since 2003.

An Indonesian official, who spoke on condition on anonymity, confirmed the unit got Australian and U.S. help in advanced wiretapping technology, and also some British and French aid.

Indonesia and the United States are likely to discuss further security cooperation during Obama's visit. Washington has been considering whether to lift a ban on military training for Indonesia's notorious special forces unit, known as Kopassus.

PAIR OF HANDCUFFS

Conboy said Detachment 88 got its name because a top police officer at a briefing on the Anti-Terrorism Assistance program had mis-heard "A-T-A" as "Eighty-Eight," which he thought was auspicious since eight is a lucky number in Asian culture.

There have also been reports that it was due to the 88 Australians who died in the Bali bombings, while a top Detachment 88 official said it was because 88 resembled handcuffs.

Australia worked closely with Indonesia on security and Canberra helped set up a training center to combat militants in 2004, pledging A$38 million ($35 million) over five years.

The facility -- boasting a forensic laboratory and a Boeing 737 fuselage -- is in the police academy in the city of Semarang.

Indonesian extremists have become more savvy at communicating by using couriers rather than cell phones to avoid detection and analysts see limits to the usefulness of electronic surveillance.

"It has acquired good capacity to pursue jihadi elements once their existence has been detected," said Sidney Jones, an expert on Islamist militants at the International Crisis Group.

"But their ability to detect previously unknown groups is much weaker, because that information has to come from the community, not from fancy intercepts," added Jones.

There have also been controversies over how Detachment 88 operates, in particular whether they have used deadly force during raids too often, raising the risk of retaliation from militants and losing possible intelligence.

Dulmatin and another wanted militant, Noordin Mohammad Top, who is believed to have masterminded suicide attacks on Jakarta hotels last year, were both shot dead during raids.

"They don't take any prisoners which I think some have noted with concern," said Conboy.

Tito Karnavian, the head of Detachment 88, told Reuters in a recent interview that officers used a response proportionate to threats under international operating procedures.

"So if the threat is lethal, we can use also the lethal force," added Karnavian, who said Noordin Top had been killed after attacking officers with an M-16 rifle and pipe-bombs.

3. Prosecution

3.1. Organisation

The Vision and Mission statement of the Indonesian Public Prosecution is as follows:

'Vision

To create a Prosecution as a law enforcement institution that carries out its tasks

Mission

To unite law enforcement in though, deeds and work

To optimise the eradication of corruption and the resolution of human rights violations

To make appropriate systems and processes for service and law enforcement, considering religious norms, morality and politeness and observing the feeling of judges and humanitarian values in society.'

Source: http://www.kejaksaan.go.id/

Source: http://www.kejaksaan.go.id/

Table translation

Jaksa Agung	Attorney General
Wakil Jaksa Agung	Deputy Attorney General
Jaksa Agung Muda Pembinaan	Junior Attorney General for Guidance
Jaksa Agung Muda Intelijen	Junior Attorney General for Intelligence
Jaksa Agung Muda Tindak Pidana Umum	Junior Attorney General for General Crimes
Jaksa Agung Muda Tindak Pidana Khusus	Junior Attorney General for Special Crimes
Jaksa Agung Muda Perdata dan Tata Usaha Negara	Junior Attorney General for Civil and Administrative Law
Jaksa Agung Muda Pengawasan	Junior Attorney General for Supervision
Pusat Pendidikan dan Latihan	Education and Training Centre
Pusat Penelitian dan Pengembangan	Research and Development Centre
Pusat Penerangan Hukum	Legal Information Centre
Pusat Informasi Data dan Statisik Kriminal	Data and Crime Statistics Centre
Kejaksaan Tinggi	High (Provincial) Public Prosecution
Kejaksaan Negeri	District Public Prosecution

The Attorney General's Office (*Kejaksaan Agung*) is responsible for conducting prosecutions and is located in Jakarta. The High Public Prosecution (*Kejaksaan Tinggi*) is located in the capital city of each of Indonesia's 34 provinces, as indicated in the map below (taken from http://www.kejaksaan.go.id/).

As of February 2005, there were 18,138 employees working within the public prosecution, 6005 of which were prosecutors. They are spread across 353 lower prosecutorial offices and 102 higher prosecutorial offies.[18]

[18] Pengaduan ke Komisi Kejaksaan, *Hukumonline*, 4 July 2007.

3.2 Model

The prosecutorial function rests with the Attorney General, who holds the position of supreme public prosecutor. The Attorney General occupies a cabinet-level post separate from that of the Minister of Law and Human Rights), both of whom report directly to the President.

The task of prosecuting a criminal case through the General Court (*pengadilan umum*) system is the responsibility of public attorneys, public prosecutors, and prosecutors (*Jaksa*). All prosecutors and prosecuting activities are to be administered by the *Kejaksaan Republik* Indonesia (Public Prosecution Services of the Republic of Indonesia or PPS). This PPS is a governmental organization established by Law to implement and execute State authority with respect to the prosecutorial activities and other duties as described in the Law. The hierarchy of the PPS is described below in descending order:

(1) *Kejaksaan Agung* (The Office of the Attorney General). The Attorney General is the highest ranking authority within the PPS. The head office is located in Jakarta and there are representative offices throughout Indonesia and its jurisdiction is inclusive of all the sovereign territory of Indonesia.

(2) *Kejaksaan Tinggi* (State Attorney) is the authority which possesses the jurisdiction at the provincial level to prosecute cases. The offices of the Kejaksaan Tinggi are located in the capital city of the province.

(3) *Kejaksaan Negeri* (District Attorney) is the authority which possesses the jurisdiction at the regional level to prosecute cases. The offices of the Kejaksaan Negeri are located in almost all regional centers.

Source: http://www.aseanlawassociation.org/legal-indonesia.html.

3.3 Tasks and Functions

2004 Prosecutors Law

Article 30 of the 2004 Prosecutors Law:

In criminal matters, prosecutors have the following tasks and powers:

a. To conduct prosecutions
b. To implement the orders of judges and court decisions that have binding force.
c. To supervise the implementation of conditional criminal decisions, supervisory decisions, and conditional releases.
d. Investigate crimes as provided for by statute.
e. Complete the case file, including by conduction additional investigations before being handed over to the court, in coordination with police investigators.
f. In the fields of civil and administrative law, prosecutors can act in and outside of court for and in the name of the state or government.
g. In the fields of public order and peace, prosecutors are to participate in:
h. Increasing legal awareness of the community
i. Securing policy of law enforcers
j. Monitoring distribution of printed materials.

k. Monitoring beliefs that can endanger the community and the state.

l. Preventing misuse and or desecration of religion.

m. Research and development and law and crime statistics.

Deciding whether to prosecute or further investigate

Once police have handed over the brief of evidence (*resume / berkas perkara*) to prosecutors (*penuntut umum*), prosecutors should examine the file within seven days (Article 138(1) of the KUHAP). They then have three main courses of action open to them.

First, if prosecutors believe that the file contains insufficient evidence to proceed against the accused, they can hand back the brief to the police and request the police to investigate further (Article 138(2) of the KUHAP). This course of action is taken in many cases.

Second, prosecutors can decide to not proceed to trial. Article 140(a) of the KUHAP allows prosecutors to 'cease a prosecution for lack of sufficient evidence, because the [alleged act] was not a crime, or...for a legal reason'. In these circumstances, the public prosecutor is to declare, and set out the reasons for, the cessation of the prosecution in a statement – the *Surat Penghentian Penuntutan.* This decision is not final – 'the public prosecutor can prosecute the accused if later it is clear that a new reason exists [to do so]' (Article 140(d)).

In some circumstances, it appears that prosecutors can decide to not prosecute a defendant even if sufficient *prima facie* evidence exists that would otherwise enable them to proceed against the defendant. Article 32(c) of Law No 5 of 1991 on Public Prosecution can be used for similar purposes – it allows the Attorney General to 'put aside' a case if the 'public interest' so requires. The Elucidation to Article 32(c) of Law No 5 of 1991 states that 'public interest' is 'the interests of the nation and state and/or the wider community'. The Elucidation permits only the Attorney General to exercise this power, and requires him or her to consider the opinion of the state institutions with authority over the issues involved in the case before doing so. In serious cases, the Attorney General should report the intention to 'put aside' the case to the President and await instructions.

Third, prosecutors can choose to prepare an indictment (*surat dakwaan*) and proceed to trial. If they decide to take this course of action, they hand over the case file to the relevant district court, which will set a trial date (Article 152 of the KUHAP). By this stage of the process, the case file will generally contain the arrest warrant, the detention order, the provision under which the accused is charged, a report on the crime scene, a list of exhibits for trial, the names of witnesses interviewed and a summary of their records of interview, a legal analysis, and a conclusion. Presiding judges are expected to have read the case file before beginning to hear the case so that they are aware of details of the issues raised in the case. Much anecdotal evidence suggests, however, that many judges fail to do this and are, therefore, ill-prepared to handle and decide the case.

Investigation and Prosecution statistics

Criminal cases in 2009

	Cases received	**Cases proceeded with**	**Cases prosecuted**	**Appeals**	**Cassation**	**Peninjauan**
Total	196,223	151,494	98,635	9,460	8,906	492
Resolved	129,969	121,186	91,542	2,004	1,162	70
Clearance rate	66 %	80 %	93 %	21 %	13 %	14%

Particular types of cases prosecuted in 2009

	Narcotics	Psychotic drugs	Child Protection	Forestry	Domestic violence	Intellectual property	People trading	Terrorism
Total	9,577	8,368	3,021	2,222	1,181	198	89	14
Resolved	8,129	7,733	2,849	2,081	1,153	196	88	14
Clearance rate	85 %	92 %	94 %	94 %	98 %	99 %	99 %	100 %

Criminal cases in 2008

	Cases received	Cases proceeded with (stage I)	Cases proceeded with (stage II)	Cases handed over to court (prosecuted)	Appeals	Cassation	Peninjauan Kembali
Total	199,653	147,652	108,104	104,369	8,353	7,881	434
Resolved	123,241	102,683	98,679	97,003	1,819	851	24
Clearance rate	Not provided	69.54 %	91.28 %	92.94 %	21.77 %	10.8 %	5.5 %

Criminal cases in 2007

	Cases received	Cases proceeded with (stage I)	Cases handed over to court (prosecuted)	Cases decided by first instance court	Appeals	Cassation	Peninjauan Kembali
Total	118,300	96,702	91,344	88,777	14,565	14,565	14,565
Resolved	96,702	91,344	88,777	14,565	1,661	981	37
Clearance rate	81.74%	94.46%	94.46%	16.41%	11.40%	6.73%	0.25%

Criminal cases in 2006

	Cases received	Cases proceeded with	Cases handed over to court (prosecuted)	Cases decided by first	Appeals	Cassation	Peninjauan Kembali
Total	103.886	80.376	78.536	73.944	17.240	17.240	17.240
Resolved	80.376	78.536	73.944	17.240	1.658	965	61
Clearance rate	77,37 %	97,71 %	94,15 %	23,31 %	9,62 %	5,60%	0,35 %

Investigations and prosecutions in corruption cases

	Completed investigations by AG/ prosecutors	Prosecuted by AG/prosecutors
2009	1,533	1,292
2008	1,348	1,114
2007	636	627
2006	454	611
2005	425	637

Source: Website of Attorney General of Indonesia – www.kejaksaan.go.id

3.4 Relations

In its performing tasks and exercising powers, prosecutors are to develop cooperative relationship with other enforcers of law and justice, state bodies and other agencies (Article 33 of the 2004 Prosecutors Law). Despite the inclusion of this provision in the Law, there is little evidence of its application in practice. As mentioned above in 2.5, cooperation and relations between prosecutors and Indonesian national police are, generally speaking at least, irregular and strained.

The Indonesian Public Prosecution is also notorious for poor internal coordination between senior prosecutors and their staff.

As was noted at 2.4 Relations above, There are, to the knowledge of the author, no formal relations between police, prosecutors, and the courts during the criminal investigations. However, it is well known that police, prosecutors and judges often speak to each other and are, in fact, notorious for conspiring to fix the outcome of particular cases in which bribes are suspected to have been paid and shared between them.

Further, there is concern now that with the establishment, in early May 2010, of the Mahkumjapol forum – at which the Supreme Court, the Law and Human rights Department, the Attorney General's Office and the National Police Force met – that improper 'deals' between these institutions might be facilitated. A particular concern here is that judicial independence will be compromised by such a forum. This forum is discussed in more detail below at 4.5 Relations.

Police and prosecutor rivalry: historical explanations

In the period after Indonesia's independence, the two central activities of law enforcement, investigating crime and prosecuting criminals, was integrated into one organizational system. The 1951 Emergency Law (Law No. 1/Drt of 1951) provided that public prosecutors would supervise and coordinate the investigative instruments of the police. This included conducting their own further investigations and providing direction, coordination, and supervision of the police. In 1955 (Law No. 7/Drt of 1955) the Prosecutors were made the central investigators for economic crimes, including investigation of public corruption. This central role was expanded to include customs and smuggling (Law No. 73 of 1967) and corruption (Law No. 3 of1971). This integrated system had the advantage of insuring that evidence sufficient to ensure convictions would be produced in court. It had the disadvantage of centralizing all the powers in one place with few institutional checks and balances. In 1981 as part of an overhaul of Indonesian criminal procedure, a committee made up of the leaders of the police, prosecutors, and judiciary recommended separating the functions of the police and the prosecutors in order

to create a much-needed level of checks and balances. These recommendations were codified in Law No. 8 of 1981 on Criminal Procedure which generally restricted the previously expansive role of prosecutors to the prosecution of crime only. Prosecutors could not investigate crimes except when investigating public corruption, smuggling, and subversion. This is known as, and is referred to, the residual power of prosecutors to investigate crime. While on face value there are a significant number of benefits to be derived from the 1981 law, the reality is that it has resulted in an increasing lack of cooperation between the police and prosecutors and the development of an unhealthy institutional rivalry. This usually leads to competing claims of incompetence between the police and prosecutors about the quality and value of evidence collected and submitted by the police in dossiers that are to be used by the prosecutors to secure a conviction against the alleged criminal. In 1991 the Attorney General Law (Law No. 5 of 1991) provides prosecutors with additional authority to complete the dossier where it is deemed insufficient to secure a conviction, particularly with respect to the carrying out of any further examination that may be required to complete the dossier to the satisfaction of prosecutors prior to the dossiers submission to the relevant court. Although these provisions did provide additional power to the prosecutors it still did not permit them to interview the accused.

Source: http://www.aseanlawassociation.org/legal-indonesia.html.

3.5 Mechanisms

Prosecutorial oversight

Presidential Regulation No 18 of 2005 on the Prosecution Commission declares that the Commission is to supervise, monitor and evaluate the performance, attitude and behaviour of judges and prosecutorial employees when performing their duties. It can make recommendations for the punishment of errant prosecutors and can recommend that prosecutors be rewarded for their achievements. It also monitors the 'condition' of the organisation, including its facilities and human resource development. The Commission is made up of retired prosecutors, academics, practitioners and societal figures. The Commission has power to take over internal investigations into prosecutorial impropriety, including if the investigation uncovered nothing or had stalled and there is evidence of collusion in the investigation (Article 12(2) of Presidential Regulation No 18 of 2005).

In 2007, the Commission had received 249 complaints since its establishment, 207 of which the Attorney General had followed up. It had been proposed that 21 prosecutors be subject to disciplinary proceedings before the Prosecutorial Honour Council.[19] In 2008, 330 community complaints were lodged with the Commission and in 2009 there were 332[20]

There is a Prosecution Honour Council which performs a similar function to the Police Council mentioned above and the Judges' Honour Council discussed in detail below.

Administrative Management

To be appointed as a prosecutor, candidates must be an Indonesian citizen, believe in One Almighty god; be loyal to the Republic of Indonesia, based on Pancasila and the 1945 Constitution; have a law degree; be between 25 and 35 years of age; be physically and mentally healthy; be honest, just and of irreproachable character; and be a civil servant (Article 9(1)). Candidates must also pass

[19] Pengaduan ke Komisi Kejaksaan, *Hukumonline*, 4 July 2007.

[20] Komisi Kejaksaan, Bisa Berbuat Apa?, *Hukumonline*, 10 March 2010.

prosecutor education and training (Article 9(2)) and declare an oath of allegiance (see Article 10). Prosecutors can be honourably discharged on their own request, if they are continually sick, if they reach 62 year of age, if they die or if they are incapable of performing their duties (Article 12). They can be dishonourably removed if they are convicted of a crime, neglect their duties, breach their oath, or perform a reprehensible act (Article 13). Before being dismissed, prosecutors must be first given the opportunity to defend themselves before an honour council (Article 13(2)).

See above 3.1 Organisation and Model for details on the hierarchical structure of the public prosecution.

Oversight and Inspection Mechanisms

The Prosecution Honour Council, mentioned above, is the primary form in which prosecutors are pursued for improprieties. It appears to be used quite regularly to pursue prosecutors accused of irregularities. For example, in 2010, the Attorney General took action against 100 prosecutors and 41 administrative staff. (25 for indiscipline, 62 for breach of authority and 54 for other indiscretions). Light penalties were handed down to 35 offenders; medium penalties to 46 and serious penalties to 60. Of the serious penalties, 10 were dishonourable dismissal, 35 were a drop in rank for one year and 13 were stripped of some responsibilities.[21]

In 2009, the Attorney General took action against 270 employees, 181 of which were prosecutors and 89 were administrative staff (52 for indiscipline, 138 for breach of authority and 80 for other indiscretions). Light penalties were handed down to 47 offenders; medium penalties to 130 and serious penalties to 93. Of those serious penalties, 14 were dishonourable dismissal, 50 were a drop in rank for one year and 21 were stripped of some responsibilities.[22]

In 2008, the Attorney General took action against 245 employees, 179 of which were prosecutors and 72 were administrative staff (84 were for indiscipline, 128 for breach of authority and 39 for other indiscretions). Light penalties were handed down to 47 offenders; medium penalties to 105 and serious penalties to 99.[23]

Structurally, prosecutors are responsible to prosecutors higher in the hierarchy to themselves. So, for example, prosecutors at the district level are responsible to their superiors at the district level who, themselves, are responsible to the head of their provincial high prosecutors' office. In turn, heads of provincial high prosecutors' offices are responsible to the Attorney General (Articles 8 and 18 of the 2004 Prosecutors Law).

Of course, public prosecutors perform much of their work in open court. Their work is, therefore, often supervised and assessed by judges, the media and the general public alike. Quite commonly reported in reliable legal news sources (such as www.hukumonline.com) are the publicly-made complaints of judges about the standard of the cases and arguments put before them by prosecutors.

In particular, judges often criticise the legal arguments and structuring of the indictments (surat dakwaan) with which prosecutors open their cases. Judges will often identify significant gaps in the legal analysis and evidence presented in these documents.

3.6 Career and transparency issues

There is a State examination for would-be public prosecutors which is similar to that for judges. Prosecutors are appointed, paid and transferred in a similar fashion to other public servants.

[21] www.kejaksaan.go.id.

[22] www.kejaksaan.go.id.

[23] www.kejaksaan.go.id.

Conclusion

There are few advantages to Indonesia's prosecution system. In its current form, the public prosecution's capacity to effectively fight crime is limited. The public prosecution is consistently rated as one of Indonesia's most problematic law enforcement institutions. Claims are made that many of its officers lack competence and are corrupt, significantly reducing incentives to impartially pursue crimes of public interest.

In order to dispose of such claims, effective mechanisms for the monitoring and review of the performance of prosecutors, both in and out of court, must be introduced. Prosecutors must also better cooperate with police and improve their indictments and their conduct of cases in court.

There are, to the knowledge of the author, no reforms being considered to remedy these problems, beyond any that might be contained in the proposed drafts of the Criminal Code and Code of Criminal Procedure which, as mentioned above, have not been finalised. The current primary statute governing the prosecution was enacted reasonably recently (in 2004) and it is unlikely that that national parliament, beset with corruption scandals and a pressing legislative agenda, will amend this law for several years.

4. Court system

The official emblem of the Supreme Court (*Mahkamah Agung,* or MA).
Source: www.mahkamahagung.go.id

According to the Supreme Court's 2009 Annual Report (p. iii), the Vision and Mission Statement of the Court is as follows:

Vision of the Supreme Court

The Vision of the Supreme Court which was formulated on 10 September 2009 is as follows: 'The Creation of a Judicial Institution which is Supreme'.

Mission of the Supreme Court

The Mission of the Supreme Court is formulated in the framework of achieving its vision. In other words, to optimally perform the primary tasks and functions of the judicial institution. As mentioned above, the focus of the performance of the primary tasks and function of the judicial institution is the running of the courts, that is deciding a dispute/resolving a legal dispute so as to uphold law and justice.

The Mission of the Supreme Court 2010-2035:

- Guard the independence of judicial institutions.
- Provide legal services that are just to those who seek justice. Increase the quality of the leadership of judicial institutions. Increase the credibility and transparency of judicial institutions.

4.1 Role and Position

Chapter IX of the Indonesian Constitution is the prime legal reference point setting out the role and position of the Indonesian Courts.

Article 24(1) declares that judicial power is the independent power to maintain a system of courts with the objective of upholding law and justice (*hukum dan keadilan*). Article 24(2) specifies that judicial power is exercised by a Supreme Court (the *Mahkamah Agung*) and the courts below it in the respective environments of public courts, religious courts, military courts, administrative courts and by a Constitutional Court. Article 24(3) leaves open the possibility that other bodies with judicial functions be established and regulated by law. Article 24A of the Constitution focuses

on the role of the Supreme Court.[24] As for the Court's jurisdiction, Article 24A(1) states that the Supreme Court can hear matters at the level of cassation, can review regulations of a lower level than statutes as against statutes, and can perform other functions as required by law. Largely because of concerns raised in the media and legal circles about the personal and professional integrity of Supreme Court judges, Article 24A(2) requires them to possess 'integrity and irreproachable character and to be just, professional, and have experience in law'. Article 24A(5) stipulates that the structure, position, membership and procedures of the Supreme Court and the legal bodies below it shall be regulated by law.

The laws anticipated by Article 24A have been overhauled in recent years. In 2001 and 2002, Constitutional amendments required Indonesia's DPR to establish a Constitutional Court. In 2003, the DPR fulfilled this mandate by enacting Law No 24 of 2003 on the Constitutional Court. In 2004, the DPR passed more statutes relating to the judiciary. On 15 January, the DPR enacted Law No 4 of 2004 on Judicial Power, which replaced a 1970 Law with the same title and subject matter; and Law No 5 of 2004, which amended Law No 14 of 1985 on the Supreme Court. On 29 March, the DPR passed Law No 8 of 2004, which significantly amended the General Courts Law (Law No 2 of 1986); and Law No 9 of 2004, which amended Law No 5 of 1986 on the Administrative Courts. Most recently, further amendments have been made to Indonesia's judicial laws: see, for example, Law No 49 of 2009 on Second Amendments to Law No 2 of 1986 on the General Court; Law No 50 of 2009 on Second Amendments to Law No 7 of 1989 on the Religious Court; and Law No 51 of 2009 on Second Amendments to Law No 5 of 1986 on Administrative Courts. Law No 48 of 2009 on Judicial Power has replaced Law No 8 of 2004.

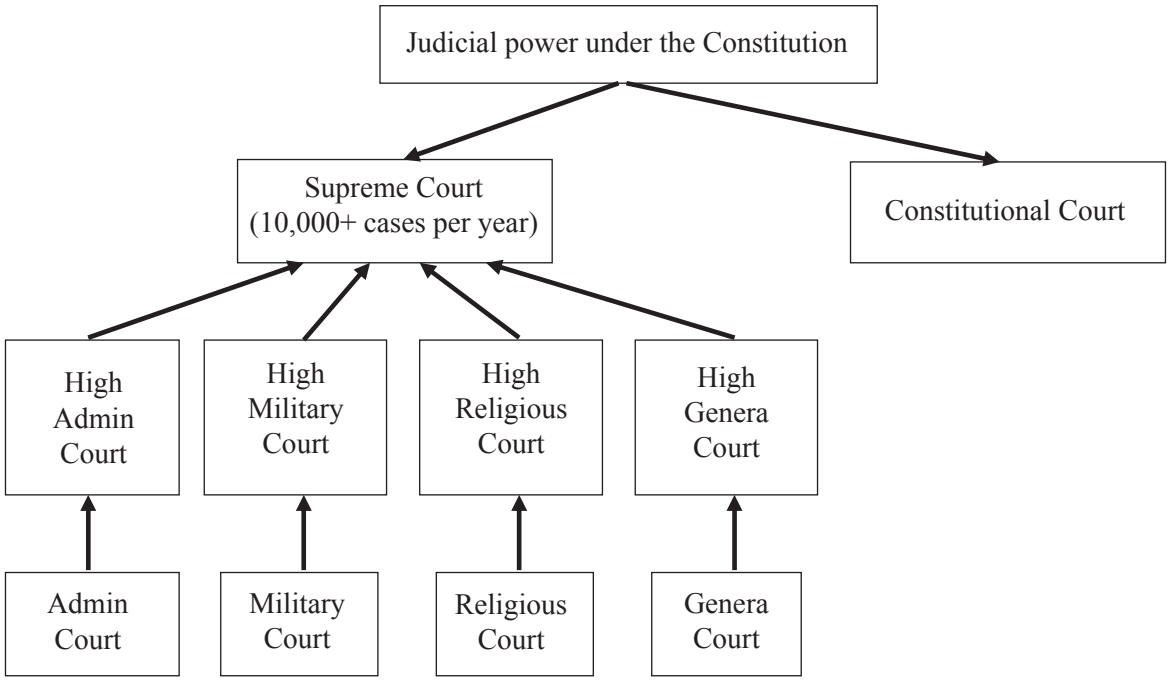
4.2 Organisation

As the table below shows, four branches of the judicature in Indonesia exist under the Supreme Court (Mahkamah Agung): the general courts (pengadilan umum), the military courts (pengadilan militer), the religious courts (pengadilan agama), and the administrative courts (pengadilan tata usaha negara).

From most of these courts, there are two levels of appeal. The first is to a high court (pengadilan tinggi). The second is an appeal, referred to as cassation (kasasi) to the Supreme Court. As will be discussed below, however, the decisions of some courts within the general courts are directly appealable to the Supreme Court.

The Constitutional Court sits outside this organisational hierarchy. It is a court of first and final instance in the matters over which it has jurisdiction.

[24] Article 24B deals with the Judicial Commission and the Constitutional Court, both of which are discussed in detail below. .



Within the general courts, there are several branches, including the corruption court, the commercial court, the human rights court, the industrial relations court and the taxation court. The tasks and functions of these courts, and their respective jurisdictions, are discussed below at

4.3 Model

Indonesia follows the civil law tradition, which it inherited from the Dutch during its colonisation of Indonesia.

4.4 Tasks and Functions

This section sets out the respective tasks, functions and jurisdictions of Indonesia's courts. The appeals process is discussed below at 4.14 and in Chapter 5 on Civil and Criminal Enforcement.

General courts (pengadilan umum)

The vast majority of civil litigation and criminal prosecutions are heard at first instance in the general courts. These courts have jurisdiction over any matter not falling within the jurisdictions of other courts, including general criminal, civil and many commercial matters.

The first instance general court is the district court, otherwise referred to as the state court (*pengadilan negeri*). These courts operates at the district (*kabupaten*) and city (*kotamadya*) level.

Appeals from the district court are heard by high courts (*pengadilan tinggi*) at the provincial level. High courts can also settle jurisdictional disputes between district courts within its territorial jurisdiction. There are very few barriers to lodging appeals.

District and high courts can provide information and advice on legal matters to government institutions in their jurisdictions if requested. Both courts can, by legislation, be given additional tasks and authority.

The general courts also house what are referred to as 'special courts' (*pengadilan khusus*), many of which employ *ad hoc judges*. The term ad hoc in this context is a misnomer, largely because, in

practice, *ad hoc* judges are employed as judges for a particular period, rather than being 'called in' to sit in specific types of cases relating to their particular areas of expertise.

These special courts include:

Corruption Court[25]

In order to understand the Corruption Court, we must first discuss the Anti-Corruption Commission (*Komisi Pemberantasan Korupsi*), established by Law No 30 of 2002 on the KPK. The KPK is an independent Commission made up of carefully-selected seconded police officers and prosecutors. It can conduct its own investigations and prosecutions of corruption cases that implicate law enforcement officers or government officials, involve a significant amount of the state's finances, or attract significant public concern (Articles 6(c) and 11 of the KPK Law). Introductory consideration (b) of the Law concedes that the government institutions which had handled corruption cases in the past had 'not yet functioned effectively and efficiently in eradicating corruption'. Taking the investigation and prosecution of these corruption cases away from ordinary police and prosecutors was a direct response to the perception that, far from pursuing corruption effectively, many ordinary police and prosecutors were intimately involved in it.

To circumvent the established career judiciary and its generally lax performance in corruption cases, a specialist court – the *Tipikor* Court – was created with the sole jurisdiction to hear the cases investigated and prosecuted by the KPK. The Tipikor Court is a branch of the Jakarta District Court (Article 54(1) of the KPK Law), but hears its cases on different premises. Fenwick (2008) describes the establishment of the *Tipikor* Court as an

> [a]ttempt to circumvent entirely a judicial system known to be complicit in protecting corruptors, and – at the very least – capable of being unresponsive or incompetent in the administration of justice.

Procedurally, several differences separate the *Tipikor* Court and the District Court. Two are particularly significant. First, rather than having three-judge panels, *Tipikor* Court hearings employ five-judge panels.

Although proceedings are usually chaired by a general court career judge, three judges on each panel are *ad hoc* judges. These are legal experts, such as academics, practitioners and retired judges, brought in to sit alongside career judges in *Tipikor* trials. The thinking behind using *ad hoc* judges was that they would be more likely to be independent, not having worked within the existing law enforcement apparatus.

The use of *ad hoc* judges in general, and three *ad hoc* judges in particular, has been a significant development. Several of the *Tipikor* Court's decisions have been split along *ad hoc* and career lines, with the majority *ad hoc* judges convicting the defendant and the minority career judges declaring that they would have acquitted or imposed a lower sentence. Appeals can be lodged with a *Tipikor* High Court, and then with the Supreme Court, again with three *ad hoc* and two career judges on the panel (see Articles 59(2) and 60(2) of the KPK Law).

At all levels – first instance, appeal and Supreme Court appeal – *Tipikor* panels have, at time of writing, a 100 percent conviction rate in the 150 or so cases heard thus far. Unlike other branches of the Indonesian judicature, the *Tipikor* Court also has a reputation for working hard to resolve cases quickly, sometimes conducting 'marathon' hearings long into the night.

[25] The description of the Corruption Court draws on Butt (S Butt, 2009).

Commercial courts (pengadilan niaga).

Presided over by specially trained judges, these courts were established under Law No 4 of 1998 in the wake of Indonesia's economic collapse of

1997. Their jurisdiction is primarily bankruptcy cases and intellectual property cases. However, case lodgement rates have been falling, apparently because of a lack of faith in the court's proceedings and decisions.

Human Rights Court

The Human Rights Court Law Was established under Law No 26 of 2000 on the Human Rights Court. The Law provides for the establishment of human rights courts within district courts in local or regional centres to adjudicate alleged cases of genocide and crimes against humanity, including violations committed outside Indonesia by Indonesian citizens.

The jurisdiction of the Court is strictly limited. It can adjudicate cases of 'genocide' and 'crimes against humanity'. The Human Rights Court Law adopts standard international definitions of those terms. Article 8 is practically a direct translation of the definition of genocide contained in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, as adopted by Article 6 of the Rome Statute of the International Criminal Court. Similarly, Article 9 of the Law adopts the definition of 'crimes against humanity' contained in Article 7 of the Rome Statute. The two other crimes punishable under the Rome Statute – war crimes and crimes of aggression – are not specifically prohibited under the Law and thus fall outside the jurisdiction of these courts.

Three ad hoc non-career judges will preside over each five-judge panel. There are rights of appeal to identically weighted panels in higher courts. Perhaps most controversially, Article 43(1) authorises the DPR to form ad hoc human rights tribunals to hear and adjudicate alleged human rights violations committed before the Law was enacted. The Law therefore appears to go further than effectively providing that genocide and crimes against humanity have always been illegal in Indonesia. It also permits a tribunal that did not exist when the crimes in question were committed to adjudicate these cases.

Industrial Relations Court (Pengadilan Hubungan Industrial)

Industrial Relations Court was established by Law No 13 of 2003 on Employment and Law No. 2 of 2004 on Settlement of Industrial Relation Dispute. This Court, which has general court judges and ad hoc judges on each panel, has jurisdiction over specified employment-related disputes. Its jurisdiction is enlivened, however, only if alternative dispute resolution fails. The Industrial Relations Court is an example of special court, appeals from which lie directly with the Supreme Court. The Court also formally registers and enforces resolutions of employment disputes arrived at using other means, such as conciliation, arbitration and mediation.

Fishery Court (Pengadilan Perikanan)

The Fishery Court was established by Law No 31 of 2004 on Fishery. Its main jurisdiction is crimes related to fishery.

The Taxation Court (Pengadilan Pajak)

The Taxation Court was established by Law No 14 of 2002. It has jurisdiction to decide taxation disputes between taxpayers and government tax authorities. From decisions of the Taxation Court there is no direct appeal to the Supreme Court.

Military courts (pengadilan militer)

The military judicature comprises four branches of courts: general military courts (*pengadilan militer*); high military courts (*pengadilan tinggi militer*); supreme military courts (*pengadilan utama militer*); and the war court (*pengadilan pertempuran*).

The jurisdiction of each of these courts depends on the rank of the military officer being tried and the type of dispute. General military courts hear criminal cases at first instance but can only hear cases involving officers below the rank of captain. The high military court hears military administration issues and has jurisdiction over soldiers ranked major and above. Both the high and supreme military courts can hear appeals from the general military court. The supreme military court also hears appeals from the high military courts in cases involving military administration issues.

The jurisdiction of the military courts has not traditionally depended on the issues in the case before it. Rather, jurisdiction has usually arisen if the alleged perpetrator is a military officer, regardless of whether the crime was committed within the course of duty. The military court usually applies civilian laws such as the Criminal Code (*Kitab Undang-undang Hukum Pidana*, or KUHP), and TNI-specific disciplinary laws and codes.

The use of the military courts to try soldiers for crimes clearly committed in an their capacity as civilians has, in the past, caused some controversy – largely because military court processes have tended to produce acquittals or lighter sentences for military officers than would probably have been imposed by a civil court – and has now been restricted by law. Article 3(4)(a) of MPR Decree No VII of 2000 states that TNI soldiers are to fall under the jurisdiction of the military court if they violate military law, and under the jurisdiction of the general courts if they breach general criminal law.

This principle has been established in Article 65(2) of Law No 34 of 2004 on the Indonesian Armed Forces.

Religious courts

There are religious courts of first instance (*pengadilan agama*) and appeal (*pengadilan agama tinggi*). Religious courts have jurisdiction only over Muslims and over defined areas of Islamic law, such as marriage, inheritance, trusts and Islamic finance issues. The statute governing the Religious Courts is Law No 7 of 1989, as amended.

Administrative courts

Administrative courts of first instance (*pengadilan tata usaha negara*) and appeal (*pengadilan tata usaha negara tinggi*) have jurisdiction to hear disputes between Indonesian citizens and the government over alleged infringements of the law or misuse of power by a state organ or official, but only after other administrative avenues have been exhausted.

Caseloads

General courts

In 2009, 3,531,631 cases were lodged in first instance courts in Indonesia, up 4% from 2008. 97.6% of the cases lodged were decided.

Fist instance court		Lodged	Decided
General courts	Civil, Criminal, Human Rights, Corruption, Commercial	180,787 (5.1 %)	163,541
	Minor Crimes and traffic infringements	3,015,511 (85.0%)	3,015,511
Administrative courts	Applications and tax cases	16,241 (0.5 %)	5,861
Religious courts	Divorce and other cases	330,984 (9.3 %)	274,545
Military courts	Serious crimes and misdemeanours	3,331 (0.1 %)	2,700
Total		**3,546,854**	**3,462,158**

At the appeals level, 14,531 cases were lodged, up 0.1% from 2008. 92% of these were decided.

Appeal court		Lodged	Decided
General courts (civil and criminal cases)	Civil, Criminal, Commercial	11,013 (75.8%)	10,423
Administrative courts	Applications	823 (5.6%)	707
Religious courts	Divorce and other cases	2,105 (14.5%)	1,837
Military courts	Serious crimes and misdemeanours	590 (4.1%)	428
Total		**14,531**	**13,395**

Criminal cases in the General Courts (First Instance and Appeal) comprised 93.5% of all cases heard in Indonesia in 2009. 3,187,852 criminal cases were lodged and 3,146,461 were decided by these courts, a clearance rate of 98.7%

Civil cases heard in the General Courts (First Instance and Appeal) comprised 6.45% of all cases heard in Indonesia in 2009. 219,926 cases were lodged and 166,920 decided by these courts, a clearance rate of around 75.9%.

Indonesia's five Fisheries Court (housed in the Medan, Pontianak, North Jakarta, Bitung and Tual District Courts): 76 cases were lodged; 61 were decided (clearance rate of 80%) in 2009. These courts heard 0.002% of the total cases heard by Indonesian courts.

Indonesia's sole Anti-Corruption Court (in Central Jakarta): 64 cases were lodged; 58 were decided (clearance rate of 91%). This court heard 0.001% of the total cases heard by Indonesian courts in 2009. On appeal, 27 cases were lodged, 22 of which were decided (a clearance rate of 81%).

Indonesia's five Commercial Courts (located in Central Jakarta, Medan, Semarang, Surabaya and Makassar): 164 cases were lodged; 76 were decided (a clearance rate of 46%) in 2009. These courts hear 0.0048% of all cases heard by Indonesia's courts.

Indonesia's 33 Industrial Relations Courts: 1,312 cases were lodged; 800 were decided (a clearance rate of 61%) in 2009.

Religious Courts

In 2009, 330,984 cases were lodged with Indonesia's first instance religious courts. Of these, 274,545 were decided, giving these courts an 82.95% clearance rate.

2,105 cases were lodged with Indonesia's religious courts of appeal in 2009. Of these 1,837 were decided, giving these courts a clearance rate of 87.27%.

The vast majority (98.121%) of these first instance and appeal cases involved marriage disputes.

Administrative Courts

1,768 cases were lodged with Indonesia' first instance administrative courts were lodged in 2009. Of these, 1,344 were decided, giving the court a 76% clearance rate for the year.

In 2009, 823 appeal cases were heard by Indonesia's administrative appeal courts, of which 707 were decided. The clearance rate was 86%.

Taxation Court

Indonesia has only one Taxation Court. It is located in Jakarta. It heard 0.4% of all cases heard in Indonesia. It had a backlog of 7,011 cases from the previous year. In 2009, 7,462 cases were lodged, and 4,517 cases were decided.

Military Courts

Indonesia's military courts heard approximately 0.1% of cases lodged in Indonesia in 2009. 3,331 cases were lodged in first instance military courts, 2,700 of which were decided (a clearance rate of 81%).

590 cases were lodged with Indonesia's military appeal courts. Of these, 428 were decision, giving these courts a clearance rate of 72%.

The Mahkamah Agung (Supreme Court)

Appeals from the general, military, administrative and religious courts can be heard on cassation (kasasi) by the Supreme Court, Indonesia's highest court.

Cassation hearings, a feature of many countries of the civil law tradition, are similar to appeals within the common law system, but they are concerned only with the legal aspects of the case and their main aim is to determine whether the lower courts have applied the law correctly. However, even though the Supreme Court is theoretically not required to adjudicate upon the facts of the case or the evidence produced by the parties, it commonly does so and can even call witnesses (Pompe, 2005).

The Supreme Court can also review the validity of laws of a level lower than legislation – such as government regulations, presidential decisions and ministerial decrees – to determine whether they are consistent with legislation. The Court also has the power to review the formal validity of lower-level laws, that is, it can review the 'procedures used to enact the law'. However, the Supreme Court cannot review the constitutionality of statutes – this is the exclusive task of the Constitutional Court.

Before 2004, if the Supreme Court found a lower-level law to be inconsistent with a statute, it was to 'firmly state that the law is invalid and not generally applicable'. However, the Court could not itself strike down the law. Rather, the government department that issued the law was to revoke it. However, since the passage of amendments to the Supreme Court Law, the Court's decisions which invalidate lower-level laws now appear to have more weight. Article 31(4) of the Supreme Court Law now states that: 'A law declared invalid...no longer has binding force'.

The Supreme Court can also exercise other powers provided for in legislation. For example, the Supreme Court is to provide 'its considered legal opinion to the President on requests for pardons and rehabilitation' and supervises the lower courts, legal advisors and notaries. The Court can also settle jurisdictional disputes between courts.

The Supreme Court has 51 judges. Of these there is one Chief Justice, one Deputy Chief Justice, and six Junior Chief Justices. The Court is divided into 8 chambers, each led by a senior judge.

Time limits for adjudication

The Supreme Court is well aware of criticisms about its case backlog, which currently stands at around 10,000 cases and is largely caused by the Court's reluctance to limit the types of cases it hears. It currently accepts around 12,000 cases per annum.

In September 2009, the Supreme Court Chief Justice issued a Supreme Court Circular Letter (No 138/KMA/SK/IX/2009) on Time Limits for Handling Cases

in the Supreme Court. The order requires that the Supreme Court decide each case and send it back to the district court from which the application was lodged within one year from the date of registration. This is a significant advance: previous regulations had required resolution within two years.

As for other courts in Indonesia's judicial hierarchy, Supreme Court Circular Letter No 6 of 1992 (21 October 1992) requires district courts to resolve cases within six months of lodgement with the district court. According to the same Circular Letter, high courts are also required to resolve each case within six months. Other statutes, such as the Bankruptcy Law (1998) and the Anti-Corruption Court Law (2009) stipulate specific times limits for case processes and resolution for particular types of cases. There is, however, no data available to the author indicating whether, in practice, these time limits are observed.

The Constitutional Court

For a number of decades, Indonesian judges and lawyers have argued that an Indonesian superior court – either the existing Supreme Court or a newly- established court – should have the authority to determine the constitutionality of statutes (Lev, 1978). This, it was argued, would improve the accountability of the Indonesian government and assist to ensure that its actions conformed to the Constitution. These reformists were unsuccessful.

However, the end of Suharto's New Order heralded a revived interest in such reforms. Provision was made for the establishment of the Constitutional Court in the third amendment to Indonesia's constitution, approved on 9 November 2001. The fourth amendment (10 August 2002) required the Constitutional Court to be established by 17 August 2003 and the Supreme Court to exercise its jurisdiction in the meantime (Constitution, Transitional Provisions, Article III). The Constitutional Court Law (No 24 of 2003) was passed on 13 August 2003. Soon after, its judges were installed by Presidential Decree and the Court began accepting cases.

The Constitutional Court's jurisdiction is explained in Article 24C(1) of the 1945 Constitution, which states:

> The Constitutional Court has jurisdiction to adjudicate with finality at first and final instance the review of legislation as against the Constitution, disputes on the jurisdiction of state institutions whose authority is provided for in the Constitution, the dissolution of political parties, and the settlement of disputes concerning the results of general elections.

Under Article 24C(2) of the Constitution and Article 10(2) of the Constitutional Court Law, the Court is also to provide a decision in the event that the Indonesian Legislative Assembly (DPR) suspects that the President or the Vice President has violated the law by committing an act of treason, corruption, or bribery; other serious crimes or improper conduct; and/or no longer fulfils the Constitutional requirements to hold office.

The Constitutional Court: a model of judicial reform?[26]

In its first three years of operation, the Constitutional Court has shown impressive levels of independence and has exhibited competence far higher than that of other Indonesian courts. To explain this, several of its decisions deserve brief treatment.

First, the Constitutional Court has indicated that the prime reference point for its decisions is the constitution, not government or legislative preferences. In a series of cases, a majority of the court's judges have held that Article 50 of the Constitutional Court Act contradicts the Constitution. This is significant, because the Constitutional Court Act is the very statute that established the court and that deals with its composition and procedures. Article 50 attempted to prevent the Constitutional Court from reviewing the constitutionality of statutes enacted before the first amendment to the constitution in 1999. The Court found this provision to be unconstitutional because the constitution does not impose any such restriction.[27] The Constitutional Court has therefore reviewed several statutes enacted well before 1999.

Second, in a 2003 case, the Constitutional Court invalidated legislation that would have prohibited former members of the Indonesian Communist Party or other prohibited organisations, or people involved in the 1965 coup, from being nominated for candidature in local, regional and national elections.[28] According to the court, this legislation breached the constitutional right of Indonesians to participate in government and to be free from discrimination.[29]

Third, the Constitutional Court has upheld the constitutional right of citizens to be free from prosecution under retrospective laws.[30] Controversially, in 2003 a majority of the Constitutional Court invalidated a statute that would have permitted the investigation and prosecution of those involved in the 2002 Bali bombings using an anti-terrorism law that had been enacted after the bombings took place (Butt and Hansell 2004; Clarke 2003). The court was strongly criticised for being soft on terrorism, but undeniably the majority's concern to uphold the text of the constitution in the face of domestic and international pressure indicates its strong levels of independence, matched with sound legal reasoning.

Fourth, the Constitutional Court has imposed obligations on the state that the court found to be implicit—even though not explicitly expressed—in the constitution. The court has primarily used two provisions as a basis to imply these obligations. The first is the preamble to the constitution,

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[26] This section draws on Butt (2007).

[27] Constitutional Court Decision No. 004/2003, reviewing Law No. 14 of 1985 on the Supreme Court (the Mahkamah Konstitusi *Law case No. 1*); Constitutional Court Decision No. 013/2003, reviewing Law No. 16 of 2003 (the *Bali Bombing case*); Constitutional Court Decision No. 066/2004, reviewing Law No. 1 of 1987 on Kadin and Law No. 24 of 2003 on the Constitutional Court (the *Kadin Law case*).

[28] Constitutional Court Decision No. 011-017/2003, reviewing Law No. 12 of 2003 on General Elections for Members of the DPR, DPD and DPRD *(the PKI case)*.

[29] In particular, the legislation was said to breach Article 27(1) of the constitution, which gives citizens to right to equal treatment before the law; and Article 28I(2), which provides the right to be free from discriminatory treatment.

[30] This right is contained in Article 28I(1).

which states that the government is to 'protect all Indonesians and their native land and, to further public welfare, the intellectual life of the people, and to contribute to the world order of freedom, peace and social justice'. The second is Article 1(3), which states that Indonesia is a law state (negara hukum). From these provisions, the Constitutional Court has implied apparently broad state obligations, including the obligation to protect citizens from corruption,[31] to protect the domestic broadcasting industry from foreign domination[32] and to provide for a fair trial, access to justice and legal aid.[33]

The reasons for the Court's early successes are unclear. It is, however, likely that much of the Court's achievements are attributable to the skill and commitment its founding Chief Justice – Jimly Asshiddique, a professor of constitutional law at the University of Indonesia with impressive legal knowledge and a captivating personality.

However, in more recent years, particularly since Jimly's term as Chief Justice expired and his resignation from the Court, some observers have begun questioning the quality of the Court's decisions. Indeed, many of its decisions have tended to undermine important reforms aimed at reducing corruption and increasing judicial accountability and transparency.

Reviews of legal framework for corruption reform

In the first case, the applicant was Bram Manoppo.[34] The KPK had investigated him over the improperly marked-up sale of a second-hand helicopter from Russia – the case in which Abdullah Puteh, former Aceh Governor was also involved. Manoppo sought a review of Article 68 of the KPK Law, which allows the KPK to 'take over' all preliminary enquiries (penyelidikan) and investigations (penyidikan) into, and prosecutions of, crimes of corruption, which had commenced before the KPK was established. Manoppo complained that the KPK had used the provision to investigate him for a crime allegedly committed before Article 68 was enacted – on 27 December 2002 – thereby breaching the Constitution's prohibition on laws of retrospective application (see Article 28I(1) of the Constitution).

The Court held that Manoppo's constitutional rights had not been damaged by the operation of Article 68 because Article 68 had not been applied to him. The KPK had never 'taken over' his case. Rather, it had investigated him under Article 6(c) of the KPK Law, which states: 'the KPK has power to conduct preliminary enquiries and further investigations into, and prosecutions of, crimes of corruption'.[35] The Constitutional Court denied Manoppo standing to bring his claim, because he was not able to prove that his constitutional rights had been breached by Article 68.

Nevertheless, the Court went on to declare that the KPK Law itself could operate only prospectively and that, therefore, the KPK could pursue corruption committed only after the KPK Law was enacted – on 27 December 2002. KPK investigations into corruption perpetrated before this date would, according to the Constitutional Court, contravene the Constitution's prohibition on retrospectivity. One feared implication of this declaration was that the KPK could not pursue

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[31] Constitutional Court Decision No. 006/2003, reviewing Law No. 30 of 2002 on the Corruption Eradication Commission (the *KPK Law case).*

[32] Constitutional Court Decision No. 005/2003, reviewing Law No. 32 of 2002 on Broadcasting (the *Broadcasting Law case).*

[33] See, for example, Constitutional Court Decision No. 006/2004, reviewing Law No. 18 of 2003 on Advocates (the *Advocates Law case No. 2*)..

[34] Constitutional Court Decision No 069/2004, reviewing Law No 30 of 2002 on the Corruption Eradication Commission.

[35] Constitutional Court Decision No 069/2004 at 64-65.

members of the Soeharto family to retrieve the vast sums accumulated during Soeharto's 33 years in power, nor to punish offenders. There has, however, been debate about whether the Court's declaration on this matter is binding, because it was not included in the Court's final holding (*amar putusan*) – the part of its decision in which it sets out whether it has decided to strike out the statute under review. Rather, the declaration was contained in its judicial reasoning (*pertimbangan hukum*), the precise legal weight of which remains in doubt.

It is unclear whether, therefore, the *Tipiko*r Court must dismiss KPK prosecutions relating to acts allegedly performed before 27 December 2002, or whether the *Tipikor* Court can legally ignore the Constitutional Court's declaration, thereby continuing to hear those cases. As a practical matter, the *Tipikor* Court has indicated in at least one case that it prefers the latter approach.[36]

In another notorious case, Dawud Djatmiko,[37] a suspect in a corruption case concerning the acquisition of land for a toll road project (Kompas, 2006), objected to several provisions of the 2001 Anti-corruption Law, including the Elucidation to Article 2(1). He argued that this provision violated his right to legal certainty under Article 28D of the Constitution. As discussed above, Article 2(1) prohibits 'any person, by means of an act which breaks the law [my emphasis], enriching themselves or another, which could damage state finances or the state economy'. The Elucidation to Article 2(1) defines 'act which breaks the law' (*perbuatan melawan hukum*) as an act which need not breach written laws. Such an act can merely fail to 'accord with the feeling of justice or social norms in the community'.

The Court accepted the applicant's objection to the Elucidation to Article 2(1) for two reasons. The first was that a fundamental principle of Indonesian law – the so-called legality principle, proclaimed in Article 1 of the KUHP – prevented a person from being convicted for performing an act unless that act was a crime under written criminal law in force at the time the act was performed. The Court rejected criminal culpability on the basis of previously unwritten and possibly undisclosed 'community' attitudes. Second, the Court observed that community 'feelings of justice' and 'social norms' might differ between regions, making a particular act criminal in one part of Indonesia, but not in another.[38] According to the Court, the Elucidation to Article 2(1), therefore, created legal uncertainty, which was prohibited under the Constitution.

Perhaps the most controversial of the constitutional challenges to Indonesia's anti-corruption framework has, however, been the *Tipkor Court case.*[39] Again, this case was brought by applicants involved in cases being heard before, or decided by, the *Tipikor* Court. Some of them were former members of the KPU, convicted for corruption in the procurement of items required to run the 2004 general elections. They challenged the constitutionality of the very existence of the *Tipikor* Court, pointing to provisions of the KPK Law. The bulk of the KPK Law is devoted to establishing the KPK and its procedures, but several of its latter provisions briefly cover the *Tipikor* Court. One such provision is Article 53, which establishes the Court.

The applicants attacked the constitutionality of the *Tipikor* Court's establishment under Article 53 on two main grounds. First, the applicants pointed to Article 24A(5) of the Constitution, which states:

> The organization, position, personnel and procedural law of the Supreme Court and the judicial bodies below it [including the *Tipikor* Court] are regulated by (*dengan*) statute [my emphasis].

[36] Decision No 01/PID.B/TPK/2005/PN.JKT.PST, at 128-129.

[37] Constitutional Court Decision No 03/PUU-IV/2006.

[38] Constitutional Court Decision No 03/PUU-IV/2006 at 74.

[39] Constitutional Court Decision No 012-016-019/PUU-IV/2006.

The applicants' main argument was that, because Article 24A(5) did not use the phrase 'in (*dalam*) a statute', but rather used the term 'by (*dengan*) statute', the Tipikor Court needed to be established not only by statute, but in its own separate statute. According to this argument, the *Tipikor* Court could not be established in a statute which was primarily concerned with the establishment of the KPK. The Court agreed, by a majority of eight to one (with Marzuki dissenting).[40]

A second argument accepted by the Constitutional Court was that having two courts, both with jurisdiction in corruption cases, created 'dualism'. Article 53 added the Tipikor Court to the existing system to heption cases, rather than displacing the existing system. The result was that ordinary police, prosecutors and courts deal with the corruption cases that the KPK decides not to pursue.

In this context, the Constitutional Court accepted that Article 53 had created 'double standards' which might lead to different decisions in similar cases depending on the court in which the cases were heard. According to the Constitutional Court, this breached the Constitution's right to equality before the law. The Constitutional Court clearly thought that all corruption cases should proceed through the *Tipikor* Court.[41]

This Court's distinction between 'in' and 'by' is highly questionable. The Indonesian equivalents for 'in' and 'by' add no complexities or inflections not present in the English. The Court should have accepted that 'by' and 'in' have the same effect – that the *Tipikor* Court must be regulated in a statute, rather than by a different type of law, such as a presidential or government regulation. Textual analysis aside, it seems entirely irrelevant whether a body is established in its own separate statute, or in a statute in which other matters are regulated or other bodies established. Surely, even the smallest part of a statute has the same legitimacy and weight as an entire statute, if enacted by a democratically elected parliament.

And, as a matter of interpretation, if Indonesia's constitutional drafters intended that establishing a new court required its own statute, they might have explicitly declared that establishment required a '*undang-undang tersendiri*' or 'separate statute'. This is a commonly-used term in Indonesian legislation to indicate such an intent.

The Court's 'dualism' holding is more persuasive. In practice, given the *Tipikor's* Court 100 percent success rate, it may well be that defendants are at a disadvantage if their cases are heard in the *Tipikor* Court rather than the general courts. Against the Court's decision in this issue, though, the *Tipikor* and general courts apply the same substantive and procedural laws: both apply the same definitions of corruption and have the same criminal penalties at their disposal. Further, given that the *Tipikor* Court is part of the general courts, how can its establishment create dualism? The Constitutional Court did not address these issues.

Despite finding that the *Tipikor* Court's establishment was unconstitutional, the Constitutional Court refused to strike down the legislative basis for the *Tipikor* Court with immediate effect. In other words, the Constitutional Court refused to disband the *Tipikor* Court. Instead, appealing to the need for 'judicial wisdom and craftsmanship',[42] the Constitutional Court decided to allow the Tipikor Court to continue operating for three years, giving the Indonesian parliament time to enact a new statute to grant the Tipikor Court exclusive jurisdiction over all corruption cases. The deadline for the enactment of the statute was set at 19 December 2009.[43] If this date passes without

[40] Constitutional Court Decision No 012-016-019/PUU-IV/2006 at 283.
[41] Constitutional Court Decision No 012-016-019/PUU-IV/2006 at 289
[42] Constitutional Court Decision No 012-016-019/PUU-IV/2006 at 288.
[43] Constitutional Court Decision No 012-016-019/PUU-IV/2006 at 289.

legislative response, the legal basis for the *Tipikor* Court will disappear and the Court should shut its doors.

The Court took this approach because it was concerned to 'restrict the legal consequences arising from a declaration of unconstitutionality of a statute' in the 'greater public interest'.[44] The Court feared that striking down Article 53 immediately would disrupt *Tipikor* trials and cause legal chaos. It emphasised the disastrous effects corruption had brought upon the nation and wanted to allay concerns that the Constitutional Court itself was weakening efforts to eradicate corruption. The Court accepted that parliament could not enact a new statue overnight, hence the grace period.[45]

Parliament did enact a new statute, though the legislation appears to stop dead the momentum of the KPK and the Corruption Court, significantly weakening their potency in two important ways.

First, the Law seems to permit a majority of career judges to sit in Corruption Court cases. The Law requires that either three or five judges preside over each case and that, on each panel, there be a ratio of *ad hoc* and career judges. The statute, however, leaves the composition of the panel to the Chairperson of the District Court in which the Corruption Court is housed, or to the Supreme Court Chief Justice, if undefined circumstances so require. It would seem entirely within the Chairperson's discretion to appoint a majority of career judges to all cases, thereby tainting the trial with the associations of incompetence and corruption that they bring.

As mentioned earlier, having a majority of *ad hoc* judges seemed to be a key component of the success of the KPK and the Corruption Court. Allowing a career judge to control the composition of the bench significantly reduces the likelihood that the Corruption Court will continue to reliably convict. The result could well have been worse, however: some members of the drafting team proposed removing *ad hoc* judges altogether; and the Law allows serving *ad hoc* judges to remain on the bench rather than requiring them to reapply for their positions.

Second, the Law does not mention the KPK at all; rather, it refers only to general public prosecutors (*penuntut umum*) bringing actions before the Corruption Court. The KPK's role in prosecuting future corruption cases is, therefore, highly tenuous. It is unclear whether, for example, once the Corruption Court Law comes into force, the KPK will continue to have power to prosecute in the Corruption Court.

Tempering techniques[46]

From the earliest days of its existence it was clear that the MK needed to find ways to make its decisions more politically palatable. If the Court failed to accommodate the environment in which it operated, it faced irrelevance and disrespect (if it continued to make decisions which the government ignored or circumvented) or even disbandment (if powerful politicians became so irritated by the Court and its decisions that they moved to have it eradicated). After this heady initial muscle-flexing, the Court, quite necessarily, adopted several 'tempering techniques' – methods to soften negative effects of its decisions on other arms of government, but which arguably require the Court to diverge from the letter of the law.

The MK has adopted at least four tempering techniques. In so doing, it has drawn on strategies employed by constitutional courts of Continental Europe and elsewhere that are also caught between enforcing the constitution and political reality.

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[44] Constitutional Court Decision No 012-016-019/PUU-IV/2006 at 288.

[45] Constitutional Court Decision No 012-016-019/PUU-IV/2006 at 286-87.

[46] This section draws on (Simon Butt, 2008)..

Technique 1. The Court has declared that its decisions operate only into the future. In other words, even if the Court finds that a law is inconsistent with the Constitution, the law will be invalid only from the date the Court hands down its decision invalidating the law. Anything done under the law before the MK invalidated the law remains legal and does not need be to 'undone'.

This self-imposed limitation was brought into stark relief in the aftermath of a MK case involving some of those involved in the Bali bombings in Kuta in 2002. The MK had, by bare majority, decided that one of the laws under which the Bali bombers were investigated and, ultimately, convicted was unconstitutional because it was enacted after the bombings took place. The law was retroactive in effect, and the Constitution prohibits retroactive laws. The decision could not, however, be used to undo the action taken under the law that the MK held was unconstitutional. In other words, the Bali bombers did not need to be set free or retried. Because they had been convicted under the law before the MK had invalidated the law, their convictions stood.

Two further cases illustrate some of the ramifications of this technique. In one case, three Australians convicted and sentenced to death for attempting to smuggle heroin out of Indonesia asked the Court to consider whether imposing the death penalty in narcotics cases contradicted the Constitution's right to life. In another, some of the Bali bombers approached the Court again, asking it to assess whether the way the death penalty is carried out in Indonesia – by firing squad – was cruel and inhumane punishment, prohibited by the Constitution. The Court turned down both requests. Even if the Court had agreed with the Bali 9 and declared the death penalty unconstitutional, though, the executions would probably have gone ahead because the death penalty had already been imposed under the law. By contrast, if the Bali bombers had succeeded in their second case, they might have been able to avoid the death penalty, at least by firing squad, because the law under which they were to be executed had not yet been applied to them – that is, they had not yet been executed.

Technique 2. In several cases, the Court has declared that a law is not consistent with the Constitution but, because the consequences of invalidating the law would be too great, refuses to strike down the law, preferring instead to ask the government to make further attempts at compliance.

A series of cases in which the Court was asked to review the national state budget provide instructive examples of the use of this technique. The Indonesian Constitution requires that the national parliament allocate at least 20% of the state budget to education. The Indonesian Teacher's Association, and others, asked the Court, in cases filed almost annually from 2004, to invalidate state budgets that have failed to meet this target. (Because the budget is a law passed by parliament, the Court can assess it.) These cases are about as straightforward as legal cases can be: the constitutional target appears clear; the budget does not meet the target; therefore, the budget does not comply with the Constitution. Realising, however, that budgets are hotly political and usually delicately balanced, the Court, each year, has declined to invalidate it, citing the likelihood of ensuing financial chaos. Instead, the Court has urged the government to increase the budget allocation for education from year to year.

Technique 3. Using this strategy, the Court has decided that a law breaches the Constitution but refuses to strike it off the books immediately, choosing instead to set a deadline for the national parliament to pass a new, constitutional, law. This approach was adopted in the Anti-Corruption Court case of 2006, in which the Court decided that the law which established the Anti-Corruption Court was unconstitutional. But, admitting that the Anti-Corruption Court was making significant dents in corruption levels in Indonesia and realising that it would be shut down if the law was invalidated with immediate effect, the MK gave parliament until 19 December 2009. At time of writing, however, it was unclear whether the DPR would meet this deadline.

Technique 4. In several decisions, the Court has decided that a law is 'conditionally constitutional' – that is that it is constitutional and can stay 'on the books' provided that it is implemented in a way which the Court thinks is constitutional.

In the Water Resources Law case (2004), for instance, the Court declared that, although it had concerns about the Water Resources Law similar to those it held regarding the Electricity Law, the MK would not invalidate the law, provided that the government issued implementing regulations which were consistent with the Constitution. In another case (MK Decision No 29 of 2007), the Court was asked to assess whether a law which allowed film censorship breached the right to free speech provided in Indonesia's constitution. The Court criticised the law for being behind the times in terms of democracy and freedom of expression, but nevertheless declared the law to be conditionally constitutional – that is, constitutional provided that the censorship board implemented the laws in ways that reflect democratic principles and human rights norms.

It seems reasonable to speculate that Court's longevity thus far can be attributed, at least in part, to its flexible approach to legal principle and interpretation, as reflected in these techniques, thereby minimising political resistance to its function is existence. Other 'new' institutions established to embark upon legal reforms have not treaded so carefully, prompting a political backlash strong enough to threaten their efficacy – in some cases, even their very existence.

The Judicial Commission, for instance, was initially established to investigate judicial (mis) conduct and to propose appointments to the MA. Within only a few years of its establishment, the Commission was hobbled after it publicly targeted previously 'untouchable' senior members of Indonesia's MA in its investigations. The MA responded fiercely, asking the MK to prohibit the Judicial Commission from investigating judges on the basis that such scrutiny might affect the independence of judges when deciding cases. The MK agreed, in effect prohibiting the Judicial Commission from examining the decisions of any Indonesian judge. This left the Commission with the sole and rather toothless function of proposing names of judges to fill vacancies on the MA – advice which the MA almost routinely ignores.

The Anti-Corruption Commission (KPK) and the Anti-Corruption Court, also, have perhaps performed 'too well'. Although both institutions began slowly, they incrementally built up an extraordinary track record of success in their investigations, prosecutions and convictions in their corruption cases, albeit involving lower-ranked public officials, including provincial governors. In so doing, they faced little overt political resistance. From this base, the KPK began targeting more senior and prominent officials – even national parliamentarians and a relative of President SBY. Pursuing big fish is clearly necessary if Indonesia is to reduce its very high corruption levels, but the KPK's timing lacked political nous. The move provoked senior politicians to launch a full-blown attack on both institutions, at a time when the MK decision's deadline for parliamentary action in support of the Anti-Corruption Court, mentioned above, nears. It may well be that, far from having its constitutional position reinforced, the Anti-Corruption Court faces possible extinction or a law that greatly reduces its effectiveness.

Although arguably necessary for the Court's survival, though, these tempering techniques are probably themselves unconstitutional or otherwise illegal, raising significant questions about the Court and its role. The Constitution requires the Court to ensure that the national parliament follows the Constitution. When the parliament fails to do so, but the Court chooses not to intervene, then the MK seems to be failing to perform this task. The Court is allowing laws to continue in force which, the Court has determined, are beyond the parliament's lawmaking power. On one view, then, the MK, charged with enforcing the Constitution, is itself breaching it. This would appear to

leave the negara hukum (Indonesia's version of the rule of law) – which requires, at a minimum, that the government abide by the law, particularly the Constitution – teetering on the brink of irrelevance.

A further problematic aspect of these tempering techniques is that, with their use, there seems little to be gained from asking the Court to assess whether a law is consistent with the Constitution. Giving only prospective effect to its decisions is a case in point. If an applicant cannot, with certainty, use a favourable MK decision to force the government to undo action that it took on the basis of an unconstitutional law, then the utility of approaching the Court in the first place appears minute. Only people to whom the unconstitutional law were to be applied in the future gain from the benevolence of the applicant, whose application to the MK led to the law being struck off the books. Meanwhile, the government can pass a law which contains the most egregious breach of human rights and apply it with impunity until someone asks the MK to strike it down. Even if the MK eventually does strike it down, any action taken under the law before it was struck down will be considered 'legal'. As mentioned, the Court made a general exception to this stance in the vote allocation case. But this is problematic in itself; the Court did not justify why it made the exception and gave no guidelines as to the circumstances in which the exception might be applied in the future.

Perhaps though, criticisms such as these should be reserved for constitutional courts which, although operating in political systems in which judicial review and accountability mechanisms are well accepted and established, persist with similar tempering techniques. It may be unfair to judge the MK using standards developed in countries which have more compliant and respectful governments, and where political considerations are not so overwhelming. Perhaps because the Court has shown many enduring signs of promise, expectations of what it can achieve in Indonesia's political environment are simply unreasonably high. It seems that to have any chance of making the government follow the letter of the Constitution in the future, the Court must itself deviate from the Constitution, at least for now.

These criticisms also ignore some of the Court's significant successes, many of which seem to have been lost amongst these high expectations. First, it has, in fact, without using tempering techniques, struck down provisions of several problematic statutes which the Court declared were not consistent with Indonesia's world-class bill of rights. These include laws which damaged freedom of expression and discriminated on the basis of political persuasion. Second, some of its 'tempered' decisions have, it seemed eventually prompted a government response. For instance, largely due to annual prodding by the MK, the national parliament, eventually, allocated 20% of the state budget to education from 2009.

Third, by all accounts, decisions of the MK are forcing some parliamentarians to at least flick through the Constitution before they sign off on laws; and they are said to be making parliamentarians more careful about what they attempt in parliament and say in parliamentary debates, lest the MK ask for a transcript of the debates and reveal it at trial for all to see. Finally, the MK provides a very public forum in which legal issues are openly explored and grievances between citizens and the government can be fully aired, if not always satisfactorily resolved. The MK's apparent legal norm shopping and flexibility does not seem to deter citizens, organisations and institutions from using it – they still flock to the Court to put their cases. Perhaps the Court's provision of this forum – in which the government is held to account to citizens for the laws it makes – is its greatest achievement thus far. It remains to be seen, though, whether the Court will build for itself authority built on reputation and popular support from which it can compel the government and parliament to comply with its decisions.

4.5 Relations

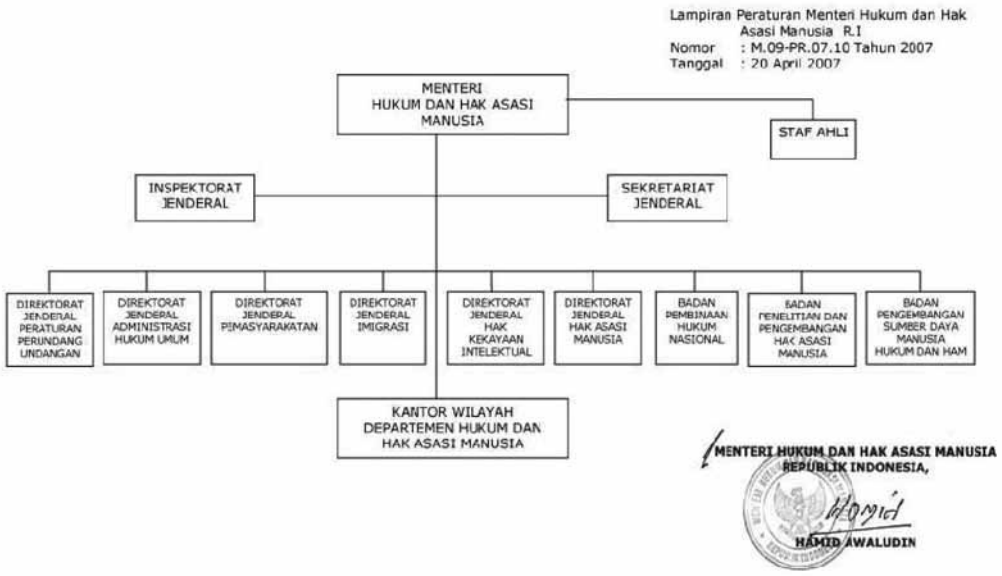
Prior to the *satu atap* reforms– and particularly during the Soeharto regime – it was widely accepted in the Indonesian legal community that the Supreme Court and other courts in Indonesia's judicial hierarchy had informal relations with all of these institutions. It was widely suspected that, in many cases, the Indonesian judiciary decided cases according to the wishes of institutions of state. After all, most judges were then under departmental control and were themselves civil servants. For the most part, judicial decisions very much reflected the desires of government. Indonesia's courts are, since the *satu atap* reforms, formally independent of other institutions of state. As mentioned below in 4.13 Judicial Independence, the *satu atap* reforms have widely been regarded as successful – at least to the extent that the government is now rarely accused of attempting to influence judicial decisions. Even though most serving judges have spent the majority of their careers subservient to government, many of them were said not to like it, and have, therefore, embraced the new culture of independence with some vigour.

However, *satu atap* has brought with it significant problems, particularly the administrative over-burdening of the Supreme Court. There are, however, indications that, in some parts of Indonesia, judges and other court officials have informal ties with other law enforcement officials, including police and prosecutors to fix the outcome of cases – the so-called 'court mafia' (*mafia peradilan*). This issue is also discussed in 4.13 Judicial Independence under the heading 'Corruption'.

'Justice' Department after satu atap

Finally, it should be noted that the satu atap reforms deprived the Department of Justice of perhaps its primary function – to administer the courts. Before the *satu atap* reforms took place, the Ministry was referred to as *Departmen Kehakiman*, which literally translates as Department of Judicial Affairs, even though it was and is more commonly translated as the Department of Justice. It has been renamed the Ministry of Law and Human Rights (*Kementerian Hukum dan Hak Asasi Manusia*).

The Ministry now has very little to do with judicial administration, as the following flowchart illustrates.



Source: Regulation of the Minister for Law and Human Rights No M.09- PR.07.10 of 2007 (see: http://www.depkumham.go.id/NR/rdonlyres/41784A9F-839F-44B5-B4B7-92EB8332EFDF/0/strukturmenteri.jpg).

Legend

Menteri Hukum dan Hak Asasi Manusia	Minister of Justice and Human Rights
Staf Ahli	Expert Staff
Inspektorat Jenderal	Inspectorate General
Sekretariat Jenderal	Secretariat General
Direktorat Jenderal Peraturan Perundang-undangan	Directorate General of Laws and Regulations
Direktorat Jenderal Administrasi Hukum Umum	Directorate General of General Legal Administration
Direktorat Jenderal Pemasyarakatan	Directorate General of Corrections
Direktorat Jenderal Imigration	Directorate General of Immigration
Direktorat Jenderal Hak Kekayaan Intelektual	Directorate General of Intellectual Property Rights
Direktorat Jenderal Hak Asasi Manusia	Directorate General of Human Rights
Direktorat Jenderal Hukum Nasional	Directorate General of National Law
Badan Penelitian dan Pengembangan Hak Asasi Manusia	Research and Development Agency for Human Rights
Badan Pengembangan Sumber Daya Manusia Hukum dan HAM	Human Resources Development Agency for Law and Human Rights
Kantor Wilayah Departemen Hukum dan Hak Asasi Manusia	Regional Office of the Department of Justice and Human Rights

Worrying trends? Mahkumjapol forum case study

Opinion: A forum for doing deals? Tempo Magazine, May 18 2010: 10.

President Susilo Bambang Yudhoyono should not forget history so quickly. Last week [in early May 2010], the government established a coordination forum made up of the Supreme Court, the Law and Human rights Department, the Attorney General's Office and the National Police Force. This forum is no different to the New Order era institution called "Mahkejapol" – with the same four organisations as members.

That forum was established to improve coordination between law enforcement bodies at that time, particularly when differences arose in the interpretation of Articles in the Criminal Code. But instead of improving coordination, the forum became an area for collusion among the legal mafia. Similar fora were established in the provinces, named "DILJAPOL" which involved chief justices, regional offices of the Justice Department, prosecutors and the local police.

In the provinces and the regencies, district chiefs and judges at high courts were a part of the "Muspida" (regional conference of executives), a body under the guidance of the governor or regent. As a result, the judges lost their independence, because courts were under the control of the executive. After this dark era ended, these fora were dissolved.

The Yudhoyono administration seems bent on repeating the mistakes of the past by reviving the same type of forum. Good coordination between law enforcement agencies is clearly needed to eradicate the legal mafia and to prevent political intervention in the courtrooms, but the aims behind the seemingly noble objective of this form contain several flaws.

Bringing together the Supreme Court, the police, prosecutors and the Justice Department goes against the principle of trias politica, the separation of powers. The Supreme Court is a body on par with the President, and therefore cannot be "merged" into an executive body under the coordination of the President. Although the forum will only be a coordinating forum, there must be clear separation between the authority to govern and the authority to uphold the law. Mixing the two is an invitation to collusion and corruption.

We worry that the Yudhoyono administration's coordination forum will become nothing more than a venue for doing deals. For example, if there was a case involving the police, it would be easy to establish 'coordination' to prevent the institutions from being adversely affected. The legal-case mafia, which involves AGO officials, the police and the judges, could be hushed up at a meeting resembling a family gathering. The solutions arrived at would be those that reflected harmonious and friendly relations. It would be easy to lobby the supposedly independent judicial authorities in such fora. Instead of preventing political intervention in law enforcement, the forum would cause it to flourish even more.

There is no need for the government to busy itself establishing such fora. Any coordination needed between the police, prosecutors and law ministers can easily be done through the cabinet. The President has full authority to tell people what to do. The Coordinating Minister for Political, Legal and Security Affairs could carry out this coordination function.

Unfinished cases – for example as a result of prosecutors returning case files to the police by saying they are incomplete – must not be resolved in a coordination forum. Senior police and AGO officials much check and ensure that their subordinates do not accept bribes or intentionally delay taking cases to court. The President must have the courage to hand out sanctions if it turns out that senior officers and AGO officials are involved in misdemeanours or felonies. Establishing a coordination forum will only give law enforcers a place to do deals.

To the knowledge of the author, the courts have no formal relations, apart from Mahkumjapol, with investigation agencies, security agencies, prosecution agencies, state agencies, legislative branches and executive branches. Of course, individual judges may still draw on connections that carry over from the Soeharto period with some of the more repressive agencies, such as the security forces, that remain strong even in democratic Indonesia. Despite this possibility, however, the author is not aware of any credible reports of any persisting formal or informal links.

4.6 Judicial Education and Training

Recruitment

The Supreme Court is now responsible for the recruitment of judges and for the appointment of judges to the 'leadership positions' of chairperson or deputy chairperson. Prior to the *satu atap* reforms, this role was performed by the Department of Justice.

As is customary in most civil law countries, the majority of Indonesian judges are recruited soon after completing law school. (However, it is possible for non-career judges to be appointed to

some Indonesian courts, including the Supreme Court). After applying for a judicial position and passing a series of entrance examinations, psychological testing, and interviews, successful candidates are selected. After an internship, candidates undergo judicial training of several months and, if successful, they will be appointed to a judicial post.

Legislative requirements

Candidates who complete their pre-appointment training must also fulfil a number of legislative prerequisites before they can be appointed to a judicial position. The prerequisites for junior and senior judicial positions differ and will be discussed briefly in this section.

District court judges and first instance administrative court judges

Article 14 of both the General Courts Law (Law No 49 of 2009) of the Administrative Court Law (Law No 51 of 2009) state:

(1) To become a judicial candidate for the district court, a person must be:

a. an Indonesian citizen;
b. devoted to Almighty God;
c. loyal to Pancasila and Indonesia's 1945 Constitution;
d. a law graduate;
e. have passed judicial education;
f. physically and mentally healthy;
g. honest and just, and have impeccable behaviour and an air of authority;
h. between 25 and 40 years of age
i. never convicted of a crime by enforceable judicial decision.

Article 14A of both laws requires that appointments to the district court be made in a transparent, accountable and participatory manner (Article 14A(1)) and that the proses of selection should involve both the Supreme Court and the Judicial Commission (Article 14A(2)). Article 14B regulates the appointment of ad hoc judges.

High general court judges

High court judges must fulfil most of the requirements for district court judges set out in Article 14(1) of the General Courts Law. They must also be at least 40 years of age (Articles 15(1)(a) and (b)) and have 'at least five years' experience as a chairperson or deputy chairperson of a district court, or 15 years' experience as a district court judge' (Article 15(1)(c)). A further requirement is that the judge in question have never been suspended for breaching the Code of Ethics (Article 15(1)(e)).

Apparently in response to criticism that Indonesian judges are generally promoted almost exclusively on the basis of seniority rather than merit, the General Courts Law was amended in 2004 to require prospective high court judges to 'pass an examination conducted by the Supreme Court' (Article 15(1)(d)). The Elucidation to (d) explains that this examination is 'a Supreme Court evaluation of the judge's decisions'. At time of writing, it was unclear whether these examinations were taking place.

Supreme Court judges

Article 7 of the Supreme Court Law states that:

(a) To be appointed as a Supreme Court judge, a candidate must:

1. be an Indonesian citizen;
2. be devoted to the Almighty God;
3. hold a master's in law, based on a law qualification or other qualification that requires legal skill;
4. be at least 45 years of age;
5. be physically and mentally healthy;
6. have at least 20 years' experience as a judge, including at least three years as a high court judge.
7. Not have been suspended for a breach of the Code of Ethics.

For non-career judges, the requirements are different. A non-career Supreme Court judge can be appointed, under Article 7(b)), provided that he or she:

a. fulfils the requirements of Articles 7(a)(1), (2), (4), (5)
b. has at least 20 years' experience in the legal profession or as a legal academic;
c. has a master's degree in law and an undergraduate law degree; or another degree and legal expertise;
d. has not had a criminal prison sentence imposed against him or her by a court for committing a crime for which the applicable prison sentence is five years or more.

'Leadership' (pimpinan) positions on district and high general and administrative courts

At least seven years' experience as a judge of a first instance general court is required for appointment to a 'leadership' position – that is, chairperson or deputy chairperson – in a district court (Article 14(2) of the General Courts Law/Administrative Courts Law).

With respect to 'leadership positions' on high courts, Article 15 of both laws states:

1. To be appointed as a High Court Chairperson, candidates require five years' experience as a High Court judge. Former District Court Chairpersons require three years' experience as a High Court judge [to be appointed as a High Court Chairperson].
2. To be appointed as a High Court Deputy Chairperson, candidates require four years' experience as a High Court judge. Former District Court Chairpersons require two years' experience as a High Court judge [to be appointed as a High Court Deputy Chairperson].

Appointment and dismissal general court judges

General court and administrative court judges are 'appointed by the President, on the proposal of the Supreme Court Chief Justice. Chairpersons and deputy chairpersons of first instance and appellate general and administrative courts are now appointed and dismissed by the President upon the proposal of the Supreme Court Chief Justice, rather than the Justice Minister with the agreement of the Chief Justice as was required under previous laws.

As for dismissal, general and administrative court judges are to be dismissed by the President, on the recommendation of the Supreme Court Chief Justice and/or the Judicial Commission through the Supreme Court Chief Justice. The Judicial Commission can only propose dismissal if the judge in question has breached the Judicial Code of Ethics.

Supreme Court leadership

The Supreme Court's Chief and Deputy Chief Justices are 'elected by Supreme Court judges and appointed by the President' (Article 8(7) of the Supreme Court Law). Junior Chairpersons are

appointed by the President from amongst Supreme Court judges put forward by the Supreme Court Chief Justice (Article 8(8) of the Supreme Court Law).

Appointment of Supreme Court judges

Article 8(1) of the Supreme Court Law states that:

> Supreme Court judges are appointed by the President from candidate name(s) put forward by the DPR.

Under the new Article 8(2)

> The DPR is to select Supreme Court candidate(s)…from candidate(s) proposed by the Judicial Commission.

Continuing judicial education

The Department of Justice and the Supreme Court have offered continuing education courses to practicing Indonesian judges since the 1970s and 80s, but the Department of Justice's offerings tapered off into almost non- existence in the mid-1990s. The Supreme Court effectively took over continuing judicial education at that time, conducting training for district and high court judges by itself and in cooperation with other institutions. However, its courses have been ad hoc, held irregularly and have not formed part of a comprehensive or structured strategy. Additionally, training opportunities have not been distributed equally amongst judges.

A number of Indonesian judges have travelled overseas to attend conferences or training sessions. For example, a number of senior judges – mostly Supreme Court and high court judges – are regularly sent to Australia to attend courses and to visit local institutions. Some Indonesian judges have also completed foreign and Indonesian university courses as part of their on-going training.

Appointment of Constitutional Court judges

The MK consists of nine judges. These judges can serve a maximum of two five-year terms (Article 22 of the MK Law). They elect their own Chief and Deputy Chief Justices, who hold their positions for three years (Article 24C(4) of the Constitution; Article 4(2) of MK Law).

The national parliament, President and Supreme Court select and appoint three judges each (Article 24C(3) of the Constitution; Articles 4(1) and 18(1) of the MK Law).

Article 24C(5) of the Constitution and Article 15 of the MK Law require MK judges to have high levels of integrity; be of impeccable character; be fair and just; have a complete understanding of constitutional and administrative law; and refrain from holding government office.

Article 16 of the MK Law adds further prerequisites, including Indonesian citizenship, a law degree, being at least 40 years of age, not having been convicted of a crime which carries a sentence of five years or more, never having been declared bankrupt, and having at least ten years' experience working in the law.

Whenever new constitutional court judges are appointed, it is common to hear concerns voiced in the media about the way in which Constitutional Court judges are selected – that is by the DPR, the President and the Supreme Court. The fear, as commonly expressed, is that, despite constitutional and legislative provision for the MK's independence,[47] in disputes that come before the MK in

[47] Article 24(1) of the Constitution requires that the MK be independent in 'upholding the law and justice'. Article 2 of the MK Law states that 'the Constitutional Court is one of the state institutions charged with independently exercising judicial power for the purpose of upholding the law and justice'. Article 12 of the MK Law provides the MK with power to control its non-judicial affairs, including its internal organisation, personnel, administration, and financial management.

which one of the appointing institutions was a party, DPR appointees would side with the DPR, the Presidential appointees with the executive, the MA appointees with the MA, or that there might be perceptions of partiality. In the knowledge of the author, from a reading of a majority of MK cases, there is no evidence of such bias or prejudice in the Constitutional Court's decision-making.

4.7 Career issues

Drawing on the Supreme Court Blueprint (2003), this section describes the processes under which judges were promoted and transferred when the courts were under government administrative control. Judicial careers are likely to progress in a similar fashion under the control of the Supreme Court, but satu atap has not been in place long enough to enable the offering of a definitive account.

While under the administrative control of the Department of Justice, the Indonesian judiciary has traditionally followed the same career progression system as other civil servants in government departments. Judges would begin their careers in a small court, usually in a remote part of Indonesia, where the cases they handle tend not to be complex. Judges could be expected to be promoted up the judicial hierarchy and to work in a number of different courts throughout the country. Judges would generally be transferred and or promoted every three to five years to a better position in the same or similar class of court, or to a court in a larger centre which handles more substantial cases. As their careers progressed and they reached particular ranks, judges could expect to be promoted to a leadership position and or to be promoted to the high court. A handful of judges were eventually appointed to the Supreme Court.

In practice, judicial promotions and transfers were rarely based on merit; rather, they were usually based on seniority – with experience, number of years in service, dedication to service, and demonstrated loyalty thought to be prime considerations. Before the *satu atap* reforms, the Justice Department was rumoured to used its control over judicial career development to influence judicial decisions in which the government was a party or had an interest (Supreme Court of Indonesia, 2003). There were claims that the lack of merit-based system tended to open up opportunities for corruption in the transfer and promotion process. It was claimed that judges could literally bargain for transfers to particular areas and could usually pay off an official in Jakarta to be transferred to a desirable part of Indonesia (ICW, 2001). The incentives to toe the line were strong. Indonesia is a strikingly diverse country, with major cities, particularly those in Java boasting a decent lifestyle for the middle to upper classes. There is, therefore, a tendency for judges to be reluctant to be posted outside of Java. Indonesia's outer islands such as Sumatra, Sulawesi and Kalimantan, for example, are, for most judges, far less coveted posts. Additionally, there are so-called hardship posts riddled with social and religious unrest such as Aceh, Ambon and Irian Jaya.

One commonly hears rumours in Jakarta of the need to develop 'good relationships' with senior Supreme Court Judges in order to obtain plum postings.

4.8 Guarantee of Tenure

The judiciary laws regulate suspension, honourable discharge and dismissal from judicial office.[48] Judges (including chairpersons and deputy chairpersons) of the general courts and the Supreme Court may be honourably discharged 'upon their own request';[49] if they are 'continuously

[48] The following provisions on removal and suspension are not exhaustive – Article 24 of the General Courts Law and Article 15 of the Supreme Court Law anticipate a government regulation to further regulate the procedures for honourable discharge, dishonourable dismissal and suspension, and the rights of the judge in question.

[49] Article 19(1)(a) of the General Courts Law; Article 11(1)(c) of the Supreme Court Law.

physically or mentally ill',[50] to the extent that they are 'unable to adequately perform [their] work obligations';[51] if they 'clearly do not have the capacity to perform their duties',[52] for example, if the judge 'has made many substantial errors when performing his or her duties';[53] and if they die.[54]

Judges will also be honourably discharged if they reach the mandatory retirement age. The mandatory retirement age has been recently extended for district court judges to 65 years of age, to 67 for high court judges,[55] and to 70 for Supreme Court judges (Article 11(b)).

Dishonourable removal

Article 20 of the General Courts Law and Article 11A of the Supreme Court Law provide the following grounds for dishonourable discharge from office for general court and Supreme Court judges:

a. Improper conduct.[56]
b. Continual neglect of their work.[57]
c. Breach of their oath or pledge of office.[58] The judicial oath is set out and discussed below.
d. Breach of Article 18 of the General Courts Law or Article 10 of the Supreme Court Law.[59] These provisions prohibit judges from holding judicial office and also working as an enforcer of judicial decisions; a guardian or a trustee connected to a case which he or she is hearing; a legal advisor; or a businessperson.

General court and Supreme Courts judges may also be dishonourably dismissed if they convict a felony (Article 20(1)(a) of the General Courts Law; Article 12(1)(a) of the Supreme Court Law).

All judges are to be given the opportunity to defend themselves before an Honour Council prior to being dishonourably removed, unless they are convicted of a crime as referred to under Article 20(6) of the General Courts Law or Article 11A(6)of the Supreme Court Law, in which case their opportunity to defend themselves is lost.[60] This process is discussed below at 4.18.

Supreme Court judges are to be honourably discharged by the President on the recommendation of the Supreme Court Chief Justice and dishonourably dismissed by the President on the recommendation of the Supreme Court (Article 11A of the Supreme Court Law).

4.9 Judicial Interpretation

'The law' in common law countries is traditionally said to be largely judge-created, with law-making assistance from the legislature and government to vary or erase the common law as

[50] Article 19(1)(b) of the General Courts Law; Article 11(1)(d) of the Supreme Court Law

[51] Elucidation to Article 19(1)(b) of the General Courts Law; Article 11(1)(e) of the Supreme Court Law.

[52] Article 19(1)(d) of the General Courts Law; Article 11(1)(e) of the Supreme Court Law.

[53] Elucidation to Article 19(1)(d) of the General Courts Law; Elucidation to Article 11(1)(e) of the Supreme Court Law.

[54] Article 19(2) of the General Courts Law; Article 11(1)(a) of the Supreme Court Law. In the event of death, judges are to be honourably discharged by the President (Article 19(2) of the General Courts Law; Article 11(1)(a) of the Supreme Court Law).

[55] Article 19(1)(c) of the General Courts Law.

[56] Article 20(1)(b) of the General Courts Law; Article 11A(1)(b) of the Supreme Court Law.

[57] Article 20(1)(c) of the General Courts Law; Article 11A(1)(c) of the Supreme Court Law.

[58] Article 20(1)(d) of the General Courts Law; Article 11A(1)(d) of the Supreme Court Law.

[59] Article 20(1)(d) of the General Courts Law; Article 12(1)(d) of the Supreme Court Law.

[60] Article 20(2) of the General Courts Law and its Elucidation; Article 12(2) of the Supreme Court Law.

required. The defining characteristic of the common law tradition is the system of precedent (*stare decisis*), under which judges must apply rules created by other judges in an earlier case from a court of the same or higher level to their own, provided that the facts of earlier case are similar or the same as the facts in the case before them. The decisions of higher courts are, therefore, often said to be 'binding' on lower courts in common law systems.

By contrast, it has traditionally been said that 'the law' in civil law systems, such as Indonesia, is largely contained within concise but generally-worded Codes which purport to exhaustively 'cover the field' of their subject matter, with some legislation and regulations to fill the gaps where necessary. Because the Codes and supplementary legislation are deemed to be comprehensive, a system of precedent is thought to be unnecessary; indeed, many civil law countries explicitly prohibit judges from creating rules of general application or using a prior judicial decision as the sole basis for their own decisions. However, as will be discussed below, the civil law system's theoretical and practical rejection of precedent, and its exclusive reliance on Codes, is arguably far less prominent than, nor as accepted as, it once was.

Lasser (2004) describes the main components of what he calls the 'official portrait' of the role of judges in France and many civil law countries that use the French model as a starting point. The portrait holds that Codes, not judges, determine the outcome of cases. Codes are primary and presumed to be infallible, and because they were drafted to ensure that they were comprehensive and clear, they can resolve virtually every conceivable fact situation that falls within their general subject matter. According to this thinking, civil law judges can, therefore, mechanically apply the relevant Code to the cases before them, and unproblematically achieve the 'correct' resolution in the vast majority of cases. In this context, judges should not need to – and in some jurisdictions, must not – exercise any value judgments or discretion. The official portrait is a picture of judge as an 'expert clerk' engaged in the routine administrative activity of applying legislatively determined policies to concrete cases.

Accordingly, to answer almost any legal problem, civil lawyers require only Codes and the training about the Codes they receive at law school. For trickier issues, they can consult the writings of legal scholars. Using these sources, it is presumed that

> legally-trained people will come to the identical result [in resolving the same problem], rather smoothly it is imagined, simply by applying to the case facts the correct code articles correctly understood and applied in correct logical fashion (Cappalli, 1998).

Clearly, a system of precedent had no place within this schema. In the official portrait, judicial decisions have no binding authority beyond the parties in the case. Even courts' interpretation of legislation is not considered formally binding.

The official portrait is based on a nineteenth century French perception of the role of the judge. The restrictions on judges, first imposed during the French Revolution, were a response to perceived inappropriate use of judicial power by judges under the French *Ancien Regime*. During that period, the high French feudal courts (or *Parlements*) were not 'beholden' to the monarch and had almost complete freedom. With high levels of independence came great discretion and power, and judges were well-known for misusing it. Indeed, the judiciary is said to have been 'one of the more abusive features of the Ancien Regime' (Utter & Lundsgaard, 1993). Judicial corruption was very common, and there was no effective way to hold the judiciary accountable for the arbitrary exercise of judicial authority.

Worse still, the judiciary was said to be largely incompetent and biased. Judges owned their judicial office and could transfer it by sale or inheritance as though it was personal property. By the time

of the Revolution, the nobility owned most French judicial posts and tended to protect their own interests as against those of lower classes and the government. Judges had a vested interest in the feudal system and actively resisted efforts directed at its reform. They created laws of general application which conflicted with legislation, thereby frustrating important government unification and reform efforts. According to Merryman 'the courts refused to apply...new laws, interpreted them contrary to their intent, or hindered the attempts of officials to administer them' (Merryman, 1984).

Soon after the revolution, the French Constituent Assembly's apparently deep-seated fear of the judiciary led it to begin establishing the 'official portrait'. The *Parlements* were replaced by a judiciary which could not transfer their judicial office nor interfere with executive action. Judges were authorised only to apply the parliamentary and executive laws and judicial law-making was strictly forbidden and unnecessary, given the purported completeness of Codes.

Rejection of legalism

Despite the continuing prevalence of the official portrait in many civil law countries, there is growing recognition amongst civil law commentators – including Indonesian scholars – that the official portrait is untenable, for several reasons.

First, it is generally accepted that legal solutions cannot be arrived at using a 'purely logical process of interpretation of legislation' and that judges 'can and do make law'. This is largely because Codes and other legislation are not flawless, as the civil law method presumes. Even the most skilful and contemplative law-makers cannot anticipate all societal developments nor every possible situation or occurrence within the ambit of the subject matter of the law they are making, so legislation is often deficient or out-dated soon after its enactment. The discrepancy between the law and practical need will be even more extreme when Codes are old and have not been amended over time – just as in Indonesia. Further, provisions of Codes or legislation are often generally-worded or unclear, making it impossible to apply the law using a purely mechanical process, even in the simplest of cases. Finally, some laws deliberately use terminology that requires judicial definition. Examples include 'good faith' and 'public interest'.

Similarly, it is arguably impossible for judges to refrain from interpreting or adding to legislation and from employing their own subjective values when doing so. Judges are required to apply the law in line with the intent of the lawmaker and the needs of the community. And, regardless of their choice of which method of statutory interpretation to use – whether grammatical, historical, systematic, sociological; - or gap-filling techniques – such as analogy or a contrario interpretation -it is now recognised that statutory interpretation is not a mechanical or administrative process and that judges everywhere exercise discretion and their personal judgment when interpreting statutes.

The need for judges to 'adapt laws to fit concrete events [that occur] within society', to 'refine the work of law-makers and to 'clear the doubts or fill the gaps' is, in fact, recognised in legislation in many civil law countries, including Indonesia. Article 16(1) of Indonesia's 2004 Judiciary Law reads:

> A court must not refuse to hear, adjudicate and decide a case brought before it on the basis that no law [applies to the case] or that [the law is] unclear. Rather, [the court] must hear and adjudicate the case.

Judicial interpretation in Indonesia

Article 1 of most Indonesian statutes – and many types of lower-level laws, such as Government Regulations and Presidential Decisions – is a definitions section. In it, key terms are defined,

usually in a sentence or two. This is also a feature of statutes in many countries which follow the civil law tradition.

In Indonesian statutes these definitions are, however, often incomplete and very generally worded. They are also sometimes inconsistent. In some civil law countries, however, this definition section is carefully worded and terms - although generally worded - are concisely, accurately and consistently defined to avoid unnecessary judicial interpretation.

But in the case of Indonesia these often incomplete and generally worded definitions require significant statutory interpretation. As will be discussed below, because Indonesia does not have a comprehensive system of law reporting and an established tradition of producing comprehensive and up-to-date legal academic works, judges cannot always rely on past decisions or established practice to 'expand' or 'fill in the gaps' in these laws.

Judges must, therefore, quite often interpret and apply these definitions 'afresh', in light of their own legal experience and knowledge, without reference to insights from legal scholars or guidance from other judges who have heard similar cases in the past. One result of this is that judicial decisions interpreting definitions are sometimes inconsistent and unpredictable.

All Indonesian statutes, and many other types of laws in Indonesia's hierarchy of laws, are accompanied by an explanatory memorandum or Elucidation (penjelasan). Although the Elucidation is not formally part of the law it explains, in practice, judges and lawyers consider the Elucidation to be an authoritative interpretative source. It is, therefore, often treated as though it is part of the law itself.

The Elucidation usually begins by outlining the purposes for which the law was enacted, and the philosophical or theoretical bases of the law. This is often described as the General Elucidation.

Elucidations then provide 'Article' by 'Article' explanations. The Elucidation usually provides further explanation of the meaning of the terms defined in the definitions section – usually Article 1 of the law – as referred to above. However, the elaborations are often very general in nature.

The elucidations of subsequent provisions are usually similarly broad and, for the most part, are arguably 'less explanatory'. In fact, as is common knowledge for most Indonesian lawyers, many of these 'Article' by 'Article' elucidations simply contain the words *cukup jelas* (sufficiently clear) – meaning that the words in the text of the statute are considered to be self-explanatory.

The result is that it is often difficult to determine the precise meaning of terms used in Indonesian legislation and to apply it to specific facts.

Doctrine and statutory interpretation

The rules of statutory interpretation in Indonesia are largely contained in academic texts, often referred to as doctrine. Doctrine – particularly doctrine written by well-respected scholars – is much more influential on the work of lawyers and judges in civil law countries than are academic works in common law countries. Not only does doctrine map the trajectory of judicial developments of bodies of law and the judicial interpretation of statutes, it also often provides proposals for reform, including to statutory interpretation, that are quite regularly taken up by judges in civil law systems.

There are many methods for statutory interpretation and in many civil law countries there is no hierarchy of methods. However, according to doctrine on statutory interpretation followed in many civil law countries, including Indonesia, judges should begin by looking at the words of the statute, including its Elucidation. This so-called grammatical method requires judges to determine the

meaning of words used in the law by considering the everyday meaning attributed to those words. Dictionaries or language experts can be used in this endeavour.

If the grammatical interpretation does not resolve the uncertainty, then, according to doctrine, judges should attempt to determine the intent of the law-maker. The starting place for this is often, again, the Elucidation, but judges also regularly consider the parliamentary debates surrounding, and other general background materials to, the law's enactment, including correspondence between Ministers and parliamentary commissions.

In addition, judges can interpret unclear laws by engaging in an 'internal' analysis of them, or by viewing them in the context of provisions in other laws. This is referred to as systematic interpretation. Using this approach, judges might derive a legal principle from a set of related sections of the legislation being interpreted or make assumptions from the structure of the law to assist them in the interpretation of a particular provision.

Legal scholars also refer to the sociological approach as being an appropriate interpretative method, particularly if the law in question is out-of-date and applying it will cause injustice or an otherwise inappropriate result. The sociological technique – otherwise known as the teleological approach – allows judges to enter the field of sociology to 'provide a new social purpose which accords with current social reality' for the law they apply.

Most scholars also refer to expansive and restrictive interpretation. Using these techniques, judges can, as they see fit, expand or restrict the ambit of legal provisions in order to either bring a set of facts in a case before them within the scope of the law or to prevent the application of the law to facts that might otherwise seem to apply to the law.

So, for example, the meaning of 'property' in the theft provisions of the Indonesian Criminal Code has been expanded to include intangible property such as electricity, and 'selling' in Article 1576 of the Civil Code has been expanded to mean 'transferring'. Judges who employ restrictive interpretation techniques might create exceptions to broad statements of legal principle contained in written laws. So, for example, judges have prevented litigants who bring a claim under Article 1365 of Indonesia's Civil Code (which provides general civil liability for damage caused by an intentional act) from claiming the full amount of damage suffered if they contributed to that damage.

Judges in many civil law countries, including Indonesia, also have at their disposal a number of methods to employ if gaps exist in the legislation being applied. Such legislative gaps occur when a matter governed by a particular law presents a question that is not expressly settled by it.

This may be because the lawmaker omitted to regulate a particular situation or because the lawmaker chose to be silent on a certain issue expecting the judge to 'find' or 'create' a solution. One such gap-filling method employs analogy. This involves extending the applicability of a provision of a law by construing it as a general rule applicable to situations that would fall outside the ambit of that law, if strictly interpreted.

A famous Indonesian example of gap-filling by analogy derives from Bismar Siregar, a well-known former Supreme Court judge. He held in the 1980s that males who convinced females to have sexual intercourse through false promises of marriage could be convicted under the theft provisions of the Criminal Code (Article 378) on the basis that the male had 'stolen' the honour of the female under false pretences. This reasoning was followed for some time, but was rejected by the MA in 1990, which held that honour is not an object for the purposes of the Criminal Code's theft provision.

A contrario interpretation is another gap-filling technique. Put simply, if analogy allows similar facts to be treated the same, then a contrario interpretation holds that facts which are not the same are not treated the same. According to the a contrario method, if a law covers a particular situation, then the law does not apply to situations not covered by the law.

A role for precedent?

As was mentioned above, Indonesia, along with countries such as France and Germany, is described as a 'civil law country'. In contrast to the common law tradition, civil law countries are generally said to rely upon Codes, statutes and government regulations as their main sources of law. In general, civil law countries do not have the system of precedent that defines common law jurisdictions. Judicial decisions are, therefore, generally not considered to be a formal source of law in civil law countries – that is, judges are not required to follow the prior decisions of judges in courts higher than, or of the same level as, their own.

However, in practice, most civil law countries have something of an informal and non-binding system of precedent. Indonesia is no exception. In Indonesia, it is considered preferable to follow prior decisions of higher courts. Indonesian first-instance and appeal courts generally consider previous decisions from the Supreme Court to be highly persuasive and will usually, but not always, follow them if they have access to the decision itself or to the jurisprudential principle arising from the case. Lower- court judges are even more likely to follow a line of consistent Supreme Court decisions on a particular point of law or interpretation. However, while judges will generally admit to following Supreme Court decisions, they will usually emphasise that they are not formally required to do so.

However, applying the previous decision is usually rather problematic for Indonesian judges. It is often difficult to obtain prior judicial decisions. Even if a copy is obtained, judicial decisions in civil law countries are typically quite short. In Indonesia, for example, the judgment may be only a few pages.

Decisions tend to lack detail and often do not disclose all relevant facts. The reasoning contained in the decision sometimes consists only of several short paragraphs that often do not clearly outline the relevant law and how it was applied by the court. Consequently, Indonesian judges often do not have much guidance on how principles from Supreme Court cases should be applied in subsequent cases.

Statements as to preferred interpretation or policy are issued by the Supreme Court in the form of *surat edaran* (circular letters). Rather like practice notes in the common law system, these tend often to be more influential in Indonesia than previous decisions, even of the Supreme Court.

Given the lack of a formal system of precedent, little attention has been paid to law reporting in Indonesia. Indonesia has no reliable or authoritative set of consistently-published judgments. Some important decisions are collected and published by the Supreme Court in a compilation entitled *Yurisprudensi Indonesia* (Indonesian Jurisprudence). Although it appears that the series is supposed to be published on an annual basis, there are sometimes a number of years between editions. In addition, only a fraction of the Supreme Court's decisions are published in this series and the decisions included are selected on an ad hoc – sometimes random – basis (Pompe, 2005). In the early 2000s, practitioners and NGOs attempted to collect important decisions and publish them on-line, but, again, the results were ad hoc and far from complete.[61]

The most significant advancement in the area of judgement reporting has been the Supreme Court's establishment, on its website (www.mahkamahagung.go.id) of a database of, at time of writing,

[61] See, for example, xem www.hukumonline.com.

over 16,000 decisions, most of which were issued over the past several years. Although this constitutes considerable progress, publication is far from complete. In 2009 alone, for example, 12,540 cases were lodged with the Supreme Court. In order to be complete, this database must be expanded many several, perhaps dozen, times fold.

Until case reporting is completed, Supreme Court decisions will continue to not be followed when they otherwise would or should have been, simply because judges and litigants do not have access to them. The result of the lack of a system of precedent, the relatively uninformative decision styles, and poor case reporting is a lack of consistency and predictability in judicial decisions, and real difficulties in establishing how the law will be applied in any given case.

4.10 Adjudication

Indonesian adjudication processes have several characteristics, most of which it shares with other countries that follow the civil law tradition.

First, three judges preside over most court cases in many civil law countries and in Indonesia, even in the lower courts. This is the 'default position': Article 11(1) of Law No 48 of 2009 on the Judiciary states that three judges should preside over a case unless legislation stipulates otherwise. (Legislation does stipulate, for example, that the Constitutional Court is to have nine judges, and for some ad hoc courts, such as the Anti-corruption Court to have five judges.) Article 11(2) of Law No 48 of 2009 on the Judiciary declares that each panel should be led by a chairperson who is usually more senior than the remaining two judges.

Second, as is the case in most civil law countries, these three judges will usually produce a single joint judgment in each case (Wells, 1994). Indonesian judges will usually meet with other judges on the panel to discuss the decision that should be issued. This meeting is referred to as the judicial deliberative meeting (*Rapat Permusyawaratan Hakim,* or RPH). However, Indonesian judges were, in 2004, given the legal authority to write dissenting judgments. The ability to dissent is regularly exercised in the new Constitutional Court and increasingly, although still rarely, in other Indonesian courts.

Third, civil law judicial processes are 'inquisitorial' in nature. In an inquisitorial system, judges aim to enquire into the truth of what occurred. By contrast, in most common law countries, judges are said to be more passive. They act as umpires between the plaintiff and defendant in civil cases and between the prosecution and defendant in criminal cases, and adjudicate based on the evidence and arguments put before them. Judges in civil law systems therefore control the proceedings and may directly question witnesses. In some countries of the civil law tradition, the judges may ask so many questions so as to leave the lawyers with few questions to ask.

Fourth, although proceedings are conducted orally in lower-level courts in civil law countries (such as the Indonesian district court), appeals and cassation applications are generally conducted in writing.[62] Arguments from both sides are lodged with the courts in documentary form and then decided upon by the judges.

Adjudication case study 1: sequence of events in criminal trials

In criminal cases in Indonesia, the sequence of events at trial is as follows:

1. Judges begin proceedings, declaring that the trial is open to the public (see Articles 153 and 154 of the KUHAP).

[62] However, in some countries such as Indonesia, the high and Supreme Courts can hear testimony from witnesses.

2. Judges invite the prosecution to read its indictment (Article 155(2)(a) of the KUHAP).
3. The defence has a right of reply on procedural grounds (*eksepsi*), in which it can dispute the indictment's compliance with legal requirements and the court's jurisdiction (Article 156(1) of the KUHAP).[63] The prosecution then has an opportunity to respond to the *eksepsi.*
4. 4. The court considers these arguments and issues an interim order (*putusan sela*) which stipulates whether the indictment is satisfactory and whether the court has jurisdiction to hear the case. If the indictment is deemed unacceptable or the court finds that it lacks jurisdiction, then the case is dismissed (Article 156(2) of the KUHAP).[64]
5. If the court accepts the indictment and jurisdiction over the case, then witnesses are examined. Article 160(1)(a) of the KUHAP requires the presiding judges to decide the order in which witnesses will be presented after hearing arguments from the prosecution and the defence. In practice, however, the prosecution generally calls all of its witnesses first and the defence then has the opportunity to call its own witnesses. Any witnesses who have statements contained in the case file that favour or disadvantage the accused, and any other witnesses that the prosecution or defence wish to question, must be examined during the trial (Article 160(1)(c) of the KUHAP). The victim of the crime will usually – but not always – be examined first (Article 160(1)(b) of the KUHAP). The process of questioning each witness generally proceeds as follows:
   a. Judges usually question the witness first.
   b. According to the KUHAP, the prosecution and defence are then permitted to question the witnesses 'through the judge' (Articles 164(2) and 165(2)) – that is, the lawyers are to inform the judge of the subject matter they want the judge to focus upon when questioning a particular witness or provide questions they wish the judge to ask on their behalf. The judge may refuse to put a question to a witness, but must provide reasons for doing so (Articles 164(3) and 165(4) of the KUHAP). The KUHAP's rationale for requiring questions to be asked through the judge is to prevent questions being put to witnesses which are irrelevant, leading, entrapping or intimidating.

      In practice, however, the prosecution and defence are almost always permitted to put questions directly to the accused and witnesses.[65] They are, however, often interrupted by the judges.
   c. After both parties and the judges have finished questioning the witness, the court chairperson should ask the accused for his or her opinion on the testimony provided by that witness (Article 164(1) of the KUHAP) . If the defendant disagrees with part of the testimony, the chairperson should ask the witnesses whether he or she wishes to amend his or her testimony.
6. The judges, prosecution and defence then usually question the accused.
7. After the accused and all witnesses have been examined, and all other evidence has been put before the court, the prosecution is invited to present its closing statement (*penuntutan*) (Article

[63] On a practical note, some lawyers attempt to use the *eksepsi* to outline their substantive arguments to the court. Formally, this is not permitted, but some judges allow it. In cases where the defence believes that there are no grounds to object to the indictment or the jurisdiction of the court, it might choose not to present an *eksepsi.*

[64] The prosecutor can oppose this decision before the relevant high court (Article 156(3)).

[65] Hari Sasangka and Lily Rosita, *KUHAP dengan komentar: untuk Praktisi dan Mahasiswa*, Mandar Maju, Bandung, 2000, tr.187; Hari Sasangka và Lily Rosita, *Hukum Pembuktian dalam Perkara Pidana: untuk Mahasiswa dan Praktisi*, Mandar Maju, Bandung, 2003, p. 31.

182)(1)(a) of the KUHAP). In this statement, prosecutors will usually attempt to argue that the physical evidence and witness testimony point towards the defendant's guilt and request the court to impose a particular sentence.

8. The defence presents its closing statement (*pembelaan or pledoi*) (Article 182(1)(b) of the KUHAP), in which the prosecution's *penuntutan* is attacked.
9. The prosecution is permitted to lodge a reply (*replik*) to the *pledoi,* to which the defence can issue a rebuttal (*duplik*) (Article 182(1)(b) of the KUHAP). The *penuntutan*, *pledoi, replik* dan *duplik* should be in written form and read in court. Copies should be given to the judge and 'other interested parties' (Article 182(1)(c) of the KUHAP).
10. The court sets a date to read its decision, and should read its decision on that date.

Adjudication case study 2: Indonesian evidence law

Under Article 184 of the Indonesian Code of Criminal Procedure, valid pieces of evidence (*alat bukti sah*) are:

a. witness testimony (*keterangan saksi*),
b. expert testimony (*keterangan ahli*),
c. documents (*surat*),
d. circumstantial evidence (*petunjuk*), and
e. testimony from the accused (*including an admission of guilt*).

According to Article 183, a judge cannot convict a defendant unless that judge has the 'conviction' (*memperoleh keyakinan*) that, on the basis of at least two valid pieces of evidence, a crime has taken place and the accused is guilty of committing it.

There is controversy amongst Indonesian lawyers, academics and judges about the weight judges can or should attribute to newer forms of evidence – such as electronic evidence (including computer files and SMSs) and sound and video recordings – or whether they can be used in court at all in most cases. These types of evidence can, however, be used in particular types of cases, such as money-laundering, corruption and terrorism.[66]

Under Indonesian law there are no specific rules on the exclusion of illegally obtained evidence.

4.11 Jurors

Indonesia, like many countries following the civil law tradition, does not employ juries in any types of cases. Decisions on the facts are, therefore, made exclusively by the presiding judges.

Role

Not applicable. Indonesia does not employ juries in any types of cases.

Appointment and Training

Not applicable. Indonesia does not employ juries in any types of cases.

Relationship with Judges

Not applicable. Indonesia does not employ juries in any types of cases.

Oversight

Not applicable. Indonesia does not employ juries in any types of cases.

[66] See Article 38 of Money Laundering Law (Law No 25 of 2003); Article 26A of Law 20 of 2001 on the Eradication of Corruption; and Article 27 of Indonesia's Anti- Terrorism Law.

4.12 Regional delimitations[67]

Law No 22 of 1999 on Regional Autonomy, accompanied by Law No 25 of 1999 on Fiscal Balance between the Central and Regional Governments, gave both districts (*kabupaten*) and municipalities (*kota*) broad and wide-ranging autonomy (*'otonomi yang luas'*), except in several matters reserved exclusively for the central government (see Article 7). Other parts of Indonesia were granted 'special autonomy' (*otonomi khusus*) status under specific legislation.[68]

The 1999 laws were followed by constitutional amendments, passed in 2000. Article 18(1) of the Constitution confirms that Indonesia is to be divided into provinces, and that these provinces are to be divided into districts (*kabupaten*) and municipalities (*kota*). Each of these three levels of government is to:

> have its own regional government (Article 18(1)) and parliament with elected members (Article 18(3));
>
> manage and regulate the activities of government, as an expression of autonomy or in assisting the central government (Article 18(2)); and have democratically-elected governors (for provinces), regents (for kabupaten) and mayors (for cities) (Article 18(4)).

Article 18(5) of the Constitution states that regional governments are to have autonomy 'as wide as possible' (*otonomi seluas-luasnya*), except over affairs of government reserved by statute for the central government. To fulfil this mandate, Article 18(6) allows the regional government to issue Perda.

The two 1999 statutes were replaced by Law No 32 of 2004 on Regional Governance (herein 'the 2004 Autonomy Law') and Law No 33 of 2004 on Fiscal Balance between the Central and Regional Governments. The 1999 Laws had, for a variety of reasons, caused great confusion (Bell, 2001). The primary reason for their replacement, however, was probably that the central government wished to regain some of the power it had relinquished during post-Soeharto fervor in 1999 (Soesastro & Atje, 2005). The 2004 Autonomy Law achieved this by providing more power to provinces and then making provincial governors official central government representatives responsible to the President.[69] The 1999 Law had given only limited (*terbatas*) powers to provincial governments and did not allow provincial governments to trump the decisions or laws of local governments in the districts and cities within the province.[70] In other words, provinces were not 'naturally' superior to districts and cities. Provinces were confined largely to mediating disputes between districts, cross-district development, and representing the central government

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[67] This section draws on Butt (2010).

[68] The specific features of this special autonomy fall beyond the scope of this report, but deserve brief mention. Law No 21 of 2001 on Special Autonomy for Papua Province (*Otonomi Khusus Bagi Propinsi Papua*) and Law No 11 of 2006 on Governance in Aceh (*Pemerintahan Aceh*) were enacted, pursuant to the Article 18B of the Constitution. For Aceh, for example, this statute allows for the application of Islamic law (*sharia*) to the Muslim inhabitants, a greater role in the administration of natural resource exploitation; election of local officials, and compensation for past abuses by the security forces. Two other provinces – the Capital City of Jakarta and the City of Yogyakarta – also have 'special' (*istimewa*) status, but they were granted this status well before 1999. Finally, it should be noted that the Habibie government granted independence to former province East Timor (now Timor Leste) after a referendum – unfortunately followed by bloody and destructive violence between pro-Indonesia and pro-independence forces.

[69] 2004 Autonomy Law, Articles 37-38.

[70] 2004 Autonomy Law, Elucidation, point h. The Elucidation (*Penjelasan*) is the explanatory memorandum that accompanies most Indonesian statutes and government regulations. It is often determinative in the interpretation of the law, though not formally part of the law itself.

within the province. Although handing power to the lower-tier governments was justified on democratic grounds, it was viewed by many as a deliberate strategy to avoid giving power to provinces which, given their size, might have been more viable as states, with potential to attempt to split from the Indonesian nation. Article 382(1) of the 2004 Autonomy Law now gives power to heads of provinces (governors) to 'guide and supervise governance in districts and municipalities' and to 'coordinate the implementation of central government affairs in provinces, districts and municipalities'. Through governors, then, the central Indonesian government (primarily through the Ministry for Internal Affairs) can, at least theoretically, retain some control over sub-provincial policy and lawmaking. Indeed, governors have been charged with reviewing laws enacted by municipal and city governments.

At first glance, the 2004 Autonomy Law appears to provide local governments with jurisdiction to make laws on a wide variety of issues and require them to exercise it. Adopting terminology employed in Article 18(5) of the Constitution, Article 2(3) of the 2004 Autonomy Law gives local governments the 'widest autonomy' in matters that are not the affairs of the central government, in order to 'increase the prosperity of the community, public services and regional competitiveness'. The Law also provides provincial and municipal governments with various 'obligations' (*urusan wajib*), including to handle development planning, public order and security, provision of public infrastructure, health, education, labour issues, small and medium enterprises, the environment, land affairs, public administration and investment (Articles 13(1) and 14(1)).

The 2004 Law imposes two limits on the powers of regional governments. First, the Law reserves some matters exclusively for the central government. Under Article 10(3), the central government's domain includes foreign affairs, defence, security, judicial affairs, national monetary and fiscal matters and religion. The central government can, however, delegate its jurisdiction to regulate these matters to local governments (Article 10(4)).

The second limitation upon regional lawmakers is more significant and appears to 'defeat the very goal' of regional autonomy itself, at least with respect to lawmaking (Bell, 2001). The central government has retained power to legislate in areas Article 10(3) does not mention. Under Article 10(5), it can exercise those powers itself or delegate them to regional apparatuses and officials on its behalf. In other words, legally speaking, the central government can continue to regulate any matter over which regional governments also have jurisdiction. It is, therefore, inaccurate to talk of limitations of national government lawmaking powers, or of exclusive lawmaking jurisdictions of local governments.

Article 10(5) is particularly significant because in the event of inconsistency between a local law and most types of national laws, the national law will prevail to the extent of any inconsistency. Law No 10 of 2004 on Lawmaking provides, in Article 7(1), a 'hierarchy of laws' (*tata urutan peraturan perundang-undangan*). This is a list of various types of laws and their relative authority. It is as follows:

- The 1945 Constitution (*Undang-undang Dasar* 1945);
- Statutes (Undang-undang) / Interim Emergency Laws (PERPU);[71]
- Government Regulations (*Peraturan Pemerintah*);
- Presidential Regulations (*Peraturan Presiden*);
- Regional Regulations (*Peraturan Daerah*).

[71] Article 22 of Indonesia's Constitution permits the President to issue Government Regulations in lieu of a Statute (*Peraturan Pemerintah sebagai Pengganti Undang- undang* (PERPU)) which have authority equivalent to ordinary statutes. These laws must be ratified by the DPR in its following sitting to remain valid.

Each type of law must not conflict with any law higher than its own type in the hierarchy; and a law can amend or revoke a law lower than its own type in the hierarchy. Put simply, then, local laws will be legally valid, at least formally, only if, when passed, they do not contradict a law higher on the hierarchy; and, once passed, a Perda is susceptible to being overridden by a statute, government regulation or presidential regulation.

Despite the diversification of lawmaking authority, there was no corresponding transfer of power to regulate judicial or 'justice' institutions. As mentioned, under Article 10(3), judicial affairs, and, indeed, the national law enforcement structure, fall within the exclusive jurisdiction of the national government. Indeed, it is the national Supreme Court that has the task of adjudicating the propriety and legality of regional laws, although as recent studies have shown, the Supreme Court has been largely ineffective in that task.

4.13 Judicial Independence

Indonesian law clearly requires that the judiciary be independent. Article 24(1) of the Indonesian Constitution states that:

- Judicial power is an independent power to maintain a system of courts with the objective of upholding law and justice.

Article 3(2) of the 2009 Judiciary Law states that:

- Interference in judicial affairs by extra-judicial parties is prohibited, unless provided for by Indonesia's 1945 Constitution.
- An example 'legitimate' interference of this variety can be found in Article 14(1) of the Constitution, which permits the President to grant pardons after considering the advice of the Supreme Court.

Article 3(3) of the Judiciary Law adds that:

- Anyone who deliberately breaches Article 4(3) is to be punished under the criminal law / convicted of a criminal offence.

A brief history of judicial (in)dependence

Under Sukarno's Guided Democracy (1959-1965) the courts came under strong attack. As the newly-independent Government had not formulated national laws, the law in force in Indonesia was still largely Dutch. Without statutory instructions or policy guidelines from the Indonesian Government, the courts maintained the Dutch laws, principles and procedures with which they were familiar. Thus, the work of judges and lawyers had a definite colonial stigma, to the extent that they were seen by some as 'colonial left-overs', effectively perpetuating Dutch rule in the independent State.Soekarno had introduced the concept of 'revolutionary law' (*hukum revolusi*) which prioritised building a strong independent state (Lev, 1972). As Lindsey (1996) explains, any law not in accordance with the radical leftist revolutionary principles [Soekarno] saw as the essence of the independent Indonesian State would be invalid…The President, as the ultimate determinant of what was 'revolutionary' became the arbiter of justice and legal authority. The rule of law eroded as Dutch laws were declared inconsistent with the spirit of independent Indonesia and presidential policy began to replace law.

Judicial independence was seen to be incompatible with the unity required for the revolution, and the judiciary became little more than an adjunct to the President. As part of Soekarno's strategy, Law 19 of 1964 on Judicial Power was enacted. The statute explicitly rejected the *trias politika* (separation of powers); stated that the courts were an instrument of the national revolution; and

enabled the President to interfere in, or retrospectively alter, the decision of any Indonesian court for the sake of the ongoing revolution or national interests. According to Article 19 of the Law:

We are in the stage of revolution and struggle for the realisation of a just, prosperous society, so all progressive forces, including organisations and state apparatuses are merely revolutionary tools... The trias politika is, therefore, not in conformity with the national law of Indonesia.

Judges were required to trade their black robes for khaki uniforms bearing a civil servant badge and Soekarno appointed the Supreme Court Chief Justice to his Cabinet.

The ascension of Indonesia's second president, Soeharto, from 1968 was accompanied by promises of legal and judicial reform. However, the judiciary fared even worse under his regime. His New Order government ensured the judiciary's loyalty in cases in which the state had an interest, by requiring lower-court judges to be civil servants *(pegawai negeri)*[72] and members of the Public Servant Corps (*Korps Pegawai Republik Indonesia* (KORPRI)).[73] This compelled hem to support government policy (Asia Watch, 1988: 170). In accordance with their civil servant status, judges could be reprimanded under Government Regulation No 30 of 1980 on Disciplining Civil Servants. Lev (1978: 55-56) describes some implications of this:

Indonesian judges, with few exceptions, tend not to have a strong sense of functional independence to begin with. They conceive themselves as pegawai negeri, officials, and as such, members of a bureaucratic class to which high status has always attached. One implication of the role of pegawai negeri is that it is patrimonially associated with political leadership, to whose will it must always be responsive. It is this as much as anything else that underlies the issue of judicial independence. Whatever the daily effects of the Ministry's responsibility, it is symbolically important as a reminder of the judiciary's conceptually limited autonomy and the direction of its loyalties.

The Ministry of Justice had organisational, administrative and financial control over the lower courts (Judiciary Law (1970), Article 11(1)), rendering judges reliant on the government for employment, pay and promotion. Imbued with a sense of loyalty to the government, judges were reluctant to bite the hand that fed them (Lev, 1978).

In addition to this structural control over the judiciary, Soeharto's New Order promoted ideological barriers to justify its stifling and crushing dissent. These barriers were used also to resist judicial reforms – including the introduction of judicial review. The first was the Indonesian state ideology – *Pancasila*. *Pancasila* is said to be the 'source of all sources of law'. However, state adherence to *Pancasila* has almost always been only rhetorical. As will be discussed below, *Pancasila* is a malleable political ideology. It was used to support and justify a wide variety of government policy and action, and to discredit alternatives raised by critics, rather than as a serious basis for law.

The second ideological barrier was the concept of the 'integralistic state'. The ideas of the integralistic state and asas *kekeluargaan* were both voted down by the Investigating Committee for the Preparation of Independence (Lubis, 1993). Neither concept appears in the Constitution. Indeed, the Elucidation to the pre-amended Constitution labelled Indonesia as a 'law state' (*Rechtsstaat*), thereby appearing to indicate a rejection of these totalitarian principles of state. Nevertheless, the executive-heavy 'division' of state power in the largely Soepomo-drafted Constitution reflected them.

Simanjuntak (1994) observes observes that, with few exceptions, the integralistic state concept remained largely dormant until it re-emerged in political and legal discourse in the early 1980s.

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[72] General Courts Law (1982), Article 14(1)(e).

[73] Presidential Decree No. 82 of 1971 concerning the Public Servant Corps of the Republic of Indonesia (KORPRI).

At this time, the government primarily directed *Pancasila* towards promoting the principle of national unity, rather than its other four principles (Cammack, 1989), thereby associating it with the integralistic state's primary concern of 'oneness'. The government used this interpretation of *Pancasila* to justify its often repressive – sometimes violent – approach to dissent. Laws No 3 and 8 of 1985 required all political parties and social organisations to adopt *Pancasila* as their 'sole foundation', regardless of their actual ideological basis. Lubis (1993: 93) points out that, despite the Constitution's reference to *Rechtsstaat*, some government ideologues began to assert that the *integralistic staatsidee* was never rejected by the founding fathers in 1945, and that, constitutionally, the New Order was bound by it.

Soon enough, some government officials began using the integralistic interpretation of *Pancasila* to justify government interference in judicial processes. In 1985, in the DPR, the then Minister of Justice said:

[T]he Government actually is applying integralistic principles in accordance with the spirit of *Pancasila* and the 1945 Constitution in supervising the judges by emphasising a priority on togetherness and consultation between the government and the judiciary (Lubis, 1993: 88, note 5).

This approach was given a statutory basis. The Elucidation to Article 14 of the 1970 Judicial Power Law provided that freedom to exercise judicial authority was not absolute, because the duty of a judge was to uphold law and justice based on *Pancasila*. According to Lubis (1993: 98),

> one would find it difficult to deny that the independence of the judiciary is not absolute because it is the power-holder who determines the meaning of upholding the law and justice based on *Pancasila.*

The government used this interpretation of *Pancasila* to justify its often repressive – sometimes violent – approach to dissent. Those pushing for a greater role for political Islam, and those pushing for greater human rights, for example, were labelled as 'against the oneness of the state' and, therefore, anti-*Pancasila.*

Clearly, the re-emergence of the organic state concept helped the government deflect calls for increased judicial independence and the introduction of judicial review. Being an organic whole, the integralistic state does not anticipate a need to uphold individual rights at the expense of the interests of the state. Furthermore, asas *kekeluargaan* served to undermine the rationale for judicial review – namely, a check on government power. Adnan Buyung Nasution (1992: 423) summarised the effect of the principle succinctly:

Opposition is interpreted as distrust of the good faith of the ruler; just as it would be inconceivable that children demand that their father account for his acts, it is inconceivable that the people demand that the ruler be accountable for his deeds.

Since the fall of Soeharto in 1998, however, important structural reforms have been made to Indonesia's judicial system. In addition to the MK's establishment, a raft of new statutes have been enacted relating to the MA and the courts below it.[74] A primary purpose of these reforms was to provide a legal basis for the transfer of control over the organisational, administrative and financial affairs of the lower courts from the government to the MA – the so-called 'one roof' (*satu atap*) reforms. This, it was hoped, would help improve judicial independence by releasing the courts

[74] Law No 4 of 2004 on Judicial Power, which replaced a 1970 Law with the same title and subject matter; Law No 5 of 2004, which amended Law No 14 of 1985 on the Supreme Court; Law No 8 of 2004, which significantly amended the General Courts Law (Law No 2 of 1986); and Law No 9 of 2004, which amended Law No 5 of 1986 on the Administrative Courts.

from the formerly tight supervision of the executive under Soeharto. Some errant judges have been replaced; judges suspected of being corrupt have been transferred away from centres of power; and senior lawyers and academics have been appointed to a number of Indonesian courts as *ad hoc* 'non-career' judges. An important move has been the appointment of Bagir Manan as Chief Justice of the Supreme Court – a former academic at the University of Indonesia with a genuine desire for reform.

However, although many positive steps have been taken, including the satu atap reforms and the establishment of the judicial commission briefly discussed below, much works remains to be done. Unravelling Soeharto's three decades of calculated judicial subordination and demoralisation will require much effort and time – probably decades.

Corruption[75]

Although inroads seem to have been made into the institutional position of the courts and the government, leading to perceptions that the judiciary is now largely independent of government, the significant problem of corruption remains. It seems that only the Religious Courts and the new Constitutional Courts are relatively clean.

For decades, the Indonesian judiciary has been widely regarded by Indonesians as one their nation's most corrupt institutions. Surveys indicate that its reputation, ironically, has been for its propensity to act illegally, rather than its capacity to enforce the law, let alone deliver 'justice' (Asia Foundation & ACNielsen Indonesia, 2001). Popular belief has it that most of Indonesia's judges and court officials are willing to accept, or even to extort, bribes from litigants to secure victory in their cases, with the Supreme Court seen one of the most corrupt courts in the country. The Indonesian joke – which even judges tell – has it that the word *hakim* (judge) is short for *hubungi aku kalau ingin menang* (contact me if you want to win)(Tempo, 2000)(Tempo, 2000) (Tempo, 2000)(Tempo, 2000)(Tempo, 2000).

It is also often said in Indonesia that corruption within the judiciary is systematic and institutionalised: illicit payments are filtered into patronage networks within which the recipient's superiors take percentages. For these reasons, the Indonesian justice system is often described as a 'mafia' (*mafia peradilan*) because most bribes are made as part of a complex web of well-organized 'arrangements' involving a number of corrupt players, rather than just a few rogue individuals. Even Supreme Court parking attendants are said to be involved (ICW, 2001).

Senior Indonesian judges, including retired Supreme Court Chief Justices, have admitted that there is much in these popular perceptions that is accurate. Former Chief Justice Soerjono, for example, estimated that 50 percent of Indonesia's judges were corrupt (Pompe, 2005: 414), as did former Chief Justice Asikin Kusumaatmadja (Inside Indonesia, 1997), although well-regarded lawyers have claimed that the proportion of corrupt judges is closer to 90% (Inside Indonesia, 1997; Republika, 1996). Another former Supreme Court Justice – Adi Andojo – went even further in the mid-1990s, publicly naming other Supreme Court judges whom he accused of receiving massive bribes from litigants (Tempo interaktif, 1997). These judges were, however, never convicted in relation to these allegations. The situation, according to one lawyer was so dire that the court:

> … shouldn't be called a house of justice [*kantor pengadilan*] but instead an auction house [*kantor lelang*]. An auction house for cases… the judge himself calls me or the prosecution calls me or a policeman calls me – they're the ones who ask me, 'Do you want your client to

[75] This section draws on Butt and Lindsey (2010a).

> be helped or not? Does your client have enough for a donation or not?' So they're actively pursuing this. They're the producers and they're offering their wares...'Do you have money or not? If you don't, I'll make an offer to your adversary'. Now when I get a telephone call like this, I'm no longer surprised…Now I feel that it is natural (Pemberton, 1999: 200).

In 2001, respected NGO Indonesia Corruption Watch (ICW) conducted dozens of interviews with judges, lawyers, court employees, prosecutors, litigants and police. Many interviewees testified that bribery was very widespread and that they had either witnessed it or had participated in it. One interviewee even claimed '… while I have been an employee of the court there have been no cases which did not involve the payment of money.' He concluded that 'if most people who take bribes go to hell, I think that no judges will be let in heaven' .

Why these high corruption levels? In Indonesia, a combination of factors is at play. Low operational budgets and low judicial salaries have often been cited as factors forcing judges to seek additional sources of finance and income (World Bank, 2004, pp.83-85; KHRN & LeIP, 1999, p.62; Dakolias & Thachuk, 2000, p.398). On the presumption that increasing salaries will somehow reduce corruption, judicial salaries have been substantially increased in recent years (Hukumonline, 2002). Parliament has also increased the Supreme Court's budget, but the Court's administrative responsibilities have also multiplied. Each year, the Supreme Court submits a budget proposal to the National Development Planning Minister and Ministry of Finance which evaluates it, puts an upper limit on it and then submits the proposed budget to parliament for approval.)

Its budget increased drastically from 79.5 billion rupiah in 2002, to 153 billion in 2004 (Hukumonline, 2004) and, after the *satu atap* (one roof) reforms, discussed below, 1.2 trillion in 2005, 2.2 trillion in 2006, and 3 trillion in 2007 (Hukumonline, 2007) By 2009, its budget was 5.4 trillion (Supreme Court Annual Report 2009). This appears to be a significant increase, but in real terms it is arguably a reduction, given the vast expansion of the court's responsibilities and administrative burdens. With this budget, the Supreme Court must, for example, administer 67 appeal courts and 706 first instance courts, including paying for building infrastructure and the salaries of over 7,000 personnel (Mahkamah Agung, 2008, p.i).

In any case, increased salaries, even combined with strong new corruption laws, have apparently failed to reduce corruption. Judges are, of course, rational persons: they unlikely to change their behaviour unless it is in their best interests to be honest (Dakolias & Thachuk, 2000, pp.365, 398; World Bank, 2004, p.vii). This might occur if detection is probable and sufficiently punitive sanctions are likely to be imposed for contravention of those laws. The Indonesian judiciary has, however, resisted the imposition of mechanisms designed to do just that, so it remains unlikely that an errant judge will be punished.

4.14 Appeals

Appeals in criminal cases

An appeal to a high court against a district court decision must be lodged within seven days of the district court decision being handed down or made known to a defendant who was not present when the decision was handed down (Article 233(2) of the KUHAP). If the defendant or prosecution does not appeal the decision within seven days, they are considered to have accepted the decision (Article 234 (1) of the KUHAP) and the decision becomes enforceable. A cassation application must be sent by the applicant to the district court which initially heard the case within 14 days of the applicant being informed of the appeal decision for which cassation is sought (Article 245(1) of the KUHAP). Again, if the cassation application is not lodged within 14 days, the parties are

considered to have accepted the decision (Article 246(1) of the KUHAP) and the decision becomes enforceable.

Appeals in civil cases

Under Indonesian civil procedural law, an applicant who wishes to lodge an appeal against a District Court (*pengadilan negeri*) decision must do so at the District Court where the case was first heard, within 14 days of that decision being handed down or the parties being informed of it (Art 7(1) of Law No 20 of 1947).9 After this period, the parties are generally deemed to have accepted the decision. Consequently, appeal requests will usually be rejected, and the original District Court decision will become binding.

Dissatisfied parties can request a cassation (kasasi) hearing from the Supreme Court, provided that their case meets some minimal requirements. Articles 45A(1) and (2) of the Supreme Court Law as amended by Law No 5 of 2004 requires the Supreme Court to accept cassation applications, unless the case is an appeal of a pre-trial hearing,

> a criminal case for a crime for which the maximum term of imprisonment is one year or less, or a fine, an administrative law case concerning a decision of a regional official the reach of which is regional.

Clearly, these grounds are extremely broad. They give most litigants the right to appeal and this lack of limitation contributes significantly to the Supreme Court's massive case backlog, mentioned above.

The Cassation request must be lodged with the District Court that first heard the case, within 14 days of the appeal court decision being handed down (Art 46 of Law No 14 of 1985 on the Supreme Court). If the court does not receive the application within this period, the cassation request should be rejected.

Cassation is generally conducted 'on the papers'. It involves the panel of judges reviewing and deciding based on the case file (which should include the decisions at first instance or on appeal, if applicable) and written arguments submitted by the parties. It generally does not involve the presentation of oral arguments or the questioning of witnesses, although exceptions are sometimes made.

The Supreme Court's cassation decision will have permanent binding force and is immediately executable, at least legally.

Peninjauan Kembali (PK)

The Supreme Court is authorised to reopen and review 'permanently binding' decisions from all of the courts below it and can even review its own decisions. This form of Supreme Court review is referred to as *peninjauan kembali* (PK).

If reviewing one of its own decisions, the panel of judges presiding over the PK will be different to the panel that heard the original cassation application.

Before 1970, the PK process was used only rarely. It was usually employed to enable the reconsideration of judicial decisions made during Dutch colonisation or under the Soekarno regime. It is now very commonly employed by litigants.

A PK can be lodged at any time after the decision for which review is sought has become binding and enforceable (Article 264(3) of the *KUHAP*). If the Supreme Court is reviewing one of its own decisions, the panel of judges presiding over the PK will be different to the panel that heard the original cassation application.

The Code of Criminal Procedure provides three grounds for a PK:

1. If there is a new circumstance which gives rise to a strong suspicion that if that circumstance had been known at the time the proceedings were taking place, the result would have been an acquittal, a dismissal of all charges, a rejection of the prosecutor's charges, or the application of a less serious criminal provision to the case (Article 263(2)(a)).
2. If in a number of decisions, statements [have been made] that something is proven, but the things or circumstances which form a basis of and reason for the decisions which were declared to have been proven, in fact contradict each other (Article 263(2)(b)).[76]
3. If the decision clearly indicates judicial error or a clear mistake (Article 263(2)(c)).

Unlike appeals and cassations, PK requests in criminal cases seem not to be subject to time limits (Article 264(3) of the KUHAP; see also Article 76 of Law No 14 of 1985 on the *Mahkamah Agung,* as amended by Law No 5 of 2004).

The PK is the final formal avenue of judicial 'appeal' for litigants. Article 23(2) of the Judicial Power Law states that the *Mahkamah Agung* cannot 'conduct a PK of a PK'.

4.15 Positioning

The Courts are entrusted with adjudicative jurisdiction within the Indonesian state and legal systems. Article 24 of the Constitution declares that:

1. The judicial power is the independent power to maintain a system of courts with the objective of upholding law and justice.
2. The judicial power is exercised by a Supreme Court and the courts
3. below it in the respective environments of public courts, religious courts, military courts, administrative courts and by a Constitutional Court.
4. Other bodies with functions that relate to judicial power are regulated by law.

Despite the Courts being granted this jurisdiction, however, it appears that Article 24(3) of the Constitution makes it possible for other bodies – apart from the judiciary – to be granted adjudicative powers. To the knowledge of the author, no such bodies have yet been established.

It should be noted, however, that at the village level in many Indonesian rural areas, traditional methods of dispute resolution are commonly used. These are discussed below at 6.6.

4.16 Judicial Administration

The Supreme Court's budget has recently been greatly expanded, but so have its administrative responsibilities. Its budget increased drastically from 79.5 billion rupiah in 2002, to 153 billion in 2004 (Hukumonline, 2004) and, after the *satu atap* (one roof) reforms, discussed below, 1.2 trillion in 2005, 2.2 trillion in 2006, and 3 trillion in 2007 (Hukumonline, 2007). This appears to be a significant increase, but in real terms it is arguably a reduction, given the vast expansion of the court's responsibilities and administrative burdens.

With this budget, the Supreme Court must, for example, administer 67 appeal courts and 706 first instance courts, including paying for building infrastructure and the salaries of its personnel (Mahkamah Agung, 2008, p.i).

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[76] Article 263(2)(b) is poorly drafted and somewhat unclear. My understanding of the provision is as follows: if in one case there is a declaration that something has been proven and which is used as a basis of the decision, but which conflicts with the evidence in another case, then a PK may be lodged.

According to the MA 2009 Annual Report, the Supreme Court currently administers 18,484 lower court officials: judges, registrars and bailiffs (see below).

Judicial salaries

Indonesian judges receive two types of formal payments for their work: a wage (*gaji*) and an allowance (*tunjangan*). The allowance is usually a greater amount than the wage.

According to the Schedule to Government Regulation No 11 of 2008, the Fifth Amendment to Government Regulation No 8 of 2000 on Wages for Judges in the General Courts, Administrative Courts and Religious Courts, judges are paid according to the following scale.

CATEGORY III				
Scale	**a**	**b**	**c**	**d**
0	1,976,600	2,035,900	2,097,000	2,159,900
1				
2	2,063,300	2,125,200	2,189,000	2,254,700
3				
4	2,153,900	2,218,500	2,285,100	2,353,600
5				
6	2,248,400	2,315,900	2,385,300	2,456,900
7				
8	2,347,100	2,417,500	2,490,000	2,564,700
9				
10	2,450,100	2,523,600	2,599,300	2,677,300
11				
12	2,557,600	2,634,300	2,713,400	2,794,800
13				
14	2,669,800	2,749,900	2,832,400	2,917,400
15				
16	2,787,000	2,870,600	2,956,700	3,045,400
17				
18	2,909,300	2,996,600	3,086,500	3,179,100
19				
20	3,037,000	3,128,100	3,221,900	3,318,600
21				
22	3,170,300	3,265,400	3,363,300	3,464,200
23				
24	3,309,400	3,408,700	3,510,900	3,616,300
25				
26	3,454,600	3,558,300	3,665,000	3,775,000
27				
28	3,606,200	3,714,400	3,825,900	3,940,600

29				
0	3,764,500	3,877,400	3,993,800	4,113,600
31				
32	3,929,700	4,047,600	4,169,000	4,294,100

CATEGORY IV					
Scale	**a**	**b**	**c**	**d**	**e**
0	2,224,700	2,291,400	2,360,200	2,431,000	2,503,900
1					
2	2,322,300	2,392,000	2,463,700	2,537,600	2,613,800
3					
4	2,424,200	2,496,900	2,571,800	2,649,000	2,728,500
5					
6	2,530,600	2,606,500	2,684,700	2,765,300	2,848,200
7					
8	2,641,700	2,720,900	2,802,500	2,886,600	2,973,200
9					
10	2,757,600	2,840,300	2,925,500	3,013,300	3,103,700
11					
12	2,878,600	2,965,000	3,053,900	3,145,500	3,239,900
13					
14	3,004,900	3,095,100	3,187,900	3,283,600	3,382,100
15					
16	3,136,800	3,230,900	3,327,800	3,427,700	3,530,500
17					
18	3,274,500	3,372,700	3,473,900	3,578,100	3,685,400
19					
20	3,418,200	3,520,700	3,626,300	3,735,100	3,847,200
21					
22	3,568,200	3,675,200	3,785,500	3,899,000	4,016,000
23					
24	3,724,800	3,836,500	3,951,600	4,070,100	4,192,200
25					
26	3,888,200	4,004,900	4,125,000	4,248,800	4,376,200
27					
28	4,058,800	4,180,600	4,306,000	4,435,200	4,568,300
29					
30	4,237,000	4,364,100	4,495,000	4,629,900	4,768,700
31					
32	4,422,900	4,555,600	4,692,300	4,833,000	4,978,000

Judges of the Supreme Court are reported to earn somewhere between 15 to 20 million rupiah in wages ('Sejumlah Calon Soroti Gaji Hakim', Hukumonline, 18 February 2010).

The following are formal allowance pay scales, contained in Presidential Regulation No 19 of 2008 on Special Performance Allowances for Judges and Public Servants in the Supreme Court and the Courts Below it.

Chief Justice of the Supreme Court	31,100,000
Deputy Chief Justice of the Supreme Court	25,800,00
Junior Chairperson of the Supreme Court	24,200,000
Supreme Court Judge	22,800,000
Chairperson of General Court, Religious Court, Administrative Court, Military Court	13,000,000
Chairperson of District Court Class IA Chairperson of Religious Court Class IA Chairperson of Administrative Court Chairperson of Military Court Type A	7,400,000
Chairperson of District Court Class IB Chairperson of Religious Court Class IB Chairperson of Military Court Type B	6,200,000
Chairperson of District Court Class II Chairperson of Religious Court Class II	5,100,000
Deputy Chairperson of High Court Deputy Chairperson of High Religious Court Deputy Chairperson of High Administrative Court Deputy Chairperson of Military Court	11,500,000
Deputy Chairperson of District Court Class IA Deputy Chairperson of Religious Court Class IA Deputy Chairperson of Administrative Court Deputy Chairperson of Military Court Type A	6,600,000
Deputy Chairperson of District Court Class IB	5,800,000
Deputy Chairperson of Religious Court Class IB Deputy Chairperson of Military Court Type B	
Deputy Chairperson of District Court Class II Deputy Chairperson of Religious Court Class II	4,800,000
Judge of High Court Judge of High Religious Court Judge of High Administrative Court Judge of High Military Court	10,200,000
Judge of District Court Class IA Judge of Religious Court Class IA Judge of Administrative Court Judge of Military Court Type A	5,400,000
Judge of District Court Class IB Judge of Religious Court Class IB Judge of Military Court Type B	4,500,000
Judge of District Court Class II Judge of Religious Court Class II	4,200,000

Comparison with other civil servants and other law enforcement institutions

Below: Scale for Civil Servant Salaries

Source: Appendix to Government Regulation No 25 of 2010

PERATURAN PEMERINTAH REPUBLIK INDONESIA
NOMOR : 25 TAHUN 2010
TANGGAL : 5 FEBRUARI 2010

DAFTAR GAJI POKOK PEGAWAI NEGERI SIPIL

MKG	GOLONGAN I				MKG	GOLONGAN II				MKG	GOLONGAN III				MKG	GOLONGAN IV				
	a	b	c	d		a	b	c	d		a	b	c	d		a	b	c	d	e
0	1,095,000																			
1																				
2	1,121,900																			
3		1,183,700	1,233,800	1,286,000																
4	1,149,400																			
5		1,212,800	1,264,100	1,317,500																
6	1,177,700				0	1,390,100														
7		1,242,600	1,295,100	1,349,900	1	1,407,200														
8	1,206,600				2															
9		1,273,100	1,326,900	1,383,000	3	1,441,800	1,502,700	1,566,300	1,632,600											
10	1,236,200				4															
11		1,304,300	1,359,500	1,417,000	5	1,477,100	1,539,600	1,604,800	1,672,600	0	1,743,400	1,817,100	1,894,000	1,974,100	0	2,057,600	2,144,700	2,235,400	2,329,900	2,428,500
12	1,266,600				6					1					1					
13		1,336,300	1,392,900	1,451,800	7	1,513,400	1,577,400	1,644,200	1,713,700	2	1,786,200	1,861,800	1,940,500	2,022,600	2	2,108,100	2,197,300	2,290,300	2,387,100	2,488,100
14	1,297,700				8					3					3					
15		1,369,100	1,427,100	1,487,400	9	1,550,600	1,616,200	1,684,500	1,755,800	4	1,830,100	1,907,500	1,988,100	2,072,200	4	2,159,900	2,251,300	2,346,500	2,445,800	2,549,200
16	1,329,500				10					5					5					
17		1,402,800	1,462,100	1,523,900	11	1,588,600	1,655,800	1,725,900	1,798,900	6	1,875,000	1,954,300	2,037,000	2,123,100	6	2,212,900	2,306,500	2,404,100	2,505,800	2,611,800
18	1,362,200				12					7					7					
19		1,437,200	1,498,000	1,561,400	13	1,627,600	1,696,500	1,768,300	1,843,100	8	1,921,000	2,002,300	2,087,000	2,175,300	8	2,267,300	2,363,200	2,463,100	2,567,300	2,675,900
20	1,395,600				14					9					9					
21		1,472,500	1,534,800	1,599,700	15	1,667,600	1,738,100	1,811,700	1,888,300	10	1,968,200	2,051,400	2,138,200	2,228,700	10	2,322,900	2,421,200	2,523,600	2,630,400	2,741,600
22	1,429,900				16					11					11					
23		1,508,600	1,572,500	1,639,000	17	1,708,600	1,780,800	1,856,200	1,934,700	12	2,016,500	2,101,800	2,190,700	2,283,400	12	2,380,000	2,480,600	2,585,600	2,694,900	2,808,900
24	1,465,000				18					13					13					
25		1,545,700	1,611,100	1,679,200	19	1,750,500	1,824,500	1,901,700	1,982,200	14	2,066,000	2,153,400	2,244,500	2,339,400	14	2,438,400	2,541,500	2,649,000	2,761,100	2,877,900
26	1,500,900				20					15					15					
27		1,583,600	1,650,600	1,720,400	21	1,793,500	1,869,300	1,948,400	2,030,800	16	2,116,700	2,206,300	2,299,600	2,396,900	16	2,498,300	2,603,900	2,714,100	2,828,900	2,948,600
					22					17					17					
					23	1,837,500	1,915,200	1,996,300	2,080,700	18	2,168,700	2,260,400	2,356,100	2,455,700	18	2,559,600	2,667,900	2,780,700	2,898,300	3,020,900
					24					19					19					
					25	1,882,600	1,962,300	2,045,300	2,131,800	20	2,222,000	2,315,900	2,413,900	2,516,000	20	2,622,400	2,733,400	2,849,000	2,969,500	3,095,100
					26					21					21					
					27	1,928,800	2,010,400	2,095,500	2,184,100	22	2,276,500	2,372,800	2,473,200	2,577,800	22	2,686,800	2,800,500	2,918,900	3,042,400	3,171,100
					28					23					23					
					29	1,976,200	2,059,800	2,146,900	2,237,700	24	2,332,400	2,431,100	2,533,900	2,641,100	24	2,752,800	2,869,200	2,990,600	3,117,100	3,249,000
					30					25					25					
					31	2,024,700	2,110,400	2,199,600	2,292,700	26	2,389,700	2,490,700	2,596,100	2,705,900	26	2,820,400	2,939,700	3,064,000	3,193,600	3,328,700
					32					27					27					
					33	2,074,400	2,162,200	2,253,600	2,349,000	28	2,448,300	2,551,900	2,659,800	2,772,400	28	2,889,600	3,011,900	3,139,300	3,272,100	3,410,500
										29					29					
										30	2,508,400	2,614,600	2,725,200	2,840,400	30	2,960,600	3,085,800	3,216,300	3,352,400	3,494,200
										31					31					
										32	2,570,000	2,678,700	2,792,100	2,910,200	32	3,033,300	3,161,600	3,295,300	3,434,700	3,580,000

PRESIDEN REPUBLIK INDONESIA,

ttd.

DR. H. SUSILO BAMBANG YUDHOYONO

Salinan sesuai dengan aslinya
SEKRETARIAT NEGARA RI
Kepala Biro Peraturan Perundang-undangan
Bidang Politik dan Kesejahteraan Rakyat,

Wisnu Setiawan

NOMOR : 27 TAHUN 2010
TANGGAL : 9 FEBRUARI 2010

DAFTAR GAJI POKOK ANGGOTA KEPOLISIAN NEGARA REPUBLIK INDONESIA

GOLONGAN I TAMTAMA							GOLONGAN II BINTANA							GOLONGAN III PERWIRA PERTAMA				GOLONGAN IV PERWIRA MENENGAH				PERWIRA TINGGI			
a	b	c	d	e	f		a	b	c	d	e	f		a	b	c		a	b	c	d	e	f	g	
MKG	BHAYANGKARA DUA	BHAYANGKARA SATU	BHAYANGKARA KEPALA	AJUN BRIGADIR POLISI DUA	AJUN BRIGADIR POLISI SATU	AJUN BRIGADIR POLISI KEPALA	MKG	BRIGADIR POLISI DUA	BRIGADIR POLISI SATU	BRIGADIR POLISI	BRIGADIR POLISI KEPALA	AJUN INSPEKTUR POLISI DUA	AJUN INSPEKTUR POLISI SATU	MKG	INSPEKTUR POLISI DUA	INSPEKTUR POLISI SATU	AJUN KOMISARIS POLISI	MKG	KOMISARIS POLISI	AJUN KOMISARIS BESAR POLISI	KOMISARIS BESAR POLISI	BRIGADIR JENDERAL POLISI	INSPEKTUR JENDERAL POLISI	KOMISARIS JENDERAL POLISI	JENDERAL POLISI	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	
0	1,145,000	1,180,800	1,217,200	1,255,800	1,295,100	1,335,600																				
1																										
2	1,174,900	1,211,600	1,249,500	1,288,600	1,328,800	1,370,400																				
3																										
4	1,205,500	1,243,300	1,282,100	1,322,200	1,363,500	1,406,100	0	1,450,100	1,495,400	1,542,200	1,590,400	1,640,100	1,691,300														
5							1																				
6	1,237,000	1,275,700	1,315,500	1,356,700	1,399,100	1,442,800	2	1,487,900	1,534,400	1,582,400	1,631,800	1,682,900	1,735,500														
7							3																				
8	1,269,200	1,308,900	1,349,800	1,392,000	1,435,600	1,480,400	4	1,526,700	1,574,400	1,623,600	1,674,400	1,726,700	1,780,700														
9							5																				
10	1,303,300	1,343,100	1,385,000	1,428,300	1,473,000	1,519,000	6	1,566,500	1,615,500	1,666,000	1,718,100	1,771,800	1,827,200	0	1,860,300	1,918,500	1,978,400	6	2,040,300	2,104,100	2,169,800	2,237,700	2,307,600			
11							7							1	1,884,300			1								
12	1,336,300	1,378,100	1,421,200	1,465,600	1,511,400	1,558,600	8	1,607,400	1,657,600	1,709,400	1,762,900	1,818,000	1,874,800	2	1,908,500	1,968,500	2,030,000	2	2,093,500	2,158,900	2,226,400	2,296,000	2,367,800			
13							9							3	1,933,400			3								
14	1,371,200	1,414,000	1,458,200	1,503,800	1,550,800	1,599,300	10	1,649,300	1,700,800	1,754,000	1,808,800	1,865,400	1,923,700	4	1,958,800	2,019,800	2,083,000	4	2,148,100	2,215,200	2,284,300	2,355,500	2,429,600			
15							11							5	1,983,800			5								
16	1,406,900	1,450,900	1,496,300	1,542,000	1,591,300	1,641,000	12	1,692,300	1,745,200	1,799,800	1,856,000	1,914,000	1,973,900	6	2,035,600	2,072,500	2,137,200	6	2,204,100	2,273,000	2,344,100	2,417,300	2,492,900			
17							13							7				7								
18	1,442,600	1,488,700	1,535,300	1,583,300	1,632,800	1,683,800	14	1,736,400	1,790,700	1,846,700	1,904,400	1,963,900	2,025,300	8	2,088,700	2,126,600	2,193,000	8	2,261,600	2,332,300	2,405,200	2,480,400	2,557,900			
19							15							9				9								
20	1,481,300	1,527,600	1,575,300	1,624,600	1,675,300	1,727,700	16	1,781,700	1,837,400	1,894,900	1,954,100	2,015,200	2,078,200	10	2,143,100	2,182,000	2,250,200	10	2,320,600	2,392,100	2,467,900	2,545,100	2,624,600			
21							17							11				11								
22	1,519,900	1,567,600	1,616,400	1,666,900	1,719,000	1,772,800	18	1,828,200	1,885,300	1,944,300	2,005,000	2,067,700	2,132,400	12	2,199,000	2,238,900	2,308,900	12	2,381,100	2,455,500	2,532,300	2,611,500	2,693,100			
23							19							13				13								
24	1,559,500	1,608,300	1,658,800	1,710,400	1,763,900	1,819,000	20	1,875,900	1,934,500	1,995,000	2,057,300	2,121,600	2,188,000	14	2,256,400	2,297,300	2,369,100	14	2,443,200	2,519,600	2,598,300	2,679,600	2,763,300			
25							21							15				15								
26	1,600,200	1,650,200	1,701,800	1,755,000	1,809,900	1,866,400	22	1,926,800	1,986,900	2,047,000	2,111,000	2,177,000	2,245,000	16	2,315,300	2,359,200	2,430,900	16	2,506,900	2,585,300	2,666,100	2,749,400	2,835,400			
27							23							17				17								
28	1,641,900	1,693,100	1,746,200	1,800,800	1,857,100	1,915,100	24	1,975,000	2,036,700	2,100,400	2,166,000	2,233,700	2,303,600	18	2,375,600	2,418,700	2,494,200	18	2,572,300	2,652,700	2,735,600	2,821,100	2,909,300			
							25							19				19								
							26	2,026,500	2,089,800	2,155,200	2,222,500	2,292,000	2,363,600	20		2,481,800	2,559,400	20	2,639,400	2,721,900	2,807,000	2,894,700	2,985,200			
							27							21	2,437,500			21								
							28	2,079,300	2,144,300	2,211,400	2,280,500	2,351,800	2,425,300	22		2,546,500	2,626,100	22	2,708,300	2,792,900	2,880,100	2,970,200	3,063,400			
							29							23	2,501,100			23								
							30	2,133,600	2,200,300	2,269,000	2,340,000	2,413,100	2,488,500	24		2,612,900	2,694,600	24	2,778,800	2,865,700	2,955,300	3,047,700	3,142,900	3,241,200	3,342,500	
							31							25	2,566,300			25								
							32	2,189,200	2,257,600	2,328,200	2,401,000	2,476,000	2,553,400	26		2,681,100	2,764,900	26	2,851,300	2,940,400	3,032,100	3,127,100	3,224,500	3,325,700	3,429,700	
														27	2,633,300			27								
														28		2,751,000	2,837,000	28	2,925,700	3,017,100	3,111,400	3,208,700	3,309,000	3,412,600	3,519,100	
														29	2,701,900			29								
														30		2,822,700	2,911,000	30	3,002,000	3,095,800	3,192,600	3,292,400	3,395,300	3,501,400	3,610,900	
														31	2,772,400			31								
														32		2,896,300	2,986,900	32	3,080,200	3,176,900	3,275,800	3,378,200	3,483,800	3,592,700	3,705,000	

Salinan sesuai dengan aslinya
SEKRETARIAT NEGARA RI
Kepala Biro Peraturan Perundang-undangan
Bidang Politik dan Kesejahteraan Rakyat,

Wisnu Setiawan

PRESIDEN REPUBLIK INDONESIA,

ttd.

DR. H. SUSILO BAMBANG YUDHOYONO

Judicial administration case study: case allocation and prioritisation

Under Article 55 of the General Courts Law, district or high court chairpersons are to 'allocate tasks to judges'. Article 56 of the General Courts Law states that court chairpersons are to allocate case files and other documents relating to a case lodged with the court to a panel of judges to resolve the case.

Article 57 states that the chairperson is to determine the order in which cases are heard, but must prioritise the following types of cases:

a. corruption;
b. terrorism;
c. illegal drugs;
d. money laundering; and
e. other cases stipulated in legislation, and cases in which the accused is in a 'State Detention House' (Rumah Tahanan Negara).

A state detention house is defined in Article 1(2) of Government Decision No 27 of 1983 on the Implementation of the Code of Criminal Procedure as ' a place where a suspect or accused is detained during police investigations, prosecution and examination in court'.

Judicial personnel

Judges

As of 2009, Indonesia had 7,390 judges in the following courts:

Court	Appellate Level Court	Court of First Instance
General courts	402 judges	3,193 judges
Religious Courts	396 judges	3,020 judges
TUN Courts (?)	34 judges	251 judges
Military Courts	11 (including the Chief Military Judge)	83 judges

Gender breakdown:

Gender	General Courts		Religious Courts		TUN Courts		Military Courts	
	Number	%	Number	%	Number	%	Number	%
Women	842	25.6%	683	20%	75	26%	15	15%
Men	2,749	74.4%	2733	80%	210	74%	82	85%
Total	**3691**	**100%**	**3416**	**100%**	**285**	**100%**	**97**	**100%**

ourt staff

The total number of clerks and bailiffs is 11,094 spread as follows:

Court Environment	Appellate Level Court	Courts of First Instance
General Courts	583	5653
Religious Courts	281	3970
TUN Courts	89	445
Military Courts	21 (no bailiffs)	52

Gender breakdown:

Sex	General Courts		Religious Courts		TUN Courts		Military Courts	
	Number	%	Number	%	Number	%	Number	%
Women	1889	32.2%	3240	45.4%	330	62%	12	20%
Men	3982	67.8%	7132	54.6%	201	38%	61	80%
Total	**5871**	**100%**	**10372**	**100%**	**531**	**100%**	**73**	**100%**

Source: Indonesian Supreme Court Annual Report, 2009.

4.17 Oversight and Accountability

External monitoring

Before the *satu atap* reforms of 2004, discussed above, external monitoring of the courts was largely the responsibility of the government – primarily the Ministry of Justice – with the assistance of the Supreme Court.

With the *satu atap* reforms came the establishment of the Judicial Commission. It was apparently intended to be only non-judicial institution with exclusive power to conduct external oversight over Indonesia's courts. As is discussed below, however, its powers, as initially conceived, were limited and, in 2006, the Constitutional Court whittled them away even more.

The net result is that, today, Indonesia's courts are subjected to no effective formal external scrutiny. The Judicial Commission bravely continues its work, but has little formal power, and the Ombudsman receives complaints about the courts and other law enforcers but, as discussed below, has very limited investigative or coercive powers. A committed circle of NGOs and the press are as effective as any formal institution at exposing judicial corruption but, again, have no power or real influence to compel the Supreme Court to act against errant judges.

The Judicial Commission

An Indonesian Judicial Commission was created and began operating in 2005, as mandated by the third amendment to Indonesia's 1945 Constitution. Article 24B of the Constitution now states that:

1. The Judicial Commission is independent and has the power to propose Supreme Court judicial appointments. It has other powers that relate to ensuring and upholding the honour, dignity, and [good] behaviour of judges.
2. Members of the Judicial Commission must have legal knowledge and experience, and have integrity and irreproachable character.
3. Members of the Judicial Commission are appointed and dismissed by the President with the approval of the DPR.
4. The composition, position and membership of the Judicial Commission is to be regulated by statute.

Law No 22 of 2004 on the Judicial Commission expands upon Article 24B. The Law reaffirms that the Judicial Commission is to be independent when exercising its powers – that is, it must be free from interference or influence from other sources (Article 2). Law No 22 establishes that the Commission is to be made up of seven members, drawn from the ranks of former judges, legal practitioners, legal academics and community members (Articles 6(1) and 6(3)), including one chairperson and one deputy chairperson elected by the other members (Articles 5 and 7(1)).

Article 13 of Law No 22 of 2004 largely restates Article 24B(1) of the Constitution, but subsequent provisions of the Law expand upon the Judicial Commission's powers and functions. As part of its Supreme Court judicial candidate proposal function, the Law requires the Commission to conduct a candidate registration process, select candidates and then put those candidates before the DPR (Article 14(1)). The Law also covers a number of administrative issues (see Articles 15-19).

Importantly, the Law requires the Judicial Commission to supervise the performance and behaviour of judges from all Indonesian courts, including the Supreme and Constitutional Courts, as part of its function to 'uphold the honour and dignity, and to ensure the [good] behaviour, of judges' (Articles 13(b) and 20). In this context, Article 22(1) requires the Judicial Commission to:

a. receive reports from the community about the behaviour of judges;
b. seek periodic reports from courts about the behaviour of their judges;
c. investigate suspected breaches of proper judicial behaviour;
d. call and seek explanations from judges suspected of breaching the code of ethics for judicial behaviour; and
e. report the findings of investigations, make recommendations and convey them to the Supreme Court and/or the Constitutional Court, and to send a copy to the President and the DPR.

If the Judicial Commission finds that a judge has committed a violation, it can, depending on the gravity of the alleged breach, propose that the judge be punished by written reprimand, suspension or dismissal (Article 23(1)). The Judicial Commission should then send the proposed sanction and its reasons for imposing it to the Supreme Court and/or Constitutional Court leadership (Article 23(2) and 23(3)) for further action.

The Commission can also propose to the Supreme or Constitutional Court that a judge be recognised for his or her achievements or service in upholding the honour and dignity, or ensuring the good behaviour, of judges (Article 24(1)).

Limitations and contestations[77]

However, the supervisory powers of the Commission are limited, presumably in the interests of judicial independence. If the Commission suspected a judge of acting improperly, it could propose that the judge be punished by written reprimand, suspension or dismissal. However, the Commission could take no further direct action – it could only send the proposed sanction and reasons for suggesting it to the Supreme or Constitutional Court leadership. The statute allowed the Commission to review the performance of judges, but the final decision on whether action would be taken lay with other judges. The Judicial Commission's efficacy therefore depends heavily on its relationships with the Supreme Court and the Constitutional Court - specifically, the willingness and ability of those courts to act on the commission's proposals and recommendations.

The Judicial Commission indicated a strong desire to perform its functions with some vigour. In its first year it received 820 complaints and reports about judicial misconduct, called 74 judges to account for their actions, and recommended that the Supreme Court take action against 18 judges. However, the Supreme Court has not responded positively to its requests to take action against particular judges and has, in fact, taken steps to avoid scrutiny from the Judicial Commission altogether.

The controversy began when Professor Bagir Manan, then Supreme Court Chief Justice, rejected a Judicial Commission request to investigate several Supreme Court judges, including himself, for

[77] The following section draws on (S Butt & Lindsey, 2010b; Simon Butt, 2007).

alleged corruption in cases they had handled. In response, members of the Judicial Commission visited the president to demand a reselection or rigorous performance assessment of all 49 Supreme Court justices as the first stage of a comprehensive overhaul of the entire judiciary. This demand was leaked to the media, as was a list of allegedly 'problematic' or corrupt judges. In response, several Supreme Court judges reported then Judicial Chairperson, Busyro Muqoddas, to the police for defamation. They then lodged an application with the Constitutional Court, arguing that the Judicial Commission's power to monitor the judiciary contradicted the doctrine of judicial independence provided by the Constitution.

On their petition, the Constitutional Court reviewed Law No 22 of 2004, the statute which established the Commission. The Court began its decision by excluding itself from Judicial Commission supervision, pointing to the principle of judicial independence contained in the Constitution, an issue neither party had asked it to rule on. The Court next found that judicial independence also prevented the Commission from supervising the Supreme Court's exercise of judicial powers. The nub of the Court's decision was as follows:

> … even though assessing the technical–judicial skills of judges by reading judicial decisions might assist the Judicial Commission to identify a breach of a code of conduct or ethics, reviewing judicial decisions might place unjustifiable pressure on the judges, thereby breaching judicial independence. Only the courts could review judicial decisions, and then only through the appeals process—not by evaluating and directly interfering with decisions or by influencing judges (Butt, 2007: 192, references omitted).

The result of this decision was to remove the primary accountability mechanism put in place to counterbalance the greatly increased autonomy the satu atap reforms brought to the Supreme Court and the courts below it. The decision also left the Judicial Commission able to do very little beyond suggesting new appointments to the Supreme Court. Detecting and punishing judicial impropriety is now, in a formal sense, almost exclusively an internal matter for the Supreme Court.

At time of writing, disputes between the Judicial Commission and the Supreme Court were ongoing. In May 2010, the Judicial Commission sought again to interview Supreme Court judges over allegations of breaking the judicial code of ethics and behaviour. The Supreme Court Chief Justice rejected the Judicial Commission's call, claiming that the Commission had been reviewing the substance of its decisions when, in fact, the Judicial Commission only had jurisdiction to investigate and monitor judges' compliance with the judicial code of ethics and behaviour.[78]

Internal supervision

Under Articles 53(1) and 53(2) of the General Courts Law, district court chairpersons are to supervise the work and behaviour of the judges, registrars, secretaries and bailiffs within the jurisdiction of their courts. Article 53(3) of the General Courts Law requires high court chairpersons

> to supervise the performance of the district courts within their jurisdictions and to ensure that judicial processes are thorough and adequate.

When performing their supervisory functions, district and high court chairpersons can instruct, reprimand and warn the judges and officials they supervise.[79]

Article 53 of the Religious Courts Law (No 50 of 2009) and Article 52 of the Administrative Courts Law (No 51 of 2009) provide similar powers to first instance and appeals court chairpersons.

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[78] 'Hakim Agung Mangkir, KY Akan 'Vonis' secara in absentia', *Hukumonline*, 24 May 2010..

[79] Article 53(4) of the General Courts Law.

The Supreme Court and Judiciary Laws enable the Supreme Court to perform 'the highest level' of supervision over the judicial processes of the courts below it.[80] The Supreme Court can require judges to account for their behaviour and actions with respect to technical legal issues,[81] and can guide, reprimand and warn them.[82]

Standards

Provisions in the judiciary laws concerning the judicial oath and prohibitions on conflicts of interest can be used to curb the misconduct of most Indonesian judges and will be set out in this section.

Oath

Under the Supreme Court and General Court Laws, most judges must take the following oath or pledge before taking up office.

> In the name of God, I swear that I will fulfil my judicial obligations to the best of my abilities and as justly as I can, firmly adhere to Indonesia's 1945 Constitution, apply all laws strictly in line with Indonesia's 1945 Constitution, and be loyal to the country and people.[83]

As was noted above, judges who breach this oath can be dishonourably discharged from office.

Assessment[84]

The Supreme Court's performance in carrying out its supervisory role is commonly criticised. Some Indonesian lawyers have claimed that the Supreme Court does not have enough time to carry out is supervisory role properly and is not particularly interested in it. According to a former Supreme Court judge, the Supreme Court's supervision of lower courts is almost completely non-functional, particularly with respect to supervision of the quality of judicial decisions. Even when some form or supervision does take place and a problem is identified, further action is rarely taken.

The Supreme Court has virtually no incentive to actively pursue allegations of judicial corruption among its own ranks. After all, corruption brings significant financial benefits to Supreme Court judges personally and provides funds arguably critical to the running of the Supreme Court and the courts for which it is responsible.

Even if the Supreme Court were inclined or pressured to pursue particular allegations, corruption is, by its very nature, a difficult crime to detect, and the Court has few investigatory powers and little experience in this area. Accordingly, responsibility for dealing with judicial conduct in Indonesia has largely shifted from the formal sector to the informal. Most revelations of judicial misbehaviour in recent years have thus come not from the courts or the Judicial Commission, or the police or public prosecution service, or even from the two agencies that have reported large numbers of public complaints about judicial corruption, the Corruption Eradication Commission (KPK, *Komisi Pemberantas Korupsi*) and the Ombudsman.[85] Rather, the most active judicial 'watchdog' is still civil society and, in particular, the media and NGO.

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[80] Article 32(1) of the Supreme Court Law.

[81] Article 32(3) of the Supreme Court Law.

[82] Article 32(4) of the Supreme Court Law.

[83] Article 30(2) of the Judiciary Law; Article 17 of the General Courts Law; Article 9 of the Supreme Court Law. The promise, also set out in Article 30(2), is identical to the oath, except that it begins with 'I sincerely promise that', rather than 'In the name of God'.

[84] This section draws on Butt, Lindsey, 2010a.

[85] The majority of complaints lodged with Indonesia's National Ombudsman Commission relate solely to the judiciary. It has, however, had very little success in resolving such complaints to the satisfaction of the public (Crouch, 2007).

Unfortunately, even when judicial impropriety is detected by either formal or informal means, as it sometimes is, there is little prospect of offenders being punished. If a judge has committed a criminal offence he or she will be tried before a court from which appeal will inevitably reach the Supreme Court, and so decisions have generally favoured fellow members of the bench. Even in the highly-publicised 'Endin and the Three Judges' case,[86] where Endin, a calo or go-between, gave evidence that he had bribed three Supreme Court judges, the courts found in favour of the judges, using poorly-justified and spurious technical arguments to defeat the action in a pre-trial hearing (*pra-peradilan*), and then even dissolved the government's Joint Anti-Corruption Team (*Tim Gabungan Pemberantasan Tindak Pidana Korupsi,* TGPTK) that was prosecuting the case. Endin himself was convicted in another proceeding of criminally defaming the judges by making the original allegations of corruption against them (see Butt and Lindsey, 2010, where we discuss this case in detail).[87] For obvious reasons, internal Supreme Court mechanisms are even less likely to result in punishment of judges than would a trial, and, even if punishment does ensue it is likely to be relatively light - a transfer or suspension, for example.

The result is that there are now no apparent disincentives for corruption in the Supreme Court, other than 'shaming' by the media and NGOs, and shaming in this context is a limited sanction, the effect of which will always be relative to the thickness of the judicial hide, individual or collective. This matters, because corrupt judges are rational individuals, disinclined to change their behavior unless their improprieties are likely to be detected and punished in a way that might cause them significant damage (Dakolias, Thachuk, 2000: 365, 398; World Bank, 2004: vii). Being rational, corrupt judges will therefore continue tend to prioritise 'wet' (*basah*) cases, for example, commercial cases or major criminal or corruption cases (where the personal or financial stakes are high, and opportunities for bribery better) over 'dry' cases, such as administrative disputes involving branches of the bureaucracy, or petty crimes, for example.

Recent controversy: the KPK and Anti-Corruption Court under attack

On 3 November 2009, the Constitutional Court played, in open court, 270 minutes of recordings of wiretapped conversations between suspects the Anti-Corruption Commission (KPK) was investigating for massive corruption and Indonesia's most senior law enforcement officials. These included Attorney General Abdul Hakim Ritonga, former Head of Intelligence at the Attorney General's Office Wisnu Subroto, and National Chief of Police Detectives Susno Duadji. Even the President's name was mentioned several times. The conversations revealed a plot to frame, for corruption themselves, two senior Commissioners from Indonesia's Anti-Corruption Commission (KPK).

Police had arrested the two Commissioners, Chandra Muhammad Hamzah and Bibit Samad Rianto, just days earlier, alleging that they had abused their powers (*menyalahgunakan kewenangan*) and received large cash bribes in exchange for dropping a major corruption investigation. Thus far, the plot revealed in the recordings had worked: Bibit and Chandra had been suspended from the KPK and were in police custody awaiting trial. Before prosecutors could bring their case before one of Indonesia's general courts, however, the two Commissioners challenged the legal basis for their suspension in the Constitutional Court. They argued that their suspensions inferred culpability, thereby contravening their constitutional rights to presumption of innocence and to equality before the law. After hearing the recordings, the Constitutional Court unanimously declared that Bibit

[86] Case No 560.K/Pdt/1997; copy on file with authors.

[87] Under Article 310(1) and 311 of the Criminal Code. See Endin defamation case (Central Jakarta District Court Decision No 427/PID.B/2001/PN.JKT.PST), copy on file with authors.

and Chandra had been framed, and decided that they should be immediately freed and reinstated as KPK Commissioners.

Their framing and subsequent redemption is, however, just one part of a much bigger story which has been front-page news in Indonesia for months. As the Constitutional Court case was on foot, in separate proceedings, former KPK Chairperson, Antasari Azhar, was being tried for murdering the husband of a female golf caddie with whom, prosecutors alleged, he had enjoyed an affair. On 11 February 2010, after a trial marred with countless irregularities and which seemed to uncover more exculpatory than incriminating evidence, raising serious doubts about whether he was involved in the murder, Antasari was found guilty and sentenced to 18 years' imprisonment.

What is at stake?

As mentioned above, Indonesia is consistently rated as having some of the highest levels of corruption in the world, often attributed to the continuing influence of Soeharto-era powerbrokers and their protégés. Pervasive corruption is said to hamper economic growth and prevent governance reforms aimed at improving transparency and accountability, leading some commentators to question the 'quality' of Indonesian democracy and, ultimately, the longevity of post-Soeharto reform.

By 2008, however, Indonesia's anti-corruption drive had gained real traction, largely due to the efforts of the KPK, established in 2003. After securing around 100 convictions in its first few years, an emboldened KPK began targeting 'big-fish' corruptors, including former and serving parliamentarians and Ministers, and even family members of the Indonesian president, Susilo Bambang Yudhyono (SBY). This progress is nothing short of astounding in Indonesia. In surveys, its citizens constantly rate key instrumentalities of government, including the parliament, key Ministries and law enforcement institutions, as incompetent and corrupt. A multitude of unsuccessful half-baked attempts – some would argue designed-to-fail – to tackle corruption had preceded the KPK's establishment. Beyond the expectations of many, if not most, the KPK had begun to make 'corruptors' think twice before engaging in corruption.

The KPK's survival is, therefore, critical to 'real' and sustainable political, economic and legal reform in Indonesia. Can established political forces with much to gain from the old corrupt system, hobble the KPK and maintain the status quo in which many government institutions, including parliaments and courts are corrupt, or even revert to Soeharto- era practices? Or can the KPK, backed by reformist groups and with massive public support, deflect these attacks and continue its work, perhaps ultimately leading Indonesians into a truly democratic future with 'clean' government officials and institutions?

Fabrication, murder and scandal

On 14 March 2009, Nasruddin Zulkarnaen, a prominent Jakarta businessman, was shot twice in the head after a game of golf. He died in hospital the following day. After a two-day investigation, police named then-serving KPK Chairperson, Antasari Azhar, a formal suspect in the case and detained him. Antasari's motive for the murder, police alleged, was that Antasari had been having an affair with Nasruddin's third wife, Rani Juliani. After discovering the relationship, Nasruddin reportedly began blackmailing Antasari, threatening to publicly reveal the affair. In response, police claimed, Antasari ordered Nasruddin's assassination.

On the very day of Antasari's detention for the murder, police released a statement bearing Antasari's signature. In the statement, Antasari claimed that he was told by an unnamed informant that senior KPK officials had accepted around 6.7 billion Rupiah in bribes to drop a major

corruption investigation. This investigation had uncovered evidence that businessman Anggoro Widjojo bribed Forestry Ministry officials, and former parliamentarian Yusuf Erwin Faishal of the National Awakening Party (PKB), to ensure that his company, PT Masaro Radiokom, was named sole provider of the Ministry's radio communications system without a tender in 2007.

The statement also declared that the unnamed informant offered to arrange a meeting between Antasari and Anggoro in Singapore. According to the statement, Antasari accepted. Wearing a wire, Antasari recorded the conversation, which was later released to the media and publicly aired. In it, Anggoro admitted that two of his staff had paid off KPK officials Jasin and Ade (presumably referring to KPK Director of Investigations, Ade Raharja, and KPK Commissioner and Deputy Chairperson Mochammad Jasin). The statement ended with Antasari claiming to have later met, this time in Indonesia but unwired, with Ari Muladi, one of Anggoro's employees, who admitted to handing over the bribe.

Claiming to be pursuing allegations made in Antasari's statement, police summoned four KPK Commissioners for questioning, and after investigating further, formally named Bibit and Chandra as suspects on 15 September 2009 and charged them for misusing their power by issuing and revoking travel bans against Anggoro and Djoko Tjandra, both of whom were under KPK investigation. Police claimed that Commissioners were required to make decisions collectively, rather than individually, pointing to Article 22(5) of the KPK Law which states that the KPK leadership is to work collectively. The travel bans and revocations had, however, been signed off on by Bibit and Chandra individually.

The move attracted significant public ire and fuelled mounting speculation that the charges were trumped-up and that a systematic assault was being launched to discredit, perhaps even destroy, the KPK. A primary cause for concern was that Bibit and Chandra were not mentioned at all in Antasari's recorded conversation with Anggoro, so it was unclear why they, and not the KPK officials named in the recording, were charged. Another was that Antasari later retracted his statement, claiming to have been coerced into making it. Some commentators speculated that pre-fabrication of his statement was entirely feasible, given that it was released so quickly after his detention.

Even the legal basis for the charges appears shaky. The KPK Law certainly does not prohibit one Commissioner from individually formalising a decision made after consultation with other Commissioners, as may well have occurred here. In any event, the KPK has, under Article 12(1) (b) of the KPK Law, clear discretionary powers to issue and lift travels ban against suspects in corruption cases. Issuing such a ban could not, therefore, constitute misuse of power.

Finally, police produced what they claimed was the official repeal of Anggoro's travel ban, issued on 5 June 2009 by the KPK and signed by Chandra, to support the allegations Anggoro had bribed Bibit and Chandra to drop the case against him. The document was, however, widely condemned as fake. The logo and several letterhead details were inconsistent with official KPK templates and the signature purporting to be Chandra's had been clearly falsified.

Nevertheless, with three of its five Commissioners in police detention, the KPK was virtually paralyzed. The plot had, to this point, succeeded. However, as mentioned, in November 2009, it began to unravel when the Constitutional Court ordered the release of Bibit and Chandra after deciding that they had been framed.

Murder or manipulation?

The Constitutional Court's decision drew mounting speculation that the murder case against Antasari was also fabricated as part of an alleged systematic attack to bring down the KPK. Of course, absent frank and honest admissions and clear-cut evidence, fabrication is difficult, if not

impossible, to prove. Yet aspects of his trial were so highly problematic that, even disregarding the Bibit and Chandra frame-up, questions about its integrity would likely have been raised.

The trial, which began on 8 October 2009 in South Jakarta District Court, quickly attracted controversy and media attention. Prosecutors alleged that Antasari and Rani Juliani, the third wife of the victim, Nasruddin Zulkarnaen, had a sexual encounter in Room 803 of the Hotel Grand Mahakam in May 2008 and that Nasruddin found out about it. They claimed that Nasruddin then threatened to expose Antasari's 'sexual harassment' of Rani in the hotel room, thereby publicly discrediting him. To prevent this, according to prosecutors, Antasari ordered Nasruddin's assassination, which was organised, financed and carried out by several others. Arguing that the murder was premeditated, prosecutors sought the death penalty.

For his part, Antasari denied killing Nasruddin. He admitted to meeting Rani at the Hotel, but claimed that he had not so much as touched her; by his account, they met only to discuss his proposed membership at the golf club where Rani worked.

On 11 February 2010, Antasari was found guilty and sentenced to 18 years in prison. In other trials, five others were convicted for carrying out the shooting and received between 17 to 19 years. Williardi Wizar, former South Jakarta Police Chief, was sentenced to 12 years for recruiting men to carry out the shooting; Sigid Haryo Wibisono, media magnate, was found guilty of financing the murder operation and was sentenced to 15 years' imprisonment; and Jerry Hermawan Lo, was sentenced to 5 years' imprisonment for setting up a meeting between Williardi and one of the assassins. Prosecutors had alleged, and presumably the Court accepted, that Antasari had coordinated with all of these individuals, except the five hitmen. Antasari had, at time of writing, appealed against the verdict, as had the prosecution who are likely to argue that his sentence was too light and again seek the death penalty.

There were at least three fundamental flaws in the prosecution case presented at trial that should have led the judges to find a 'reasonable doubt'[88] or even to declare that they had uncovered a political frame-up.

First, the prosecution produced a 38 calibre Smith and Wesson revolver as the murder weapon. Yet a number of witnesses testified that this was unlikely to have been the murder weapon. Dr Mun'im Idris, a forensic expert from the University of Indonesia, testified that the weapon could not have made Nasruddin's head wounds and that he was, in fact, shot with a 'FN Five-seven' pistol. An expert marksman and military trainer inspected the gun. He observed that it was in poor condition and testified that it would have been difficult, if not impossible, to shoot accurately. He indicated that it would have taken around 4,000 practice shots to master the use of the gun, yet, according to defence claims, the convicted hitmen had very little or no gun handling experience.

Second, to establish motive the prosecution case relied heavily on a threatening text message received by Nasruddin, apparently sent from Antasari's phone. The alleged message read: 'This is our internal problem. Only the two of us need to know about this. If you blow it up, you know the consequences'. This message is too ambiguous to be considered threatening in itself, without, at the very least, evidence being led to show what the consequences were. Further, several information technology experts testified that according to official phone records, no texts or conversations between their phones occurred in the alleged period. They also testified that a third party could anonymously send such text messages using an internet service.

[88] In Indonesia, the standard of proof in criminal cases is that guilt has been proven 'validly and convincingly' (*sah dan menyakinkan*). Many Indonesian commentators argue that this is roughly equivalent to the common law standard of 'beyond reasonable doubt'.

Finally, many of those found guilty of involvement in the murder, and who had admitted in police statements that Antasari was its 'mastermind', retracted their statements during their own trials. Some of the hitmen claimed that they had been coerced, even tortured, into confessing their involvement, but in fact were not involved at all. Other hitmen claimed that they were asked to carry out the killing in the interests of 'national security' and were promised jobs in the intelligence forces if they carried out murder. Wiliardi Wizar, the former South Jakarta Police Chief found guilty of recruiting the hitmen, testified that he was persuaded by Hadiatmoko, then Deputy Chief Detective of the National Police, to claim that Antasari had ordered the assassination of Nasruddin. Wiliardi said that, in return, he was promised immunity from prosecution. Hadiatmoko denied these claims. In a bizarre twist, however, Hadiatmoko's former boss, Susno Duadji, Chief of Police Detectives at the time of the murder, appeared unexpectedly as a witness for Antasari, claiming that Hadiatmoko was directly responsible for the team investigating Nasruddin's murder and that the team had informed him that they could not find any motive for the murder. This casts further doubt on the prosecution's case and, ultimately, on the court's finding of guilt.

Indeed, aspects of the prosecutor's case, when tested at trial, verged on farce, or as one defence lawyer claimed 'a cheap soap opera'. In particular, the prosecution had trouble establishing what really happened, if anything, at Hotel Grand Mahakham. This is critical, because these alleged events went to Antasari's motive for murder: to stop Nasruddin publicly revealing his alleged affair with Nasruddin's wife, Rani. Prosecutors attempted to prove that a sexual encounter took place by adducing an audio recording of the encounter. Yet the recording was barely audible. A prosecution-obtained document purporting to be a transcript of the recording matched none of the muffled noises on the tape.

Even more questionable was the manner, revealed during the trial, in which the 'meeting' was recorded. Just prior to joining Antasari, Rani phoned Nasruddin. They left the call connected throughout the alleged encounter, with Nasruddin recording the audio on his mobile phone. In fact, the only audible part of the recording, played in court, was Nasruddin telling Rani not to turn her phone off. Moreover, the Court heard, Nasruddin dropped Rani off at the hotel to meet Antasari and then burst into their unlocked hotel room after allegedly hearing the 'indecent acts' over his phone.

There is, in fact, very little evidence indicating that Nasruddin and Rani were ever formally married. They claimed to have wedded unofficially under Islamic Law (*kawin siri*) – a type of marriage not recognised by the state. Nasruddin's other two wives, and his driver, however, testified that they had no knowledge of the marriage, with one claiming Rani had been introduced to her by Nasruddin as Antasari's step daughter. Media reports speculated that all this pointed to Nasruddin's involvement in the plot and to Rani being brought in specifically to join it.

Tip of the iceberg?

The cases of Antasari, Bibit and Chandra should not be seen in isolation. From the earliest days of its existence, the KPK has faced resistance, not only from those it has investigated, but also from Indonesia's other law enforcement institutions. Initially, this resistance was limited: several of those found guilty of corruption launched constitutional challenges, some of them successful, to Indonesia's legal infrastructure for handling corruption cases. Targeting figures with more powerful political connections, has, however, drawn more intense retribution against the KPK. The framing of Bibit and Chandra and, perhaps, Antasari, are examples of this. There is, however, more evidence of systematic pushback. In 2009, the national parliament, many of whose members had been or were under investigation by the KPK, enacted a statute that significantly weakened the Anti-Corruption Court – the KPK's key ally. In 2010, the government is set to reduce the KPK's budget and to issue a regulation curbing the KPK's wiretapping powers upon which the KPK relies heavily for its convictions.

There is much public and media speculation that powerful political actors have the KPK in their sights. This speculation has arisen not only because of the KPK investigation involving the bribery of Forestry Department officials brought to light during the Bibit and Chandra scandal. It arose also because of the KPK's investigation into the government bailout of Bank Century to the tune of 6.7 trillion rupiah – funds that were then allegedly improperly transferred to favoured depositors, and even, some allege, to help fund the President's campaign for re-election in 2009.

It is no exaggeration to say that post-Soeharto political and legal reform sits on a knife's edge. The cases discussed in this article have, in a way unprecedented in Indonesian history, publicly revealed the depths of institutionalised corruption at the highest levels in Indonesia's law enforcement institutions. If the KPK were to be rendered impotent, Indonesia's anti-corruption efforts will deteriorate and corruption, unchecked, is likely to increase yet again. Governance reforms, the rule of law and, arguably the consolidation of Indonesia's so-called democratic transition are all at stake.

If the KPK does fall, then the prospects of eradicating corruption from within the police, prosecution and judicial system becomes slim – at least in the foreseeable future. Perhaps partly because they have an interest in continuing impunity for corruption, many police and prosecutors appear to be willing allies in this endeavour to bring down the KPK. One reason is that police and prosecutors resent that the KPK, despite being a new institution, has greater powers of investigation than they possess; and that the KPK can take over their corruption investigations if they are being handled inadequately or are tainted by corruption. Another reason is that, by taking the big corruption cases away from police and prosecutors, the KPK has denied them one of their most lucrative sources of income: bribes from suspects and defendants in corruption cases, rumoured to be more 'forthcoming' than suspects and defendants in other cases. Another reason is that, as public support for the KPK mounts, inevitably so too will pressure urging it to tackle the corruption about which everyday citizens commonly complain: corruption within the so-called justice sector, including the police force, prosecution and general court system. Of course, it was also confirmed by the recordings played in open session in the Constitutional Court that police involvement was not limited to assisting political players in their 'pushback' against the KPK. Rather, police and prosecutors have themselves been key players in some of these major corruption scandals. Their legal impunity, too, depends on them getting the KPK 'out of the way'.

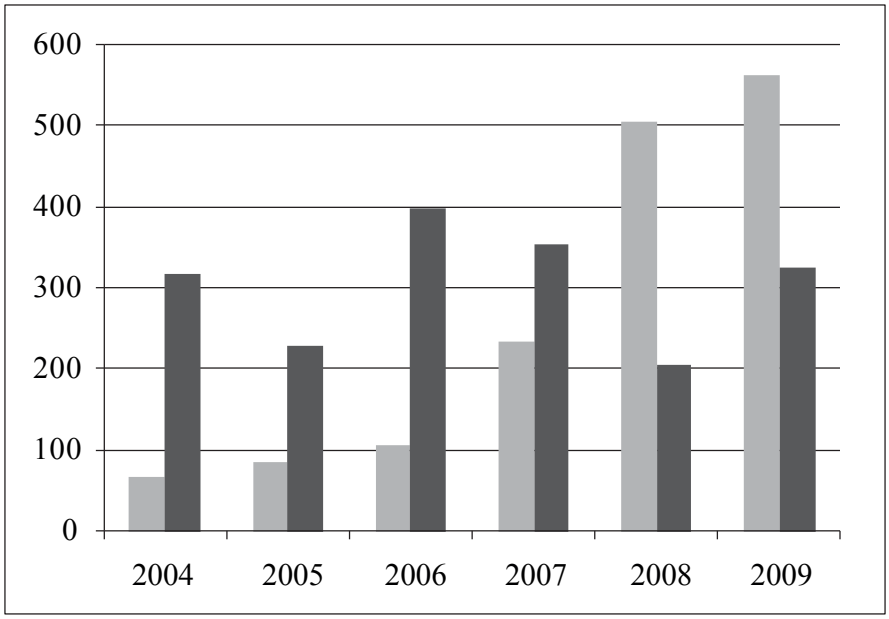
Supreme Court complaint handling

These problems appear to be born out in the following figures contained in the Court's Annual Report for 2009. According to the Supreme Court's Annual Report, in 2009 the Supreme Court improved its internal supervision system so to improve the integrity of court officials and public services. However, the evidence it provides for this claim is far from convincing.

The Report points to MA Chief Justice Decision No. 076/KMA/SK/VI/2009 on Guidelines for Handling of Community Complaints. Under this law, public information and complaints desks are established in the Supreme Court and several other courts around the country. Citizens can report complaints to district, high courts, or directly to the Supervision Board (Badan Pengawasan) of the MA, through the information desks in the relevant court, or through the MA's website. Within 15 days, the person who lodged it has the right to be given information about whether the report is appropriate to be processed or not.

As the following table shows, the MA received over 2000 complaints in 2009. 891 were processed, 327 of which were delegated to Appeals Courts. 1, 249 of which were considered 'inappropriate to be processed' for reasons that the annual report failed to disclose. The annual report did not indicate how the complaints were handled or resolved.

Number of complaints processed by the MA (black) and number of complaints delegated to the High Courts.



Supreme Court-led disciplining of judges

As the following tables show, several judges, and other court staff, were sanctioned in 2009, although the Annual Report does not disclose their improprieties. Punishments included dishonourable discharge, transfer (in one case, to Aceh), demotion to a non-sitting judge and demotion to a lower pay scale.

Court officials disciplined in (2009)

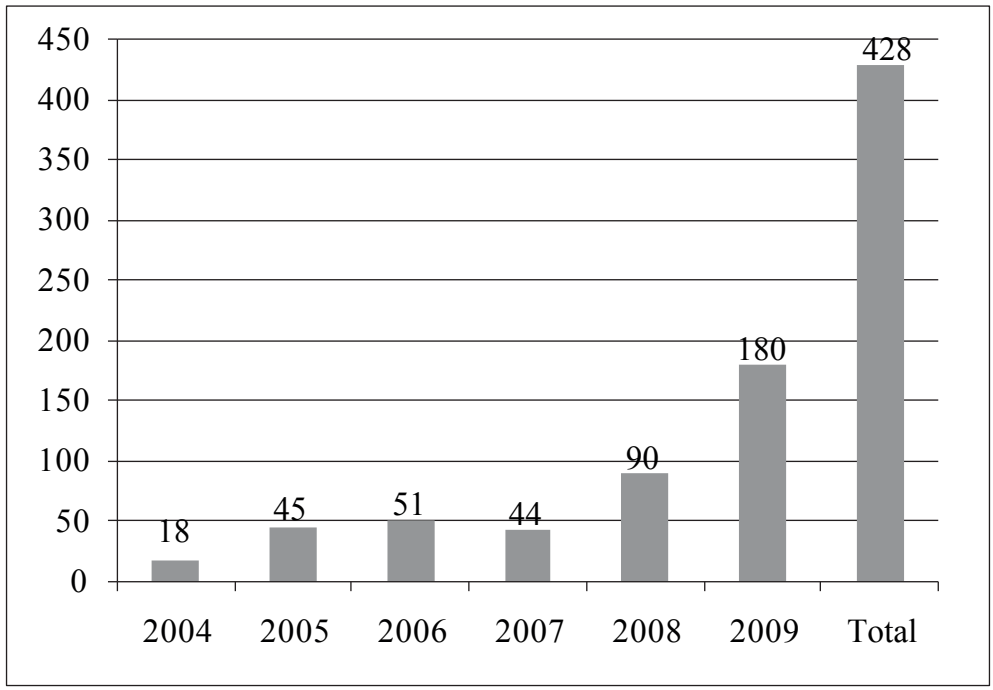
Position	**Punishment**			**Total**
	Heavy	**Medium**	**Light**	
Judge	30	5	43	78
Registrar/Secretary	10	2	6	18
Deputy Registrar	1	0	0	1
Deputy Secretary	5	0	4	9
Junior Registrar	3	0	0	6
Structural Official	5	0	0	5
Substitute Registrar	4	2	4	10
Bailiff/Bailiff Substitute	7	1	5	13
Civil servant / army officer	25	2	10	37
Civil service candidate	2	0	1	3
Total				**180**

The executive summary of the Annual Report does not expand upon the types of punishments that fall respectively into the 'heavy', 'medium' and 'light' categories.

As the following table shows, 2009 represents a two-fold increase in the 'disciplining' of judges compared to the previous two years. Nevertheless, given the extent of suspected judicial impropriety in Indonesia mentioned above, on still might have expected more court staff to have been pursued.

Of the 180 pursued in 2009, some are likely to have received a light punishment – presumably little more than an oral or written reprimand. Yet action was taken against less than 0.01% of the 18,484 judges, registrars and bailiffs under the control and supervision of the Supreme Court.

Court officials disciplined (2004-2009)



Case studies: recent decisions of the Judges' Honour Council

Most Indonesian judges[89] are subject to a Code of Ethics and Behaviour contained in Joint Decision of the Supreme Court Chief Justice and Judicial Commission Chairperson No. 047/KMA/SKB/IV/2009 dan 02/SKB/P.KY/IV/2009, 8 April 2009.[90]

Despite extensive searching, I was unable to obtain this document. According to media reports, the Code, said to be based on the *Bangalore Principles* of Judicial Conduct (2002), requires, amongst other things, that that judges be just, honest, discerning, wise, independent, impartial, modest and professional and to have high integrity and avoid conflicts of interest. It also prohibits judges from seeking, or accepting, gifts from the parties that appear before them (Hukumonline, 2009b).

Alleged breaches of this Code are heard in the Judges' Honour Council (*Majelis Kehormatan Hakim,* or MKH), an institution provided for in the statute that governs the Judicial Comission (see Judicial Commision Law (Article 23). Article 11(A)(8) of Law No 3 of 2009 on Second Amendments to Law No 14 of 1985 on the Supreme Court, provides that the MKH is chaired by Junior Chairperson of Supervision Division of the Supreme Court. Four officials from the Judicial Commission and two additional Supreme Court judges sit on the panel. An MKH had heared cases of alleged judicial misconduct for many years but it began hearing cases in its current composition in September 2009.

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[89] Constitutional Court judges are subject to Constitutional Court Regulation No 2/PMK/2003 of 2003 on the Ethics Code and Behaviour Guidelines for Constitutional Court Judges.

[90] Alleged breaches are heard under special procedures contained in the Joint Decision of the Chief Justice of the Supreme Court and the Chairperson of the Judicial Commission No: 129/KMA/SKB/IX/2009-04/SKB/P.KY/IX 2009 on the Procedrues for the Establishement,Work and Decision Making Process of the Judges' Honour Council.

From the available press reports consulted, it seems that the MKH, as currently composed, was not, at time of writing, providing a sufficient disincentive for judges to avoid impropriety. It appeared, in fact, from the few reported cases heard thus far, that the Council might be being used to divert judges from potential trial in Indonesia's ordinary courts, thereby allowing them to potentially avoid criminal punishments for acts that are criminal in nature, including receiving a bribe. It is clear that when judges receive a bribe, they break a number of Indonesian laws. Indonesia's 1999 Anti-corruption Law, amended in 2001, provides in Article 2(1) a very broad definition of what constitutes corruption, which includes any 'illegal' act that enriches the perpetrator or another, and which damages the finances of the state. Article 3 prohibits any person from, with the aim of enriching him or herself, another or a corporation, misusing their authority, opportunities, or means at their disposal because of the office they hold, in a way which could damage the state's finances or the economy. Article 12B emphasises that every kind of 'gratification' (*gratifikasi*) constitutes a bribe, provided that it relates to the functions of the office of the receiver and it 'contradicts' (*berlawanan*) the receiver's obligations or tasks.[91] The Elucidation to Article 12B(1) defines 'gratification' broadly, to include 'money, goods, discounts, commissions, interest-free loans, transport tickets, accommodation, holidays, free medicine and facilities'. Indonesia's Criminal Code (*Kitab Undang-undang Hukum Pidana*, or KUHP) and 1980 Bribery Law also prohibit corruption in many of its various forms.

Judges should, therefore, face criminal trial for bribery. Yet it appears that the MKH process is allowing judges to avoid trial. One case heard before the MKH in late 2009 involved two judges, both accused of taking bribes. The alleged improprities arose out of cases surrounding the murder of Mayor (Purn) Lodewyk Sirait, with the two judges under investigation involved in separate trials for the alleged perpetrator and accomplices.

The victim'swife, it was alleged, sought more serious penalties against the defendants than the judges might have otherwise imposed; she claimed that the judges received bribes from her in order to meet her requests. During the MKH hearings, however, both judges claimed that they had received no money. They were, nevertheless, found to have sought and received money – around Rp 300 million.

The Council handed down what can only be described as very light sentences for these offences. The allowances of both judges were revoked for around two years; they were both demoted for one year; and they were transferred to Aceh and Kupang respectively, both remote areas, to serve as non-sitting judges. It should be noted, however, that two members of the Council disagreed with this punishment and would have preferred that, instead, the judges be dishonorably discharged (Hukumonline, 2009a).

I could find no further information as to whether, once having these administrative sanctions were imposed against them, these judges were then subject to criminal proceedings (which, if successful, could have resulted in their imprisonment, fining or both). It is likely that the MKH process, in effect, substituted for criminal process, resulting in far lighter penalties than would have been applicable if the criminal law was applied and they had been found guilty of bribery.

If, on the one hand, based on this case, the MKH appears to be handling quite serious matters but issuing inappropriately light penalties, on the other, the MKH seems also to be handling rather trifling matters – quite insignificant in light of the scale of judicial impropriety in Indonesia – and

[91] Apparently contradiction this provision, the Judicial Code of Ethics reportedly allows judges to receive a gift of no greater value that Rp 500,000, provided that it does not come from one of the parties involved in cases being heard before the judge ('Majelis Kehormatan Hakim Disiapkan', *Seputar Indonesia*, 3 Mei 2009).

imposing disproportionately heavy punishments. For example, in one cases, decided in February 2010, one judge was dragged before the panel based on a claim by his wife that he had neglected her. He was posted in Papua, whereas she was in Makssar, South Sulawesi. She had loaned him money 66 times (a total of Rp 84.5 million) to visit her, which was not repaid and which the Council thought constituted a 'gratification' which he should have reported. It was alleged that he had had an affair with his foster sister who also lived in Makassar – apparently an inappropriate act that brought the judiciary into disrepute (Hukumonline, 2010). He was transferred to Palangkaraya for two years, prohibited from hearing cases for two years, and had promotions delayed for one year.

The panel's decision in this case seems questionable, and it is surprising that the panel decided to hear this case in the first place. Surely this was a personal matter between the judge and his wife with which the MKH need not concern itself. It is inconceivable that the penalties imposed upon this judge are similar to those imposed upon the judges found to have engaged in bribery.

4.18 Other Court Staff

Apart from general office staff, two other officials are critical to the running of the court: the registrar (who is largely responsible for case management and the administration of the court) and the bailiff (who is not only responsible for ensuring the smooth hearing of cases but also for tasks associated with the enforcement of judicial decisions).

Conclusion

The courts have received more attention from reformists and donors than criminal investigators and prosecutors. Significant progress has been made in respect of Indonesia's court system in the post-Soeharto era. In particular, the satu atap reforms have, by all reports, reduced government interference in judicial processes. Also significant is the Constitutional Court, which is significantly contributing to government compliance with the Constitution which now contains an impressive list of human rights.

Having a judiciary that is largely independent of government and that enforces fundamental rights is clearly a significant advantage for Indonesian citizens. Increased judicial independence places citizens and government on more equal footing in criminal cases, which might making it more difficult for the state to fight crimes, but makes it more likely that the rights of citizens, including suspects and defendants, are respected.

Yet, despite these effective reforms, problems remain, including the widespread perception that the vast majority of Indonesian judges are corrupt, incompetent or both. Whether this is true, public perceptions and trust in the Indonesian courts would be greatly enhanced by more effective oversight, transparency and accountability.

Errant judges should be dismissed rather than lightly punished; those who commit a criminal offence must face imprisonment and fines rather than administrative 'slaps on the wrist'. In short, judges should not be able to abuse their new-found independence – they must be held accountable when exercising it.

Now that independence has been achieved, the judicial reform agenda, at least as proposed by civil society, seems to be directed towards improving judicial transparency and accountability.

As for future reforms, the Supreme Court is preparing a new Blueprint (2010-2035). As is mentioned below, the Blueprint was not, however, available at time of writing; indeed, it had probably not been finalised.

5. Civil and Criminal Judgement Enforcement

Enforcement problems significantly undermine the efficacy of judicial decisions in Indonesia in both civil and criminal cases.

5.1 Types of Enforcement

Civil Cases[92]

Under Indonesian law, a decision must generally be binding (mempunyai kekuatan hukum tetap, literally, 'have permanent legal authority') to be enforced. Although this concept is commonly referred to by lawyers and often encountered in law textbooks, statutes, judicial decisions and the press, its meaning is usually assumed rather than explained. For example, Indonesia has two Civil Procedure Codes - the *Herziene Indonesisch Reglement* (the HIR, which applies in Java and Madura) and the *Reglement Buitengewesten* (the RBg, which is valid in the rest of Indonesia). Both of these codes are silent on the meaning of *kekuatan hukum tetap.*

A judicial decision is considered binding in two circumstances. The first is where it has been appealed to a High Court (*pengadilan tinggi*) and then heard on cassation (kasasi or appeal on point of law) by the Supreme Court. The second is where the time limits have lapsed for appeal to the High Court or for a request for cassation by the Supreme Court. For more information on appeals, please see 4.15 above.

Lodgement of a request for an appeal or cassation will generally constitute a stay on enforcement. However, Art 180 of the HIR provides a very limited and rarely-employed exception to this principle. It permits a lower court to order the enforcement of a civil decision despite a pending appeal or cassation hearing if:

> [T]here is a valid document, something written which is legally recognised as evidence, or if there is a binding prior decision or a prior claim which has been accepted, or if the dispute regards ownership rights.

This provision's meaning is quite unclear, but its significance has been reduced by a number of Supreme Court memos, or circular letters (surat edaran). Circular Letters No 13/1964 (10 July 1964); 5/1969 (2 June 1969) and 3/1971 (17 May 1971) strongly criticise judges for allowing any of their decisions to be enforced pending an appeal. Circular Letters No 6/1975 (1 December 1975) and 3/1978 (1 April 1978) order District Court judges to refrain from executing their own decisions pending an appeal, even if the requirements of Art 180(1) have been fulfilled, unless 'exceptional circumstances' exist - and even then, only if the party seeking enforcement provides adequate security. 'Exceptional circumstances' are, however, not defined. Article 180(1)'s lack of clarity; the prohibitive tone of these circular letters; and uncertainty over the meaning of 'exceptional circumstances' probably mean that most judges would not order the enforcement of their decisions pending an appeal, even if they thought doing so might be appropriate or beneficial.

After a court's decision has achieved binding force, the unsuccessful party can voluntarily comply with the decision. However, this is uncommon, at least partly because many Indonesians hold the judiciary in low regard. Unsuccessful parties may be particularly reluctant to comply with court decisions they do not respect. In such cases, the successful party must make a further application for an order compelling the unsuccessful party to comply with the most recent judicial decision dealing with the dispute (see Art 195(1), HIR).

[92] This section draws on Butt (2008).

The chairperson of the District Court that heard the case at first instance oversees the enforcement of permanently binding decisions. It is, therefore, responsible for ensuring compliance with Supreme Court and High Court decisions, as well as its own. The recalcitrant party is called before the chairperson of the District Court, who directs that party to comply with the decision within eight days, or such shorter time as may be ordered by the chairperson (Art 196, HIR). If the unsuccessful party does not comply, or does not attend the enforcement hearing despite being validly summonsed, then the court can take action to ensure compliance. For example, it can seize and auction property to finance damages awarded to the successful party; or it can put a monetary value on an act or service that the unsuccessful party refused to carry out (Arts 197(1), 200(1), and 225(1) of the HIR).

The court clerk (panitera) or bailiff (juru sita) are to ensure compliance in accordance with the chairperson's enforcement order (Law on Judicial Power of 1970, Art 33(3)). The police are commonly called in to assist, particularly if resistance is strong or physical (Bachar, 1995: 6).

Delay

These provisions give rise to a number of problems, many of which cause or may contribute to long delays in the enforcement of, or eventual non- compliance with, court decisions at every level of Indonesia's judicial hierarchy (Media Indonesia, 1997; Gray, 1985: 115). First, the HIR does not require the District Court chairperson to respond to a request for an enforcement order immediately - or even within a particular time. As a result, courts can allow such requests to languish deliberately, or through administrative incompetence, causing significant delays in execution. Secondly, Art 196 of the HIR does not impose sanctions upon parties who fail to comply within the eight-day period. Thirdly, it seems that the chairperson of the District Court can delay the execution of a decision for any reason, even though Arts 195, 196 and 197 of the HIR appear to require the judge to ensure compliance. Fourthly, these provisions can be used to unfairly disadvantage the unsuccessful party. Some plaintiffs deliberately wait to apply to the District Court for enforcement, knowing that the court will most likely require the defendant to pay interest on the amount awarded by the court. He also notes that court officials and police face physical - sometimes violent - opposition from unsuccessful parties who resist compliance.

However, the most notorious method employed to delay execution of judicial decisions - the surat sakti - lies outside the legislation. As mentioned above, surat sakti are usually sent by the Mahkamah Agung Chief Justice to the chair-person of the District Court responsible for the enforcement of a particular decision, requesting the chairperson to delay enforcement.

These surat sakti are often issued in cases where extra-judicial pressure appears to have been placed on the courts to bring about the desired result for one of the parties.

Criminal Cases

Article 270 of the KUHAP and Article 27 of Law No 5 of 1991 make prosecutors responsible for enforcing judicial decisions in criminal cases. Enforcement is to be supervised by a judge (Article 277) who is to ensure that the decision is complied with (Article 280(1)).

The World Bank (2004) notes that judicial practices have contributed to enforcement problems. Some judges do not prepare their formal written judgement before they read out their decision in the courtroom; rather, they use notes to announce their decisions and then have them typed up by a clerk – a process that can take some months and which may result in errors if the judge does not inspect the final product. Because prosecutors must execute their decisions using a written copy of the decision (Article 270 of the KUHAP), they must usually wait for a substantial time until it

has been typed. The World Bank also notes that some decisions have been altered by clerks when typing up decisions, presumably in return for an illicit payment.

***Surat sakti*[93]**

Finally, some Supreme Court cassation and PK decisions have not been enforced, or have had their enforcement significantly delayed, through the issuance of a *surat sakti* (literally, 'magic letter').

A term popularised by the Indonesian media, *surat sakti* literally means 'magic letter'. On a general level, a *surat sakti* is usually an order from someone with particular power and authority used to achieve a particular purpose in a way that might not be conventional or legal. In legal circles, a *surat sakti* has been traditionally understood as a letter written by a superior judge – the Supreme Court Chief or Deputy Chief Justice in the cases reported thus far – to a first instance court judge responsible for ensuring compliance with a Supreme Court decision. The letter usually advises the judge to delay the execution of that decision, even though that decision is formally binding.

Most lower courts defer to such instructions from the Supreme Court, even though the issuance of *surat sakti* are often thought to be tainted by corruption or government interference, and the legality of *surat sakti* is questionable.

Administrative cases

Litigants frequently encounter problems when trying to have administrative court decisions enforced against the government. It is common for government institutions to ignore the decisions of the administrative courts, or to delay enforcement for as long as possible.

Law No 9 of 2004 Amending Law No 5 of 1986 on the Administrative Courts imposes sanctions upon administrative decision-makers who do not comply with administrative court decisions. These sanctions take the form of fines or administrative sanctions. The Law also provides for shaming of the public official involved in the public media. Law No 51 of 2009, which again amends Law No 5 of 1986, provides that if 60 working days passes without compliance with the administrative court decisions, then the administrative decision complained of no longer has binding force. If after 90 working days, the decision has not been implemented, then the plaintiff can seek an order from the court commanding the public official to implement the administrative court decision. If the decision is not complied with, then he or she can be fined and shamed in the mass media.

Labour cases

Law No 2 of 2004 on the Industrial Dispute Resolution does not provide specific procedures for the execution of the decisions of the Industrial Relations Court. Presumably, then, the procedures for execution in civil cases, described above, apply. The Law does, however, contain provisions on the enforcement of dispute resolutions arrived at outside of the court, by conciliation, arbitration or mediation, for instance. If registered with the Court, parties can seek a court order for the court-sanctioned enforcement of that resolution (see Articles 13-14, 23, 44).

5.2 Organisation

Indonesian law does not provide for any specific or separate enforcement agency. Rather, the enforcement of judicial decisions falls to the public prosecution which enforces court decisions in criminal cases) and the judiciary (which enforces court decisions in civil cases).

[93] This section draws on Butt (2008).

5.3 Model

Indonesian law does not provide for any specific or separate enforcement agency. Rather, the enforcement of judicial decisions falls to the public prosecution which enforces court decisions in criminal cases) and the judiciary (which enforces court decisions in civil cases).

5.4 Tasks and Functions

In civil cases, the chairperson of the District Court that heard the case at first instance is responsible for enforcing judicial decisions relating to cases that were first heard in that court. A particular district court will, therefore, be responsible for enforcing any appeals against its decision heard by a higher court, or any cassation decision from the Supreme Court. As is mentioned in 5.1, the 'winning' party in a case can approach this district court and request an enforcement order. The court clerk (panitera) or bailiffs (juru sita) are to ensure compliance in accordance with the chairperson's enforcement order.

Prosecutors are, as mentioned above at 5.1, responsible for the enforcement of criminal cases.

See above at 5.1 for the respective tasks and functions of prosecutors (criminal enforcement) and courts (civil enforcement).

5.5 Relations

Indonesian law does not provide for any specific or separate enforcement agency. Rather, the enforcement of judicial decisions falls to the public prosecution which enforces court decisions in criminal cases) and the judiciary (which enforces court decisions in civil cases).

There are no formal relations between prosecutors and courts in the enforcement of judges. Once a judicial decision in a criminal case is issued, for example, it is, in effect, handed over to prosecutors to enforce.

5.6 Process

See above at 5.1 for enforcement processes. In addition, it can be noted that there are no formal processes for the socialisation of the enforcement of the judgement itself. Parties can, however, expected to be informed when their cases have been decided. (Indeed, the decision will usually be read in open court.

5.7 Mechanisms

Administrative matters

As mentioned, the ordinary courts and prosecutors are responsible for the enforcement of judicial decisions in Indonesia. Some of the general administrative matters relating to the courts and prosecutors was mentioned in chapters 3 and 4.

5.7 Mechanisms

To the knowledge of the author, there are no specific mechanisms to monitor the enforcement of judicial decisions beyond those mentioned in previous sections of this report. As mentioned in 5.1, the general court is responsible for overseeing the enforcement of judicial decisions in civil cases and the prosecution in criminal cases. Judges and prosecutors are, as mentioned in chapters 3 and 4, general oversight and monitoring, both internal and external. (For example, the Supreme Court is responsible for monitoring the performance of judges and for taking action against judges who are judged to have acted improperly.)

Conclusion

There are currently no particular advantages to Indonesia's system for enforcing judicial decisions. The law relating to enforcement is underdeveloped and requires significant reform, and, partly as a result, enforcement practices are somewhat *ad hoc.*

To the knowledge of the author, there are no proposed reforms to Indonesia's legal infrastructure for enforcement. There only possible exceptions might be to criminal enforcement, if contained within the proposed drafts of the Criminal Code and Code of Criminal Procedure, discussed in previous chapters.

f civil enforcement mechanisms should, however, be fast-tracked because, processes, as they currently stand, significantly undermine the efficacy of judicial proceedings in Indonesia. Measures should be taken so that parties need not apply for a separate enforcement order from a court to enforce a decision of that court. Judicial decisions must be enforceable even if an appeal has been lodged against them; unless they are immediately enforceable, respect for decisions of lower courts, in both civil and criminal cases, will continue to plummet. The relevant laws on criminal and civil procedure are desperately out-of-date and vague and must be revised.

6. Lawyers and Other Legal Services

Government lawyers[94]

Government lawyers are public servants who are university law graduates. Most departments of the Indonesian government have their own legal offices, often working in the legal bureau (*Biro/ Bagian Hukum*) of that office.

Advokat (Advocates) and Pengacara (Lawyers).

These are private-sector lawyers. They have law degrees, work in law offices, advise clients and represent them in court. Advocates focus on litigation (although many also provide legal advice), while pengacara are general lawyers who may, for example, draft business contracts, plan business affairs and be involved in property matters.

Notaries

Notaries are responsible for ensuring that important legal documents comply with legal formalities so that they are 'valid' and can, therefore, be enforced in Indonesian courts, for instance In the Indonesian context, notaries are semi-public officials who witness and formalise important legal documents. Formally, they do not represent particular parties, but rather their function is to objectively formalise agreements that parties have already made and to archive them at their offices. The bulk of the work of Indonesian notaries is to prepare and formalise notarised deeds, also called authentic deeds (akta otentik). Some Indonesian notaries are also Pejabat Pembuat Akta Tanah (Land Deed Official), which allows them to perform functions in connection with establishing good title to land in real property transactions.

6.1 Organisation

Indonesia has seven major bar associations:

- Association of Indonesian Advocates (*Ikatan Advokat Indonesia* (IKADIN)),
- Indonesian Advocates Association (*Asosiasi Advokat Indonesia* (AAI)), Institute of Indonesian Legal Advisers (*Ikatan Penasehat Hukum Indonesia* (IPHI)),
- Association of Advocates & Lawyers of Indonesia (*Himpunan Advokat & Pengacara Indonesia* (HAPI)),
- Indonesian Lawyers' Union (*Serikat Pengacara Indonesia* (SPI)),
- Association of Indonesian Legal Consultants (*Asosiasi Konsultan Hukum Indonesia* (AKHI))
- Association of Capital Markets Legal Consultants (*Himpunan Konsultan Hukum Pasar Modal* (HKHPM)

Relations between many of these competing bodies have been very poor for many decades.

PERADI, as the most recently-established of these organisations, created under Law No 18 of 2003, is perhaps now the most important and influential of these organisations.

6.2 State Regulation

The primary instrument by which the state regulates the activities of lawyers is Law No 18 of 2003 on Advocates. Prior to this the industry was largely unregulated.

[94] This section draws on CCH Asia (1991) and www.indobiz.com.

6.3 Lawyers

Article 2(1) of the Advocates' Law requires only that advocates have a law degree and have had professional Advocates' training run by the Advocates' Organisation. Upon graduation from law school, lawyers can begin work in a private firm or company. To work as a litigator or trial lawyers, however, applicants must obtain a license, which may be granted after the applicant passes an entrance examination administered by the Ministry of Law and Human Rights (International Commission of Jurists, 2006).

Lawyers are subject to a Code of Conduct that is enforced by PERADI and that is available on PERADI's website.

Lawyers provide 'legal services', defined in Article 1(2) of the Advocates' Law to include legal consultation, legal aid, representation, power of attorney, defending and performing other legal acts in the interest of their clients.

To the knowledge of the author, Indonesian law does not distinguish between the role of lawyers in criminal cases and civil cases.

6.4 Education and Training of Lawyers

Lawyers are appointed and trained by the Advocates' Organisation (Article 29 of the Advocates' Organisation Law).

6.5 Disciplining lawyers

It is clear that many Indonesian lawyers have skills and professional standards that would rival the world's best lawyers. For the most part, however, the Indonesian legal profession's image is tainted by consistent and sustained allegations of impropriety – in particular, for corrupt practices, such as bribing judges, prosecutors and other court personnel on behalf of their clients (International Commission of Jurists, 2006).

Articles 17-20 of the Advocate's Law impose the following obligations upon advocates:

1. When performing their professional duties, advocates are prohibited from discriminating between clients based on gender, religion, political affiliation, ethnicity, race, or social and cultural background;
2. Advocates must maintain the confidentiality of all matters that come to his/her knowledge or about which s/he is informed by a client as part of their professional relationship, unless otherwise stipulated by law.
3. An advocate shall be prohibited from holding any other position that could give rise to a conflict of interest with the duties and dignity of his profession.
4. An advocate shall be prohibited from holding any other position that requires such services that could prejudice the Advocates' Profession, or reduce the advocate's independence and freedom in their ability to perform their duties and responsibilities.
5. If an advocate accepts an appointment as a state official, the advocate is prohibited from practicing as an advocate for the term of appointment.

The Advocates Law (Articles 14-17) sets out the following rights of advocates. These include protections for advocates against state interference when advocates are handing their cases.

1. An advocate shall be free and independent to voice opinions or make statements to pursue a case in which s/he is involved before any court, meanwhile adhering to the professional code of ethics and the provisions of the prevailing laws and regulations;

2. An advocate shall be free to perform his/her professional duties to pursue a case in which s/he is involved, while also adhering to the professional code of ethics and the provisions of the prevailing laws and regulations;
3. An advocate may not be sued or prosecuted in either a civil or criminal court on account of something s/he has done in good faith as part of the performance of his/her professional duties in the interest of a client before the court;
4. In the performance of his/her professional duties, an advocate shall be entitled to obtain information, data, and documents, whether from government agencies/institutions or other parties, where such information, data and documents are necessary for the pursuit of a client's interest, subject to the provisions of the prevailing laws and regulations;
5. An advocate shall be entitled to have the confidentiality of his relationship with a client respected, including a prohibition on the seizure or inspection of case files and documents, and on the electronic monitoring of communication devices used by an advocate.

Source: Indonesian Legal System 2005, pp 116-117, available at www.aseanlawassociation.org

All seven bar associations have endorsed a Code of Ethics for Advocates. There is, however, to the knowledge of the author, no central process for disciplining judges. The result, then is that discipline is a matter for each of the bar associations. This means that lawyers expelled from one bar association can join another and continue to practice (International Commission of Jurists, 2006).

Action can be taken against lawyers if they:

- Neglect the interests of their clients
- Behave in a way that is inappropriate towards their opponents or colleagues
- Behave in way, or make a declaration, that is disrespectful of the law or the courts
- Perform acts that contradict the obligations, respect, honour or dignity of the profession
- Breach the law or act inappropriately
- Breach the Advocates' Oath or Code of Ethics (Article 6 of the Advocates' Law)

This action can take the form of an oral or written reprimand, suspension for between 3-12 months, disbarment (Article 7). Such action is to be taken by the Advocates' Organisation (Article 8) – PERADI.

Advocates are to be disbarred on their own request, if they are sentenced to four years imprisonment or more for a crime, or if so decided by the Advocates' Organisation (Article 10(1)).

The Advocates' Organisation is to supervise advocates to ensure that they uphold the code of ethics and the law (Article 12). If action is to be taken against an advocate, the advocate in question is to be given the opportunity to defend him or herself before the Advocates' Organisation Honour Council (Article 26).

6.6 Dispute Resolution

Local Dispute Resolution Mechanisms in Indonesia[95]

At the village level in many parts of Indonesia, a system of voluntary mediation exists to which villagers can submit their adat disputes (Hooker, 1978). This dispute settlement process is often aimed at conciliation; consensus is generally said to be preferred by many *adat* communities

[95] The following section summarises Stephens (2003).

over the imposition of a judgment in favour of one party and against the other. These *adat* disputes commonly involve land and family matters, but may also deal with commercial or criminal issues.

The venues and actors involved in this process vary from place to place. Most commonly and informally, villagers with disputes will often approach community leaders – including *adat* figures, police and military officers, and religious figures – to assist them to resolve their disputes. If a less informal approach is desired, villagers might seek the assistance of one of the two village-level institutions involved in dispute resolution in many villages: the village head (*kepala desa*) or some form of village council, both of which should be elected by villagers. The Village Representative Board (VRB), introduced by Law No 22 of 1999 on Regional Government, is to play the village council role, but had not begun operations in all villages at the time of writing. It is hoped that the VRB will provide more effective dispute resolution services than its predecessor – the Village Consultative Council – which was '…inclined to make rather authoritarian decisions' (Benda-Beckmann, 1984, p.71) In 2001, an Asia Foundation survey discovered that 86% of respondents preferred informal consensus-based dispute resolution over the formal judicial system to resolve their disputes.

Pre-trial conciliation/mediation

Indonesian judges are required by law to encourage conciliation before proceeding to trial.

Supreme Court Regulation No 1 of 2008 on Procedures for Mediation in Court is the primary legal instrument regulating this process. Its key provisions are as follows:

- If mediation is not pursued as required by the regulation, this results in the final decision of the court having no legal effect (Article 2(3)).
- Judges are required to include in their decisions that mediation was attempted, and include the name of the mediator used by the parties (Article 2(4)).
- All civil cases, except from those heard in the commercial courts, the industrial relations courts are to be mediated, with the assistance of a mediator, before the case is lodged at first instance (Article 4). Generally, those who conduct mediations must have certification as a mediator, accredited by an institution that has been approved by the Supreme Court (Article 5(1)). Some areas of Indonesia do not have such mediators, in which case, a judge can perform the function of a mediator (Article 5(2))
- The mediation is, in principle, closed to the public, unless the parties otherwise decide (Article 6).
- On the first day of a case, the judge is to require the parties to mediate (Article 7(1)) and to do so directly and actively (Article 7(3)). The presiding just must adjourn proceedings to give the parties an opportunity to mediate (Article 7(5)).
- To mediate their disputes, the parties can choose a judge (who is not presiding over their disputes), an advocate or legal academic, a non- lawyer who the parties think has a command over the subject matter of the dispute, or a combination of them (Article 8(1)).
- The parties are required to mediate in good faith (Article 12(1)). The Regulation also sets out several Stages in the Mediation Process Within five days of the parties appointing a mediator, both parties must submit their claims to each other and the mediator (Article 13(1)). The mediation is to take place within 40 days from the appointment of the mediator, although, with mutual agreement, this time can be extended by a further 14 days (Article 13(4)). The mediator can declare the mediation to have failed if one of the parties does not attend a mediation meeting at the scheduled time on two consecutive occasions (Article 14(1)).

- The mediator is to devise a schedule of mediation meetings (Article 15(1)) and must encourage the parties to actively participate in the mediation (Article 15(2)).

The Akta Perdamaian

If the mediation is successful, the parties, with the help of the mediator, are to produce a written document containing the agreement, signed by the parties and the mediator (Article 17(1)). The parties are then to attend court on a scheduled date to inform the judge of the agreement (Article 17(4)). The parties can submit this to the court in the form of a Settlement Agreement (*Akta Perdamaian*), which, if need be, can later be enforced by the court. In order to be enforceable, the Agreement must be

- Be agreed to by the parties Not conflict with the law Not damage a third party
- Be capable of execution and
- Be made in good faith (Article 23(3)).

If, however, after 40 days, the parties cannot reach an agreement, the mediator must declare in writing that the mediation process has failed and inform the judge of the failure (Article 18(1)). The judge is then to schedule the case for hearing (Article 18(2)). At every stage of the trial before the final decision is handed down, the judge is to continue to urge the parties to mediate (Article 18(3)).

Parties can attempt mediation even when a case is being heard on appeal or cassation (Article 21(1)).

It is commonly reported that judges almost routinely neglect the requirement to attempt to encourage parties to resolve their disputes outside of court.

Arbitration

Before 1999, arbitration was governed by the Dutch Code of Civil Procedure for Europeans in Indonesia (*Reglement op de Burgelijke Rechtsvordening* (the BRV or the RV) (1849). This was out-dated and inadequate. For instance, it provided no express prohibition on courts from interfering in proposed and on-going arbitration, and from refusing to recognise arbitration awards.

The Law on Arbitration and Conciliation (Law No 12 of 1999) revokes and replaces many of the old Code provisions. It contains the following relevant provisions:

- The Agreement to arbitrate needs to be in writing and signed by parties (Article 9(1)).
- Parties can choose the law which will apply to any disputes which may arise between them (Article 56(2)).
- Award, domestic or foreign, are enforceable by Indonesian courts in the same way as a civil decision of a court (Article 64).
- It provides procedures used in arbitration proceedings (Articles 27-51), which may be applicable if the parties do not explicitly agree to the rules they will follow.
- Decision of arbitrator is final. There is no appeal 'on the particular legal relationship arising from the agreement' (Articles 52-53).

Once arbitrated, Indonesian courts are 'prohibited' from hearing the case afresh:

- 'District courts do not have jurisdiction to adjudicate cases between parties which are bound by an arbitration agreement' (Article 3).
- The existence of a written arbitration agreement eliminates the rights of the parties to lodge a request with a district court to resolve a dispute arising out of the contract (Article 11(1)).

- The district court must refuse to hear, and must not interfere in, the resolution of a dispute if the parties have agreed to arbitration (Article 11(2)).

There are, however, avenues for judicial intervention:

- If the parties cannot agree upon an arbitrator, then the chairperson of the relevant district court will appoint an arbitrator or a panel of arbitrators for them (Article 13(1)).

A District Court can, on request, strike down arbitration award if:

- documents used during the arbitration hearing are later discovered to be false;
- after the award has been made a document hidden by one of the parties is discovered and is determinative; or
- the award was made on the basis of deception by one party to the dispute (Articles 70-72).
- Such District Court decisions can be appealed to the Supreme Court (Article 72(4)).

Domestic and awards

To be enforced by courts in Indonesia, domestic awards must be registered within 30 days of being issued (Article 59(1)). If not, then the award becomes unenforceable. If the losing party does not comply with the award, the winning party can request enforcement order from chairperson of district court (Article 61). Before ordering enforcement of domestic awards, the chairperson of the district court determines whether the arbitration award complies with administrative requirements of the Law and ensures that it complies with morality and public order (Article 62(2)). If the award does not so comply, then the chairperson can refuse to enforce it (Article 62(4)).

The Central Jakarta District Court is the judicial institution with jurisdiction to recognise and enforce international arbitration awards (Article 65). For international awards, the award must:

- deal with trade or commerce (Article 66(b));
- not conflict with public order (Article 66(c));
- be made by an arbitrator or panel of arbitrators in a country which has a bilateral agreement with Indonesia or is a signatory to a multilateral agreement to which Indonesia is also a member (Article 66(1)).

If the Chairperson of the Central Jakarta District Court decides not to order the enforcement of the award, then dissatisfied parties appear to be able to appeal to the Supreme Court (Article 68(2)), which must hand down a decision within 90 days (Article 68(3)).

Conclusion

There are many disadvantages to Indonesia's system of lawyers and other legal services. Internal bickering between lawyers' organisations, and the general fragmentation of the legal profession, has greatly hampered the ability of Indonesian lawyers to self-regulate and to maintain standards of integrity and competence. While arbitration is, generally speaking, a good option for those seeking to resolve their disputes in Indonesia, it is beset by problems, including interference by Indonesia's general courts in the enforcement of awards. Court-ordered pre-trial mediation, while looking good on paper, is, by many accounts, rarely ordered in practice. Village- level dispute resolution, though generally cheap, accessible and quick, is commonly said to lack impartiality. To the knowledge of the author, there are no significant proposed reforms relating to these areas.

7. Justice Sector Reform

This Chapter examines who initiates and develops justice sector reform and the ways in which the state responds to them.

7.1 Initiation

There are several 'key players' in the justice reform sector in addition to those mentioned below at 7.8. They include the following.

The Courts

Now that authority over the administration and organisation of most of Indonesia's courts has been transferred from government departments (primarily the Department of Justice and the Department of Religious Affairs), the Supreme Court is largely responsible for the details of reform of the justice sector. The MK (Mahkamah Konstitusi – Constitutional Court) handles reform and processes of the Constitutional Court, within the framework of legislation and government regulations.

Government-supported law reform institutions

The *Lembaga pembinaan hukum national* (National Legal Development Agency) and the KHN (*Komisi Hukum Nasional* – National Law Commission) advise the government on legal reforms in particular areas, but were not, at time of writing, particularly influential.

Civil society (NGOs)

Much of Indonesia's successful law reform has been initiated and pushed by civil society organisations that were established soon after Soeharto fell in 1998. Many of the work on reforms with government and the Courts although, of course, it is ultimately up to the government as to whether the suggested reforms are taken up.

Prominent legal NGOs include:

- PSHK (*Pusat Studi Hukum dan Kebijaksanaan Indonesia* – Centre for
- Indonesian Law and Policy Studies)
- LeIP (Lembaga Kajian dan Advokasi untuk Independensi Peradilan - Indonesian Institute for an Independent Judiciary)
- MaPPI (*Masyarakat Pemantau Peradilan Indonesia* – Indonesian Court Monitoring Community)
- KRHN (Konsorsium Reformasi Hukum Nasional – National Legal Reform Consortium)

Long-established and strongly-functioning NGOs include:

- LBH (*Lembaga Bantuan Hukum* – Legal Aid Institute)
- YLBHI (*Yayasan Lembaga Bantuan Hukum Indonesia* – the Indonesian Legal Aid Foundation)
- PBHI (*Perhimpunan Bantuan Hukum Indonesia* – Indonesian Legal Aid and
- Human Rights Association)

Donors

The International Donor community also actively suggests proposals for reform. Key donors operating in the area of justice-sector reform include:

- UNDP (United Nations Development Programme)
- TAF (The Asia Foundation)

- AusAID
- World Bank (particularly justice for the poor project).
- USAid

7.2 Responsibility

Primarily, the government and the Courts. See above 7.1 and below 7.5 and 7.8.

7.3 Design

To the knowledge of the author, there are no standard principles or methods used in justice-reform design.

7.4 Review

To the knowledge of the author, review of reform processes is rare.

7.5 Implementation

The legal form that reform initiatives take appears to depend on the extent and scope of the reform. Fundamental reforms, such as satu atap, have been established by legislation, as have other important requirements such as the prerequisites candidates must have to serve as judges, and the processes for review of judicial performance and disciplinary hearings. Other significant reforms have taken place through government regulation. Many reforms, too, have been effected through internal regulations or guidelines. For instance, the Code of Judicial Ethics and Behaviour is, as mentioned, contained in a joint decision of the Judicial Commission Chairperson and the Supreme Court Chief Justice. Given the importance of this Code, and the fact that judiciary-related statutes provide that judges can be punished if the Code is breached, one might have expected or hoped that it be enshrined in a higher-level law.

7.6 Evaluation

Official attempts to evaluate reform performance are rare in Indonesia. Indonesia's media is vibrant and free, however, and major newspapers (such as *Kompas, Koran Tempo* and *Media Indonesia*) regularly report on issues relating to the justice sector, including the success or otherwise of reforms. Major justice-sector institutions, such as the Supreme Court, the Constitutional Court and the Judicial Commission, publish annual reports, some of which contain information that can be used to evaluate reforms. See, for example, Chapter 4.18 above, where statistics on Supreme Court-led disciplining of judges are set out and discussed.

7.7 Remedies

To the knowledge of the author, justice-sector reforms, if deficient, are rarely effectively remedied.

7.8 Oversight

The role of the following institutions in leading the identifying need, design, implementation and review of justice sector reform

The Parliament

As mentioned, the Parliament has enacted, by legislation important justice- sector reforms. The parliament is, however, hobbled by capacity constraints and the enormity of the task of regulating a country of Indonesia's size and complexity. Each year it issues a *Prolegnas* – a plan setting

out the laws that it seeks to enact in that year – which it consistently fails to meet. Justice sector reforms are sometimes pushed aside to meet demands that are considered to be more pressing or which might be considered to bring more significant political benefits.

Parliamentary Committees

Commissions (*Komisi*) are the primary working units of the DPR – almost all of the DPR's main functions are performed in Commissions, except those performed by the Plenary Session. All DPR members (except its leadership) must be member of a Commission.

The DPR currently has 11 Commissions with their own areas of operation.

'Commission III: Law and lawmaking, Human Rights and Safety' is the commission primarily concerned with justice sector reforms. Like other commissions, it performs legislative, supervisory and budgetary functions. As part of their work, they prepare, discuss and amend Bills within their areas of operation. They also supervise the implementation of laws and oversee the budget.

The Ombudsman

The National Ombudsman Commission (*Komisi Ombudsman Nasional*) was established by Presidental Decree in 2000 (Presiden Decree No 44 of 2000) by then-President late Abdurrahman Wahid. Law No 37 of 2008 now provides a statutory basis for its operations. Its primary function is to monitor the administration of public services provided by state and public services at the national and local levels (see Article 6) and to receive complaints about maladministration in the administration of public services. It can conduct its own investigations and seek to cooperate with other law enforcement institutions. Its powers are, however, limited to making reports, recommendations and complaints (see Articles 35, 37, 38).

The Ombudsmen is made up of seven members, of which one is Chairperson and one is Deputy Chairperson. It also has a secretariat, led by a General Secretary. Although clearly ernest in its receipts of complaints and investigations, the Ombudsman is significantly hampered by its lack of power to compel cooperation, as Ombudsman institutions in many other countries face.

It's main functions are, in essence, to investigate and, if appropriate, to name and shame. The Ombudsman has, correspondingly, not significantly improved police or judicial impropriety (Sherlock, 2002; Crouch, 2007).

Local and Provincial Governments

As mentioned above in 4.13, the justice system is a matter over which the national government has exclusive jurisdiction. There is, therefore, limited or no scope for local or provincial governments to become involved in reform of the justice system.

Central Government

The primary government department related in justice-sector issues is the Department of Law and Human Rights (*Departamen Hukum dan HAM (Hak Asasi Manusia*)). Before the satu atap reforms, the Department of Justice (Departmen Kehakiman) as it was then called, was in charge of judicial administration, organisation and finance. Now, much of this function has been transferred to the Supreme Court.

As mentioned in Chapter 1, Indonesia's first and second Presidents – Soekarno and Soeharto – significantly contributed to the weakening of the judicial system and law enforcement jurisdictions, largely by budgetary and capacity neglect. Yet, Soeharto's successor, Habibie, initiated a number of key justice-sector reforms, including the one-roof reforms, which saw levels of judicial

independence from government increase significantly, and anti-corruption reforms. Indonesia's fourth and fifth Presidents, Abdurrahman Wahid and Megawati Soekarnoputri respectively, largely continued these reforms.

Indonesia's current President, Susilo Bambang Yudhoyono, is widely considered to be reformist – including in respect of the justice sector. For instance, he recently made following statement President Susilo Bambang Yudhoyono stressed his resolve to purge the 'judicial mafia,' calling on law-enforcement agencies to commit to the fight. 'Remember, in the hands of corrupt law enforcers, anything bent can be straightened and the straight can be bent. I want judicial mafia practices to cease,' said Yudhoyono at the State Palace … Law-enforcement officials, whether in Jakarta or the regions, should not manipulate the law, he said. The President named eliminating corruption in the judiciary as one of his top priorities when announcing the government's first-100-day program in October. (Saraswati, 2010).

However, SBY's image as a supporter of justice-sector reform has been tainted by rumours, circulating at time of writing, that money used to bailout an ailing bank (Bank Century) was diverted into his re-election campaign fund and that he was involved in attempts to cover up investigations into the scandal.

Conclusion

There are, to the knowledge of the author, no significant proposed judicial reforms, save the possibility of a new Supreme Court blueprint that was being developed at time of writing.

There are very few examples of government-led judicial reforms. Most significant reforms have been developed and pushed by civil society groups rather than the government. International donors have also been able to effect reform, but providing funding contingent on various legal and institutional reforms. Some of these reforms have not, however, been successful. A class example of this was the IMF's so-called 'conditionalities' for the injection of several billion dollars into the Indonesian economy after the 1997 Asian economic crisis. One such conditionality was the establishment of the commercial court, ostensibly to allow for effective bankruptcy proceedings. The reforms were rushed through and, in fact, failed because of a lack of consideration as to how they would operate in the Indonesian system. In particular, in Indonesia, the judges to run the commercial courts were poorly trained. Many of the decisions the commercial court produced have been wrong or highly questionable (Lindsey, 1998).

8. Conclusions

8.1 Strengths and Weaknesses

Great strides have been made – most notably, in the area of judicial reform, the establishment of the Constitutional Court and the introduction of the one roof (*satu atap*) reforms, leading to far higher levels of judicial independence of government. These reforms compliment other governance reforms that have been made successfully in post-Soeharto Indonesia, including democratisation (at least, electorally), decentralisation and constitutional.

Sadly, at time of writing, Indonesia's justice system has far more weaknesses than it has strengths. However, the *satu atap* reforms in particular, have created its own problems, including administrative chaos within the court system. Continuing problems such as poor judicial capacity and tight budgets are yet to be adequately addressed.

As for police and prosecutors, few significant reforms have succeeded since the fall of Soeharto, although, significantly, the police force has been separated from the armed forces.

8.2 Challenges and Controversies

Since the fall of Soeharto, significant reforms – particularly *satu atap* – have been made to the Indonesian judicial system, leading to significant improvements in judicial independence. Over the same period, several new specialist courts have been established, two of which have been successful beyond reasonable expectation: the Anti-corruption Court, with its 100% conviction rate; and the Constitutional Court, which, although issuing some questionable decisions, regularly displays its professionalism and independence of government.

This increased judicial independence has not, however, been matched by an increase in judicial accountability and transparency. Indeed, the general judiciary, led by the Supreme Court, has embraced its new independence and used it to put up strong resistance to other reforms. Powerful entrenched interests that seek to maintain the status quo have pushed back as can be seen by several cases mentioned in this chapter: Endin, the Joint Team cases, the Judicial Commission cases and even the pushback against the KPK and Anti-Corruption Court. Meanwhile, the Supreme Court has inherited from government departments the enormous responsibility of managing the lower courts – a responsibility that it has not effectively met.

All of this suggests that most of Indonesia's courts remain in a position in which they can successfully resist efforts at ensuring judicial accountability and transparency. This means that the judiciary is likely to continue unchecked as corrupt as ever because the Supreme Court is unlikely to pursue allegations of impropriety with any vigour. Indeed, the Supreme Court itself has an interest in the perpetuation of the corrupt system. Not only do illicit returns bolster the salaries of some Supreme Court judges, they are also used to supplement a flagging budget, thereby allowing the Court to perform core functions.

With the KPK flagging under intense pressure, as described above, external monitoring is unlikely to yield successful investigations, prosecutions and convictions. In this context, it seems clear that smaller sectoral reforms aimed at reforming a particular aspect of judicial institutional practice and procedure so as to improve judicial accountability, transparency or governance might be formally made relatively easily but are unlikely to hold if they conflict with the interests of the status quo.

Undoubtedly, the most staggering and significant problem in the justice system is corruption. Despite more than a decade of attempted reform, corruption is still pervasive – indeed,

institutionalised – within the police, prosecution and courts. The Anti-Corruption Commission (*Komisi Pemberantasan Korupsi*) has, however, against all odds, developed an impressive track record of corruption convictions against senior officials, including parliamentarians and ministers. The Commission has, however, been under attack from powerful political forces resisting the status quo. If the Commission is shut down, then the prospects of reducing corruption levels in Indonesia in the foreseeable future become slight.

8.3 Current Reforms

To the knowledge of the author, the primary reform currently being undertaken within the Indonesian justice sector is the reconfiguration of the Supreme Court Blueprint. In speech given in Palembang, Sumatration 7 October 2009 (on file with the author), the Chief Justice o the Supreme Court admitted that only around 50% of the 2003 Blueprint had been 'implemented', largely because the blueprint was philosophical and theoretical, whereas the problems faced by the Court are practical and complex. The Supreme Court has, therefore, needed to re-evaluate the blueprint for the future. To this end, the Supreme Court is preparing a new Blueprint (2010-2035). The Blueprint was not, however, available at time of writing. As for other justice institutions, such as the police and prosecution, the author is unaware of major current or proposed reforms beyond the commonly-propounded, but rarely enforced, pledges to eradicate corruption from those institutions.

8.4 Issues for Future Reform

There are, in my view, at least three critical areas for future reform of the Indonesian justice system:

1. Increasing cooperation and coordination between actors in the justice system – particularly between police and prosecutors. This is critical and, as this report has shown, has not yet been adequately addressed in post-Soeharto reforms.
2. **Continuing anti-corruption efforts.** The work of the Anti-corruption Commission and the Anti-Corruption Court must be continued and intensified if the 'culture of corruption' in the administration of government is to be addressed.
3. **Judicial administration.** By all accounts, the Supreme Court has been swamped by the administrative tasks allocated to it under the satu atap reforms. This, it is often reported, has distracted the attention of many judges from their key adjudicative duties, resulting in a drop in the overall quality of decisions. There must be greater attention directed towards judicial capacity-building and career development. Publication of judicial decisions must be continued and intensified.

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JAPAN FINAL

REPORT

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1. Political, Cultural, Historical and Socio-economic

Context

Japan is a densely populated archipelago in North-East Asia, and remains the second largest economy in the world (on one measure) with a very high per capita GDP. Foreign pressure forced the country to reopen to the world in 1853, prompting large-scale efforts to modernise the economy, society and legal system. French and especially German law were main influences in enacting six major codifications in the late 19th century, but American law has played a major role in the US-led Occupation (1945-51) and in a "third wave" of law reforms since the 1990s. Yet Japan continues to demonstrate quite ambiguous relationships towards modernity, "the West" and law itself {Tanase 2010}.

The study of Japanese law has led to new paradigms or theories being developed, particularly by foreign commentators writing in Western languages {Baum and Nottage 1998}, to explain phenomena seemingly showing that law remains quite unimportant in socio-economic ordering {Abe and Nottage 2006}. A central debate has concerned low per capita civil litigation rates, compared to other similar economies, especially in Europe and the United States {Nottage and Wollschlaeger 1996}.

The "culturalist" theory explains low levels of litigation on the basis that "the Japanese don't like law" {Noda 1976}, due primarily to the legacy of a Confucian tradition – emphasizing harmonious and hierarchical social relationships. "Institutional barriers" theory instead argues that "the Japanese can't like law" {Haley 1991} Access to justice is restricted by limited numbers of legal professionals, and problems in court proceedings, so claimants cannot afford to sue and thus do not obtain the outcomes nominally prescribed by the law. "Social management" theory suggests that "the Japanese are made not to like law". Institutional barriers are maintained particularly by social elites, to resolve social problems outside the courts, which might lead society in unpredictable directions. Often, alternative dispute resolution procedures and resources are inaugurated to facilitate this approach. Some of the theorists adopting this perspective, especially in its earlier incarnations, have been skeptical about this management of social problems {Upham 1987}. But others suggest that it may be justified under more communitarian approaches to contemporary democracy {Tanase 2010}.

By contrast, "rationalist" theory asserts that "the Japanese do like law", acting in its shadow {Ramseyer and Nakazoto 1998}. Despite high barriers to bringing suit, Japanese law is predictable – at least in some areas, and compared to countries like the United States – so claimants do not even need to file suits to be able to obtain favourable settlements out of court. Much rationalist theory also relies on quantitative social science, particularly econometrics. However, more recent "hybrid" theory combines more qualitative methodology, and takes a more eclectic and nuanced approach to show how "the Japanese sometimes like law, but sometimes don't" {Milhaupt and West 2004; Nottage et al eds 2008}. This chapter concludes by suggesting that the third wave of reforms to Japan's justice sector now are mostly driven by "institutional barriers" theory, but that the variable effects so far suggest that cultural or social factors do remain.

1.1 Major Historical Events

A coalition of some powerful tribes, governed by customary norms, began to unify Japan as a state in the 5th century {Abe and Nottage 2006}. A centralised regime was gradually organised, with the Emperor at its apex, but the law was still unwritten and undifferentiated from custom. The first effort at codifying the law began in the latter half of the 7th century, when Chinese legal codes

were transplanted. To strengthen its power, Japan's Imperial Court eagerly adopted the Chinese legal system, as well as the Chinese governmental system and tax system. However, to make the transplanted law conform to the Japanese reality, both ancient customs and emerging practices came to be incorporated into the legal codes.

The effort to develop a strong centralised regime soon collapsed, as a manorial system developed. Powerful nobles obtained a sort of extraterritorial jurisdiction, and made their own laws in their vast manors. This legal pluralism was further accelerated when the warriors who had been the guardians of the manors of nobles began to claim their own rule over manors and to make their own laws. While formal laws enacted by the Imperial Court were still nominally valid all over the country, their effectiveness was considerably curtailed. After the warrior class established their own central government in the early 12th century, legal pluralism remained prevalent. While both the Shogunate, the warriors' central government, and the Imperial Court enacted laws which had ostensibly national validity, the manors of nobles and the feudalities of warriors are governed by their own laws.

The country was only really unified in late 16th century after a bloody civil war, by a powerful warrior, Hideyoshi Toyotomi. Laws with substantial national validity were enacted. Toyotomi's rule was short, however. After his death, Ieyasu Tokugawa came to power and founded a Shogunate which lasted for fifteen generations, and completed the unification of the law. Although the Tokugawa Shogunate granted warlords both legislative and judicial powers in their territories, it restricted warlords' legislative powers within demarcations set by its own laws and put lawsuits brought by a resident of one warlord's territory against a resident of another warlord's territory under its own jurisdiction. In addition, in the middle of the 17th century, the Tokugawa Shogunate closed the country, except for limited trade with China and the Netherlands, to block the influence of Christian religion over the Japanese people and to prevent warlords from accumulating wealth and weapons by foreign trade. This isolation policy continued until the mid 19th century, with Japanese law developing without foreign influence and acquiring some distinctive features.

On the one hand, Tokugawa era law remained predominantly administrative law, used by the Shogunate to help maintain national unity. On the other, largely in the form of precedents, detailed legal rules developed dealing with secured loans, commercial notes and so on. However, the ideological underpinning was that law was not available to citizens in the form of "judiciable rights", but only through the benevolence of rulers. More recent research, by contrast, suggests that functional equivalents to Western rights consciousness, and greater variability and dissent did exist in Tokugawa village practice {Ooms 1996}.

The isolation policy came to an end in 1853, with the arrival of American warships. Due to related political turmoil, the Tokugawa Shogunate became weak and surrendered its power to the Emperor in 1867. This "Meiji Restoration" established a new regime, with the Emperor Meiji at its apex. The Meiji Government urged the creation of a strong monarchy, and promoted the modernisation of the legal system. The main reason for the latter was to revise disadvantageous treaties that the Tokugawa Shogunate had concluded with the United States and European countries, since Japan first had to be recognised as a modern sovereign state by those countries. The Meiji Government sent officials around the world to study modern Western law. It was first attracted primarily by French law, but ultimately enacted various codes drawing more on German law towards the end of the 19th century. In particular, the Constitution of Imperial Japan (the Meiji Constitution) was enacted in 1889, on the model of the Prussian Constitution. Japan became a modern constitutional monarchy, at least in appearance. Under the Meiji Constitution, sovereignty resided in the Emperor and all governmental organs including the judiciary were regarded as mere assistants to the Emperor.

The Constitution did include a bill of rights, but provided that those rights were guaranteed only within limits set by legislation. Thus, the Imperial Diet (parliament) could arbitrarily restrict the constitutional rights of the people.

After Japan's defeat in World War II, democratisation of its polity and society began during the Occupation (1945-51) under the control of the US General Douglas Macarthur, Supreme Commander of the Allied Powers. The new Japanese Constitution was enacted in 1946, and came into effect the following year {Hook and McCormack 2001}. It declared that sovereignty resided in the people, and that the Emperor was nothing more than the symbol of the state and the unity of the people. It also declared that constitutional rights were inviolable, and a system of judicial review was therefore institutionalised. This Constitution has never been amended and still lies at the very heart of the Japanese legal system. In 2000, the Diet resumed a detailed study of possible reforms, and recent surveys have suggest considerable public support for certain constitutional amendments. But it remains uncertain whether major changes will result for example from any or all of the views expressed in the 2005 Report by the upper House of Councillors http://www.sangiin.go.jp/eng/report/ehb/ehb.pdf>).

Japanese law was therefore formed in the crucible of comparative law, and continues to intrigue comparative lawyers. It borrowed early on from China, from continental Europe in the late 19th century, and from Anglo-American law particularly during Japan's Occupation following World War II. In the wake of economic stagnation and accelerating deregulation over the 1990s, some commentators now proclaim "the Americanisation of Japanese law" {Kelemen and Sibbitt 2002}. However, it has also been framed by international law, law reformers remain attracted to broader "global standards", and it has a long and strong indigenous legal tradition. Accordingly, Japanese law can be expected to remain an archetypical "hybrid" legal system, not readily characterised as belonging to any particular "legal family" {cf. Merryman et al 1994}.

[Q2.1.] Several general implications might be drawn for countries interested in Japan's experiences in adopting and adapting modern "Western" law to meet local circumstances, particularly in Asia, including perhaps Vietnam. First, the "reception" process works better when it is not rushed. Secondly and relatedly, it works better when several overseas countries are compared that have somewhat different legal and socio-economic traditions (Japan's Meiji reformers, for example, looked very closely at France, Germany and England). Thirdly, it helps both to send out researchers to the countries of interest for significant periods rather than just short visits (even in the Meiji period, some spent many years overseas, eg even qualifying and working as a barrister in London, and Japan's present Supreme Court sends dozens of judges for one-year research programs all around the world, including recently Australia). Japan also involved foreign advisors who stayed in Japan for many years, often decades (eg Professor Boissonade from Paris, who helped draft several Japanese Codes). Finally, Japan's experience shows the importance of placing trust in (a) leading commentators from leading university law faculties, and (b) a highly professional and incorruptible judiciary which can have the confidence to develop legislation and case law to meet the country's own and evolving socio-economic circumstances (especially if the legislature cannot or will not act quickly or extensively enough).

1.2 Economic System

Japan is a regulated market economy with some significant free market elements. Those elements have become more important as the country embarked on privatisation and deregulation from the 1980s, and especially from the mid-1990s.

Post-War Japan has often been described as a "coordinated market economy", closer to Germany or France than to a "liberal market economy" like the US or the UK {Hall and Soskice 2001}. However, on some measures such as the size of the public service or government-owned enterprises, the Japanese economy is closer to the Anglo-American end of the spectrum {Nottage 2001}. In addition, until the economy was mobilised for the War effort from the 1930s, corporate finance depended much more on stock markets than loans from banks, and there existed intense competition among a multitude of banks {Alexander 2008}. Some even argue that even the post-War Japanese economy (and law-related behaviour) has been driven primarily by conventional competitive market forces and economic actors {Ramseyer and Nakazoto 1999; Miwa and Ramseyer 2006}.

Most commentators nonetheless insist that this revisionist view is too simplistic, and that Japan does retain some distinctive economic institutions {Nottage 2010}. For example, "main banks" (usually the largest lenders, often with a small shareholding) continue to play an important – although arguable diminishing – monitoring function over the managers of their customer firms {Puchniak 2008}. This substitutes for the paucity of hostile takeovers in Japan {Puchniak 2009}, which also theoretically discipline managers of target firms so they work in the interests of those firms' shareholders, although the threat of hostile takeovers has become more real in recent years {Milhaupt and Pistor 2008}. Main banks also still form the core of "horizontal" *keiretsu* (corporate groups, much looser than the pre-War, often family-centred *zaibatsu* combines), although those groups have been affected by financial markets deregulation and mega-mergers (eg of Mitsui and Sumitomo banks) particularly following Japan's financial crisis of 1998. Japan also retains some powerful "vertical" *keiretsu* especially in the manufacturing sector (eg Hitachi's corporate group), and firms within the *keiretsu* also assist in mutual monitoring and fund- raising.

Another more "coordinated" aspect of the post-War Japanese economy is the important role played by core employees, not just shareholders or bank creditors, even within listed companies. The "lifelong employment" system only emerged in the 1950s and never applied to a majority of firms or employees, and its scale has diminished further since the late 1990s due to economic pressures and some labour market deregulation, but the system still presents a powerful ideal {Wolff 2008}. Labour unions are often organised for firms rather than across industries, and strikes or industrial action remain comparatively rare.

The post-War Japanese economy has also been characterised by strong government-business relations. For example, under the "convoy system" of financial markets regulation, licensing and other requirements from the Ministry of Finance made it difficult to enter most market segments, and then each financial institution generally moved at the speed of the slowest market participant. This system only started to come under pressure when Japanese firms began to raise funds through deregulating bond markets in the 1980s, and as the government embarked on broader deregulation from the late 1990s due to international competitive pressures and the collapse of major financial institutions {Amyx 2004}. The Ministry of International Trade and Industry (MITI, renamed METI from 2001) also extended pre-War techniques to promote industrial policy in certain sectors {Johnson 1982}, but it had difficulty in directing some sectors or individual firms – the relationship instead was largely consensus-based {Callon 1995}. More generally, central and (sometimes to a lesser extent) local government tried to implement various policies through technically non-binding "administrative guidance", but this phenomenon also represented consensus- based "authority without power" {Haley 1991}.

1.3 Political System

One key concern of the Meiji era reformers was primarily instrumental: to develop a modern "Western" legal system so as to renegotiate unequal treaties with foreign imperial powers, but also

to support economic development. This attitude also underpinned persistent calls for a "strong State", including stable political leadership and close government-business relations. However, for more than 150 years other influential reformers have also pursued more idealistic objectives: to promote rights-based democracy and more decentralised decision-making. This has tended to promote more varied and complicated political and economic configurations.

One or the other philosophies has generally prevailed during different historical periods For example, democracy in the Taisho era (1912-26) was characterised by a proliferation of political parties and socio-economic diversity. But from 1955, despite the US-driven post-War Constitution and other Occupation-era changes, one major political party – the conservative Liberal Democratic Party (LDP) – secured control over the more powerful lower House of Representatives through to 1993, when it lost power completely for 14 months before forming a new governing coalition with its former rival, the Social Democratic Party (SDP). That lasted only until 1996, when the LDP regained power with the Komeito ("Clean Government") Party associated with a major lay Buddhist organisation.

However some significant changes were made to the electoral law and other legislation from around 1993 {Stockwin 2008}. Under Prime Minister Junichiro Koizumi, who served unusually a maximum term (from 2001-6), the LDP attempted some major internal reforms. These included a strengthening of the Prime Minister's de facto role and of the new Cabinet Office, along with a weakening of the traditional LDP "faction" system. Even though factions did often have different outlooks on economic and other issues, allowing the LDP to retain power by presenting a somewhat new face if the general electorate was dissatisfied about government's approach under the leadership of one faction, Koizumi and other LDP reformers argued that the faction system encouraged excessively wasteful "pork barrel" politics and was no longer a viable approach to 21st century electoral politics. After his retirement, however, the LDP elected a succession of short-lived Prime Ministers who were unable to pursue much further reform within the Party and more generally. The LDP lost power again in the August 2009 general elections for the lower House, giving way to a new coalition government led by the Democratic Party of Japan (DPJ) and Prime Minister Yukio Hatoyama.

Leadership and Authority

Formally, the State is led primarily by the Prime Minister and the Cabinet (heading the Executive branch), nominated mainly from among members of the Diet (two Houses comprising the Legislative branch) who derive authority from being elected by Japanese citizens aged 20 or over. Rather than providing leadership, the role of the Judicial branch of government is to ensure that the other branches remain accountable to the people (as explained under "Accountability" below). In practice, however, until 10 years ago the Prime Minister has tended to have less power than in comparable (English-style) parliamentary systems because he has typically been elected from a faction within the LDP and has retained the leadership only for comparatively short periods.

A fundamental principle of the post-War Constitution is that sovereignty resides in the people, and no longer in the Emperor (Art 1). Although the Emperor does play some indispensable roles in state affairs, such as the convocation of the Diet, those are mere rituals performed with the advice and approval of the Cabinet.

The Prime Minister appoints Cabinet Ministers, a majority of whom must be elected members of the Legislature – the Diet. (In fact, it is rare nowadays for Ministers not to be parliamentarians.) The Cabinet is jointly responsible to the Diet, which nominates the PM from Diet members. If

nominations of the two houses of the Diet differ and cannot be reconciled by joint sitting, or if the upper House of Councillors (with 242 members –

146 elected from constituencies and 96 by proportional representation) does not decide within ten days of the lower House of Representatives (with 480 members – 300 elected from constituencies and 180 by proportional representation), the latter's decision prevails. In fact, therefore, the leader of the majority party in the lower House is always nominated as PM. The lower House may pass a vote of no confidence in the PM by simple majority, whereupon the Cabinet must also resign or the PM may dissolve the House and call a general election. After any general election the Cabinet must resign to make way for a new Cabinet. The Cabinet, led by the PM, leads the Executive branch of government and is responsible eg for administering laws and foreign affairs, enacting Cabinet Orders, concluding international treaties, and presenting the budget.

Because of this post-War framework, Japan adopts a English-style "Westminster" style of democracy where the Executive and Legislative branches are tightly linked (compared eg to France or the United States), even though there is still technically a separation of powers with checks and balances between the Executive, Legislative and Judicial branches of government. A consequence is that a majority of bills are submitted to the Diet by Cabinet – and drafted primarily by the relevant Ministries after meetings of their Deliberative Councils (*shingikai*) – rather than by individual members of parliament, as in the US. A somewhat distinctive feature for most of the post-War era in Japan involved the relevant ministry sending its draft proposal not only to Cabinet, but simultaneously to the Political Affairs Committee of the ruling LDP, which would discuss the proposal among LDP members or political factions and sometimes opposition politicians before review by the Cabinet and submission of a bill to the Diet.

Both Houses of the Diet have the power to investigate legislation (Constitution Art 62), but it is rare for bills to have a "first reading" and initial discussion in a general assembly, open to the public. Instead, bills are referred first to relevant House Standing Committees of the House, which usually deliberate in private (unlike in the US, which provided inspiration for the post-War committee system). Bills are later debated in general assembly, but the time is usually very limited, and in the upper House consent from at least 20 members is required in order to propose amendments to a bill. If the lower House passes a bill but the upper House vetoes it or does not approve it within 60 days, the former may overrule the latter by two-thirds majority. In short, therefore, the lower House is stronger and (via the Cabinet and the Ministries' involvement in drafting legislation) the bureaucracy plays a more important leadership role than in the US political system.

Overall, however, Japan's law-making processes have also become much more varied and complex particularly since the late 1990s. A new Cabinet Office – led directly by the Prime Minister – has impinged on traditional deliberative councils and other law-drafting processes hitherto jealously guarded by individual ministries, and there is ever-greater rivalry among the latter. The entire law- and policy-making system has become more transparent and politicised.

The new DPJ-led government is committed to further increasing the actual (not just constitutional) power of elected politicians over government officials. This includes exploring various options for further decentralisation of power. Chapter VIII of the post-War Constitution provides for local government autonomy, but generally only as provided in separate legislation, and particularly in practice Japan has had a centralised and unitary rather than federal system of government, with local jurisdictions largely depending on national government financially. The Ministry of Internal Affairs and Communications (formerly Ministry of Home Affairs), although much less powerful than its pre-War counterpart (the Home Ministry), intervenes significantly in local government,

as do other ministries. This is done chiefly financially because many local government jobs need funding initiated by national ministries. This is dubbed as "thirty-percent autonomy" (*san wari jichi*). The result of this power has been a high level of organisational and policy standardisation among the different local jurisdictions. However, some of the more collectivist jurisdictions, such as Tokyo and Kyoto, have experimented with policies in such areas as social welfare, official information disclosure or consumer protection that later were adopted by the national government.

Specifically, Japan is now divided into forty-seven administrative divisions, the prefectures: one metropolitan district (*to*—Tokyo), two urban prefectures (*fu*—Kyoto and Osaka), forty-three rural prefectures (ken), and one district (*do*—Hokkaidō). Large cities are subdivided into wards (*ku*), and further split into towns, or precincts (*machi or cho*), or subprefecture (*shicho*) and counties (*gun*). Cities (*shi*) are self-governing units administered independently of the larger jurisdictions within which they are located. In order to attain shi status, a jurisdiction must have at least 30,000 inhabitants, 60 percent of whom are engaged in urban occupations. The terms machi and cho designate self-governing towns outside the cities as well as precincts of urban wards. Like the cities, each has its own elected mayor and assembly. Villages (*son or mur*a) are the smallest self-governing entities in rural areas. They often consist of a number of rural hamlets (buraku) containing several thousand people connected to one another through the formally imposed framework of village administration. Villages have mayors and councils elected to four-years terms.

All such prefectural and municipal governments in Japan are organized following the Local Autonomy Law, a statute applied nationwide in 1947 pursuant to Article 92 of the Constitution which provides that: "Regulations concerning organization and operations of local public entities shall be *fixed by law* in accordance with the principle of local autonomy". Article 93 adds that "The local public entities shall establish assemblies as their deliberative organs, *in accordance with la*w. The chief executive officers of all local public entities, the members of their assemblies, and such other local officials *as may be determined by law* shall be elected by direct popular vote within their several communities." Under the Local Autonomy Law, each jurisdiction has a chief executive, called a governor (*chiji*) in prefectures and a mayor (*cho*) in municipalities. Most jurisdictions also have a unicameral assembly (*gikai*), although towns and villages may opt for direct governance by citizens in a general assembly (*sokai*). Both the executive and assembly are elected by popular vote every four years. Local governments follow a modified version of the separation of powers used in the national government. An assembly may pass a vote of no confidence in the executive, in which case the executive must either dissolve the assembly within ten days or automatically lose their office. Following the next election, however, the executive remains in office unless the new assembly again passes a no- confidence resolution.

The primary methods of local lawmaking are local ordinance (*jorei*) and local regulations (*kisoku*). Ordinances, similar to statutes in the national system, are passed by the assembly and may impose limited criminal penalties for violations (up to 2 years in prison and/or 1 million yen in fines). Regulations, similar to cabinet orders in the national system, are passed by the executive unilaterally, are superseded by any conflicting ordinances, and may only impose a fine of up to 50,000 yen. Local governments also generally have multiple committees such as school boards, public safety committees (responsible for overseeing the police), personnel committees, election committees and auditing committees. These may be directly elected or chosen by the assembly, executive or both. All prefectures are required to maintain departments of general affairs, finance, welfare, health, and labor. Departments of agriculture, fisheries, forestry, commerce, and industry are optional, depending on local needs. The governor is responsible for all activities supported through local taxation or the national government. [Q.2.2]

Aims, Objectives and Visions for the Justice Sector

In 1999, the then (LDP) Prime Minister established the ad hoc Judicial Reform Council (JRC) to advise him and the Cabinet on an appropriate vision and goals for Japan's justice sector in light of socio-economic and political reforms already underway since the 1990s (see <http://www.kantei.go.jp/foreign/judiciary/index.html>). Under Article 2 of the Law concerning Establishment of Judicial Reform Council (Law No 68, promulgated on 9 June 1999) the JRC was to: "consider fundamental measures necessary for judicial reform and judicial infrastructure arrangement by defining the role of the Japanese administration of justice in the 21st century. The agenda of the Council may include the realisation of a more accessible and user-friendly judicial system, public participation in the judicial system, redefinition of the legal profession and reinforcement of its function."

The Council presented its Final Report on 12 June 2001 (<http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>). It recommended in Chapter II ("Justice System Responding to Public Expectations"):

Part 1. Reform of the Civil Justice System

1. Reinforcement and Speeding Up of Civil Justice
2. Strengthening the Handling of Cases Requiring Specialised Knowledge
3. Strengthening of Comprehensive Response to Cases Related to Intellectual Property Rights
4. Strengthening of Comprehensive Response to Labour-Related Cases
5. Improvement of Functions of Family Courts and Summary Courts (eg for small claims)
6. Strengthening of the Civil Execution System
7. Expansion of Access to the Courts (eg filing fees, civil legal aid, convenient access to courts, effective relief for victims)
8. Reinforcement and Vitalisation of Alternative Dispute Resolution (ADR) Mechanisms
9. Reinforcement of the Checking Function of the Justice System vis-a- vis the Administration

Part 2. Reform of the Criminal Justice System

1. Improvement and Speeding Up of Criminal Trials
2. Establishment of Public Defense System for Suspects and Defendants
3. How Public Prosecution Should Be
4. Investigations and Trial Proceedings in the New Era
5. Rehabilitation of Offenders, Protection of Victims

Part 3. Responses to Internationalisation

1. Internationalisation of Civil Justice
2. Internationalisation of Criminal Justice
3. Promoting Legal Technical AssistanceInternationalisation of Lawyers (the Legal Profession)

Chapter III set out "How the Legal Profession Supporting the Justice Should Be":

Part 1. Expansion of the Legal Population

Part 2. Reform of the Legal Training System (including new postgraduate "Law School" programs and national legal examination to qualify as a *bengoshi* lawyer, judge or public prosecutor)

Part 3. Reform of the Lawyer System (eg easier access to lawyers and their internationalisation)

Part 4. Reform of the Public Prosecutor System (including enhanced popular participation in prosecutons)

Part 5. Reform of the Judge System (eg appointment processes) Part 6. Mutual Exchanges Among the Legal Professions

Chapter IV described the "Establishment of the Popular Base of the Justice System":

Part 1. Establishment of the Popular Base of the Justice System (Popular

Participation in Justice)

1. Introduction of New Participation System [saiban-in or quasi-jury system] in Criminal Proceedings
2. Expansion of Participation Systems in Other Fields (civil and criminal justice, judiciary, etc)

Part 2. Laying the Groundwork for Establishment of the Popular Base

1. Realisation of a More Easily Understandable Justice System
2. Reinforcement of Education about the Justice System
3. Promotion of Disclosure of Information Related to the Justice System

Setting the stage for these wide-ranging and detailed Recommendations, many of which will be examined later in this report on Japan, Chapter 1 of the JRC's Final Report comprehensively set out the following "Fundamental Philosophy and Directions for Reform of the Justice System" (key points underlined):

Part 1. The Shape of Japanese Society in the 21st Century

By realizing simple, efficient, and clear government that is suited to achieving important public functions effectively, the people will build a free and fair society in mutual cooperation as autonomous subjects bearing social responsibility and, on that basis, will contribute to the development of international society.

What is it that has been sought in the various reforms, including political reform, administrative reform, promotion of decentralisation, and reform of the economic structure such as deregulation, on which Japan has worked? These reforms have sought to transform the excessive advance-control/adjustment type society to an after-the-fact review/remedy type society and, in promoting decentralisation, to reform the bloated administrative system and improve the quality of governing ability (strategicness, integration, mobility) of the political branches (Diet, Cabinet). The efforts to ensure disclosure of administrative information and accountability to the public, to achieve improvements in policy assessment functions, and to achieve transparent administration already are in the process of being realised.

Such various reforms assume as a basic premise the people's transformation from governed objects to governing subjects and at the same time seek to promote such transformation. This is a transformation in which the people will break out of viewing the government as the ruler (the authority) and instead will take heavy responsibility for governance themselves, and in which the government will convert itself into one that responds to such people. At the same time such social structural transformation is taking place, social conditions are changing domestically and internationally every moment, becoming more complicated, sophisticated, diversified and internationalised. In such a society, the people's free, creative activities are expected, and individuals and companies shall develop their social economic living relationships more autonomously and actively.

In the 21st century, connections both within national boundaries and across national boundaries will become stronger in all social fields. Globalisation has been making rapid progress with startling information and communications technology innovation, and the "fences" between sovereign countries are lowering. Under such circumstances, actions necessary for Japan to occupy an "honoured place in international society" (the Preamble to the Constitution) while exercising accurate and agile governing ability will constantly be called into question. While the international society's eyes looking at our country are likely to become even more severe, whether or not our country can respond to these issues depends not only on the governing ability of our government but also on how full our society is of creativity and vitality, as well as on what values we can transmit to the international society. The international society is not a given order. The series of various reforms mentioned above is related not only to domestic issues but is related also to how actively we can contribute to forming a free and fair international society where people with various values can live together meaningfully.

What we seek to build in this manner in the 21st century is an open society full of creativity and vitality based on respect for individuals, that will contribute to the development of the international society.

Part 2. Expected Role of the Justice System in Japanese Society in the 21st Century

1. Role of the Justice System

The judicial branch, which is based on the concept of the rule of law and places all parties concerned in an equal position and under which an impartial third party makes a decision based on fair legal rules and principles through proper and clear procedures must, along with the political branches, be a pillar to support the "space of the public good" (kokyosei no kukan).

Justice is expected to correct illegal actions and to provide a remedy for injured persons' rights in concrete cases and contests by properly resolving the cases and contests in question through proper interpretation and application of law; to play a role in coping with violations of rules appropriately by properly and promptly realizing the power of punishment through fair procedures; and thereby to maintain and to develop the law. Accordingly, the judicial function has an aspect of realisation of public values, and the courts (the judicial branch) shall be positioned as a pillar supporting "the space of the public good" (*kokyosei no kukan*) in parallel with the Diet and the Cabinet (the political branches), which seek to create order by mapping out policies against the backdrop of majority rule and by fixing and conclusively executing norms in the form of law for the future.

It can be said that the concept of the rule of law, stating that all people are equal under the law, most clearly appears in the fundamental nature of the justice system, that being that all people are treated equally and an impartial third party makes a decision based on fair and clear legal rules and principles through fair procedures. This means that the voice of only one person, if it is sincere and righteous, should be listened to seriously. In turn, for each and every one of the Japanese people, this is a matter that relates to the dignity and pride of living one's precious life as an individual person, which directly ties to the principle of the respect for individuals which is the most basic principle of the Constitution.

When likened to the human body, if the political branches constitute the heart and arteries, the judicial branch shall be said to be the veins. The series of reforms mentioned above, such as political reform and administrative reform, are, so to speak, an effort to restore and strengthen the functions to make blood flow swiftly by removing extraneous crudescence in the heart and arteries. According to this metaphor, justice reform shall be considered to be aiming at harmonizing

the body and improving its health by expanding and strengthening the scale and function of the justice system as part of the what the "shape of our country" should be in the 21st century, with fundamental reflection on whether or not the existing veins were excessively small.

The Constitution established the judiciary as one of the branches of the tripartite separation of powers, or the system of checks and balances, along with the Diet and the Cabinet. To ensure that the judiciary would be suited to meet that role, the Constitution provided as part of the judicial power not only jurisdiction over civil cases and criminal cases but also jurisdiction over administrative litigation, and further granted the judiciary the authority to review the constitutionality of laws (Article 81). Through the exercise of this authority, the judiciary was expected to serve as the ultimate guardian of the rights and freedoms of the people and to maintain the legal order with the Constitution at the top. There are a considerable number of evaluations suggesting that the judiciary has not necessarily met these expectations sufficiently. When there is a need to expand and strengthen both the scale and the function of the veins, as described above, it must be emphasised that the need to reinforce and strengthen the judicial-check function vis-a-vis legislation and administration is included therein.

The administrative litigation system needs to be reviewed from the standpoint of reinforcing the judicial-check function vis-a-vis the administration and securing the rights and freedoms of the people more effectively. This is also important to enable the effective exercise of the essential functions of the administrative branch, namely, that the Cabinet actively tackles various domestic and foreign issues strategically, in an integrated manner and with mobility, while blocking improper political pressure on the individual administrative processes and securing strict enforcement of the law.

In the case of the system for reviewing the constitutionality of laws, if there are ways in which that system has not always functioned adequately, various backgrounds and circumstances may be thinkable as reasons for that. Among others, it may be pointed out that the Supreme Court, which is the court of last resort for exercising the power of constitutional review, must handle an extremely large number of appeals, so it may be difficult for that court to adopt a stance for dealing with constitutional questions. This is different, for example, from the situation of the U.S. Supreme Court. The following matters are worth considering: to what degree the number of appeals can be narrowed, and whether or not it is possible, by reviewing the relationship between the Grand Bench and the Petty Benches, to allow the Grand Bench to take the lead and devote its efforts to vital cases such as those involving constitutional questions. Also, there is probably room for further efforts with regard to the manner in which justices of the Supreme Court are appointed.

At any rate, the role of the justice system will become dramatically more important in the Japanese society of the 21st century. In order for the people to easily secure and realise their own rights and interests, and in order to prevent those in a weak position from suffering unfair disadvantage in connection with the abolition or deregulation of advance control, a system must be coordinated to properly and promptly resolve various disputes between the people based on fair and clear legal rules. The justice system in the 21st century must be one that establishes predictable, highly clear and fair rules through the resolution of disputes and effectively checks violation of the rules. At the same time, it must be one that affords a proper and prompt remedy to people whose rights or freedoms have been infringed. This shall also lead to reinforcement of the ability to respond to globalisation by building up the underpinnings of Japanese society.

Role of the Legal Profession

For the people to actively form, maintain and develop diversified social connections as autonomous beings, the legal profession which directly engages in the administration of justice must provide

legal services in response to the specific living conditions of each individual and to his or her needs as the so-called "doctors for the people's social lives."

It is people who manage a system. In connection with increasing the role of the justice system in Japanese society in the 21st century as discussed above, the role of the legal profession (lawyers, public prosecutors, judges), which serves as the bearer of the justice system, must become more diversified, broader and heavier. For the judicial branch to support, along with the political branches, "the space of the public good," and to establish a flourishing, self-responsible society where the rule of law extends everywhere, it is indispensable that the role of the legal profession, as the profession directly engaged in the administration of justice, become markedly greater.

For the people to autonomously form social connections as self- determinative beings, it is indispensable for them to receive the cooperation of the legal profession, which can provide legal services in response to the specific living conditions of each individual and his or her needs. As in the case of medical doctors who are indispensable for people's health-care services, the legal profession should play the role of the so-called "doctors for the people's social lives."

There will be dramatically increased expectations that the legal profession will help make various activities of individuals and corporations be conducted in line with legal rules by providing proper legal services, including legal advice, on individual issues relating to those activities, and will prevent disputes from occurring and, in the event disputes have occurred, will seek to achieve proper, prompt, and effective resolutions and remedies for those disputes based on legal rules.

Also, if our country seeks to live as a trade and science technology- oriented country in the international society of the 21st century, the importance of the legal profession's role in various aspects of forming and administering domestic and foreign rules is further strongly recognised. Above all, accurate response to fields that require advanced expertise, including increasingly important protection of intellectual property rights, is demanded, as is continuous promotion of support to developing Asian countries for coordination of law as a contribution to the international society.

In order to achieve the above roles in the 21st century, the existence of a larger stock of legal professionals sharing the concept of the rule of law, and their wide range of activities in various fields of a society based on a spirit of mutual reliance and unity, are strongly demanded.

Role of the People

The people, who are the governing subjects and the subjects of rights, must participate in the administration of justice autonomously and meaningfully, must make efforts to form and maintain places for rich communication with the legal profession, and must themselves realise and support the justice system for the people.

For justice to achieve the role demanded of it satisfactorily, broad popular support and understanding are necessary. With the improvement of the quality of the governing capability of the political branches through political reform and administrative reform, the political branches' responsibility for accountability to the people becomes heavier. In the same way, the judicial branch must establish a popular base by meeting the demand for accountability to the people, while paying heed to judicial independence. Justice can play its role fully only if its activities are easily seen, understood, and worthy of reliance by the people.

For justice to secure a popular base, the legal profession must have won the public trust. The source of this trust lies in the legal profession's consciously, and with an open attitude, constructing a desirable system of justice that responds to public expectations. The legal profession must willingly

carry this out while being aware of both the importance of accountability to the people and the high responsibility for establishing a better system of justice for the people. For that purpose, the legal profession must contribute to the people's autonomous activities to form a better society by securing rich communication with the people as a profession while constantly enhancing its own quality. On the other hand, it is incumbent on the people that they support justice by participating in the administration of justice autonomously and meaningfully and by making efforts to form and maintain places for rich communication with the legal profession. Ultimately, there is no foundation supporting the development of Japan in the 21st century other than creative cooperation, free development of personality and a sense of responsibility deeply based on sympathy with others, by each and every person, each of whom is a governing subject and a subject of rights. This should be clearly defined as applying to the relationship to the justice system, as well.

The Prime Minister and government accepted the JRC's Final Report and, in pursuant to Chapter V on "Promotion of this Reform of the Justice System", established within the new Cabinet Office a Headquarters to Promote Justice System Reform (*shiho kaikaku sokushin honbu*). Over its statutory term from 2001-4, through various "study groups" this Headquarters deliberated further on the JRC's recommendations and proposed many similar legislative amendments (see {Oda 2009} p56 for a summary of the work program published by the Headquarters in 2002; and more generally {Foote 2007}). However, some legislation only came into effect from 2005 onwards (see further Part 7 below).

For example, the Comprehensive Legal Support Law was enacted in 2004, creating a new independent agency (the Japan Legal Support Centre) from 2006. Branches of this agency (nicknamed 'Ho Terasu') manage legal aid for civil cases and court-appointed lawyers for criminal cases, provide fee- charging legal services in rural areas where the numbers of lawyers are limited, support the victims of crimes, and provide legal information to the general public. Also, instead of suspects only being entitled to request court-appointed lawyers after they are prosecuted, court-appointed lawyers are now available promptly after arrest for those who are suspected of certain serious crimes (see Parts 6.3.1 and 6.6.1 below).

Institutions

What institutions are involved in the justice sector? How do they relate to each other?

The Headquarters and indeed the JRC itself marked a significant departure from the usual post-War practice in justice system reform. That had hitherto been dominated by three stakeholders covering the three main branches of the legal profession in a narrow formal sense (*hoso* – a term borrowed from China, according to {Oda 2009} p 73, citing Mikazuki): the judiciary, public prosecutors, and *bengoshi* lawyers.

Members of all three branches nowadays have to pass the same very difficult National Legal Examination (shiho shiken, sometimes somewhat misleadingly translated as the National Bar Examination). They then obtain more practical legal training at state expense at the Legal Research and Training Institute (LRTI) near Tokyo, including externships at courts, prosecutors' offices and law firms. The period of the training had been for two years, but was shortened to one and half years in 1998 and further shortened to one year from 2006. Although it is difficult to enter the LRTI it is easy to graduate, compared say to the otherwise similar German system, and those who graduate from LRTI are all regarded as qualified bengoshi lawyers. However, around 8 percent of most capable students are often asked, or volunteer, to join the judiciary after graduation from the LRTI – almost all then remain judges until reaching mandatory retirement age. Around another 12 percent join the Ministry of Justice (MoJ) as public prosecutors, mostly specialising in criminal

prosecutions. About 80% of the remaining LRTI graduates remain *bengoshi* lawyers in private practice, with full rights (under the 1949 Lawyers Law) to provide all sorts of legal services and to represent clients in all courts and tribunals.

Until reforms during the Occupation, lawyers had lower status because they sat easier exams than the judges and prosecutors until 1914 and thereafter underwent separate post-examination practical training. In addition, the status of prosecutors was generally viewed as higher than that of the judiciary, who were appointed and administered through the MoJ. But in 1947 the Public Prosecutors Office became independent of the Courts, which were granted rights to manage their own administration through the Supreme Court under the Courts Law (see {Oda 2009} pp 53-4). And from the 1960s some very capable LRTI graduates began to turn down offers to join the judiciary, further supporting the rise in status of *bengoshi* lawyers {Taniguchi 2007}.

Once this post-War legal profession system fell into place, until the late 1990s reforms to civil and criminal justice as well as broader aspects of the administration of justice came to require in practice the respective approval of the Supreme Court (administering around 2700 judges in 2009), the MoJ (with around 1,700 prosecutors) and the Japanese Federation of Bar Associations (*Nichibenren* or JFBA, with 28,000 *bengoshi*). Such consensus- based decision-making impeded major reforms. For example, the numbers allowed to pass the National Legal Examination each year was limited to 500 until 1992, when it rose to 700, with two hundred places were reserved to those who had first sat the Examination not more than three years beforehand. The latter was a compromise countermeasure aimed at the problem of many applicants sitting the Examination multiple times, resulting in the average age of successful applicants becoming very high; but in 1998 that age was still almost 27 years old. From 1999 the number of passers was raised to 1000 per annum, then to 1500 in 2004. But from 2001 the JRC recommended 3000 per annum by 2010 – aiming thereby to increase the size of the *hoso* legal profession to a level comparable to that in France by 2050.

These more radical measures, and other reforms proposed by the JRC and favourably received by the government, came about partly because the 13 members of the JRC were selected from a more diverse group {Foote 2007}. They comprised one *bengoshi*, one former senior judge and one former senior prosecutor, but also 5 professors (including the Chair and Vice-Chair), two businesspeople, an author / media commentator, and executives of the Housewives Association and the Japanese Trade Union Confederation (see <http://www.kantei.go.jp/foreign/judiciary/member.html>).

However, some of the momentum created from this process has been lost in recent years. Some senior judges have complained privately and sometimes publically about the difficulty of selecting high-quality LRTI graduates for the judiciary. Many lawyers are concerned about the rapid growth in those entering private practice, arguing that the markets are already saturated. Elections in 2010 for chairmanship of the JBFA were hotly contested (see Part 6.1), with both candidates (especially one) calling for National Legal Examination passers to be capped significantly below 3000 per annum. Those opposed to further reforms along the lines of the JRC recommendations can also now tap into broader public concerns about the newly-implemented quasi-jury (*saiban'in*) system (see 4.12 below).

Accountability

Which are accountable to what organisations and by what mechanism?

How is accountability to the leadership (for example, the Party-State and or government) ensured? An important accountability mechanism, and another aspect of the separation of powers under

Japan's post-War Constitution, is the power for an independent judiciary to review decisions of other branches of government. Judicial power is vested in the Supreme Court and lower courts established by law. It extends firstly to review of the legality of secondary legislation promulgated by the Executive branch such as Cabinet Orders, ministerial ordinances and other administrative rules. Implicit in the Constitution (Art 73(6)) is the possibility of delegated legislation, but in principle the legislature cannot completely delegate its law-making power to the Executive branch – although the Supreme Court has often in practice allowed quite broad delegations.

Judicial review applies, secondly, to the constitutionality of the primary legislation enacted by the Legislative branch. The latter judicial review extends, as in the US and unlike the traditional Westminster system, to consistency with a constitutional bill of rights comprising thirty articles which prescribes that "these fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights" (Art 11). These include not only rights to such civil liberties as the freedom of speech, the free exercise of religion and several procedural rights of the accused. There is also a right to welfare: "all people shall have the rights to maintain the minimum standards of wholesome and cultured living" (Art 25(1)). However, the concrete content of this right to welfare is thought to depend on the welfare policy of the government, so welfare recipients are not entitled to claim that a particular welfare policy is unconstitutional.

Despite these powers, the Japanese judiciary has been very reluctant to exercise its post-War powers to revoke the decisions of other branches of the government. Statutes enacted by the Diet are only been found unconstitutional in eight situations, namely involving:

- confiscation powers under the Customs Law and "due process" (1962);
- patricide under the Criminal Code and "equal treatment" (1973);
- legislation regulating pharmacies and the right to choose one's occupation (1975);
- Public Election Law and malapportionment in voters' rights (1976 and 1985);
- restrictions on property transfers under the Forestry Law (1987);
- Postal Law exemption from liability versus the right to claim compensation from the government (2002);
- Public Election Law's requirement of residence in Japan versus rights of Japanese citizens living abroad (2005); and
- Nationality Law and "equal treatment" of children from international marriages (2008).

Where the Court finds a legislative provision to be unconstitutional it is not automatically rendered void; instead, it sends the judgment to the Cabinet and Diet for re-enactment. Sometimes adequate amendments can take years, as in the malapportionment situation (No 4 above) where the Court ruled in 1985 that the government had failed to rectify the inequalities among voters (favouring those in rural areas) within a reasonable time, and that the then boundaries were also unconstitutional. And its original 1976 judgment did not invalidate the entire election based on the unconstitutional electoral boundaries. Even though not directly applicable as the litigation did not involve revocation of an administrative disposition, the Court instead adopted an analogy from the Administrative Litigation Law (Art. 31) whereby an administrative decision could be declared unlawful yet kept in effect due to the public interest involved (for a direct application, see also the Nibutani Dam case: see {Sonohara 1997}).

Cases in which the Court declares unconstitutional the decisions of organs belonging to the executive branch are also rare. However, in 1997 the Supreme Court did decide that a prefectural

governor's contributions to Yasukuni and Gokoku Shinto shrines were contrary to the prohibition on state promotion of a particular religion (Art 89).

It can therefore be argued that politically important decisions are virtually immune from judicial scrutiny, and hence the judiciary has been nearly a non-entity for most of Japan's political history. Explanations and appraisals differ concerning this phenomenon. A "rationalist" theory argues that it results from the long reign of the LDP, which led not only bureaucrats within the executive branch but also the judiciary to comply with the Party's clear policy preferences at least in politically important situations, even without direct interference by the Party {Ramseyer and Rasmusen 2003}. Econometric evidence is presented arguable indicating that judges that go against such preferences in "politically charged cases" (like the constitutionality of Japan's "Self-Defence Forces" or SDF) tended to be assigned by the Supreme Court to less prestigious postings (cf Part 4.14 below).

In contrast, some contest that conservative outcomes in constitutional litigation are related primarily to Japan's civil law tradition regarding judicial administration {Haley 1998; 2007}. For example, {Satoh 2008} (pp 604-5, citations omitted) argues that:

"This situation is largely the result of the broad legal influence of Japan's Cabinet Legislation Bureau (*Naikaku-Hosei-Kyoku*). The Cabinet Legislation Bureau ("CLB") is comprised of senior government officials with expertise in specific legal areas who are seconded from various government ministries and agencies. The CLB's formal tasks are to provide legal opinions to the Prime Minister and other legislative officials and to review drafts of bills, regulations, and orders to determine if they are consistent with the constitution and legal precedent. As such, the CLB's purpose is to avoid the type of legal confusion seen in the United States when legislative decisions are found to be unconstitutional by courts after their enactment. Due to the significant influence of the CLB's opinions, the Japanese Supreme Court has almost always upheld government acts, particularly where they involve significant political questions such as legislative districting or voting rights.

Although the propriety of the CLB's involvement in these issues is questionable, the Court has held that the CLB's role in evaluating draft legislation does not violate the Constitution. Indeed, the consultative function of the CLB bears a striking resemblance to the role of France's Council of the State (*Conseil d'État*), which also assists the executive branch with legal advice. The Japanese Constitution, however, mentions nothing about the CLB's advisory role."

Constitutional Structures

The Japanese version of the separation of powers has already been mentioned as a basic principle underlying the political system and embodied in the Constitution. So have two of the three fundamental principles commonly viewed as underlying the Constitution: sovereignty lying with the people (no longer the Emperor), and respect for fundamental human rights (reinforced by an extensive and justiciable bill of rights).

The third foundational principle is pacifism and peaceful cooperation with foreign countries. Under Article 9 of the Constitution, Japan renounces "war as a sovereign right of a nation" and the "threat or use of force as means of settling international disputes". However the government has successfully contended the constitutionality of maintaining the SDF, which emerged out of the Policy Auxiliary Force created during the Korean War, as a minimum necessary force for the country's self-defence. The CLB has suggested a defence budget benchmark of one percent of GDP and the government has mostly adhered to that, although this still means that the SDF is now one of the largest and best-equipped military forces in the world {Martin 2008}.

In 1959 the Supreme Court also refrained from ruling on the constitutionality of the US-Japan Security Treaty, on the ground that it was a political question beyond the scope of constitutional review and best left to Cabinet (with power to conclude treaties) and the Diet (which ratifies them). But it suggested in passing that there could be review in some instances, and in the later electoral malapportionment cases the Court did review issues that can be viewed as very political.

Security issues have also given rise to discussions about the process for constitutional amendment, especially since the 1990s when the government began sending the SDF on peace-keeping missions to the Middle East pursuant to new and specific legislation. Constitutional amendment has never occurred and is comparatively difficult. It must be approved by a two- thirds majority of each House in the Diet, and by a majority in a popular referendum (with referendum procedure contained in a 2007 law which has not yet come into effect). Despite an explicit provision (as in the German Constitution), amendments are also argued to be limited to those consistent with the basic principles of the present Japanese constitution, including sovereignty of the people, respect for human rights and pacifism. The LDP and many citizens have been quite open to amendment of Art 9, but others and the DPJ have been opposed.

1.4 Other Actors

Role of state-owned enterprises, private sector, non-governmental organisations and associations.

Local Bar Associations

In justice sector reforms we have already mentioned (above Part 1.3, "Aims") the hitherto more central role of the JBFA, coordinating the 52 local Bar Associations. As explained below (at the outset of Part 6), Japan also has many "quasi-lawyers" with more limited rights to provide legal services, especially outside the courtroom, such as judicial scriveners (*shihoshoshi*). Each of these sub-professions has its own peak association, but they have not played much direct role in the current wave of justice sector reforms. Nonetheless, some of their policy preferences are reflected in the JRC's Final Report and have been implemented. For example, judicial scriveners are now allowed to go beyond preparing litigation documents. If they undertake training to receive a further qualification, they can now represent clients in Summary Courts.

Universities

The introduction above to the JRC also shows that universities have a role in judicial reform initiatives. Japan has a long tradition of both public universities (which provided three of the JRC members, including its Chair) and private universities (which provided the other two professors). Academics have long been called upon to chair such *shingikai* as they usually have technical expertise and are viewed as somewhat more neutral, able also to facilitate compromise among different interest groups represented on the law reform or policy councils.

However, law professors also have some more direct interest in contemporary justice sector reform because it proposes an expansion in legal professionals accompanied by a new system of university-level legal education. Specifically, to ensure that 3000 applicants pass the National Legal Examination each year by 2010, the JRC proposed and the government have introduced a new-style Examination (*shin-shiho shiken*) that applicants can only sit if they have undertaken a new two- or three-year postgraduate law program in an accredited university "law school". In 2004 the Ministry of Education accredited 68 new law school programs, and there are now around 70 teaching around 7000 students. This provides a significant new market for universities, struggling with Japan's ageing population profile and in competition with private "cram school" (*juku*), which had diverted students from university studies to prepare them for the old-style Examination

(which had not required any university qualification for its applicants). Yet there is much work involved in setting up such law schools. Also, their attractiveness to students (and therefore the universities) has been undercut because the pass rate has already dropped to around 35% (much lower than the 70-80% envisaged by the JRC, although still much higher than the rate for the old-style Examination). The pass rate will probably continue to decline if the number of passers is henceforth capped at less than 3000 per annum.

Business Sector

A major new player in justice system reform in Japan is the business sector, especially larger or export-oriented companies long exposed to legal risk in markets overseas, but also increasingly within deregulating or stagnant domestic markets. Particularly important has been the Japan Business Federation (*Nippon Keidanren*), a peak association created in 2002 out of the longstanding *Keidanren* (Japan Federation of Economic Organisations) and Nikkeiren (Japan Federation of Employers' Associations). The Federation now comprises 1,295 companies, 129 industrial associations, and 47 regional economic organisations (see <http://www.keidanren.or.jp/english/profile/pro001.html>). On 22 May 1998, for example, the Keidanren Board adopted a report, *Shiho Seido Kaikakuni Iken* (Opinions on the Reform of the Judicial System), emphasizing Japan's transformation into an open market society and promoting comprehensive reforms such as:

- increasing judge numbers and appointing them from *bengoshi;*
- allowing non-*bengoshi* corporate staff to represent their own corporations in litigation and to provide legal services to related companies;
- allowing practice as *bengoshi* by corporate legal staff, parliamentarians, and their policy assistants (*seisaku hisho*) without undertaking training at the Judicial Research and Training Institute after passing the National Legal Examination;
- allowing judicial scriveners and patent attorneys to represent clients in certain court proceedings;
- allowing multidisciplinary partnerships between *bengoshi* and such other legal professionals; and
- establishing post-graduate professional "law schools.

These recommendations influenced a LDP committee report on civil justice system issues and especially a report by the *Keidanren*-affiliated Twenty- First Century Policy Institute in 1998. The philosophy and recommendations of the two Keidanren-related reports are reflected in many of the JRC recommendations and policies subsequently implemented by the government {Kitagawa and Nottage 2007}. Smaller but also important was the Japan Association of Corporate Executives (*keizai doyukai*), which in 1994 recommended an expansion in the judiciary to meet unmet legal needs (see {Hamano 2007} p188).

Non-Governmental Organisations

In contrast, although the JRC membership did include a representative of one Non-Governmental Organisation (the Housewives Association, *shufuren*, interested for example in consumer policy), NGOs have played a relatively small direct role in justice sector reform initiatives. This partly reflects the weak legal and tax basis for non-profit organisations (NPOs) in Japan, despite improvements in recent years, resulting in many small local groups but few professionally managed organisations. {Pekkanen 2006} argues that political institutions—the regulatory framework, financial flows, and the political opportunity structure—are responsible for this pattern, with the result that civil groups still have little chance of influencing national policy debates. On the other hand, over the last decade the mass media seems to have become much more interested in law- related affairs,

including justice sector reforms, although some of this reporting – notably the implementation of the quasi-jury (*saiban'in*) system from 2009 – has included some quite negative views.

Conclusion

Overall, the law and specifically the justice sector have therefore begun playing a more visible role in political and socio-economic ordering in Japan. The globalisation of the economy and the society weakens the influence of cultural traditions, and accelerating deregulation makes bureaucratic management of disputes difficult to maintain. In addition, there are pressures from foreign countries to make the Japanese legal system meet global standards, which have always held an attraction for law reformers in Japan anyway. Some Japanese corporations and their main peak associations are also demanding a more usable legal system, to protect themselves, develop new business, and perhaps also impose to gain an edge over less legally sophisticated competitors. Citizens' groups and others have jumped on this bandwagon too. From 1999, and especially over 2001-4, the government has responded to these pressures by implementing wide-ranging recommendations from the diversely constituted JRC. As noted above and described further below, these reforms have centred on speeding up and improving both civil and criminal court proceedings, expanding ADR and the legal profession, ameliorating legal education, and promoting more citizen participation in the justice system.

However, as evidenced by the ongoing debate about the numbers permitted each year to pass the National Legal Examination, there has been some backlash against some changes. Old institutions and ways of ordering society die hard, and not just due to vested interests – such as the temptation for incumbent *bengoshi* to maintain a smaller Bar and hence less competition. Rather, many citizens still seem unsure about whether law necessarily or even usually achieves justice, let alone economic development. Such attitudes influence some legal elites, even among the judiciary or *bengoshi*, who wish to advance social justice as well as legal consciousness. This arguably reflects a broader and persistent communitarian tradition within Japanese society {Haley 1998}, although one nonetheless to selective invocation and application of liberal rights for the overall benefit of perhaps increasingly diverse communities {Tanase 2010}. It is therefore scarcely surprising, for example, that the plethora of changes to corporate law and many other aspects of corporate governance since the 1990s amount only still to a "gradual transformation" {Nottage et al eds 2008}.

2. Criminal Investigation

2.1 Organisation

Japanese police administration is managed by each prefectural government (see generally {Araki 1998}, {Foote 1992}, {Miyazawa 1992}, {Clack 2003} and {Johnson 2007}). However, in order to implement a national strategy of crime control, the Diet legislates on policing matters directing each prefecture police bureau through the central agency for police administration, the National Police Agency (NPA). Japan also introduced a Public Safety Commission system in order to increase civilian control of police power. The Commission consists of disinterested persons so as to ensure its neutrality. The Commission is expected to civilise and democratise the police agency through command and control. Each prefecture and NPA has its own commission consisting of nominated citizens. For example, the National Public Safety Commission has six members nominated from the Diet (including the chair), the business sector, labour union groups, former judges, journalists and law professors. The chair and members of the Commission are nominated by the Prime Minister. However, there has been strong criticism about the inadequate control function of the Commission because the members work part-time and lack independent staff and resources and, although the members could examine any complaint from the community for police activity and illegal activity, the whole administrative business of the commission is managed by the officers in each police department Prefectural commissions have been criticised for the same reasons as the National Public Safely Commission. The National commission has no supervising power over the prefectural one.

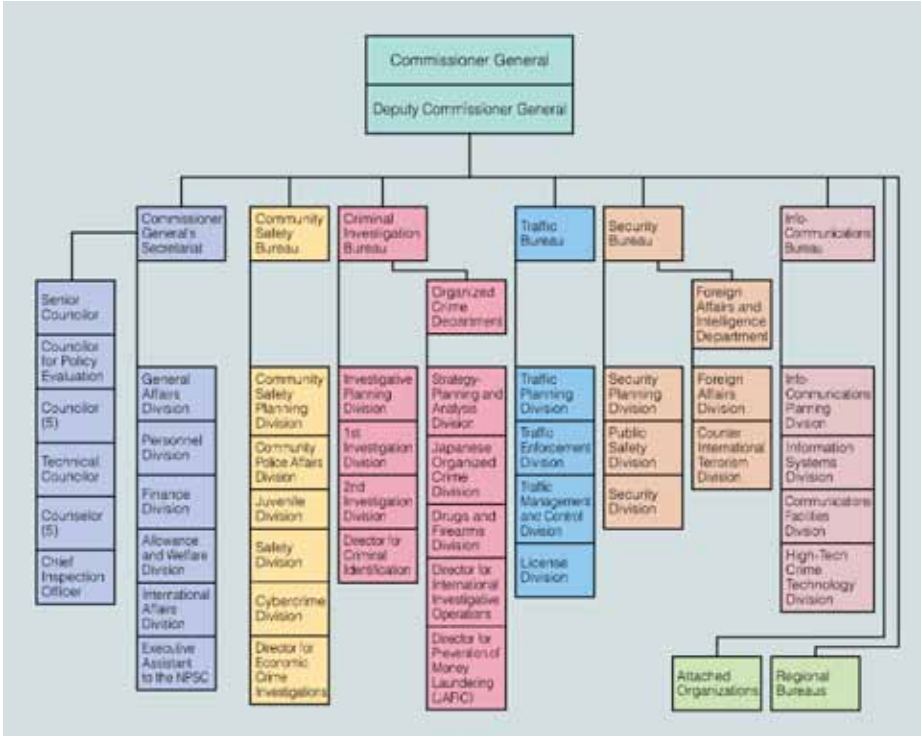
In December 2008, the Japanese police authority consisted of approximately 250,000 law enforcement officers and approximately 30,000 administrative officers working for the NPA and local police offices (see generally <http://www.npa.go.jp/english/index.htm>). The most significant characteristic of the career system in the Japanese police agency is the small number of elite officers and their domination of the organisation. Each year, limited numbers of elite graduates from top ranked universities are employed by the NPA and selected for career advancement so that they can dominate the top positions in the bureau. The elitism in the Japanese police agency is relatively strong in comparison with other public sectors. The percentage of female police officers is also very small – with women making up only five per cent of the total police force. On the other hand, women make up 40 per cent of the total police administration staff. The salary of police officers is defined by the "public officer compensation package" and each prefecture has no power to decide their own payment standard. On the national level, the salary for a first year police officer is 214,390 yen and the average of all police officers is 474,584 yen. It is a significantly lower level compared with the judge's and prosecutor's salaries, even in the case of high executive of the National Police Agency.

In the head office of the NPA, there are five main bureaus (community safety, criminal investigation, traffic, security and info-communication) and three attached institutes (police colleges, imperial guard headquarters and the institute of police science). For crime investigation, there are various specialised sections depending on the needs of different prefecture, as well as sections dealing with organised crime, violent crime, intellectual crime, drug control, traffic control and community-police affairs.

The next figure shows the organization of the National Police Agency. Each prefectural police headquarters is organised similarly and as an example of the prefectural police institute, the organization of the Metropolitan Police Department is shown in the next figure. As the investigation unit, the four major investigative units are assigned generally as: organized crime unit, white collar

crime unit, and the general crime investigation unit including the violent crime and intelligence crime unit. There are over 1,200 police stations in Japan. In the case of the Metropolitan Police, it has 101 stations within its jurisdiction.

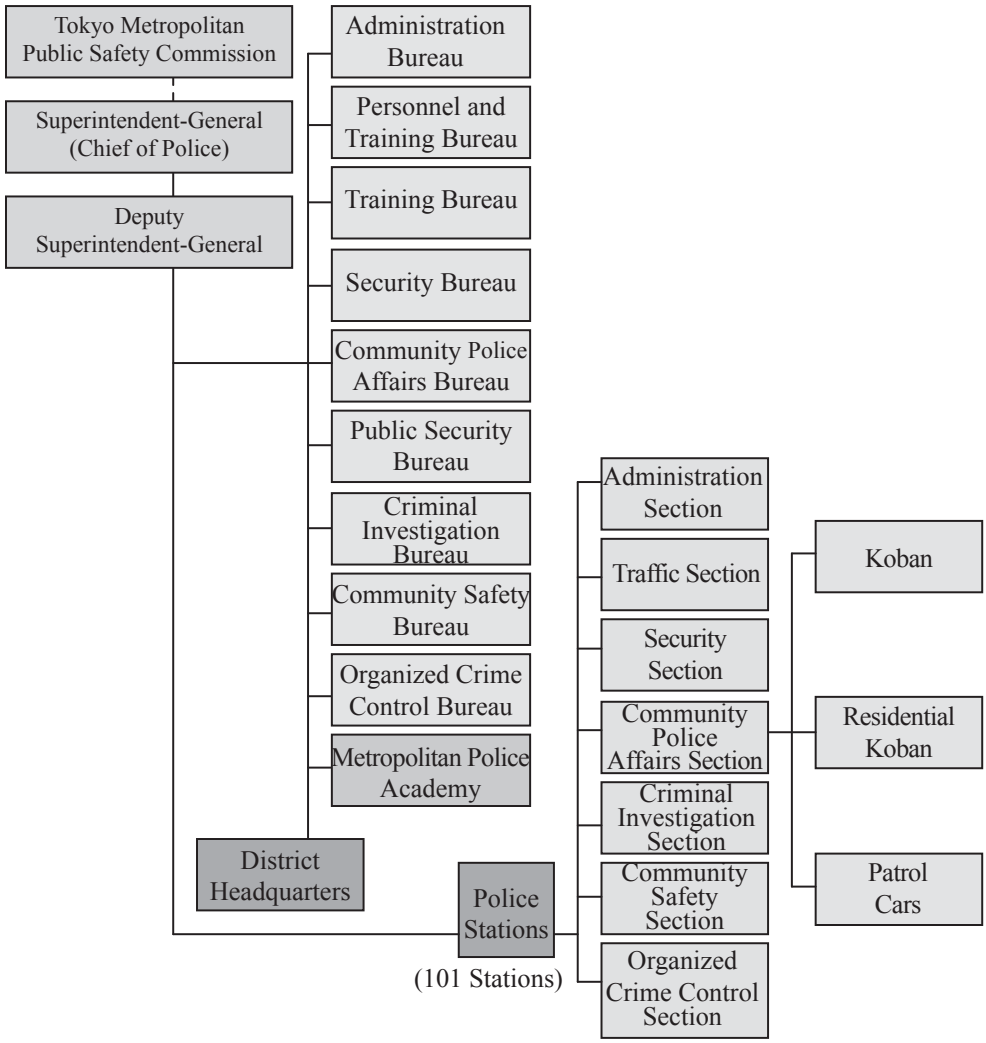
In Japan, there is a total of forty-seven prefectural police headquarters and each headquarters corresponds with a local governmental body. Each prefectural headquarters are also supervised by the *Regional Police Bureaus*, which divides the nation into seven jur



National Police Agency

Recently, the budget for investigation has become a significant and unique issue. In 2004, the total nationwide budget allocation for crime investigation was 2,588,630,000 yen (estimated at around 25 million US dollars). However, this amount dramatically diminished after 2000, when it decreased by over sixty- seven percent. The reason for the diminishing budget is the voluntary restraint of the police itself.

During the period from 2000 to 2004 it is reported that in almost all prefectures in Japan many police stations and headquarters have been making money through the backdoor for many years. The main technique of making money is to send a bill in the pretext of an investigation cost. The purpose of making money is mostly for the entertainment costs for visitor(s) and celebration cost for police chiefs' promotions in each station. They have thus public strongly criticized and now distrust the investigation budget of each prefectural police business. Some citizen ombudsmen's groups filed a suit against the court requesting the disclosure of information for such activities and demanding the return of the money to each prefecture.



Metropolitan Police Department

2.2 Model

Modern police agencies in Japan were launched in the Meiji era, over one hundred fifty years ago, and were modelled on the French police system that existed at that time. In 1872, a government official, Kawaji, was sent to France with the mission of learning about French police organisation. He returned to Japan and implemented the French model of police organisation in Japan. Since this time, Japanese police organisation had been controlled by centralised administrative powers. After the Second World War, however, at the time of post-war democratisation the US Occupation authorities directed the decentralisation of governmental power within police organisation, introducing the American model based on the supervision of police authority by local administrations. The public safety commission system, mentioned above, was introduced in order to realise such control.

The current system of administration of police power by small regional units is criticised mainly for regionalism and inefficiency as well as for the use of outdated techniques in criminal investigation. First, the use of small regional units of police investigation is unsuitable to the investigation of criminals using automobiles and other forms of high-speed transportation. On the other hand, local control can be recommended to the extent that it facilitates consideration of unique circumstances

in different communities. The Glico-Morinaga case (1984-1985), a famous case that has yet to be solved, involved the kidnapping of the president of Glico and the blackmail of many companies in the food industry, is a useful example. The Shiga prefecture police tracked down the suspect car to the spot where a blackmailed company was handing over money but failed to arrest those involved. The patrol officers were without information of the investigation and although they found the suspicious automobile and questioned its occupants the car was able to escape. Later the car was found abandoned with a wireless application for intercepting police radio broadcasting inside. In this case, the direction and information about the investigation did not reach the local patrol officers in Shiga prefecture from the Osaka prefecture police agency that had been investigating this case. After this incident, the NPA started to rebuild a more unified investigation system.

A second criticism of local police administration concerns the scientifically unsophisticated investigation methods used by local police authorities. Even in murder investigations, the detective still depends on the harsh and coercive interrogation of suspects and lacks the necessary professional skills for drawing out information in the interrogation room. The techniques used in local crime investigation have not kept pace with the increasing globalisation and sophistication of crime.

2.3 Tasks and Functions

According to pre-War tradition, Japanese police work is classified into two categories similar to those in European police law. The first category is administrative police work: typically traffic control, patrol in the town and police boxes duty. Police work in this category aims to maintain order in town and on the street through crime prevention. The second category is crime-investigation, or the so-called "judicial police function".

Administrative Police Function

Japan has a quite unique tradition of "community policing", which is a kind of strategy for keeping order in the town and on the street {Bayley 1981}. Each police office in a local town has many police boxes in the street, known as *koban*, which usually consisting of two or three patrol officers.

The *koban* is the front line base for daily patrol work and crime prevention. On the other hand, people in the street use the box not only for to report crime but also for many other purposes, such as protecting lost children, reporting lost property and asking for directions. Many criminologists consider that this kind of community based policing in Japan has succeeded in establishing a good relationship between police power and the local community, in contrast to the tension which exists in this relationship in many other developed countries. People in town refer to the police officers in the box as *"omawari-san"* (officer on the beat), which is a very popular and friendly name for the police. It is difficult to translate into English although most dictionaries refer to the meaning of *"omawari-san"* as "cop", despite the absence in the term *omawari-san* of the critical nuance that exists in the word "cop".

On the other hand, it is very common for the people to dislike the traffic control function of police work. The reason is that the regulation and prosecution of the violation of traffic rules is unfair, or at least has the appearance of unfairness. People feel that much police action in this area does not target truly dangerous driving but punishes small and minor violations that endanger neither the driver nor the community. In a public opinion survey, there are some judicial cases of unequal treatment for police regulation over parking offences. (For another example of discretionary enforcement regarding bicyclists, including drink driving, see <http://blogs.usyd.edu.au/japaneselaw/2008/11/traffic_rules_and_alcohol_reg u.html>.)

Another important aspect of the administrative police function is intelligence and security, especially concerning extreme right and left wing groups. After the Occupation, this field occupied significant attention in NPA strategy until the end of the Cold War. However, in the post Cold-War period, these groups do not present a significant security threat. However, religious cult and espionage activities are of current concern to the NPA. The security risks posed by religious cults materialised in the tragic incident of the attack by the religious cult group Aum-Shinrikyo (currently known as Aleph). On 20 March 1995, Aum- Shinrikyo launched a sarin gas attack at several subway stations in metropolitan Tokyo, causing the death of 12 people and the injury of over 5,000 people by the poisonous gas. Before this incident, the NPA monitored the activity of this cult through secretive investigations. Nonetheless, the police did not prevent the gas attack in Tokyo. Consequently, there has been strong criticism and scepticism of the police authority's capacity for information analysis of intelligence investigations.

Judicial Police Function

For crime investigations, the local police agency has the mission of arresting suspects and collecting evidence. However, for some specific crime categories other law enforcement sectors are responsible for criminal investigations. Such agencies include the Anti-Narcotic Agency, Rail Road Police Agency, Maritime Safety Official, Imperial Guard Headquarters and Self-Defence Force Police.

Most violent crime is investigated by the police and the law permits the prosecutor to investigate any crime. The prosecutor, however, does not take responsibility for investigation of violent, drug and traffic crime. On the other hand, three special departments were established to investigate the crime in two categories because of the political independence and special knowledge required for investigation activities. These departments are the Special Investigation Department of District Prosecutor Office at Tokyo, Nagoya and Osaka, respectively. This dual structure is an important aspect in the organisation of crime investigation in Japan.

The legislation has a statute of limitation clause and the police will give up the investigation according to the condition of each specific crime. However, in April 2010, the parliament legislated to abolish the statute of limitation in murder cases and expanded the length of many crimes. This means that the police have to keep the evidence, information and investigation documents forever. No institute can control the specific term of investigation even in cold cases. At the moment, there is not statistical data on how many days/months within which the police are required to arrest the suspect. In 1973, the data shows that in the whole crimes statistics ninety percent of suspects were arrested within one day, twenty seven percent within one month, and eighteen percent under three months. At the moment, official statistics show the clearance-rate only and in 2007 thirty one percent of suspects were arrested across all crimes types, and ninety six percent of murder suspects were arrested. On the other hand, for theft it is only twenty seven percent.

For the judicial police function, the police can operate by using compulsory investigation methods like arrest, search, seizure, inspection and wiretapping. Each method is required to apply the warrant from judges except some exceptions which law permits. For example, the Constitution requires arrest warrants but it says "except in the case of on-the-spot arrest". The Criminal Procedure Law also permits the exception of search and seizure without warrant in the case of arrest. An inspection warrant is quite unique because the Anglo-American law jurisdictions generally lack such a method. The warrant permits officers to investigate by using human sensations like watching, smelling, hearing and others. The wiretapping warrant is permitted to investigate only in the case of organized crime.

Except wiretapping, there are no preventive methods for the police in Japan in order to stop crime but recently some regulatory powers were introduced into legislation. One example is regulation of domestic violence. Since

2001 the police department could involve and resolve depending at the request of citizens who are suffering any violence from their spouse. Another example is stalker regulation. Since 2000, on the claim from female who are be stalked, the police chief could give a caution against the stalker and the chair of the prefectural Safety Commission could order preventing it.

2.4 Relations

As explained in the previous Part 2.3, it is unique to the crime investigation system of Japan for the prosecutor's office to investigate crime. This function means that prosecutor is responsible for the interrogation of suspects, too. For all criminal charges, after the police send the case file to the prosecutor's office, the decision of whether the suspect will be indicted depends on the prosecutor's office. Article 248 of the Criminal Procedure Law (CPL) permits the prosecutor the discretion to dismiss the case.

Concerning the discretion of whether or not to prosecute a criminal suspect, each prefectural office has its own policy, though theoretically the Ministry of Justice has command authority over prefectural offices. Sometime, this relationship results in strong political tension between the party in government and the prosecutorial authority. Article 14 of the Prosecutor Office Law permits the Minister to command investigation into specific cases by the Attorney General. In fact, in 1954 the Minister of Justice, Inugai, stopped an investigation of political corruption by Diet members from the government and ruling party. This command authority is considered to be subject to political exploitation and criticised as an unreasonable discretion in a democratic society.

2.5 Mechanisms

Coordination

In Japan, some intelligence authorities work independently. However, the National Intelligence Joint Task Force (NIJTF) convenes every two weeks in order to exchange intelligence. The members of NIJTF are representatives from the Cabinet Intelligence and Research Office (CIRO) under the Prime Minister's Office; Defence Intelligence Headquarters (DIH) under the Self Defence Force; Intelligence and Analysis Service (IAS) under the Ministry of Foreign Affairs; the Public Security Intelligence Agency (PSIA); the Security Bureau (SB) under the NPA; and the Public Safety Department (PSD) of the Metropolitan Police. Because of the secretive nature of this meeting and consequent non-disclosure of Task Force information, the precise activities of this group are unclear and concrete examples of cooperation and coordination amongst intelligence agencies are largely unknown. There is little academic research in this area making it difficult to describe the nature of co-ordination amongst different intelligence agencies.

Administrative

In the academic discussion of crime investigation, many scholarly works sometime ignore the uniqueness of the social context of Japanese police activity. Two particular points about the Japanese social context deserve particular attention. In the crime investigation process, statistical data shows that most important evidence used in investigating crime is offence reports filed by citizens including victims. The social responsibility of police for keeping order and protecting the community from crime is imperative in Japanese society, where citizens expect the myth of being "the safest country in the world" to conform with reality.

On the other hand, the cultural background must not be ignored. The aforementioned *koban* system is an effective instrument for maintaining order, and serves the additional function of a kind of network station for individual civic responsibility. For example, many Japanese people report lost property to the nearest *koban*. In Japan, lost property is often returned to its rightful owners (see generally {West 2005}). The *koban* is in one way a key mechanism for maintaining social order and collecting information but at the same time a social mechanism used to encourage social responsibility amongst good Samaritans. The latter function of police service assists in generating the social capital necessary for crime investigations by the police. Therefore, the relationship between society and the police may be described as a kind of "give and take" relationship. Many observers outside Japan feel admiration for such cooperative social mechanisms employed by the Japanese police service. The effectiveness of this system is reflected in the high arrest rate of criminal suspects by the Japanese police.

A second unique aspect of criminal investigation in Japan is that of suspect interrogation. In the law of criminal procedure, the police can hold a criminal suspect in custody for three days and the prosecutor can extend this to a maximum of twenty days for each suspected crime. The decision by the prosecutor requires a court warrant. However, the success rate is almost 100 per cent. Following the award of a warrant, the suspect is interrogated by the prosecutor. This interrogation is not traditionally subject to visual-audio recording. The interrogator's aim is to extract a confession from the suspect because this is considered to be the "king of evidence" in Japanese courts. Experienced detectives are expected to extract statements from suspects concerning their personal background, life history, the motive of the crime, how the crime was committed and a statement of apology. For this task, most interrogators hope to form a good relationship with the suspect, known as constructing "rapport". Over ninety per cent of suspects confess in this way.

On the other hand, there has been strong criticism of this style of interrogation. For example, in the 1980s four death-row inmates were released following not guilty decisions in new trials, prompting the bar association to criticise the harsh interrogation techniques used by the police to obtain confessions even from the suspects who deny any wrongdoing. All four of the death-row inmates confessed to committing the crime of double or triple murder and arson only after long periods of detention and interrogation. In their trials, they retracted their confessions and alleged that they had been subject to violent and oppressive techniques during their interrogation. However, at trial the court placed far greater weight on their written statements of confession.

There is strong conflict amongst different evaluations of police interrogation techniques in Japan. Academic opinion is also divided. Proponents of a vigorous system of criminal interrogation argue that such a system operates effectively because the detective can work as a kind of social counsellor. On the opposing side it is argued that harsh interrogations have led to many wrongful convictions and that there needs to be a strong requirement for transparency of the entire process of interrogation and the implementation of rules regulating investigative interviews. Recently, the issue of criminal investigation techniques has become the subject of large public debate within Japanese society. Since 2003, the Japan Federation of Bar Associations (JFBA – see Part 6 below), which has often influenced policy making concerning criminal justice, has campaigned to introduce full visual and aural recording in the interrogation room (see <http://blogs.usyd.edu.au/japaneselaw/2009/09/japans_new_quasijury_system_a n_1.html>). The Public Prosecutor Office (PPO) and NPA are strongly opposed to such a policy because it could jeopardise the close relationship between detective and suspect. The tradition of criminal interrogation in Japan has required no outside scrutiny. However, because of recent wrongful convictions and the introduction

of a new system of civil participation in criminal trials in 2009, the PPO and NPA have started the partial video-recording of suspect interviews mainly in the final portion of interrogations. In some cases the court has admitted the video as supporting evidence regarding the voluntariness and trustworthiness of confession..

Oversight and Inspection

As mentioned above, the interrogation practice has not traditionally been subject to direct outside scrutiny. However, there are many potential forms of control over investigations, such as the requirement for administrative inspection, civil actions and making complaints in relation to prosecution activities. Such complaints may be made by victims of police misconduct to district courts in the same jurisdiction as the police office in question. In such cases, the judge can order mandatory prosecution and nominate special independent prosecutors from the bar. Statistically, there are very few cases in which the court has rendered such decisions. For example, in 2008 the court received 304 complaints, only one of which resulted in a final decision to prosecute. In 2006, the court received 243 complaints, none of which were prosecuted. As a result, this prosecution claim system has been an ineffective method of oversight of investigative activities.

2.6 Criminal Investigators

Police officers who want to become detectives must firstly be recommended by a supervisor in each police department. The candidate is generally required to have achieved a high performance in police academy and police duty; a high score of shooting accuracy; and a senior level of Judo and/or Kendo. With the recommendation, he or she must pass an examination after completion of a Criminal Police Academy Training Course. After finishing this three month training program he or she may be assigned to a vacant detective position. However, there is no special training program for interrogators in the Japanese police academy.

Generally the investigation units are divided into six divisions; the violent crime division, white-collar crime division, theft and property crime division, investigation liaison division, laboratory division and the initial response division. Each division consists of the division chief, unit chiefs, senior staff, and investigators. The capacity of each division depends on the crime condition and population size of the jurisdiction. In the case of serious crime, a specific investigation task force is set up in a local police station having the jurisdiction of the target crime and many investigators are sent to the local station from headquarters. The investigator has no specific term for their job and retires usually at age sixty. Each investigator develops their career through working not only at one division but at different divisions and different police stations inside the prefecture.

As mentioned before, the Prosecution Office generally does not involve investigation of serious crimes but sometimes the task force requires legal advice for evaluating the reliability of specific evidence including a suspect's confession.

Conclusion

The Japanese police have been admired for their highly efficient investigations and succeeding in keeping good a condition of public safety. However, due to the recent lower clearance-rate of crime observers have started to doubt the ability and function of police. The police established their reform of strategy and training of human resources inside the department having strong sense of crisis. However, the social and economic background and the community plight are changing drastically and it seems that the police could not correspond to the significant variance of the criminal world.

The Japanese police authority succeeded in achieving a high rate of criminal arrest and deterrence of street crime. This tradition was based not only on the organisational and functional quality of the police service but also on the socio-legal background. The Japanese achievement of one of the lowest crime rates amongst developed countries has resulted in Japanese police receiving international acclaim their work, especially for succeeding in community policing. On the other hand, there has also been criticism of closed-door interrogation techniques and the low level of public oversight over policing (see eg <http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Japan.aspx>).

Although since 2001 Japan has embarked on significant reform efforts in the judicial process and legal education (see Part 1.3 above and Part 7 below), there has been no corresponding reform of police authority. Many characteristics of the Japanese police remain unchanged, such as long detention periods, police detention cells, the absence of mandatory audio- visual recordings of suspect interviews and the absence of witness defence attorneys in the interrogation room.

Recently, some criminal cases of wrongful conviction in Japan have led to media and public criticism of unsafe and unreliable investigation methods, especially the use of harsh interrogation techniques for seeking confession and the disrespect shown to conflicting evidence. The imperatives of transparency and accountability in the police authority are becoming significant political issues in the Diet. Because the recently elected DPJ promised to introduce mandatory audio-visual recordings of suspect interviews, the public expects that the police force should become better regulated. On the other hand, several retired high-ranked officers have had articles published in widely circulated magazines or journals in order to emphasise the importance of maintaining the autonomy and independence of the police force. However, the achievement of transparency and accountability are vital if the police authorities hope to keep public trust in the future.

> In terms of keeping the community safe, the Japanese police are confronted with big problems: the global economy, information technology, complicated social mechanisms, the nuclear family, moral hazards, lost educational control and so on. The requirement to the police function is also increasing complexity. The new generation police function and the style are still looked for.

3. Prosecution/Procuracy

3.1 Organisation

Two major principles guide the Ministry of Justice (MoJ) regarding prosecutors: the principle of prosecutor unity (overall), and the principle of (individual) prosecutor independence. These create somewhat competing objectives, as explained below (in the next section), but the Japanese system balances them comparatively well to achieve a predictable system consistent with a particular vision of the rule of law.

3.2 Model

Japan has a national, centralized, hierarchical, career procuracy whose structure corresponds to that of the judiciary. Like prosecution organizations in the United States, South Korea, and Taiwan, Japan's procuracy is part of the executive branch of government, which places real and symbolic distance between prosecutors and the judges who work in the judicial branch. Before the Occupation reforms of 1945-52, Japanese courts were not a separate branch of government but rather a semi-independent organ in the Ministry of Justice. Then as now, the Ministry was run by prosecutors, who controlled all budgetary and administrative matters of the judiciary, including the appointment, promotion, transfer, supervision, and dismissal of judges and court officials. Prosecutors frequently used these levers to pressure judges, thereby breaching again and again the principle of judicial independence. From arrest through investigation to trial, judges did little to restrain prosecutors. The separation of the judiciary from the procuracy in the Occupation was aimed at eliminating these problems. In significant respects the reforms have worked. (A practice remains of some judges being "loaned" to the MoJ to assist even in litigation, but almost exclusively in civil and public law cases - not criminal cases – and in very small numbers usually only for 2-3 years: see Part 4.5 below.)

Today, the prosecutor's office is formally just one organ among many in the Ministry of Justice, but in reality prosecutors run the ministry and direct almost all of its principal activities. Although their titular head (the Minister of Justice) is a cabinet member and (almost always) an elected politician, many prosecutors cannot recall their current boss's name. Some even dismiss the minister as "irrelevant" in all but extraordinary cases involving high-level corruption and other high-profile crimes. Among other things, this means that, for the most part, prosecutors in Japan enjoy significant independence.

The Supreme Prosecutors Office stands at the apex of the procuracy, above the 8 High, 50 District, and 203203 Local Prosecutors Offices (one in each of the 50 municipalities with a District Court and the 203 municipalities with a branch of a District Court).These office levels are tied together, in theory and in reality, by "the principle of prosecutor unity," one of the most important of all facts about the organisation of prosecution in Japan. This precept holds that "the procuracy is a national, united, hierarchical organisation in which superiors command and subordinates obey and all prosecutors form one body" (see {Johnson 2002}, citing Nomura 1978 p126). This principle is rooted in provisions of the Public Prosecutors Office Law that give various office heads, and all prosecutor managers, authority to direct their subordinates in any work-related area, whether investigation, indictment, or trial. Though the Minister of Justice is the formal head of the procuracy, the same law restricts her ability to control prosecutors by conferring power to direct only the Prosecutor General in "particular cases."

The principle of prosecutor unity stands in tension with another provision of the Public Prosecutors Office Law, the "principle of prosecutor independence." This tenet states that each individual

prosecutor is an "independent government agency" with power to institute prosecution and perform other functions as authorized by law. This independence is protected in two main ways. First, no prosecutor can be fired, suspended, or given a pay cut except in narrowly defined circumstances and through specific legal procedures. Second, and as described above, the Minister of Justice (and "politicians" more generally) have limited authority to direct and manage prosecutors.

There is a clear division of labor between the different types of prosecutor offices in Japan. Local and District offices make almost all initial charge decisions, and prosecutors in them also participate in investigations, both directly, by collecting and evaluating evidence and interrogating and interviewing suspects and witnesses, and indirectly, by supervising and interacting with the police. The 8 High prosecution offices supervise the Local and District offices in their respective jurisdictions, and they help set policy as well. The High offices also help decide whether to appeal acquittals or sentencing decisions that have been made by the District and Local Courts, and they influence front-line decision-making in politically sensitive cases, such as those involving high-profile suspects and defendants or victims. At the pinnacle of Japan's procuracy is the Supreme Prosecutors Office, which reviews and supervises the decisions made by all of the offices beneath it and which plays the executive role in setting policy for the procuracy as a whole. As described below (in Section 3.4), executive prosecutors in the Supreme and High offices do instruct and influence lower level prosecutors in a variety of ways.

The Japanese way of organizing prosecution works well in at least two ways. First, it enables prosecutors to effectively manage the tension between two imperatives of justice that Americans regard as often incompatible and always in tension: the need to individualize case decisions, and the need to treat like cases alike so as to achieve a tolerable level of consistency. To an extent inconceivable to many American researchers, the Japanese way of prosecution achieves concord, not discord, between individualisation and consistency (see {Johnson 2002} p160). This is a major achievement.

Second, the collective and hierarchical features of Japan's procuracy (as evidenced in practices such as *kessai*—the system of consultation with superiors about case dispositions) help explain Japan's high conviction rates. These rates, which average about 97 percent in contested cases, are frequently criticized as a sign that Japan's criminal process is biased against criminal suspects and offenders and in favour of the state. Although there are plenty of pro-state biases in Japanese criminal justice (see {Miyazawa 1992; Feeley and Miyazawa eds2001; Johnson 2002}), the major cause of the high conviction rates is actually the prudent charging policy of Japanese prosecutors. That policy is not an accidental accomplishment; it is the product of conscious planning and of well-designed mechanisms (such as kessai) for turning aims into achievements. Furthermore, the primary beneficiary of the charging policy is not "the Japanese state" (as many critics contend) but rather suspects and offenders who do not get charged in the Japanese system but who would (if similarly situated) in countries (such as the US and UK) that organize prosecution differently. Ironically, a system that convicts almost all defendants is often highly protective of the liberty interests of criminal suspects, a fact that is generally overlooked by well-intentioned but mistaken critics of Japan's high conviction rates (see {Johnson 2002} p237).

Japan's high conviction rates have been lamented and applauded by many people, and the point of departure for most evaluations is the perception that Japan has a conviction rate that comes close to 100 percent. This perception is misleading because it fails to take into account the fact that Japan has neither an arraignment system nor a system of plea bargaining (the latter is illegal in Japan, though it does occur occasionally), so that all defendants—even those who have confessed—receive a trial. And of course, defendants who acknowledge guilt are unlikely to be found not guilty.

If one recalculates Japan's conviction rate (number of defendants convicted/number of defendants tried) by considering only those criminal trials in which guilt is contested (about 4 to 7 percent of all trials), then the conviction rate drops considerably. In Summary Courts, which try less serious crimes and cannot impose punishments greater than 3 years of imprisonment, the conviction rate in contested cases ranges from 93 to 96 percent. In District Courts, which try more serious crimes, the conviction rate in contested cases is slightly higher, ranging from 95 to 98 percent (Johnson, 2002, p.217). Compared with conviction rates in America and some other countries, these convictions rates are still high (the median conviction rate in American jury trials is about 75 percent), but contrary to what many analysts contend, Japan's conviction rates do not come "vanishingly close" to 100.

Even with this clarification the question persists: Why does Japan have high conviction rates? There are many parts to the answer, including a judiciary that can be overly compliant, but the core answer and the key proximate cause is prosecutors' conservative charging policy, which tends to allow the indictment of criminal suspects only when the probability of conviction is very high. The procuracy's internal, hierarchical, and informal controls (such as *kessai*, described elsewhere in this report) are used to monitor and sanction front-line prosecutors, so as to ensure that they comply with what has been called a "trial sufficiency policy" (Johnson, 2002, p.230).

Prosecutors' conservative charging policy has several effects in addition to the high conviction rate. For starters, some prosecutors find it frustrating, for they would like to charge more suspects. Many victims never get heard in court because their cases are dropped before indictment. The Japanese public loses opportunities to be educated in the "classroom" of the criminal trial (see Tocqueville). And Japan's conservative charging policy also seems to suppress the supply of skilled and vigorous defense lawyers, for who wants to do criminal defense when the chances of acquittal are only about one in 20, even when guilt is contested?

Many commentators contend that Japan's high conviction rate reflects a criminal justice system that is biased in favor of the state and against suspects and defendants. There are some important elements of truth in this view (see Setsuo Miyazawa, 1992), but it is too simplistic. Among other things, Japan's conservative charging policy means that the procuracy prefers the risk that an uncharged offender will re-offend over the risk that a charged suspect will be acquitted. This preference, purposefully institutionalized and systematically enforced, means that many offenders who would be charged in other systems (such as those in the United States, England, and Australia) never face the threat of criminal sanction or stigma in Japan (Johnson, 2002, pp.238-239).

3.3 Tasks and Functions

As described in this section and further below, prosecutors in Japan play three major roles, as operators, managers, and executives (see generally {Wilson 1989}). *Operators (hira kenji)* investigate, indict, and try cases. These frontline workers perform the organisation's core tasks: processing suspects by "clarifying the truth" about alleged bad acts; determining legal guilt and innocence; and specifying appropriate sanctions. *Managers (joshi)* monitor and coordinate the work of operators in order to attain organisational goals. *Executives (kanbu)* have special responsibility for securing organisational autonomy and maintaining public support.

Operators: Uncovering and Constructing the Truth

Operators do the work that justifies the procuracy's existence. They perform its core task, the work that enables the organisation to manage its most critical problem. For prosecutors, the central problem is the historian's challenge: determining who did what to whom, and why. The bad acts

from which most crimes are constructed consist of events that have already occurred. Since the past does not exist and cannot be directly perceived, prosecutors come to know it not through immediate observation but by collecting and interpreting evidence. Thus, *the prosecutor's core task is to clarify and construct the truth* about allegedly bad conduct – to recover bad acts from their ambiguous past by finding a coherent story in them or imposing one on them so that sound charge decisions can be made.

Of course, operators perform many other tasks as well, such as deciding whether and what to charge and presenting the state's case at trial, but their central task, the fundamental work on which all other work depends, and the job prosecutors themselves regard as their primary duty, is to explicate the facts of cases by acquiring and interpreting evidence during the pre-indictment investigation.

Prosecutors believe their core task is to "clarify the truth" about alleged criminal acts. In a survey conducted in 1994-95, 216 out of 235 prosecutors (92 percent) ranked "explicating the truth about a case" as a "very important objective." Of the other 19 respondents, 18 ranked this objective as "important" and only one as "not very important." Thus, 234 out of 235 prosecutors (99.6%) regarded "explicating the truth" as either important or very important, making this goal the organisation's most cardinal objective. In California, Washington, Minnesota, and other American prosecutors offices, the nature and depth of the commitment to truth- finding differs considerably (see {Johnson 2002} p123).

Japanese prosecutors agree not only about what their core task is but also about how to perform it. In brief, prosecutors clarify the truth by preparing written documents (*chosho*) during the pre-indictment investigation. Usually, the most crucial part of these dossiers is the suspect's confession, for a confession remains "the queen of evidence" in Japan, "the decisive element of proof sought by every prosecutor before he takes a case into court and the single most important item determining the reception his efforts are likely to receive from most Japanese judges when he gets there" (see {Johnson 1972} p149). This reliance on confessions is sometimes taken too far. Indeed, many of the most serious miscarriages of justice in Japan have occurred because of false and coerced confessions.

At present, prosecutors and police do not record confessions verbatim. Rather, they prepare summary statements that abridge and organize the suspect's statements. These summaries synthesize testimony that the suspect has given over several sessions or days of interrogation. They are, therefore, the prosecutor's reconstruction of the truth or, as many defence lawyers see it and say it, "the prosecutor's essay." This method of constructing "truth" enables prosecutors to generate logically consistent and coherent accounts which judges may find difficult to resist. Moreover, large, liberally interpreted exceptions to the hearsay rule allow most dossiers to be entered as evidence. The judge's role, then, in practice if not in principle, is to review the results of the investigation as recorded in police and prosecutor dossiers. The truth that typically prevails at trial – and the truth that judges authoritatively pronounce – is the truth that prosecutors have uncovered and constructed. In the end, claims about the status of "truth" in particular cases depend on perceptions about the legitimacy of the process (and the actors in the process, prosecutors especially) for construing and constructing the truth.

During the investigation period, operators perform many other functions as well. They apply to judges for detention warrants. They supervise investigations by the police (who are the main investigators in the vast majority of criminal cases). They perform their own investigations, especially in white-collar crime and high-profile cases. They interrogate suspects and interview

witnesses. They research past cases in order to discern what the "going rates" have been in similar cases. And they make decisions about what sentence to request if an indictment is made.

During the trial period, front-line prosecutors do what trial prosecutors do in most other systems: present the state's evidence, cross-examine witnesses, and try to persuade the court to convict and impose an appropriate sentence. Until the lay judge reforms of 2009, many trial prosecutors found trial work less interesting and challenging than investigation-and-charging work because most trial sessions were mainly paper affairs which did little more than ratify decisions that had been made by police and prosecutors during the pre-trial period. But with much increased lay participation in the new trial system (at least for serious cases), there is less reliance at trial on documents (*chosho*) and more reliance on oral presentations and arguments made in open court. Although it is too early to tell how the lay judge system will alter the standard operating procedures of prosecutor-operators, many things will no doubt change under the new system—but not everything. The early returns from the first year of Japan's lay judge experience suggest that prosecutors' sentence requests (*kyukei*) may have become more severe for some kinds of cases (murder, rape, assault with injury), but of the first 444 persons tried by lay judge panels, there was not a single acquittal (Mainichi Shimbun, April 17, 2010: "Saibanin Saiban: Gokan Chisho ni Genbatsu Keiko: Jisshi Jokyo o Kohyo").

3.4 Relations

Relations between Prosecution Agencies

The principle of prosecutor unity stands in tension with another provision of the Public Prosecutors Office Law, the "principle of prosecutor independence." This tenet states that each individual prosecutor is an "independent government agency" with power to institute prosecution and perform other functions as authorized by law. This independence is protected in two main ways. First, no prosecutor can be fired, suspended, or given a pay cut except in narrowly defined circumstances and through specific legal procedures. Second, and as described above, the Minister of Justice (and "politicians" more generally) have limited authority to direct and manage prosecutors. In practice, the principle of prosecutor independence is often subordinate to the principle of prosecutor unity and the corollary requirement of obedience to superiors. As Kawai Nobutaro wrote a half-century ago, "the iron rule" of Japan's procuracy is that "those above command and those below obey" (see {Johnson 2002}).

Maintaining Independence

Executive prosecutors create space for operators and managers to conduct their jobs. Their chief concern is acquiring sufficient freedom of action so that operators can perform their critical task and so that managers can infuse the definition of that task with a sense of mission. Executives also "maintain" the organisation by acquiring the resources (money, labour, and political support) it needs to survive and prosper. Both tasks are easier to accomplish in Japan than in the United States.

The main focus of executive prosecutors is organisational autonomy, which means minimizing rivals and securing freedom from political constraints. Since prosecutors in Japan monopolize the power to charge people with crimes, they face little competition when it comes to making the critical indictment decision. Police duties, however, do overlap with prosecutor obligations, especially with respect to investigations and "clarifying and constructing the truth." As a result, prosecutor relations with the police are more complicated than relations with any other actors in the criminal court community. Executive prosecutors spend considerable time and energy negotiating this sensitive relationship.

As for freedom from political constraints, until recently, crime and criminal justice were relatively quiescent issues in Japan, so that politicians routinely deferred to prosecutors on most criminal justice matters. Since 1945, a Minister of Justice has openly used "the power to direct and manage" the Prosecutor general in only one case, the shipbuilding scandal of 1954 (see also Part 2.4 above), though it is difficult to discern how often subsequent ministers have used their authority to influence case decisions behind the scenes. What is clear, however, is that in the late 1990s, as crime and criminal justice became increasingly politicized issues and politicians began to engage more directly in criminal justice policy-making, executive prosecutors have had to spend more energy securing this aspect of organisational autonomy.

A key responsibility of executive prosecutors is to maintain the organisation is by securing sufficient political support to enable operators and managers to perform their jobs effectively. The key constituency is the public, with whom executives quietly but consistently cultivate good relations. Executives care about this relationship for several reasons. First, they need to recruit qualified personnel to fill the organisation's ranks, and the legal apprentices from which they recruit participate in the wider culture and thus are influenced by popular perceptions. Second, prosecutors care about their relationship with the public because Article 4 of the Public Prosecutors Office Law imposes a duty to "represent the public interest" (an obligation most take seriously). This is of course a general mandate, but what it means for the most part is that prosecutors of all ranks are expected to listen to what suspects, defendants, victims, witnesses, and citizens say about the criminal process—both in specific cases and in more general terms—and take their comments and interests into account when making decisions about particular cases or deciding general policy. Third and most importantly, in order to perform the organisation's core investigative tasks, prosecutors must secure the public's cooperation – as victims, complainants, witnesses, suspects, and defendants, and as lay judges who will render verdicts and decide sentences in serious criminal cases (under the new lay assessor or quasi-jury system which started in 2009: see Part 4.12 below).

3.5 Mechanisms

Prosecutorial Oversight

Managers: Cultivating Mission and Controlling Operators

If Japanese prosecutors agree that uncovering and constructing the truth is their core task, how is that sense of mission inculcated, and how are operators coordinated and controlled so as to accomplish it? The answer is managers, who perform two key functions. First, managers cultivate in operators widespread agreement about and endorsement of the way their critical task is defined. Second, managers coordinate and control operators in order to attain organisational and jurisprudential objectives such as the correction of individual offenders and the treatment of similar cases similarly.

Managers in Japan also coordinate and control operators' activities to an extent unseen in American prosecution offices. The contrast is stark. Most American prosecutor organisations have "virtually no instruments by which to enforce" office policies (see {Abrams 1971} p53), and American scholars have even argued that "a bureaucratic, rule-oriented, administrative model of management does not fit the nature of the job of criminal prosecution" (see {Carter 1974} p117). Even in federal prosecution offices, coordination and control are so little evident that one commentator has called the American system an "adhocracy" (see {Burnham 1996} p83).

Japan is different and in this respect more like France and South Korea than the United States. Prosecutor managers utilise three main mechanisms to ensure that office policies will be properly implemented by front-line prosecutors. First, managers articulate specific criteria in written

manuals, guidelines, and standards (such as the *shori kyukei kijunshu*). Unlike their American counterparts, Japanese prosecutors work in an organisation that is saturated with policy directives, and more than 99 percent of those that I surveyed said that the directives are indispensable guides to action. In contrast, a similar survey conducted in California found that more than 80 percent of American prosecutors stated that formal manuals and rules are unimportant.

Second, managers in Japan require front-line prosecutors to clear their decisions with supervisors, chiefly through the *kessai* system of consultation and approval. In order to make charge decisions and sentencing recommendations, operators must consult with and obtain the approval of two or three managers, depending on the seriousness of the case. This is known as *shobun kessai*. In serious cases, operators must also obtain approval to arrest, detain, and extend the detention of suspects. Throughout the *kessai* process, the manager performs at least four functions. As judge he reviews the adequacy of the evidence. As teammate he provides aid and support in difficult cases. As teacher he helps educate young prosecutors about how to do their jobs. And as manager he ensures that like cases are treated alike.

Third and finally, managers control and coordinate operators through audits (kansa) of past decisions. In audits, managers mainly review cases that have not been charged. When they find a dubious non-charge disposition, they require the responsible prosecutors to produce written and oral explanations – an obligation that all find onerous. Like audits in the business world, these after-the-fact checks are one more way of ensuring that the organisation's affairs are in order.

In sum, managers in Japan's procuracy wield strong controls over their subordinates' behaviour – much more influence than their American counterparts do. Athough these controls go a long way toward explaining some of the central achievements in Japanese criminal justice (high levels of correction, consistency, conviction, and so on), they also open the door to inappropriate top-down pressure in cases that prosecutor elites regard as "risky" (such as the arrest of prosecutor Mitsui Tamaki just hours before he was scheduled to blow the whistle on prosecutor corruption; see Mitsui 2003). Predictably, bureaucratic controls within the organisation are also a significant source of dissatisfaction among people who quit the procuracy (Johnson 2002:135).

Administrative Management

A major concern for executive prosecutors is organisational maintenance, or assuring the necessary flow of resources to the organisation. Three inputs are especially crucial: capital, labour, and political support.

Obtaining adequate financial appropriations has seldom been a major problem for prosecutor executives. In fact, the procuracy's share of the national budget has hardly changed since 1980. At about 0.120 percent (12 yen per 10,000), the procuracy's budget remains about one-third the size of the budget for courts. Around 90 percent of that budget goes to pay personnel expenses such as salaries, which compare favourably to prosecutor salaries in the U.S. Department of Justice. As mentioned below (Part 4.16), prosecutors' annual salaries are broadly similar to judges' salaries, but judges may receive better pension and other benefits (such as heavily subsidised accommodation when the judges are rotated around various Courts around the country, usually for 3-year terms).

Acquiring an adequate supply of labour has been a more difficult task for executive prosecutors, but they have always managed to do so satisfactorily. The personnel problem (a shortage of new recruits and an increase in the number of *yameken*, or "prosecutor-quitters") was especially acute from the mid-1980s through the early 1990s, when many real and potential prosecutors expressed frustration about the ubiquitous bureaucratic controls described above and about the transfers to new office and job assignments that occur every two to three years (one purpose of regular transfers

is to discourage the kinds of familiarity and friendships that may breed corruption). Since then, however, the personnel problem has declined in significance, in large part because the number of bar-passers (and therefore the number of potential prosecutors) has been increased substantially (with the justice system reforms of recent years, the number may continue to increase in the years to come).

Oversight and Inspection Mechanisms

Much problematic prosecutor behaviour stems from two connected facts: the criminal justice system's deep dependence on admissions of guilt, and the absence of checks on official power in the interrogation room. In Japan, the conditions of interrogation – the duration and intensity of questioning, the duty to endure questioning even after the right to silence has been invoked, and the unavailability of defence lawyers – mean that an "overborne will" is more than merely an occasional problem {Hamada 1992}. Although Japanese courts have been reluctant to acknowledge this problem {Miyazawa 1992}, the United Nations has not. It has repeatedly rebuked Japan for violating international protocols about the length, location, and methods of interrogation; for excessive reliance on confessions for evidence; and for inadequate disclosure of evidence to the defence. In the words of one of the country's pre-eminent legal scholars, Japan "cannot go on forever ignoring the UN's counsel" (see {Hirano 1999} p4).

Clearly, a salient problem of prosecution in Japan is the secrecy that shrouds prosecutor behaviour. Interrogation abuses and excessive secrecy both arise from the fact that prosecutors are largely unaccountable to external organs of authority {Foote 1999}. The procuracy's autonomy and solidarity interact to insulate the organisation from outside scrutiny. Autonomy creates room for the freedom of action that bureaucrats everywhere crave, but the cost is a loss in external accountability. At the same time, the organisation's solidarity means that prosecutors on the front lines can react to internal control efforts in only two ways. They can comply with directives and thereby remain "loyal" to the organisation, or they can "exit" the role altogether. In most instances, "voice" (dissent) is not an option.

When Japanese prosecutors have tried to protest organisational problems, as Abe Haruo and Mitsui Tamaki did, the consequences were severe. In the early 1980s, the dissenting Abe was pressured to quit the organisation (and later was charged, some say unfairly, with criminal extortion; see {Kubo 1989} p97). Some 20 years later, {Mitsui 2003} was arrested by prosecutor colleagues on the eve of a press conference that he had scheduled in order to tell the world what he knew about slush-fund embezzlement by executives in the procuracy. Tachibana Takashi, one of Japan's premiere investigative reporters, called Mitsui's arrest "absolutely ridiculous" (*Shukan Asahi,* 17 May 2002), and Uozumi Akira, another respected writer, said "there are almost no previous examples of exercises of authority as arbitrary as this one" (*Shukan Kinyobi,* July 5, 2002).

Without more meaningful mechanisms of external accountability, prosecutors in Japan will be able to continue concealing actions that, in a democracy, ought to be subject to public scrutiny. The new lay judge or quasi-jury (*saiban'in*) system may be one mechanism that will shed more light on this important part of the criminal justice system (see {Anderson and Johnson 2009} and Part 4.12 below). At present, however, it needs to be noted that Japan's prosecutor organisation is so cohesive, so unaccountable, and so resistant to outside scrutiny that it is difficult to see or say what some of its problems are (see {Johnson 2002} p279).

3.6 Career and Transparency Issues

Prosecutors in Japan are appointed from the ranks of those who have passed the bar exam and graduated from the Legal Training and Research Institute (see other parts of this report on how

to become a legal professional). The initial assignment for most prosecutors is in a large urban (District) prosecutors office, where the diversity of cases and the availability of senior prosecutors enable newcomers to rapidly learn more about how to do the job. After a year or two in the initial assignment prosecutors will be transferred—and most will be transferred every two or three years thereafter. Decisions about where to be transferred depend on a variety of considerations, including what the organization's needs are, seniority, merit, and the individual prosecutor's own desires. As prosecutors gain more experience, most move into management ranks, with the most able and the most politically reliable being assigned key posts in the Ministry of Justice as well. Evaluations of merit also involve many criteria, including, of course, assessments of mistakes that have been made by the prosecutor in question. In some instances, acquittals that can be attributed to imprudent or ineffective prosecutor practice result in postings to less desired locations and jobs. Though Japan's prosecutor system is a career procuracy, some prosecutors do leave it before reaching retirement, for various reasons: because frequent transfers can be hard on family and personal life; because of frustration over job assignments or career trajectory; because of a yearning to do different kinds of legal work (usually as a private attorney); and because of a desire to earn more money than can be made working as a prosecutor. On the whole, however, satisfaction with the job seems to be quite high (Johnson, JWJ, 2002, p.49; see also p.142).

From the time they enter the legal profession, prosecutors are educated to believe in the crucial importance of truth through confessions. The instruction they receive is both formal and informal. Formally, legal apprentices hear numerous lectures that emphasise the "truth through confession" theme, and training programs thereafter further help to inculcate in young prosecutors a shared sense of this mission. The most important settings for instruction, however, are the informal and after- hours occasions at restaurants, bars, karaoke clubs, and the like. There, young prosecutors are regularly instructed in the organisation's traditions and implored to carry them on. Like Japanese working in other large organisations, from business to bureaucracy, prosecutors spend a great deal of time together. Indeed, the prosecutor organisation so envelops them that it sometimes seems to resemble a "total institution" – a place where the usual barriers between work, play, and sleep break down (see {Goffman 1961} p5). Most prosecutors regularly spend twelve hours or more in the same places, under the same authorities, and in the company of the same (prosecutor) others. One salient subtext of their interactions is that a prosecutor's job is to determine the truth by obtaining a full, detailed confession. The cumulative effect of these countless conversations is a strongly shared sense of occupational mission.

The organisation of prosecution in Japan is cohesive to an extent matched by few, if any, American prosecutor organisations. Japanese prosecutors manifest a commitment to their organisation and to each other that are seldom seen elsewhere. Although some individual prosecutors chafe at the controls that correlate with cohesion (and some end up leaving the organisation before retirement), for the vast majority, solidarity with colleagues and commitment to the organisation are welcome features of their occupational environment. The cohesion between Japanese prosecutors helps make sense of a critical fact that is hard to explain otherwise – the seriousness with which they perform their jobs. Compared to their American counterparts, prosecutors in Japan are extremely *majime* (serious) about their work. Since the values at stake in criminal justice – life, liberty, dignity, property, and reputation – are very important, one must commend Japanese prosecutors for the responsible attitude with which they approach their duties. Their commitment to the prosecutor's role obligations seems also to reflect high levels of job satisfaction, for in organisations of various kinds "satisfied workers usually work harder and better than frustrated ones" (see {Etzioni 1964} p2).

Conclusion

Japan's criminal justice system—and its system of prosecution in particular—has some significant problems. Investigations can be highly intrusive and even coercive. Truth is sometimes fabricated, corrupted, and concealed. Mistakes are made, occasionally leading to miscarriages of justice. Bias exists, against outsiders and the unrepentant especially. Prosecutors lack accountability to external organs of authority, and their ostensible adversaries (defense lawyers) are too often impotent in the criminal process. Victims' needs and interests are sometimes sacrificed at the conviction rate altar (though in recent years victims have moved considerably closer to center stage in Japan's criminal process). Most fundamentally, Japan's prosecution system is so averse to outside scrutiny and academic study that it remains difficult to see or say what some of the problems are (Johnson, 2002, p.279).

Still, in comparative perspective Japan's system of prosecution seems to work fairly well. Many comparisons could be made, but here we make only a few summary observations about how prosecution in Japan compares with that in the United States. If justice means taking into account the needs and circumstances of individual suspects, then prosecutors in Japan must receive higher marks than their American counterparts. If justice implies treating like cases alike, then the capacity of Japan's procuracy to do so is impressive. If justice should promote healing, not just punishment, then Japanese prosecutors must be reckoned more restorative than prosecutors in the United States. And if justice depends on uncovering and clarifying the truth, then we hope that this section has shown how fundamental this maxim is deemed to be in Japan.

The British historian Arnold Toynbee observed that "civilization is a movement and not a condition, a voyage and not a harbor." At the same time, change does not necessarily mean progress (as noted by American journalist H. L. Mencken). In the years to come, Japan's procuracy will have to adapt to changes in the social, political, and economic contexts of criminal justice as well as to changes that have been stimulated by the country's justice system reform movement—including the lay judge system that began in May 2009. For example, in 2009, when the Democratic Party of Japan gained control of government, there was meaningful regime change for the first time in more than half a century. In many respects, Japan's economy continues to stagnate, as it has for most of the past two decades. And in the years to come major demographic challenges will confront the country as a result of the interaction between a baby bust and the rapid greying of society. As Japan's prosecutor organization adjusts to these and other changes, it is important to recognize that change can sometimes be for the worse. Consider, for example, the rise of mass incarceration in America since the 1970s (America's present per capita incarceration rate of 753 inmates per 100,000 population is more than seven times higher than it was four decades ago and 12 times higher than Japan's present rate of 63). Or consider the use of torture by American interrogators in the never-ending war on terror—and in defiance of international law. Indeed, change is not necessarily progress.

But of course some things do need to be changed in the way Japan prosecutes crime. In our view there are two main imperatives: enhancing transparency in the interrogation room, and increasing accountability to external organs of authority. It seems likely that these changes will eventually come. In working toward them, there are also real prosecutor achievements that must not be undermined. High on the list of merits is the historic commitment to "rehabilitation through leniency" that has characterised Japan's procuracy for much of the postwar era (see Johnson 2002 and Foote 1992). Unfortunately, in the last decade or so there have emerged signs that Japanese criminal justice is becoming significantly more punitive, a trend that some observers call "penal populism" (see Miyazawa 2008, and Hamai and Ellis 2008). America's experience in recent decades suggests that this is a journey best avoided.

4. Court System

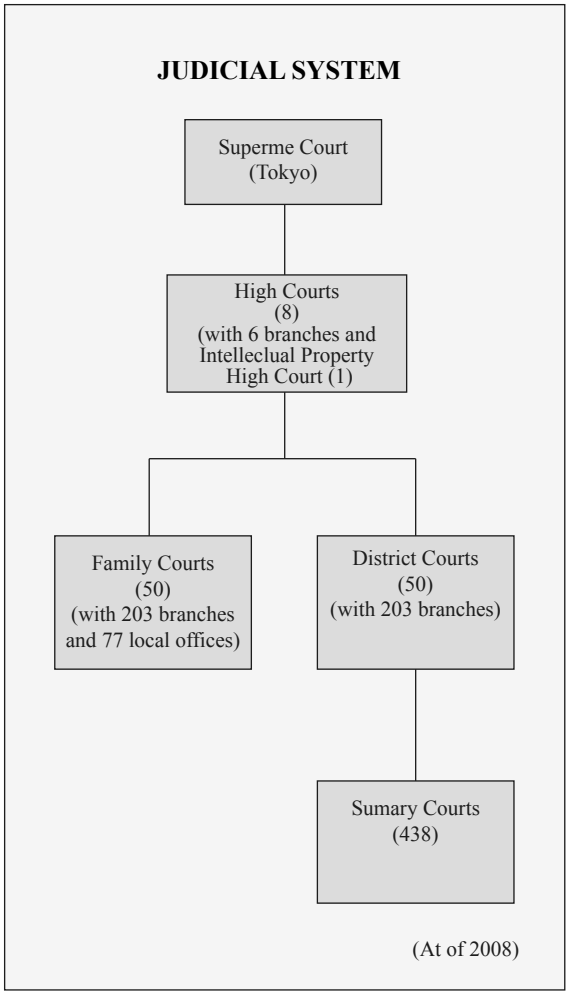
Within the overall analytical framework set out in chapter 1 above, chapter 4 should give more detail on the court system (with particular focus on its inter-relationship with other agencies, and the degree to which its role and functions are shaped by political, ideological, cultural (etc) factors set out above).

4.1 Role and Position

Regarding the judiciary's structure, the post-War Constitution provides only that "the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law" (Art 76(1)). The lower courts established by law are high courts, district courts, family courts, and summary courts.

The Constitution provides that "no extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power" (Art 76(2)). Thus, no judicial body can exist outside the hierarchy with the Supreme Court at its apex. While some quasi-judicial bodies which adjudicate particular types of dispute do exist as parts of the executive branch, their judgments are not final. Parties can sue to seek revocation of the judgments in either a district court or a high court, depending upon the organs which made the first decisions, and the Supreme Court has the final say. Those quasi-judicial bodies include the Fair Trade Commission, the Marine Accidents Inquiry Agency, the National Tax Tribunal, and the Patent Office.

As for the relationship to the other branches of government, as mentioned in Chapter 1 above and depicted in the Figure below, the judiciary provides a check over the legality and constitutionality of legislation enacted by the Diet. It is also itself subject to review by the Legislature through the possibility of impeachment proceedings (infrequently invoked: see Part 4.18 below). The judiciary reviews orders and other secondary legislation or acts by the Executive, while the Cabinet formally designates the Chief Justice of the Supreme Court and appoints its Justices as well as lower Court judges (although lower court appointments in fact are recommended by the Supreme Court and its General Secretariat: see Parts 4.7-9, 4.13 and 4.17). Citizens entitled to vote in general elections, who also elect parliamentarians and hence the Prime Minister, can also review nominations to the Supreme Court (but no Justice has ever been removed through this process: see Part 4.18 below).



4.2 Organisation

The Supreme Court is the highest body of the judicial branch, dealing with appeals filed against judgments of high courts. District courts are courts of general jurisdiction that deal with most

civil, criminal, and administrative law cases in the first instance. Family courts are specialised courts dealing with family affairs and juvenile delinquency cases in the first instance. Summary courts are courts of limited jurisdiction which deal with civil cases involving claims not exceeding 1,400,000 yen and minor criminal cases designated by law in the first instance (<http://www.courts.go.jp/english/system/syst em.html>).

4.3 Model

The Supreme Court is the highest body of the judicial branch, dealing with appeals filed against judgments of high courts {Abe and Nottage 2006}. It comprises the Chief Justice and fourteen Justices. Hearings and adjudications in the Supreme Court are made either by the Grand Bench, or by one of three Petty Benches each made up of five Justices. Each case is first assigned to one Petty Bench. Only if the Petty Bench assigned a case finds it necessary to answer questions concerning the interpretation of the Constitution, or to overrule a precedent of the Supreme Court, will the case is transferred to the Grand Bench. The vast majority of cases are decided by Petty Benches.

The Court has a high caseload, despite reforms to the Code of Civil Procedure in effect since 1998 allowing discretion to hear civil appeals, at least compared to many Anglo-American final courts of appeal {Taniguchi 2005}. Specifically, for example, in 2008 the Court received 3,977 new civil cases, 878 administrative law cases, and 2497 criminal appeals (and However, almost all were simple cases which could be dismissed by "order" or other means instead of by full judgments (see hand-annotated/translated data provided separately). Furthermore, the preliminary analysis and drafting of such orders is done by around 30 *chosakan* who are elite-track experienced District Court judges rotated into the Supreme Court to assist the 15 Justices of the Supreme Court (see further Part XXX below). In fact, for example, other data (eg via its websites, and available on request from this Report's authors) indicates that the Supreme Court only gives full judgment - and therefore more direct scrutiny by the Justices themselves - in around 100 civil/administrative law cases each year, and that this caseload has been quite stable over recent years. This is still quite high for a final court of appeal (compared eg to the Australian High Court, House of Lords [now called the Supreme Court] in the United Kingdom, or the Supreme Court of the United States), but may not be so high compared to other countries influenced by the civil law rather than common law tradition. In addition, for these 100+ cases each year, Japan's Supreme Court Justices can and do also draw on the research capacity of the chosakan.[Q.2.6.1(b)]

High courts are intermediate appellate courts which have jurisdiction mainly over appeals against judgments rendered by district courts or family courts. In criminal cases originating in summary courts, however, appeals come directly to high courts. In addition, a high court has original jurisdiction over administrative cases on election, insurrection cases, etc. The Tokyo High Court also has exclusive original jurisdiction over cases to rescind decisions of such quasi-judicial agencies as the Fair Trade Commission. There are eight high courts in eight major cities and six branch offices elsewhere; and in April 2005 the Intellectual Property High Court was newly established as a special branch of the Tokyo High Court, to handle cases relating to intellectual property only.

District courts are courts of general jurisdiction which deal with most of civil, criminal, and administrative law cases in the first instance. In civil cases, district courts also have jurisdiction over appeals against judgments rendered by summary courts. They are situated in 50 locations, with branches in 203 locations. In district courts, most cases are disposed by a single judge. When a collegiate body consisting of three judges in a district court finds that a case brought to the court should be handled by a collegiate body, the case is handled by the collegiate body. In addition, the

Court Organisation Law requires that certain kinds of criminal cases and appeals against judgments of summary courts should be handled by a collegiate body consisting of three judges.

Family courts are specialised courts dealing with family affairs and juvenile delinquency cases in the first instance. Family courts and their branch offices are established at the same places where district courts and their branch offices are located. In addition, there are seventy-seven local offices of family courts, in which cases are handled by a single judge.

Summary courts are courts of limited jurisdiction which deal in the first instance with civil cases involving claims not exceeding 1,400,000 yen and minor criminal cases designated by law. There are 438 summary courts. In summary courts, all cases are handled by a single summary court judge. These judges are typically former court officials and have not passed the National Legal Examination necessary to qualify as *bengoshi* lawyers, prosecutors or judges of the superior courts.

There is basically one District Court for each of Japan's prefecture-level units (see Part 1 above), except for Hokkaido island which gets another three because of its geographical isolation (see Part 4.12 below). There are extra Branches in other smaller cities or towns depending on how many cases are brought in those localities. (Generally, for example, the plaintiff in civil litigation must sue in the jurisdiction where the defendant is domiciled. Thus, cities with large populations will have more Branches of District Courts.) In addition, the Tokyo area will have disproportionately more Branches because many companies are incorporated and therefore domiciled in that area). Similar principles apply for Summary Courts. The High Courts are located in some of Japan's largest cities, but also bearing in mind geographical convenience (thus, for example, there is one in Sapporo and another in Takamatsu but not in Yokohama even though the populations of those cities are smaller than Yokohama, which located near to Tokyo which already has a High Court). The Supreme Court is in the capital, Tokyo.[Q2.6.1(a)]

4.4 Tasks and Functions

Courts not only adjudicate cases but also provide mediation services of various types (see Part 4.11 below).

In addition to the primary function of exercising judicial power, the Supreme Court is vested with rule-making power and the highest authority for judicial administration (see Part 4.17 below). Under the post-War Constitution, the Supreme Court administers the whole judicial system independently, without any intervention by the executive branch and legislative assembly (see Part 4.14 below).

4.5 Relations

Investigation Agencies, Security Agencies, Prosecution Agencies

The judicial branch is independent from the executive branch, like prosecutors' offices and police agencies, and also supervises their investigative activities as a neutral decision maker and law-abiding gatekeeper. In criminal trials, however, in fact the courts do not exclude prosecutors' evidence based on violations of procedural rules although the Supreme Court did establish exclusionary rules thirty years ago. Courts have rarely decided that illegally obtained confessions are involuntary although the Criminal Procedure Law prohibits admitting such confessions as evidence. The requests for warrant are almost never refused by the courts. Through these court practices, the prosecutors' offices and police agencies in Japan do not feel they are being supervised by the courts regarding their investigations.

There are two main reasons for this situation: psychological and institutional. First, judges tend to stand in similar positions with the administrative agencies for dealing with criminals/defendants in the criminal process because judges have empathy towards law enforcement authorities. Secondly, judges hesitate to use their supervising power against law enforcement authorities because the institutional background of the Japanese courts lacks a liberal tradition as the national body for human rights protection. Although the judicial branch theoretically has political independence and each judge has independent power without any political intervention, based on the Constitution, each judge has limited democratic foundations based on the public and the community. Instead there exists strong control from the Supreme Court's General Secretariat for promotion and relocation.

Professor Daniel Foote {1992} suggests that the reduced possibility of judicial control over the administrative branch makes distrust for rule by law in Japan from the public, if the legitimacy of investigative authority is suspected. This passivism of the judicial branch in Japan is rooted in their tradition that emerged when the courts came under attack from the conservative LDP in the 1960s, following liberal judicial decisions concerning highly political issues. The General Secretariat did not respond to these attacks by protecting the liberal judges but instead tried indirectly to keep their movements in check (but see Part 4.14 below).

Criminal trials generally have no political context and no arguments emerge regarding the defendant's political background. However, the Japanese courts are very reluctant to protect human rights, like political freedom and freedom of expression, in specific cases concerning such political issues. Recent cases for posting political manifestos in housing complexes are one example. Although residents receive many other fliers, the Tokyo Metropolitan Police arrested only anti-Iraq war campaigners as trespassing on the residential space. The main gate of the complex was not closed and any posting was possible to each door. In the trial, the court only focused on the interpretation of the article for prohibiting trespassing under the Criminal Code and did not mention the constitutional requirement for political freedom and freedom of expression, thus also ignoring discretionary enforcement by the police. Actually, the Japanese police tends to use power not for keeping order and investigating crime but often for gathering information about the Communist Party and citizens' movements, by detecting and pursuing petty offices. Yet Japanese courts hesitate to regulate such arbitrary law enforcement policy dependent on human rights protection because the defence cannot prove the true intentions of police authorities.

State Agencies, Legislative Branch, Executive Branch

Although under post-War separation of powers doctrine (outlined in Part 1) the judiciary is formally separate from both legislative and executive branches of government, a quite unique relationship also exists between the judiciary and the Ministry of Justice (see <http://blogs.usyd.edu.au/japaneselaw/2009/07/who_defen ds_japan_government_l.html>).

The Ministry has responsibility, via the Prosecutors Offices, not only over prosecutors dealing with criminal cases. It also directly manages 55 prosecutors (as of 2009) who handle most of the 20,000 constitutional or administrative (and some civil) litigation cases involving the central government. These *shomu kenji* are able to deal with this large caseload not only thanks to the Ministry's para-legal staff (especially for the many simpler cases) and, for example, collaboration with National Tax Agency officials for tax litigation involving the government. Between one-third to one-half of the *shomu kenji*, either in the Tokyo head office or assigned to regional Legal Affairs Bureaus around the country, in fact are judges who have been seconded by the Supreme Court usually for 2-3 years. The Supreme Court also seconds a few judges to the Tokyo Prosecutors Office. After working for the Ministry, they return to judging.

The JBFA and others have objected to these practices. The judge-secondee *shomu kenji* expanded in the late 1960s when the central government found itself subjected to mass tort litigation (eg for pollution and product safety failures). But it also appears to be an organisational leftover from pre-War French influence on judicial administration and administrative law practice. To avoid criticisms that it is contrary to the separation of powers and creates at least a perception of bias, the Supreme Court has had to be careful not to assign former *shomu kenji* to the administrative law divisions of the larger courts; but in smaller courts it is more difficult for such judges to avoid hearing cases against the government. In any event, this issue has become somewhat less controversial for two main reasons. Since 2004 government agencies such as the MoJ have been able to hire *bengoshi* for up to five years, so as of 2009 five of the 55 *shomu kenji* were *bengoshi,* which diversifies the group. And the Supreme Court has also expanded the numbers of seconded judges and the places where they are sent to – not only other Ministries, but also for example universities and even private law firms (as explained in the next Part 4.7).

4.6 Judicial Education and Training

As explained above (Part 1.3), to qualify as a lawyer (*bengoshi*) with full rights to give legal advice and represent clients – and also to be appointed as a senior court judge or public prosecutor – one must pass the National Legal Examination (*shiho shiken*), and then be trained at the Legal Research and Training Institute (LRTI). University legal education still takes place primarily at the undergraduate level. Every year, about 45,000 students graduate with a Bachelor of Laws. However, most of them do not become lawyers, instead finding employment in governmental organs or private corporations, because it has been extremely difficult to pass the National Legal Examination. In 2004, while more than 40,000 people took the Examination, less than 1,500 examinees passed. The number of successful examinees is intentionally limited. The number was 500 in 1990, then gradually increased to 1,000 in 2000, and to around 1500 in 2004. It was expected rise to around 3,000 per annum in 2010, as part of a broader program of judicial reforms underway since 2001 (see also Part 1.4 above, and Parts 6 and 7 below).

Another aspect of the judicial reform program concerning the training of prospective legal professionals was the inauguration of 68 new postgraduate "Law Schools" from April 2004. However, although it is easier for their (carefully selected) students to pass a "New Legal Examination" (*shin-shiho shiken*), it remains one of the most difficult in Japan – with a pass rate of about 30% {Nottage, 2005a}. The old *shiho shiken*, which could be attempted without any university degree, has been gradually phased out to allow the new Law Schools to get established, although (as recommended by the JRC in 2001) a small new scheme will be introduced to allow those unable to afford Law School to still qualify to become a *bengoshi*, prosecutor or Judge.

Those who have passed the Examination receive the same further but more practical legal training the LRTI, administered by the Supreme Court and funded out of the judiciary's budget. The five courses taught in this Division of the LRTI comprise criminal and civil litigation (*keiji* and *minji saiban*, both taught by judges and concentrating on *yoken-jijitsu-ron* or dwhat facts have to be alleged proven to make out claims), prosecutions (kensatsu, taught by prosecutors), civil and criminal law practice (*minji* and *keiji bengo*, taught by *bengoshi*). Trainees receive a government stipendium and subsidised accommodation, as well as externships in lawyers and prosecutors offices as well as a court. The rises in of those passing the LRTI each year over the last decade have been paralleled by reductions in the period of overall training, from 24 to 12 months.

The style of LRTI instruction is very much based on court-related work, especially litigation techniques and judgment-writing. It retains remnants of the pre-War orientation towards training

to become judges (or prosecutors, who were then considered equal or even superior to judges). This is despite the large proportion of judicial work involved in settling cases, rather than rendering formal judgments (see Part 4.11 below). It also goes against the reality that around 80% of LRTI graduates go into private legal practice, which is steadily involving more transactional legal work. Moreover, from the late 1960s some of the brightest graduates began declining offers to work as judges upon graduation, with Tokyo's now very large law firms recently becoming even more attractive career options (see Part 6 below).

Once graduates have decided on their career path, there is still very little lateral movement. The Courts Law has long provided that *bengoshi* or prosecutors can be appointed as judges, but there has been almost no exchange. One very limited exception has been the re-appointment as judges of prosecutors "loaned" from the Courts to the Ministry of Justice, usually for 2-3 years (see Part 4.5). Another is the appointment of *bengoshi* as full-time judges, since the Supreme Court changed its policy due to increasing pressure from the JFBA. However, no more than five were appointed this way each year through the 1990s. Somewhat more have been so appointed following the JRC recommendations, but the numbers remain low – ranging between 4-10 yearly over 2003-9 (see, in Japanese, <http://www.toben.or.jp/news/libra/pdf/2009_11/p02-16.pdf>). A further recent development has been the appointment of *bengoshi* as part-time judicial officers (called *chotei-kan*) empowered to conduct civil or domestic relations conciliation procedures with the same level of competence as a judge (see Part 4.11). They are appointed from among attorneys who have practical experience of five or more years, and 237 were so appointed over 2004-9.

The few who are appointed to the judiciary from among *bengoshi* will have received some ongoing Continuing Legal Education, administered through Bar Associations, although this too is a recent and quite limited development (see Part 6.4). Those who pursue a career as a judge upon graduation from the LRTI are dependent on ongoing education administered by the Supreme Court. The Court itself organises various seminars or longer conferences (eg two *jitsumu kyogikai* in 2009), usually to encourage – but not, at least formally, to force – more unified practices among lower courts dealing with pressing socio-legal issues (eg traffic accidents from the 1960s: {Foote 1992}). The LRTI also offers a few such conferences (collectively called *sogo bunya kenkyukai:* one of the two in 2009 was for judges seconded as professors to the new Law Schools). The LRTI offers more area-specific Seminars over 2-3 days (*saiban bunya betsu kenkyukai:* 19 in 2009), with numbers of attendees similarly capped at 20-40 judges each. Usually each lower court or Division within larger ones gets funding to send a judge to attend such events, meaning that judges – especially younger ones – do not get the opportunity to attend them very often.

In addition, through the LRTI the Supreme Court arranges six induction courses (*shokumu donyu kenshu*) especially for newly appointed judges (eg for one week immediately after graduation from the LRTI and before commencing work in the courts; 4 days after three years of judging; 3 days after ten years and promotion from Associate to Full Judge; also 3 days for those few judges appointed from among *bengoshi*). There are also some separate induction courses and ongoing CLE Seminars specifically for Summary Court judges (five in 2009).

All such official judicial training is conducted internally; in general judges cannot get funding to attend conferences or educational events hosted by other organisations such as the JFBA. However, the Supreme Court does arrange for some short-term study tours (*hakengata kenshu*). In 2009 there were two to media organisations (newspaper companies and the national broadcaster NHK – for 16 full judges), three to private companies (Tokyo, Osaka, Nagoya – for 24 full judges), and two to a university or technology institute to get IP-related training (3 judges, one for 3 months rather than 2 weeks). This program offers one-year secondments by full and especially associate judges

to the Bank of Japan (one) and private companies (nine judges), with the Supreme Court covering their salaries and some further expenses.

Lastly, the Court organises a growing number of other long-term secondments. One longstanding example is to the MoJ as *shomu kenji* (10 planned for 2010), where over 2-3 years the judges obtain new perspectives on legal practice and the workings of government by helping represent it in administrative and civil cases (see Part 4.6 above). Others go to the MoJ to assist with other work such as law reform initiatives over 2-3 years (10 in 2010). Another established practice is secondment directly to the Tokyo District Prosecutors Office for 2 years (a few judges, having at least 5 years' experience). All these judges resign and get appointed as prosecutors (*kenji*), then get reappointed when rejoining the courts. So do almost all judges who are seconded to other Ministries or government agencies (a few each and also for 2 years in principle, although some of these also simultaneously have another status (eg Tribunal Member or *shinpankan* if working in the Japan Fair Trade Commission). This includes the Foreign Ministry and its missions overseas, and usually another judge is seconded to JICA or the MoJ to assist them with legal technical assistance projects abroad. Around 30 associate judges do a year's research based at courts or universities outside Japan (eg in 2009: 9 out of 29 to Europe, 16 to the US, and two each to Australia and Canada). A few judges are usually seconded also to the House of Representatives' Legal Affairs Division (*hoseikyoku*) or to the Social Insurance Agency (*shakai yokin hoken kiko*), and one to the Keidanren's 21st Century Policy Institute thinktank (see Part 1.3 above).

The gradual diversification of such secondments is also evident in placements now to private law firms (about 10 judges for 2010). They become registered as bengoshi for the two years, but also remain Court Officials (*saibansho jimukan*). Associate judges (and prosecutors) have been allowed this possibility since legislation was enacted in 2004 pursuant to JRC recommendations (see, in Japanese, <http://www.kantei.go.jp/jp/singi/hourei/hanjiho.html>). The aim, especially for these newer programs, is to broaden the judges' horizons at an early career stage, and help them to be more adaptable and interactive – traits increasingly seen as valuable for judges in the post-JRC context of greater popular participation in the judicial system.

4.7 Career Issues

Appointment (key points in **bold**)

A legal apprentice at the Legal Research and Training Institute desiring to become a judge applies to the Supreme Court just before the end of apprenticeship at the Institute {Abe and Nottage 2006}. The Constitution prescribes that "the judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court" (Art 80(1)). In fact, the Cabinet has never refused to appoint a person put on the list submitted by the Supreme Court, and the Conference of Supreme Court Justices only approves a list made by the General Secretariat. Those who are admitted to the judiciary are first appointed as **assistant judges** for a term of ten years. After ten years, almost all assistant judges are promoted to full **judges**. Like the appointment of new assistant judges, promotion decisions are formally made by the Cabinet based on the list submitted by the Supreme Court, but the real decisional power again rests with the General Secretariat. The term of a full judge is also ten years, and hence those who want to continue their judicial work have to apply for readmission every ten years. The procedure of readmission is the same as the first admission.

A new development, emerging from the JRC process, has been the establishment in 2003 of an Advisory Committee for the Nomination of Lower Court Judges in order to advise the Supreme Court on appointments. It shall have up to 11 members comprising 6 selected from among judges, prosecutors and *bengoshi*, and five from outside this *hoso* elite. (In May 2010, the 10 Committee

members comprised two *bengoshi* lawyers, one prosecutor, one incumbent judge, one former Supreme Court Justice who has now returned to being Emeritus Professor, four other professors and one writer: see <http://www.courts.go.jp/saikosai/about/iinkai/kakyusaibansyo/>.) Although data and analysis is so far limited, it appears that this Committee has not infrequently refused to recommend appointments proposed by the Supreme Court, but especially for those candidates applying from among *bengoshi* rather than trainees from the Legal Research and Training Institute (LRTI) or existing judges seeking re-appointment as a full Judge. The Supreme Court seems to be happy to minimise criticism by provisionally accepting almost all applications to become judges, but also happy when candidates (like those it used to reject itself in the past) are rejected by the new Committee, thanks to the judges but also other *hoso* or other members sitting on that Committee, as well as to the criteria it suggests to the Committee. Interestingly, in appointing judges from LTRI trainees, the Supreme Court's criteria rely heavily on grades and other assessments from the (now only 12-month) LRTI, including the practical training externships to Courts and prosecutors' offices and law firms, but not (at least in theory) the National Legal Examination results (data held instead by the MoJ). This means that LRTI trainees keen to become judges study and work particularly hard at the LRTI, compared to many of those thinking of becoming prosecutors (although the MoJ also looks closely at LRTI results) and especially those thinking of becoming *bengoshi* lawyers (often hired quite early in their LRTI study period) – unless the latter are thinking some day of studying for an LLM or other qualification abroad, where the LRTI results may be viewed more seriously.[Q.2.6.4]

During their tenure as assistant and full judges, judges are frequently transferred among courts and gradually promoted to better positions. Decisions to transfer and promote judges are within the Supreme Court's authority for judicial administration and substantial decisions are made by the General Secretariat, creating some risks for the independence of individual judges (see Part 4.13 below).

Exceptions to this judicial personnel management are **Supreme Court Justices** and **summary court judges**. These, unlike ordinary judges, need not be qualified as *bengoshi* lawyers (by completing the Examination and the Institute apprenticeship). The Chief Justice of the Supreme Court is designated by the Cabinet and appointed by the Emperor among those over the age of forty and have sufficient legal knowledge. The appointment by the Emperor is mere ritual. Other Supreme Court Justices are appointed by the Cabinet. At the beginning of 2008, six Supreme Court Justices were those selected from among lower court judges, four from among *bengoshi* private practitioners, and the remaining five were two former public prosecutors, two former officials, and a former professor of law.

Most summary court judges are former court clerks whose long experience in judicial practices or academia necessary for professional duties result in appointment by the Selection Board for Summary Court Judges. (Also eligible for appointment are those who have practiced law for three years or more as assistant judges, public prosecutors or *bengoshi*.) In 2009 there were about **800 summary court judges** who are not (usually) qualified as lawyers, compared to **15 Justices of the Supreme Court** (who mostly are) and around **1700 judges** and **1000 assistant judges** (who always are so qualified, having passed the National Legal Examination and LRTI training course). (See statistics at <http://www.courts.go.jp/english/system/system.html> and p22 Table 1 from the annotated/scanned "Courts Data Book 2009" provided separately; see also ibid p27 Figure 1 for a graph showing the increases in judge numbers over 1946-2009, overall as well as excluding the Summary Court judges). All four categories of judges are widely seen as extremely capable, ethical and professional, especially those who have passed the Examination and LRTI course (as well as of course all Supreme Court Justices). The main public criticism, reflected for example in the Judicial Reform Council's documents, is that they sometimes lose touch with real

life over the course of long careers solely within the judiciary. The Supreme Court administrators have responded in various ways, such as more variation in secondments of judges, other judicial secondment and to a lesser extent in appointments to the judiciary (see Part 4.6). [Q.2.6.4].

4.8 Guarantee of Tenure

Term of office and tenure of judges

The terms of (re-)appointment for judges of summary, district and high courts are outlined above (Part 4.9); and review by voters for Justices of the Supreme Court is explained further below (Part 4.18).

Also important to tenure is the age of retirement. Summary court judges are to retire at the age of 70 and other judges at the age of 65. In fact, most Supreme Court Justices are quite elderly when appointed, meaning that they only serve a few years before having to retire at 65. When other judges retire they sometimes work a few more years, full- or part-time, particularly as *bengoshi* in private law firms; but generous pensions make this quite uncommon.

Formally, tenure is of duly appointed judges is guaranteed by the Constitution. Art 64 provides that judges shall not be dismissed except by public impeachment, unless judicially declared mentally or physically incompetent to perform official duties; and that no disciplinary action against judges shall be administered by any executive organ or agency. The Judges Impeachment Law of 1947 provides that this shall be conducted by the Judge Impeachment Court composed of fourteen members of the Diet. In addition, any disciplinary measures against a judge who has neglected duties or is guilty of disgraceful conduct must be taken through disciplinary action against the judge in a case on status conducted by a high court or the Supreme Court (see Part 4.18 below).

4.9 Judicial Interpretation

Role, authority of judges in interpreting and applying the law

Formally, judicial precedents are not a source of law. Even a decision of the Supreme Court is no more than the final judgment of the particular case at issue, having no legal binding effect on future similar cases. (However, to overrule its own precedent, the Court must sit as a Grand Bench, comprising all fifteen Justices.) Lower courts can freely interpret laws without being bound by past decisions of the Supreme Court. However, lower courts are generally obedient to the precedents of the Supreme Court, and the Supreme Court itself is very cautious about overruling its own precedents. Thus, its precedents are the most important clues for predicting how any given case will be decided, and thus constitute a de facto source of law. If there is no relevant precedent of the Supreme Court, the precedents of high courts occupy the same position.

Japan's superior courts have established many important precedents by interpreting abstract provisions in statutes, especially in private or commercial law fields such as tort law {Nottage 2004a}. Judges generally see it as their responsibility to fill apparent "gaps" in legislation, especially in the Codes, if this is possible within the general principles on which they based. An important technique is to invoke "general clauses" provided in the Code, such as the general principle of good faith applied to contract law {Nottage 2007}. Hence it is impossible to understand the present condition of the Japanese law without sufficient knowledge of those precedents.

4.10 Adjudication

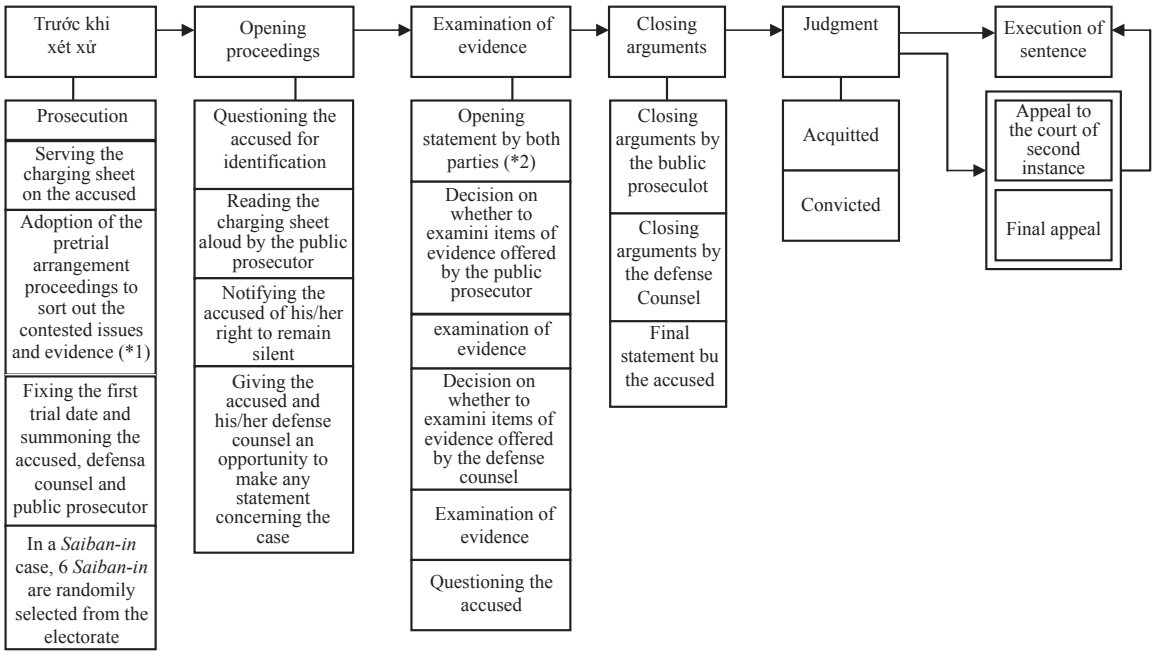
General Procedures

Following major reforms during the US-led post-War Occupation, Japan moved from a more French-style inquisitorial approach to an adversarial procedure in both civil and criminal procedure.

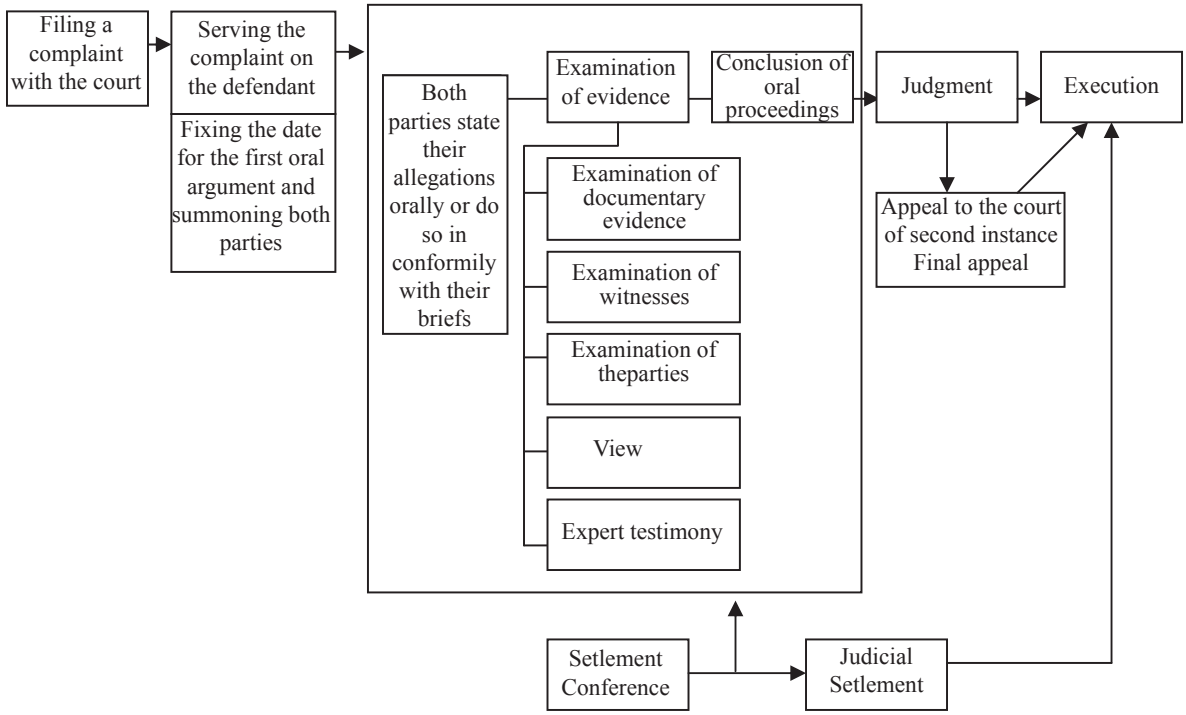
However, there has been some counter- reactions in recent decades and so the approach can be said to be a mixed or hybrid one, especially in civil procedure {Taniguchi 2007}.

The general procedures under the Code of Criminal Procedure and the Civil

Procedure, respectively, are summarised below:



From: Supreme Court of Japan, "Justice in Japan" (2009) 25



From: Supreme Court of Japan, "Justice in Japan" (2009) p 22

One key feature is the post-War introduction of the adversary principle, with each side making its case rather than the Court identifying issues and inquiring into the evidence. One important change

in the Code of Civil Procedure (new Art 294) required the examination of witnesses in Court to be conducted first by the parties (or their lawyers) and only secondarily by the judge. The old Art 261 was also repealed, which had allowed the judge to examine ex officio any evident at almost any time s/he deemed necessary. Relatedly, in the first decades after World War II the judges neglected the still-existent Art 127, which provided as "power of clarification" (shakumeiken) to ask questions of the parties and suggest further evidence. From the 1960s, however, the Courts began to use this power again more vigorously in order to expedite and manage civil proceedings more effectively. Relatedly, judges have generally become more active in examining witnesses – but still usually only after the parties or their lawyers have completed their own examinations {Taniguchi 2005}.This is especially so if parties are self-represented (as is permitted in Japan, and often the case especially for example in Summary Courts). Courts are also under time pressure and have pressed for new practices and some Code of Civil Procedure reforms allowing earlier identification of issues in dispute, and to have fewer and less intermittent hearings.[. [Q.2.6.2]

In criminal justice, as noted in the Figure above, the introduction of the saiban'in quasi-jury system has made it mandatory to have a pre-trial phase for arranging issues and evidence. Although that remains discretionary for other criminal cases, it has been used already also in some other complex litigation recently (eg the securities fraud prosecution of takeovers entrepreneur Horie: see Nottage et al eds 2008). However, courts do not receive or research case files from prosecutors in the pre-trial period. [Q.2.6.2]

Special Procedures

(a) Summary Courts

(see <http://www.courts.go.jp/english/proceedings/civil_suit.html>)

Because claims sought in summary courts are relatively small, their procedure is significantly simplified to dispose of such cases expeditiously. For example, a plaintiff may bring an action by merely outlining the dispute orally without filing a complaint. Allegations in summary courts need not be prepared by briefs. Judgments rendered in summary courts may be summarised significantly more compared with those rendered in district courts. Moreover, a court may have a judicial commissioner (*senmon i'in*), chosen among laypersons with a good reputation, attend a trial mainly to assist in effecting a suitable settlement reflecting common sense. In addition, a judicial settlement may be effected in a summary court upon the parties' motion before the filing of an action regardless of the amount of the claim.

In addition, under the 1996 Amendments to the Code of Civil Procedure, a **small claim action** may be filed with summary courts so that controversies involving small claims may be resolved judicially at reasonable cost corresponding to the relief sought. This procedure is available for a monetary claim of up to 600,000 yen. The plaintiff may select this procedure at the time of filing of an action, but a plaintiff may not select this procedure more than ten times a year in a single summary court (so that the system does not get bogged down with firms using it as a debt collection mechanism). The defendant may request the case to be tried by the ordinary procedure before the presentation of his or her allegations. The court must decide to that effect if the claim sought exceeds the monetary limit or the case trial by this procedure is inappropriate, even if the defendant does not so request.

The court shall complete these trials and conclude oral arguments in one day unless it finds special cause for continuation. Accordingly, only such evidence as can be produced immediately is admissible. The order of examination of witnesses and parties is left to the court's discretion and

witnesses may testify without oath with the court's permission. When the court deems it proper, witnesses may be questioned by utilising telephone conferencing.

The court renders a judgment just after the conclusion of oral argument. When the court renders a judgment in accordance with this rule, it may do so by notifying the parties orally of the main text of judgment and the summary of the reasons for it without making an original judgment document. In this case, the court shall have a court clerk put into the record the specification of parties and the claim, the main text of judgment and the summary of reasons. In a judgment for the plaintiff, the court may grant the defendant a proper grace period or installment plan, to be made within three years. The court may also exempt the defendant from liability for the delay damages accruing since the time of filing of the action, subject to the defendant's payment without default.

A judgment in this procedure is not appealable to any appellate court. Instead, the losing party may file an objection with the same court, in which case the court retries the case in accordance with the procedure which is basically the same as the ordinary procedure. But the court may render a judgment according to the rules mentioned above. A judgment rendered upon the objection is not appealable unless it involves a constitutional question.

A longer-standing and very frequently used special procedure involves a **demand for payment** (*tokusoku* cases: for statistics see {*Nottage* and Wollschlaeger 1996} and see also Part 5 below). This involves a decision made by a court clerk (shokikan – see Part 4.11 below) which orders the debtor to make payment or to deliver a certain amount of money or negotiable instrument. It is issued upon a creditor's motion where the motion appears to be well based from the allegation without hearing the debtor's allegation nor conducting examination of evidence because it is issued on the assumption that there is no dispute about the claim between the parties. However, this assumption is not always true. So the debtor may file an objection to the demand within two weeks from the day of its service, in which case the demand for payment is invalidated, and it is considered that an action was filed at the time of the motion for demand for payment. Failure to make an objection within the time limit causes the demand for payment to be declared provisionally enforceable by the court upon the creditor's motion. The debtor may still file an objection to the demand for payment within two weeks from the day of its service, however, in which case it is similarly considered that an action was filed at the time of the motion for demand for payment. Failure to file an objection within the time limit makes the demand for payment permanently enforceable. But a demand for payment has no *res judicata* because the existence of the claim has not been ascertained, which is done in a trial.

Large computer systems have been introduced in some major summary courts designated by the Supreme Court Rules in order to facilitate the disposition of the high volume of cases. The territorial jurisdiction of such courts is broadened when a motion for demand for payment is disposed of by utilizing the computer system.

(b) Mediation or Conciliation

(see {Sato 2001} ch 8)

Court-annexed mediation or conciliation has quite a long tradition in Japan. For example, compromise (*wayo*) was used exceptionally to resolve land disputes among nobles and *samurai* during the Kamakura era (12th-14th centuries), and private settlement (*naisai*) was the principal dispute resolution mechanism during the Tokugawa era (17th-19th centuries). Commended settlement (*kankai*), modeled on the French *conciliation preliminaire,* was widely used in the Meiji era from 1868 until the German- inspired Code of Civil Procedure came into effect from 1890. New laws were introduced mandating pre-trial mediation during the 1920s-30s, following

rapid increases in tenancy and agricultural land disputes, and the war-time Special Law for Civil Affairs further stressed consensus and harmony instead of application of law by the courts.

Those mandatory mediation schemes were abolished as part of the Occupation's democratisation process, but two main forms of court-annexed conciliation remain widely used in post-War Japan – one purely conducted by judges, the other partly so. (In addition, the roles of judges in either respect encompasses can also encompass those played by part-time judicial officer s, *chotei-kan*, appointed from those qualified as *bengoshi* with for or more years' practical experience: see Part 4.7 above.)

Art 89 of the present Code of Civil Procedure (identical to Art 136 of the pre-1996 Code) does not impose a duty (as in Germany) but gives the **power to the Court** or a separate commissioned or entrusted judge to attempt to arrange settlement of the dispute; the party and its legal representative can also be ordered to appear in Court. The largest Courts have a separate Division where a commissioned or entrusted judge can take charge of the settlement attempts, but even in those Courts (and in all smaller Courts) it is the original Judge(s) facilitating settlement. With a three-Judge panel sometimes one or two judges attempt settlement. Almost always these Judge(s) will meet ex parte with one party or their lawyers. Bar Associations have apparently never formally objected to this practice, although it has recently attracted some academic criticism relating to possible undue pressure or breach of "natural jutice" – especially the rights to have one's arguments heard and to know what the other party's arguments are. (However, similar concerns and the constitutional requirement of public hearings did lead to a separation of settlement negotiations – which can occur privately with the judges – and the open- court preliminary procedure aimed at narrowing the issues for the oral hearing phase, added in Arts 168-174. In the decade before the new Code was enacted in 1996, Courts – especially busier and larger ones – had experimented by mixing up those two aspects in the so-called *wakai-ken*- benron procedure.) Litigation will be resumed if the Judge(s) feel that the parties are unable to reach settlement. However, further conciliation may be attempted, and the later this occurs in proceedings the stronger the guidance given by the Judge(s).

If settlement (*sosho-jo no wakai*) is achieved, or if a claim is withdrawn or admission made, the agreement has the same effect as a final and conclusive judgment (Art 267, identical to old Code Art 203). This contrasts with a simple compromise contract (Civil Code Art 695), which if breached only allows the innocent party to bring a new action under contract law. The frequent use of Art 89 settlement-in-litigation also makes it rare for parties to use instead the new "settlement-before-filing" procedure now available only in Summary Courts (Art 275). Settlements-in- litigation occur in around a third of all Summary, District and High Court cases (although sometimes perhaps achieved without Judge involvement, and hardly ever in the Supreme Court). In addition, another third of cases are formally withdrawn, often also as a result of settlement facilitation by Judges.

Art 265 of the new Code also adds a procedure allowing the parties to request the Court (or its commissioned or entrusted judge) in charge of the settlement sessions to make an appropriate settlement proposal. Once issued, the proposal is binding like a court judgment, but a party can revoke its request before then. So far it has been relatively little used, reflecting the more flexible Art 89 procedure as well as the continued popularity of settlement instead under the 1951 Civil Conciliation Law (CCL, *minji chotei ho*), which inspired Art 265.

The CCL, however, gives settlement facilitation **power to a Conciliation Committee, usually comprising one Judge and two laypeople**, selected from among citizens who have broad knowledge and experience. When conciliation is successful, the settlement terms are entered in the record and have the same force and effect as a final and binding judgment. If unsuccessful,

the procedure comes to an end with the dispute remaining unsettled. However, if the court or entrusted judge deems it necessary, it may adjudicate the case by a ruling (*wakai ni kawaru kettei*) with the ambit of both parties' claims and "considering all circumstances equitably for all parties", regardless of the failure of conciliation (Art 17). The parties or any interested person may file an objection to the ruling within two weeks, in which case the ruling loses its effect (Art 18, reflecting a successful post-War constitutional challenge to pre-War conciliation that had not allowed parties to object except by appealing to a higher court). But in the far more common case where no objection is filed, it has the same effect as a judicial settlement.

A newer and alternative procedure, but hitherto hardly ever used, allows "arbitration-in-conciliation" by the Conciliation Committee, for disputes over renting land (Art 24-3, with Art 31 extending this *mutatis mutandis* to all commercial disputes). Parties can request the Committee to issue a binding decision if they agree in writing and settlement is inappropriate or unlikely to succeed.

CCL conciliation is available to settle all types of civil disputes and is widely used because it is simple, pragmatic and inexpensive. For example, there is no extra cost to the parties after they have paid their litigation filing fees. Also, under Art 2, CCL conciliation can be requested whether or not litigation is pending. Although consent of the parties is usually required, the Court can also itself refer a litigation case to CCL conciliation (Art 20). However, in practice the Court will seek the parties' views before making such an order and either party can later challenge it (cf Art 22); and both parties' consent is required for CCL conciliation referral once litigation has progressed to the stage of examining the evidence after identifying the issues. When an order is made, jurisdiction will go to a different Court (eg the specialist Conciliation Divisions in the larger courts). Where parties apply for CCL conciliation, the Summary Court has jurisdiction unless the parties can agree on the District Court for the conciliation. Where the order or agreement occurs during litigation, the litigation court has discretion to suspend proceedings until conciliation is over.

In addition, as a result of revisions in 1992, the conciliation procedure must be exhausted before the case can be filed with the district court when it deals with the increase or decrease in rent for housing or land. In 1999 the Specific Conciliation Law (*tokutei chotei ho*) was enacted to provide for the debt arrangement through conciliation of debtors on the verge of economic collapse.

Generally, conciliation should be conducted by a full Conciliation Committee. However, the Judge may dispose of conciliation if s/he deems it appropriate, though disposition by a conciliation committee becomes mandatory if the parties so request. The conciliators are not bound by the adversary principle, as in litigation; they can go beyond hearing the parties' arguments and evidence. Conciliators can also ex officio investigate facts and take evidence from parties, experts and administrative agencies, as well as call witnesses. The conciliators also often meet separately with each party and then propose concrete terms of settlement. (In other words, this is not usually "facilitative" but instead quite "evaluative" mediation, which is one reason – along with its close relationship to the court system – for translating it as "conciliation".) The Judge mostly leaves the discussions to the two lay conciliators, only becoming involved at the start and the end. S/he checks that any settlement proposal is consistent with Art 1: to settle disputes not by the strict application of law but by application to actual circumstances (*jotsujo*) the principles of sound reason (*jori* - recognised in 1875 as a source of law, and arguably synonymous with *dori* or supplementary moral principles, as applied in pre-Modern laws and judicial decisions). Where necessary, a representative or assistant can appear on behalf of a party, and non- *bengoshi* can appear if permitted by the conciliators.

CCL conciliation remains very popular. The caseload doubled in the decade up to 1997, reaching almost 200,000 cases – about half the number of litigation cases (for subsequent data, see also {Yamada 2009}). However, it is little used for larger commercial (B2B) disputes. The major impediment appears to be the lack of suitably experienced businesspeople among the conciliators appointed by the Courts, linked to their flat and low hourly rates of pay. The problem is exacerbated by cases going to the Summary Court for CCL conciliation, unless the parties can reach a further agreement to take matters to the District Court.

(c) Complex disputes

The Judicial Reform Council final report contained many recommendations for improving the capacity of the court system (and the legal profession more generally) for dealing with complex and often time-consuming disputes. As mentioned above (Part XXX), this led for example to all Intellectual Property cases being centralized in the Osaka and Tokyo District Court, then the Tokyo High Court. Another important 2003 amendment to the Code of Civil Procedure (in effect from 2004) was the introduction of part-time "expert commissioner" advisors to judges (see {Nottage 2005} reproduced at <http://ssrn.com/abstract=837864>). As of April 2009, the 1763 commissioners included 840 specialising in medical misadventure cases, 556 in construction and 225 in IP (see p24 Table 7 of the annotated/scanned "Courts Databook 2009" provided separately). Resolving complex disputes may also be facilitated by appointment of part-time *choteikan* judicial officers (75 for civil cases in 2010: see ibid p23 Table 4(1) and generally (b) and Part 4.6 above).[Q.2.6.3(b)]

4.11 Jurors

Jury systems, or more generally systems that promote lay participation in justice, are seen to foster better justice outcomes and more civic engagement with the legal system {Anderson and Nolan 2004}. Lay participation systems, however, are more costly in contrast to purely professional justice systems in terms of efficiency and infrastructure costs. While Japan has had a number of roles for lay people to play in justice, the most prominent have been the Imperial Jury System in place from 1928 to 1943, and the *saiban-in* system ('lay judge system') introduced in August 2009. The Imperial Jury System has been viewed as failing to be able to deliver better justice or more civic engagement due to its marginalisation that saw it used in only five cases in its final three years {Anderson and Kirby 2010}. The new saiban-in system has been designed to try to avoid that outcome by making the system mandatory for all serious criminal trials with estimates that it will result in over 3,500 cases per year {Anderson and Saint trans 2005}.

Role

Jurors, or more accurately 'lay judges', are called to serve for all trials where the accused is charged with a crime punishable by death or life imprisonment, or an intentional crime that results in the death of the victim. The accused may not waive the lay judge trial. Given this approach, the discretion of prosecutors in selecting what particular crimes a defendant will be charged with will be a crucial element in whether the Lay Judge System avoids the marginalisation seen in the Imperial Jury System {Johnson 2009}.

Lay Judge Trials are heard by a mixed panel of three professional judges and six lay judges, or if there are no facts in controversy and all agree then they may be heard by a panel of one professional judge and three lay judges. The mixed panel decides both the verdict (i.e. matters of fact and application of fact to law) and – quite uniquely – the sentencing. Professional judges alone determine matters of law, though lay judges may volunteer opinions on the issues. Decisions of

the mixed panel are by a modified majority rule, whereby at least one professional judge agrees with the majority.

Appointment and Training

Lay judges are selected randomly from people on the electoral rolls. As such, lay judges must be 20 years of age and a Japanese citizen. Certain people are affirmatively excluded from being lay judges including people who have not completed compulsory education (through Year 9) and those who have been imprisoned. In addition, people within the legal profession such as professional lawyers, legal academics, government lawyers, para-legals and politicians are excluded, presumably because they would lead to the system being captured by legal professionals. People who are full time students or over the age of 70 years may decline service. A small number of discretionary exceptions for significant work and social obligations are available to excuse an otherwise eligible lay judge. In addition to the lay judges a small number of alternate lay judges are nominated in the event one of the lay judges cannot serve. After appointment the law does proscribe any compulsory training, but it is understood the court system has prepared a video and handbook orientation for the selected lay judges.

Relationship with Judges

Beyond providing that the professional and lay judges should deliberate and decide together the verdict and sentence, the Lay Judge Law and accompanying rules provides no guidance to how the relationship between professional and lay judges should be managed. As a result, one of the most common concerns voiced about the lay judge system is that it will not result in robust discussion and deliberation of issues because the lay judges will defer to the professional judges (eg {Kiss 1999}). The Supreme Court of Japan, charged with successfully managing this relationship, is very much aware of this critique and presumably are addressing the matter through internal training and counselling of professional judges in group management. As the system only began in August 2009, whether the courts are successfully able to manage this relationship is an issue to monitor over time.

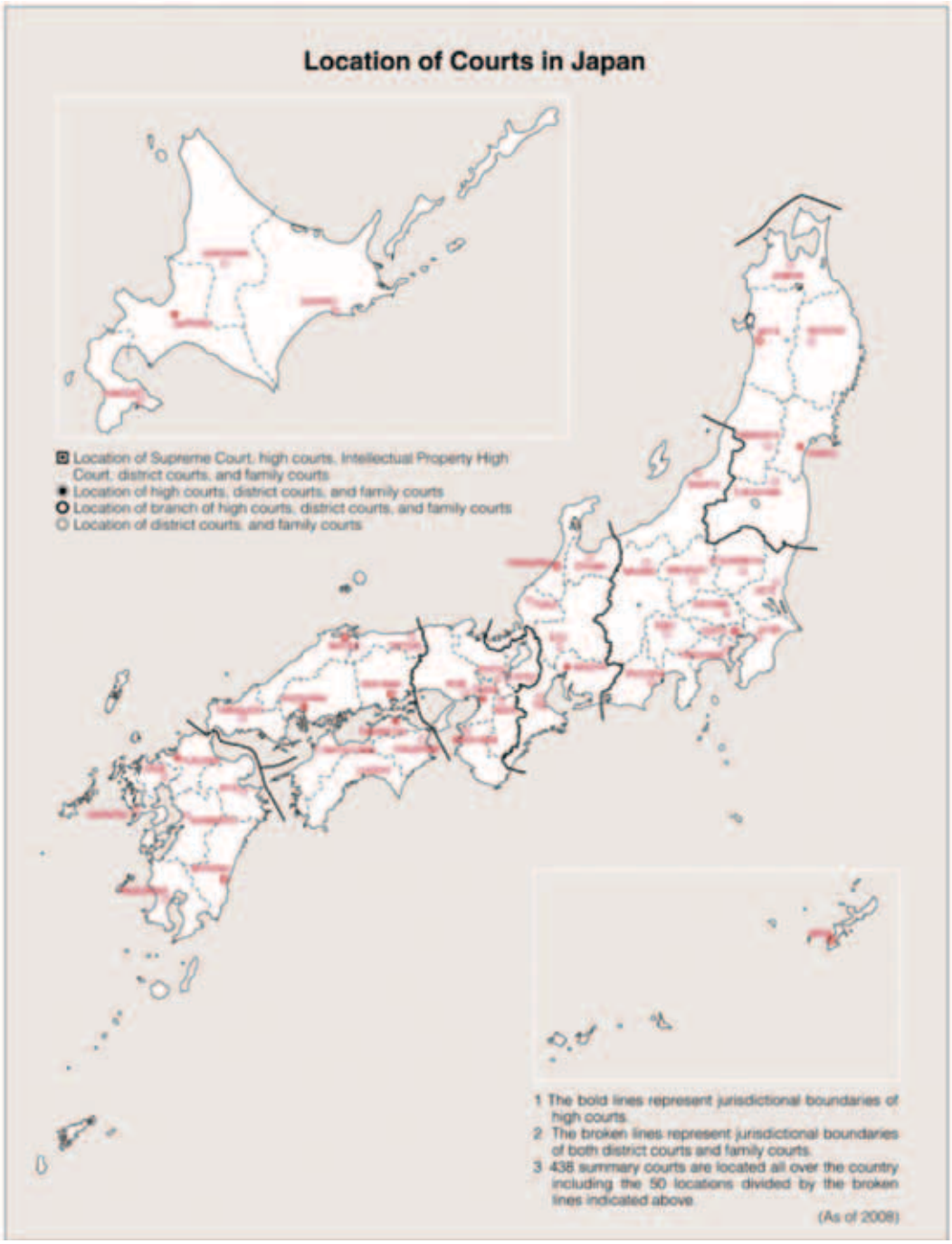
Oversight

As the Japanese lay judge system incorporates a mixed bench approach, the primary oversight is the internal oversight of professional judges by lay judges, and vice-versa. The rationale is that in this way the risk of internal judicial bias and external lack of legal expertise can be controlled or mitigated. Some critics have noted this ideal might structurally be hampered by the strict secrecy provisions imposed on lay judges that prevent them from ever discussing the case with outsiders, including concerns about the way the matter was handled and questions of whether the final written judgment reflected the opinions of the full panel {Levin and Tice 2009}. Institutionally, the Lay Judge System is under significant oversight and review by the Supreme Court of Japan, the jointly sponsored Saiban-in Promotion Office, and public scrutiny {Anderson and Ambler 2006}. This is so extensive that it is unclear whether the political will to continue with the experiment will be long-lasting if the system fails to deliver better justice and more civic engagement in the immediate term.

4.12 Regional Delimitations

The 50 District Courts have territorial jurisdiction over their respective districts, the area of which is identical to that of each prefecture (except Hokkaido island in the north, which is divided into four districts): see Part 4.3 above. Family Courts have parallel jurisdiction. There are also 438 Summary Courts throughout the country, usually in or near the same building where there exists

a district court. High courts are located in eight major cities in Japan: Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu. Each high court has its own territorial jurisdiction over one of eight parts of Japan, as indicated below (reproduced from <http://www.courts.go.jp/english/system/system.html>):



This entire court system is unified through the Supreme Court and its General Secretariat. There are no disparities in budget or enforcement related to local governments or politics, as in some countries like China. The Court's main concern is citizens' access to justice in more remote parts of Japan, especially where there are few *bengoshi* lawyers (or even *shisho shoshi* judicial scriveners). To help resolve this problem it is currently researching how other countries, like Australia, send judges on "circuit" – to deal with cases in different areas on a short-term basis.

4.13 Judicial Independence

The Supreme Court is vested with rule-making power and ultimate authority regarding judicial administration (as detailed in Part 4.17 below). This includes the power to assign lower court judges to particular positions in particular courts. Each lower court judge is assigned to a particular position in a particular court, transferred to another position in another court for every three to five years, and usually promoted gradually to better positions. While all matters concerning judicial administration are formally determined by the Conference of Supreme Court Justices, most substantial decisions are made by the General Secretariat of the Supreme Court, with the Conference only approving the decisions of the General Secretariat. The latter's senior members are selected from among lower court judges, and they make up an elite class within the judiciary.

Until World War II, the Ministry of Justice had authority over judicial administration. During the Occupation, this authority was transferred to the Supreme Court to guarantee the independence of the judiciary from the executive branch. While the independence of the judiciary was certainly reinforced, the independence of individual judges was not. There is a risk that judges who have overruled the precedents of the Supreme Court or otherwise have been disobedient to the Supreme Court or its General Secretariat will be disadvantaged in their placement and promotion. The Court Organisation Law does provide that a judge shall not be transferred against his or her will. But if a judge ever refuses the decision of the General Secretariat to transfer him or her to a particular position in a particular court, the judge will probably never be transferred to a better position in the future. So it is wise for a lower court judge not to reject the decisions of the General Secretariat, even if to do so is inconsistent with his or her own conscience. This situation has potentially undermined the Constitution's declaration that "all judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and laws" (Art 76(3); see {Abe and Nottage 2006}).

- Over the last decade, a debate has continued particularly among foreign academics about whether the judiciary's independence has in fact been compromised by this personnel management system. On the one hand, Professor J Mark Ramseyer starts with a simple theory: that judicial independence will only be enacted and implemented in countries where there is a significant likelihood of the incumbent political party losing power in general elections (see generally {Ramseyer and Rasmusen 2006}). Because of the LDP's long incumbency, this leads him to predict that Japan will not in fact demonstrate judicial independence. His immediate problem, however, is that there is almost no indication of the LDP attempting to exercise direct control over the judiciary (eg by Cabinet appointing its members or known conservatives to the Supreme Court; instead, Cabinet always approves the candidates recommended by the Court). Nor is there evidence of individual LDP politicians directly contacting individual judges to try to influence their decisions. Accordingly, Ramseyer is forced to argue that the (LDP) government *indirectly* influences the judiciary, by obtaining a judge rotation process administered by the Supreme Court that punishes judges for giving decisions that offend LDP political preferences. He then uses econometric data to suggest that individual judges do suffer career-wise in their job rotations, even controlling for factors like intelligence (measured eg by whether they graduated from a top university), if they rule that:Self-Defence Forces are contrary to Art 9 of the Constitution;
- a statute prohibiting door-to-door canvassing in elections (which would help opposition parties) is unconstitutional;
- electoral laws favouring rural voters represent unconstitutional malapportionment (until 1985, when rural voters were no longer the focus of LDP electoral strategy); or

- injunctions should be issued against national governments (but not local governments, as these change quite often – so the Japanese judiciary is supposed to know that the LDP doesn't mind independence in that field).

Ramseyer further hypothesises that the LDP does not have any interest in punishing judges in cases which are not "politically charged" like these, and so that in other cases careers will depend on non-political cases like "legal accuracy" (as measured eg by appeal rates) and "efficiency" (numbers of judgments written and disposition times). He argues that this is proven by data on tax litigation (where the government wins 90-95% of the time) and criminal prosecutions (99%).

However, his own data show that judges who mistakenly find for the taxpayer actually go on to enjoy *better* careers than those judges whose pro- government judgments are affirmed. Further, although judges whose acquittals were reversed did tend to suffer career-wise, those whose conviction was reversed did not. This suggests a general pro-conviction (hence pro-government) bias in these cases, but which Ramseyer believes are not LDP-politically charged. Accordingly, he switches from quantitative to qualitative methodology to break down his aggregate results, arguing that acquittals generating adverse career effects are in fact situations where judges side with opposition parties in politically-charged cases.

As pointed out by {Upham 2005}, this is an abrupt change in methodology. It also raises a broader concern that a similar qualitative analysis of other cases (eg constitutional cases highlighted by Ramseyer) will instead suggest that they may be less politically charged than he asserts and that a key concern of the Supreme Court is to reward accuracy and efficiency there too (eg because the precedents or other *legal* arguments about the SDF are quite clear). More generally, Ramseyer does not volunteer data analysis of cases where precedents and legal principles are less clear, such as product liability cases, but where directly or indirectly the government is implicated in litigation and hence which are arguably "politically charged".

Another critique of Ramseyer's approach comes from Professor Haley, who argues that although the Supreme Court may have developed a pro-government bias in some respects, this has developed independently of the LDP in order to retain (very successfully) the general trust of the public. He argues that any conservative bias relates also to the visions of Westminster-style (not completely US-style) separation of powers and a career judiciary system derived from the civil law tradition (see eg {Haley 2007}).

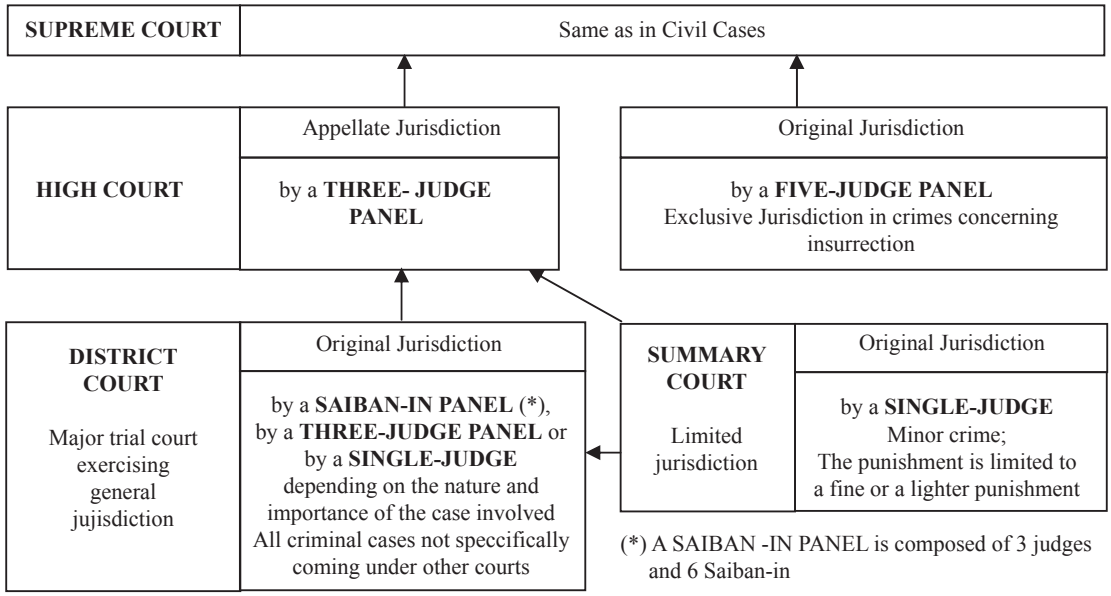
In sum, Ramseyer's theory should not be held to have been proven even on the data he does present. His more recent work is also not persuasive. He presents data suggesting that even after the LDP lost power in 1993-6 (especially 1993-4), (a) leftist lower-court judges continued to suffer career-wise, and (b) the non-LDP Prime Ministers did not appoint Supreme Court Justices with different policy preferences (tested by their subsequent judgments) than those appointed by LDP predecessors (see {Ramseyer and Rasmussen 2007} and {Ramseyer 2008}). Yet, going back to his starting theory, if it became evident that the LDP no longer has a monopoly of power, the Supreme Court should have stopped punishing leftist judges. And the fact that the non-LDP government did not attempt to stack the Court suggests simply that the judiciary retained its independence.

On the other hand, this debate – even if mainly among foreign academics rather than by Japanese commentators – can raise and leave quite serious doubts about the independence and therefore broader trustworthiness or integrity of the judiciary. It would therefore be helpful for Japan, and perhaps other countries like Vietnam who may develop a career judiciary system that includes regular rotations, to clarify in a transparent manner what the criteria are for assigning judges at particular times to particular (types of) courts. They should also consider changing the system in

light of any changing expectations about employment relationships in the broader community. In Japan, for example, the notion of "lifelong employment" (which comes with extensive flexibility given to employers to dispatch employees to new workplaces) survives but for a shrinking proportion of the general population; there is more variability in employment patterns and changes, linked not only to economic pressures but also changing roles and expectations about women and child-rearing. Lastly, countries like Vietnam would need to consider whether they share other similar values found in Japan that help support the judge rotation system, such as the egalitarian idea that all judges should "share in the pain" of having to serve outside the popular major urban areas during their careers – no matter how good the judges happen to be. [Q.2.6.4 (b)]

4.14 Appeals

Criminal Cases



See: Supreme Court of Japan, "Justice in Japan" (2009) p21

(a) Appeals to the Court of Second Instance

A party dissatisfied with the judgment of the first instance may file an appeal (a koso appeal) with a high court for its review alleging an error. A public prosecutor is entitled to appeal as well as the accused. Grounds for an appeal to the court of second instance are: (i) non-compliance with procedural law in the trial procedure; (ii) an error in the construction or application of law in the judgment; (iii) excessive severity or leniency of the sentence; and (iv) an error in fact finding.

The proceedings in the second instance are not carried out as a new trial, in which all issues of facts are tried again, but a review of the proceedings and judgment of the first instance through the case records of the court of first instance. Therefore, the proceedings in the second instance are mostly limited to oral arguments presented by the prosecution and the defense counsel, and a high court, unlike the court of first instance, does not examine witnesses and other evidence. However, the court of second instance may exceptionally examine a witness when it is necessary to inquire into factual matters that remain uncertain, notwithstanding the examination of the records of the court of prior instance.

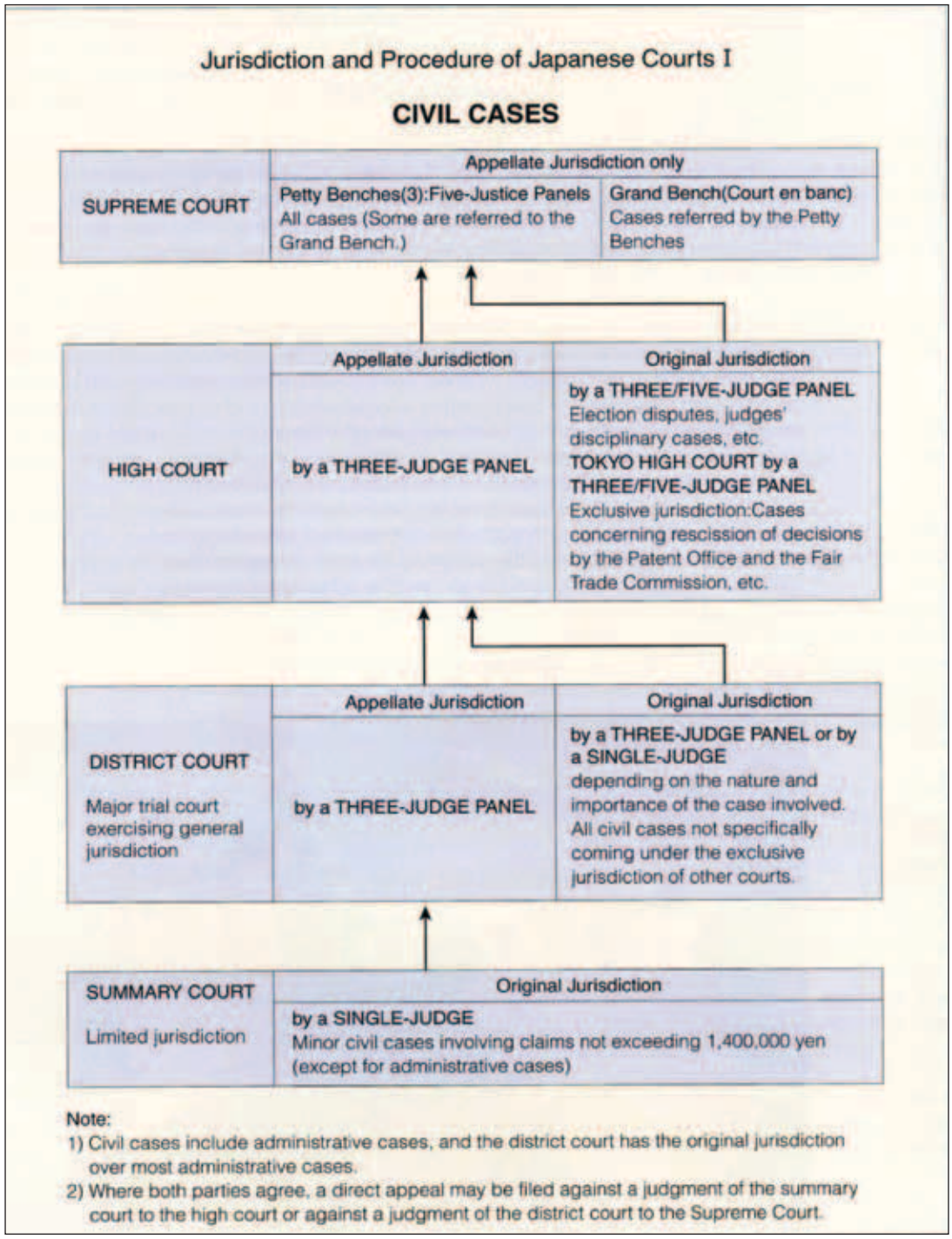
If the court finds no error in the judgment of prior instance after reviewing the case records of the court of prior instance and examining the factual matters, the court shall dismiss the appeal. On the other hand, if the court finds an error deserving modification of the judgment of prior instance, the court has to quash the judgment of prior instance. If the court finds that the court of first instance should make further examination of evidence or render a corrected judgment, the court should quash and remand the case to the court of first instance, and the case is tried again by the court of first instance. However, the high court may render a new judgment immediately, if this is feasible, on the basis of the court proceedings and of the evidence examined at the high court and at the court of prior instance. In either case, no penalty heavier than that imposed by the court of prior instance can be rendered if the appeal is filed only by the accused. It goes without saying that, in the trial of the remand case, the judgment of the high court is binding on the court of first instance.

(b) Final Appeals

The party may also file an appeal with the Supreme Court against the judgment of the court of second instance as a final appeal (a Jokoku appeal). The grounds for a final appeal are limited to (i) a violation of the Constitution or an error in its construction, or (ii) an alleged conflict with precedents of the Supreme Court or high courts. However, the final appellate court may quash the judgment of prior instance, if the court deems it incompatible with justice not to quash it, in certain specified circumstances. The Supreme Court, as "the guardian of the Constitution", is the court of last resort with the authority to determine the constitutionality of any law, order, regulation, or official act (Constitution Art. 81).

Thus, the main objective of the final appeal system, to secure proper construction of the Constitution and the laws, distinguishes the proceedings of the final appellate instance, in which the examination of a witness never takes place, from those of the first instance or of the second instance. However, as the Supreme Court is the court of last resort in the country, it has the discretion to reverse such judgments of prior instance if it deems that it is manifestly unjust not to do so.

The mode of judgments on a final appeal is nearly the same as that of an appeal to second instance: dismissing the appeal when the Supreme Court finds no error in the judgment of prior instance; or remanding the case when the Supreme Court quashes the judgment of prior instance. However, when quashing the judgment of prior instance, the Supreme Court can remand the case not to the court of second instance but to the court of first instance. The Supreme Court can also render its own judgment on the case immediately where it considers appropriate, based on the court record and the evidence.



(a) Appeals to the Court of Second Instance

The losing party in the first instance may file an appeal to the court of second instance with an upper instance court with competent jurisdiction. Specifically, an appeal from a judgment rendered in a district court may be filed with one of the high courts, and from a judgment rendered in a summary court with one of the district courts, each of which is decided according to the location of the court of first instance. A court of second instance is normally composed of three judges.

An appeal to the court of second instance is made in writing, containing the specifications of the parties and the judgment under appeal, the appellant's wish to appeal and so on, together with the necessary amount of revenue stamps. It is filed with the court of first instance within two weeks

from the day of service of the judgment on the appellant. Failure to meet these requirements causes dismissal of the appeal. The reasons for appeal need not be disclosed at the time of filing of the appeal but the appellant must file a brief containing the reasons on which the appellant appeals, within 50 days. The reasons may be not only error in the application of law in the judgment but error in the fact finding, because no specific reason for appeal to the court of second instance is provided in the Code of Civil Procedure and the court of second instance is still a trial court. The appellant may be required to file an answer within a certain period by order of the presiding judge.

The trial in the court of second instance is considered to be a continuation of the trial at first instance. However, because the trial at the first instance is issue-oriented and the parties endeavor to present all of the allegations and evidence pertinent to the issues, the trial in the court of second instance is mostly focused, to the extent of the grounds for appeal alleged by the appellant, on whether the judgment in the first instance should be reversed. The parties may present allegations and evidence on the merits, however, to the extent they are necessary. The court may hold proceedings for arranging issues and evidence, in which case telephone conferencing is frequently utilised, or to examine additional evidence if necessary.

The judgment can dismiss the appeal, or reverse the first-instance decision either by remanding the case back for retrial or by rendering a judgment on the merits finding new facts on the basis of the materials presented.

(b) Final Appeals

The losing party in an appeal to the court of second instance may file a final appeal with an upper instance court with competent jurisdiction. A final appeal from a judgment rendered in a high court may be filed to the Supreme Court, and from a judgment rendered in a district court to one of the high courts, decided according to the location of the district court. A final appeal may be taken directly from a judgment in the first instance upon the agreement of both parties, which is referred to as a "direct final appeal". A case in a high court is tried by a three-judge panel while a case in the Supreme Court is tried by one of the three Petty Benches each of which is composed of five Justices. The exception is a case involving constitutional questions, where the Grand Bench consisting of all fifteen Justices tries the case.

Not being a trial court, a final appellate court exercises its jurisdiction only over questions of law contained in a judgment of prior instance, which means the court is bound by the facts found in the judgment of prior instance unless the fact-finding raises questions of law. The Code of Civil Procedure provides that the losing party may file a final appeal as of right either on the ground that the judgment of prior instance contains a violation of the Constitution or on the ground that the procedure in the lower court contains any of six kinds of substantial illegalities each of which is set forth in the Code. In addition, with respect to a final appeal to the Supreme Court, the losing party may file a petition for acceptance of final appeal on the ground that the case involves an important issue of construction of law. The decision on whether such a petition should be accepted or not is left to the discretion of the Supreme Court (similar to the *certiorari* system in the US, and the result of the 1996 amendments to the Code). On the other hand, a final appeal to a high court may also be taken as of right on the ground that the procedure in the lower court contains any illegality material to the judgment.

A final appeal is made in writing containing similar particulars to those required in an appeal to the court of second instance, and by filing it with the court of second instance within two weeks from the day of service of the judgment on the appellant. On the other hand, the reasons for appeal need not be disclosed at the time of filing of the appeal but the appellant must file a brief with the court

of second instance containing the reasons for appeal in compliance with the format designated by the Supreme Court Rules. This must be done within 50 days from the day of service of a written notice of the filing of final appeal, which should be served after the appeal unless the appeal had been dismissed. Failure to meet any of the requirements mentioned above causes dismissal of the appeal. Otherwise, the court of second instance sends the case to the final appellate court. The final appellate court, which may dismiss the appeal for any defect in procedural requirements, considers the case to decide if any reason for final appeal as provided in the Code is found to the extent of the reasons alleged by the appellant. The court has the discretion to inquire into other reasons where justice requires.

With respect to a petition for acceptance of final appeal to the Supreme Court, the procedure for filing it is similar to that of a final appeal. Upon receipt of the case, the Supreme Court, which may dismiss the petition for procedural reasons, considers the case to decide if it involves important issues to the extent of the reasons alleged by the appellant. When the Supreme Court deems that the case involves an important issue, the court accepts the petition as a final appeal, after which the case is handled as if a final appeal has been filed. Otherwise, the Supreme Court rules that the petition is unacceptable.

After the deliberation, the final appellate court shall quash the judgment of prior instance whenever the court finds any of the reasons for final appeal described in the Code. In addition to that, the Supreme Court may quash the judgment of prior instance when the court finds any material violation of law. Otherwise the final appellate court dismisses the appeal. In case of quashing, the case is basically remanded.

A judgment rendered by a high court as a final appellate court is appealable to the Supreme Court only on the ground that it contains a violation of the Constitution, which is referred to as a "special appeal to the court of last resort".

(c) Appeals against Rulings

In the first-instance procedure at the first instance, a court or an individual judge in charge decides on various ancillary matters in the form of rulings or orders. Such interlocutory decisions (*kettei*) are not always appealable, but some important decisions are made appealable under the Code. Appeal from such decisions is referred to as appeal against a ruling. The procedure with respect to appeal against a ruling applies basically that of appeals to the court of second instance, *mutatis mutandis.*

4.15 Positioning

See especially Parts 4.4-4.9 above and 4.17-18 below.

4.16 Judicial Administration

In addition to the primary function of exercising judicial power, the Supreme Court is vested with rule-making power and the highest authority for judicial administration. In its conduct of these administrative affairs, the Supreme Court acts upon the resolutions of the Judicial Assembly, which consists of the fifteen Justices and is presided over by the Chief Justice. To exercise its rule-making power, the Supreme Court may establish rules of judicial procedure and of certain matters relating to *bengoshi* lawyers, the internal discipline of the courts, and the administration of judicial affairs. In establishing rules on important matters, the Supreme Court consults the Advisory Committee on Rule-Making, comprising judges, public prosecutors, lawyers, officers from related institutions, and persons with relevant knowledge and experience, to inquire of the

necessary matters to establish rules. Then the Judicial Assembly deliberates and approves the proposed rules formulated on the basis of the Committee's report.

The designation of the Chief Justice of the Supreme Court and appointment of other Supreme Court Justices and judges of lower courts are within the purview of the Cabinet. However, the nomination of candidates of lower court judges from among whom the Cabinet appoints, including the Presidents of the high courts, and the assignment of judges to a specific court are reserved for the Supreme Court, which exercises the authority through the resolutions of the Judicial Assembly, provided that, as a rule, the nomination of candidates of lower court judges requires advice of the Advisory Committee for the Nomination of Lower Court Judges. In addition, such matters as the appointment and dismissal of court officials other than judges are within the purview of the judicial administration of the Supreme Court. In effect, the Supreme Court (especially its General Secretariat: *jimu sokyoku*) has very centralised control over almost all judicial administration; the High Courts, for example, have very limited separate power to manage their own affairs or budget. (In fact, a breakdown of budget by different levels of Courts is not readily found in the public domain; it would have to be requested therefore from the Supreme Court itself.) [Q.2.6.3 and Q.2.6.5]

As for the budget of the courts, the Supreme Court, upon the resolution of the Judicial Assembly, submits annual estimates of revenues and expenditures directly to the Cabinet. If the Cabinet reduces the Courts' estimated expenditures, the Supreme Court may request the Cabinet to raise the reduced amounts. The Cabinet then shall attach details of the reduction concerning the estimated expenditure to the revenue and expenditure budget and clearly state the necessary fiscal resources so that the Diet can amend the figure for its deliberation. The budget recently has been about three or four times that of the procuracy, fluctuating as follows (according to <http://homepage3.nifty.com/hanreichousakai/>):

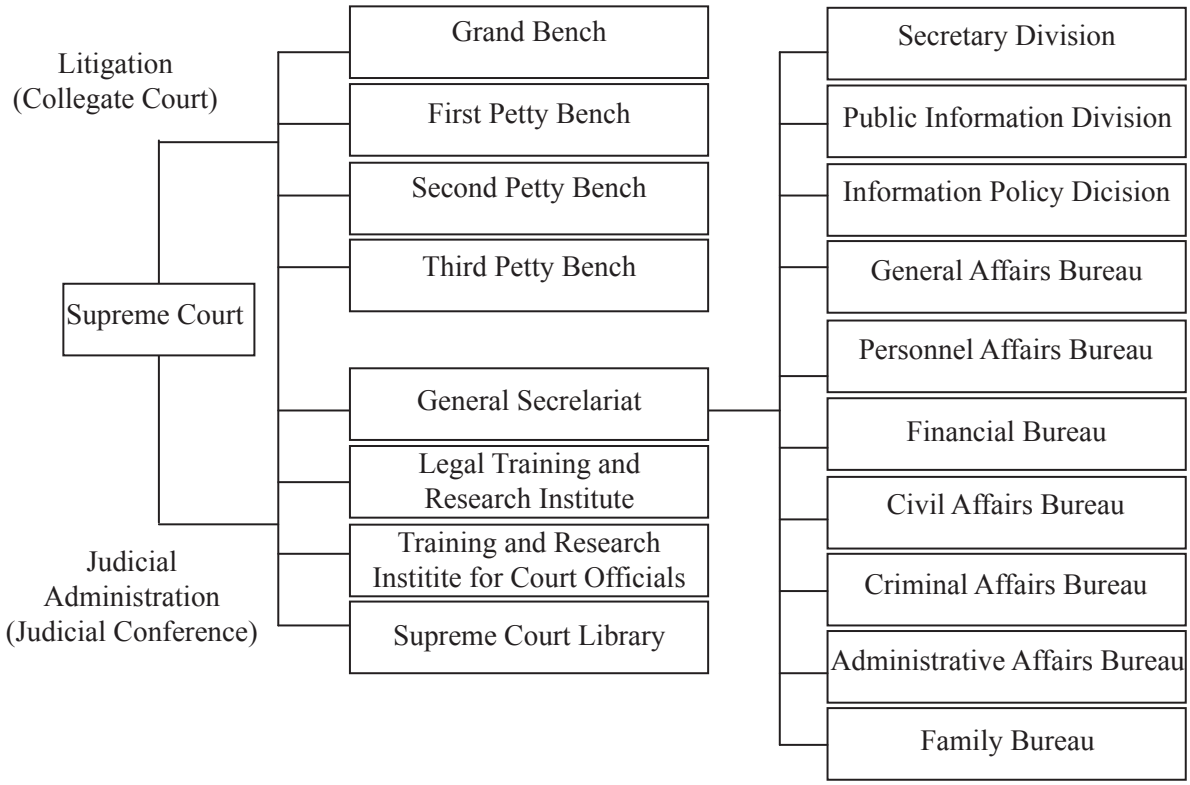
Year	Budget for the Courts (yen)	State Budget (yen)	Percentage
2004	315,627,056,000	82,110,924,617,000	0.384
2008	327,580,849,000	83,061,339,913,000	0.394
2009	324,732,707,000	88,548,001,321,000	0.367
2010 (draft)	323,178,000,000	92,299,200,000,000	0.350

Judges are paid very well, especially from mid-career, although they must work long hours and are often rotated among different courts throughout their careers. Pension schemes are complicated but are generally based on incomes and years worked, hence will also be high. This explains why there are almost no recorded examples of corruption among the post-War judiciary.

For example, the monthly salary of the Chief Justice of the Supreme Court is 2,065,000 yen (identical to that of the Prime Minister). Other Justices are paid 1,507,000 yen (like Ministers or the Chief Prosecutor). The President of the Tokyo High Court gets 1,444,000 yen (like the deputy Cabinet Secretary, parliamentary Vice-Ministers, and the head of the Cabinet Legislative Bureau). Other High Court Presidents earn 1,337,000 yen monthly (like the head of the Tokyo High Prosecutors Office – other heads as well as the Deputy Chief Prosecutor earn 1,231,000 yen monthly). Less senior full judges earn between 531,000 and 1,207,000 yen monthly, divided into 8 grades; associate judges' monthly salaries begin at 227,000 yen, but this moves up quite quickly through 12 grades (usually once or sometimes twice annually over their 10-year appointment. Similarly, prosecutors earn 227,000-1,207,000 monthly, across a total of 20 grades. (In other

words, judges and prosecutors basically earn identical salaries – again a historical leftover from pre-War justice system administration.) By comparison, the average monthly salary of *bengoshi* lawyers in 2008 was 553,000 yen. The median will be lower, however, because a small number of *bengoshi* tend to earn very large salaries whereas most lawyers (as in other countries) work in sole or small practices earning below-average incomes (for more details as of 2004, see also {Nakazoto et al 2004} at <http://ssrn.com/abstract=951622>).

In order to carry out these financing and administrative affairs, the Supreme Court has the General Secretariat (jimu sokyoku) as its internal organisation responsible for judicial administration, the Legal Training and Research Institute, the Training and Research Institute for Court Officials, and the Supreme Court Library. The key staff of the General Secretariat are generally selected from among the judges of lower courts, and work in judicial administration is generally very favourable for career advancement as a judge.



From: Supreme Court of Japan, "Justice in Japan" (2009) 8

4.17 Oversight and Accountability

Professional discipline of judges

Part 4.8 above notes the formal role of the Cabinet in designating the Chief Justice of the Supreme Court and reviewing its General Secretariat's recommendations for appointments of other Justices as well as lower court judges. Under Art 79(2) of the post-War Constitution, appointments of the Justices also "shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment". The same review by voters should occur after subsequent ten- year periods, but the fact that Supreme Court Justices are usually appointed close to mandatory retirement age means that this provision has almost no scope to operate in practice. In addition, the public has never voted off a Supreme Court Justice (and most would have trouble even naming one of the 15) and Cabinet has never rejected any nominations for appointments.

Similarly, there have only been 8 cases of Impeachment completed by the Legislature under Art 78 of the Constitution (see, in Japanese only, <http://www.dangai.go.jp/lib/lib1.html>). The first decision was rendered in 1948 and the eighth, involving a District Court Judge stalking (sending harassing emails) to a female subordinate, in 2008 (see also <http://search.japantimes.co.jp/cgi-bin/nn20081204a1.html>). The latter Judge was dismissed, as were the judges in all five of the preceding cases. Out of the 8 cases, six have also involved appeals for leniency and reinstatement as a judge. The first three were rejected but judges were reinstated in the last three cases, after at least five years had elapsed since dismissal and each had diligently researched and/or practised law as a *bengoshi* lawyer.

Formally, the procedure is set out in the Judges Impeachment Law of 1947. A Tribunal comprises seven members from each House, but acts independently without being bound by its decisions, and it addresses cases that a Diet Prosecution Committee decides to bring upon complaint lodged by any person. Grounds for impeachment are serious breach or gross neglect of duties, and misconduct affecting the authority and credibility of the judge (irrespective of whether it occurred during his or her official duties). The Tribunal may only dismiss (by two-thirds majority) or acquit; other disciplinary measures fall within the competence only of Supreme or High Courts.

Judges can also be disciplined by the courts themselves for breach or neglect of duties, and misconduct undermining the dignity of the judiciary, but no data is readily available. Rather than formal discipline for outright misbehaviour, judges who do neglect duties are more likely to suffer in (lack of) promotions in the job rotation system outlined above (Part 4.14).

4.18 Other Court Staff

Organisation of other court staff – how and by whom recruited, performing what functions, paid by whom, what education/training etc.

In addition to some 3,500 Summary Court and other full-time judges as of 2009, plus the 237 part-time *chotei-kan* appointed since 2004 (Parts 4.7 and 4.11 above), there were around 22,000 other court officials made up as follows, paid for by the Supreme Court and trained through its "Training and Research Institute for Court Officials" (adapted and updated from: <http://www.courts.go.jp/english/system/system.html>).

(a) Judicial Research Officials (chosakan: 40-50)

These provide research necessary for trials and decisions of cases under the instruction of Justices or judges in charge. About half are recruited from among specialists in the fields of intellectual property, tax administration and other specialised fields. About half are qualified as *hoso*, mostly being mid-career elite judges assigned like American "court clerks" to assist the Justices in research for Supreme Court cases.

(b) Court Clerks (shokikan: 9,400)

With high levels of legal education, court clerks are responsible for attending court proceedings and submitting detailed public records, assisting judges in researching laws and judicial precedents, and carrying out other duties as provided by law in order to assure due process. Moreover, the responsibility of court clerks to make preparatory arrangements between dates of the court proceedings has been recognised as very important, and court clerks are taking an active part in administering litigation in cooperation with judges to realise proper and prompt justice. For example, as mentioned above (Part 4.11.2(a)), *shokikan* play a very important role in the large volume of *tokusoku* demands for payment made through the Summary Courts.

(c) Family Court Probation Officers (katei saibansho chosakan: 1,600)

These conduct factual investigations and manage human relationships to effectively resolve cases of domestic relations, personal status and juvenile delinquency, submitting reports to the judge. They are specialists in social sciences such as psychology, sociology, pedagogy and social work.

(d) Court Stenographers (sokikan: 300)

These take stenographic records of court proceedings and perform other such work. The courts are no longer hiring new stenographers, as they have specialised and quite expensive skills. Instead the courts take audio recordings of hearings and later outsource transcription services to private sector companies. (There is some criticism of this new practice, however, as it means that on the same day the lawyers or judges cannot go back immediately confirm what was said eg by witnesses under examination.)

(e) Court Secretaries (jimukan: 9,300)

These deal with matters concerning judicial administration and assist in work related to handling cases filed with the courts. Some with legal backgrounds and interests may gain extra skills and qualifications to be become Court Clerks (*shokikan*), but others eg with skills in finance or human resource management remain jimukan for their entire careers. Both groups are not rotated among different courts nation-wide as with judges, although sometimes they move to different courts within the same prefecture.

(f) Court Enforcement Officers (shikkokan: around 700)

These execute civil judgments and serve some documents issued by the courts (see Part 5).

Conclusion

Assessment in relation to main strong points and weak points of the court system; degree to which it meets the country's own goals, objectives visions for the justice system as a whole; illustrations of challenges and controversies and issues for reform.

The Japanese career judiciary derives from a civil law (German and French) tradition that is still evident particularly in its bureaucratic structure, but also in some aspects (such as secondments to MoJ to represent the government as *shomu kenji*) that raise tensions with post-War separation of powers doctrine. Nonetheless, the judiciary is independent of both the executive and the legislature. A minority view that the Supreme Court instead acted like a good butler, anticipating the preferences of the "master" (the long-incumbent LDP) by itself volunteering to influence lower-court judges in "politically charged" cases, is not established by the data presented and:

"the picture they draw seems contrary to human nature: judges who are highly skilled and fiercely faithful to doctrine and precedent 99 percent of the time are perfectly willing to betray their professional identity when the Secretariat puts out that the LDP would like them to do so" (see {Upham 2005} at p 435).

The self-identity of individual judges is indeed that they do wish to preserve independence in their judgments; they choose this career precisely because they do not want to be beholden to a particular client (like the government, for public prosecutors) or even clients generally (like *bengoshi*). Japanese judges also enjoy the constitutional guarantee not to have their salaries reduced, and even if they are promoted more slowly or to less desirable courts because of personal convictions expressed in judgments that do not meet with approval from the Secretariat, they still enjoy comfortable salaries and pensions. The judiciary also maintains very high trust among the

general public, unlike politicians and even recently the bureaucracy. Given this situation, it is unsurprising that its personnel management system has not changed very much (see {Ramseyer and Rasmusen 2007}; {Nishikawa 2010}).

However, particularly as more cases have been filed in courts since the 1970s (albeit still from a low base) and new types of disputes have arisen (such as medical malpractice or IP cases), concern has emerged that the judiciary lacks sufficient understanding of general conditions in Japan's evolving society as well as enough expertise in specific fields.

Prompted by the JRC recommendations, the Supreme Court has therefore agreed to increases in numbers passing the National Legal Examination (generating a larger and more diverse pool to choose more judges from), and sent more judges out for long-term secondments to a greater variety of organisations (including the new Law Schools). It has agreed to further reforms to the Code of Civil Procedure to bring in specialist lay experts (see {Nottage 2005b}). It has also spent enormous energy on bringing into effect the *saiban'in* system, to promote greater popular participation and legitimacy in criminal justice even at the expense of a core value held by the judiciary: predictability or consistency in the application of the law. The Court has also hired hundreds of part-time *Chotei-kan* to assist in court- annexed civil conciliation cases, but so far this has not translated into more full-time appointments as judges from among the *bengoshi*. The recent backtrack from increasing the numbers allowed annually to pass the National Legal Examination may further reduce pressure on the judiciary in that respect, as well as for related calls to abolish the "associate judge" system enacted in 1947 as a "temporary" measure. In sum, the Japanese judiciary seems to have reached a fairly stable new equilibrium but one somewhat different from that of a decade ago, underpinned by the JRC initiative and that backdrop.

5. Civil and Criminal Judgement Enforcement

5.1 Types of Enforcement

Civil

Civil execution (*minji shikko*) is a procedure whereby creditors may request the State to satisfy their claims by the exercise of State power when debtors do not voluntarily perform their obligation (see <http://www.courts.go.jp/english/proceedings/civil_suit.html> at 3.b).

For instance, if debtors fail to perform their obligations of payment of money, the creditors, based upon claims affirmed by a judgment, judicial settlement etc may attach the debtors' property, sell it by auction and distribute the proceeds for the satisfaction of their claims. Of the various cases requiring execution, those dealing with attachment and auction of movables, vacant possession of real estate and delivery of movables are handled by court enforcement officers (shikkokan). They are officials of the district court but receive commissio000000ns from applicants for civil execution. Enactment of the Civil Execution Law (No 79 of 1979, CEL), replacing relevant parts of the 1891 Code of Civil Procedure, has created more expeditious and equitable proceedings for execution as well as for enforcement of collateral such as mortgages and pledges.

Enforcement and execution were further facilitated when relevant parts of the CEL were amended as the Civil Provisional Measures Law (No 91 of 1989, in effect from 1991), dealing with execution of provisional attachments (*kari-sashiosae*) and provisional dispositions (*kari-shobun*). Other amendments have occurred in the mid-1990s, as Japan's economic situation deteriorated, and since 2003 after JRC recommendations (outlined in the Conclusions below). Overall, this field of law was updated relatively early and has been further improved subsequently, related to declines in economic conditions (eg the Oil Shocks in the 1970s Japan's "lost decade" of the 1990s) perhaps more so than broader justice system reforms.

Criminal

Although concerns are raised about police and prosecutor discretion in proceeding to trial, enforcement of criminal judgments is predictable and uniform nation-wide, so this will not be covered further in other sections of this Part. An interesting exception concerns those convicted for serious crimes and sentenced to death. The Minister of Justice must sign the execution order, but sometimes has refused to do so at all for personal or religious reasons. The question has arisen whether this is an abuse of discretion, although in practice Ministers change quite frequently anyway. Other Ministers have not been quick to sign execution orders, meaning that dozens of prisoners remain on death row (awaiting execution) for many years. The psychological toll on these prisoners has led to some (but limited) political controversy and (unsuccessful) constitutional challenges.

Japan provides for capital punishment in 12 Articles of its Penal Code and in 5 special laws (see {Schmidt 2002} p30). In practice, however, the only people ever sentenced to death are persons convicted of murder. The sole method of execution is hanging, and usually there are delays of many years— or decades—between the occurrence of a capital crime and an execution. Since the quick is the enemy of the careful in Japan, as it is in the United States (the only other rich democracy that retains capital punishment and continues to conduct executions on a regular basis), its capital process—from the first instance trial, through appeals, to execution—is slow and deliberate.

Japan is one of 13 Asian nations that retain capital punishment. Like most other Asian countries in that category, it has a death penalty that is largely symbolic and that plays little or no role in crime control (Johnson 2008). In this respect, Japan represents the predominant pattern in Asia, for

only four Asian nations carry out executions with any frequency—as a regular criminal sanction rather than a one-in-a-thousand penalty of chiefly symbolic or political importance. The high-rate users are China, Vietnam, North Korea, and Singapore: three authoritarian states that are (or were) communist, and one on the right that has been called "a post- Maoist model of the Chinese future" (see {Johnson and Zimring 2009} pp407- 422).

Japan's death penalty started to surge in the 1990s. Death sentences have increased over the past decade (from 1995 to 2005 the annual average doubled), and executions also have spiked. In 2007 and 2008, Japan carried out more executions (24) than it had in the previous eight years. The causal story for this surge is complicated, but at its core is the fact that the revival of capital punishment in Japan is one part of a larger trend toward increasingly severe punishments (*genbatsuka*) in Japanese criminal justice (ibid, p74).

The administration of capital punishment in Japan—and the execution process especially—is characterised by high levels of state secrecy and silence (Johnson 2005). Officials have occasionally tried to explain and justify various aspects of their secrecy policy, but in the final analysis the main motives for it seem to be to protect Japan's death penalty system from external scrutiny and criticism and to preserve the prerogatives of the persons who administer it. Since there is no government power greater than the power of life and death and no government intrusion more invasive than the death penalty, there is no government power in greater need of public oversight. In Japan that oversight is missing {Johnson 2006}.

Administrative

As noted above (Part 1.3 under "accountability"), judgments ruling that actions or laws are illegal or even unconstitutional may not be enforced if public interests are strong enough (see further eg {Sonohara 1997}).

Labour

No special issues arise, even under the Tribunal system established in 2004 {Wolff 2008}.

5.2 Organisation

Title of Debt and Execution Clause

For civil execution, the first basic principle is that the creditor must have (a) a title of debt (*saimu meigi*) with (b) an execution clause (*shikkobun*). (The detailed description below, except for the Conclusions, draws heavily on {Hattori 2000}. Combined, these two elements are commonly called an enforceable exemplification (*shikko seihon*). With it, an execution proceeding may be started by the creditor simply filing a petition with the proper execution authority (CEL Art 171).

(a) The **title of debt** is a formal document confirming that the claim is to be enforced definitely and conclusively, and the CEL exclusively defines several types (Art 22). While a judgment is a typical title of debt, executions on deeds notarised by a public notary (*kosei shosho*) are far more numerous in practice. The latter notarial deed serves as a title of debt (*shikko shosho*) only when it involves a money claim for a fixed sum and includes the debtor's statement that his or her property is subject to immediate execution once the satisfaction of the claim is overdue. Other important types of titles of debt include the payment demand note (*shiharai tokusoku*: see Part 4.11.2 above) declared provisionally enforceable (see Code of Civil Procedure Art 391), pre-commencement compromises (*kiso-zen no wakai*), settlement agreements during the proceedings (*sosho jo no wakai*), admissions of claim (*seikyu no nindaku*: see CCP Art 267), and Civil Conciliation Law settlement agreements (see Part 4.12 above) which have been entered in the court record.

Promissory notes and other such purely private documents are not, as in certain other countries (eg Italy), titles of debt.

(b) The **execution clause** is a separate public certificate attesting to the fact that the particular title of debt is enforceable in favour of the particular creditor and against the particular debtor. Because the face of a title of debt may not reveal satisfaction of some requirements, including the irrevocability of the judgment, the fulfilment of conditions precedent or the identification of non-parties for or against whom the title may be executed, such a certificate is required to assure the execution authorities that all the requirements for enforceability are met. In cases of titles of debt other than a notarial deed, the court clerk of the court issues the execution clause; in the case of a notarial deed, the notary public issues it (CEL Art 26). The execution clause is inscribed at the end of the instrument of the title of debt and reads: "This instrument is issued to [creditor] for the purpose of execution against [debtor]." While the execution clause is not required for commencing the execution in exceptional cases (CPLR Art 43(1) and by implication decisions ordering non-penal fines and penal fines), several additional execution clauses are issued if a special need for the issuance has been proved (CEL Arts 19 and 28).

Enforceability sometimes raises questions of substantive law that cannot be resolved on the face of the instrument. For example, when the creditor's claim depends on the occurrence of a certain fact which the creditor bears the burden to prove (not, eg, an acceleration clause in a notarised lease contract), it may not be evident on the face of the title of debt whether or not such a fact has already occurred. Alternatively, there will be cases in which enforceability extends to a person not named in the title of debt (eg inheritance cases). In such cases, the creditor must prove *prima facie* by a certificate (eg, for inheritance, issued by the government- administered family register or *koseki*) the occurrence of the stated fact or the extension of enforceability against or in favour of the person not shown on the title.

Types of Civil Execution

Execution is generally carried out against the debtor's property (in effect, it proceeds in rem rather than *in personam* - meaning against the person or company itself). The execution authorities do not compel the debtor to perform the acts required by the title of debt in person. Instead, to the greatest extent possible, they seek to secure for the creditor, without the debtor's assistance, the equivalent of the debtor's performance.

If the obligation to be enforced is to pay money or to surrender specific property, the execution authority sells the debtor's property to obtain the money or takes the property from the debtor and turns it over to the creditor. This mode of execution is called direct compulsion (*chokusetsu kyosei*).

Even if the debtor is obligated to do, or refrain from doing, a specific act, the law avoids personal compulsion. An obligation which can be performed by a person other than the debtor him/herself may be enforced through execution by substitute (*daitai shikko*) - performance by a third person and payment of the expenses thereof from the proceeds of the execution levied on the debtor's property (CEL Art 171). If the nature of the obligation is such that it does not permit performance by a third party, an indirect form of personal compulsion is used. In that case, the court may award damages to be paid by the debtor unless and/or until he/she performs. This method is called indirect compulsion (*kansetsu kyosei:* CEL Art 172). Compulsion by imprisonment, however, is not allowed. This differs from many common law countries, where court retain broad "contempt of court" powers, and even some civil law countries such as Germany.

5.3 Model

Power to conduct civil enforcement proceedings is vested in the court of execution (*shikko saibansho*) and the bailiff (*shikkokan*). The CEL greatly strengthened the powers of both.

Court of Execution

"Court of execution," as used in the CEL is simply another name for the district court when it is conducting an execution proceeding. (The court having territorial jurisdiction is prescribed in accordance with the object of the execution, eg execution against immovables is to be conducted by the district court where the immovables are located: CEL Art 44.) In larger district courts, a special division comprised of several judges is usually designated to handle execution matters, though each individual proceeding is handled by a single judge.

The court of execution is primarily responsible, with the aid of the bailiff, for garnishments of claims due to the debtor from a third party (eg choses in action, tort or contract claims or other intangibles), as well as executions against immovables, ships and the like.

The court acts in execution matters by issuing judicial rulings (*kettei*). It is left to the discretion of the court whether to hold oral proceedings or not (Art 4), and the CEL provides for informal examination (*shinjin*: Art 5). There are occasional exceptions, however, in which courts other than the district court may perform the function of a court of execution. For example, the court record of a compromise or conciliation agreement may be executed by the summary court or the family court.

The Bailiff

The bailiff is an officer of the court who handles enforcement proceedings (CEL Art 2 and Courts Law Art 61) and who serves court documents (detailed in Art 99(1) of the Code of Civil Procedure). In 1998, for example, bailiffs accepted 9,078 requests for service of court documents and 417,129 execution cases (including executions of provisional attachment and provisional disposition), largely seizures and compulsory sales of movable and immovable property. In April 2000 there were around 620 bailiffs nation-wide, and there are also a few deputy bailiffs. The district court may, if necessary (eg because of shortages of bailiffs), have court clerks perform the function of bailiffs (Bailiffs Law, *shikkokan ho*, No 111 of 1966, art 20).

Although the bailiff is a public official, s/he generally does not receive a salary but discharges duties on a fee basis (see Part 5.7 below). Bailiffs are stationed in each district court (Art 62), and a judge in each court is appointed to supervise them (Supreme Court Rule No 10 of 1966, Arts 4 and 5). Bailiffs are responsible for executions against tangible movables (defined in Civil Code Art 86 as anything other than immovables), including negotiable instruments, and also for taking possession of specific property, movable or immovable (CEL Arts 122 et seq and 168-9). In addition, they assist the court of execution in effectuating all types of execution (CEL Art 64(3)).

5.4 Tasks and Functions

As detailed above (Part 5.1), those executions that generally are more or less legally difficult or complicated and require determination or interpretation based on a legal perspective have been placed in the jurisdiction of the court, while those which are somewhat simpler and formulaic but need out-of-court, factual or physical activities are entrusted to the bailiff.

5.5 Relations

Both the court of execution and the bailiff are parts of the judiciary (see Part 5.2 above). They become joined under the Bailiffs Law of 1966, although the Supreme Court did exercise some

controls already from 1954; originally they were simply appointed by the Interior Minister following an examination {Bennett 1999}. Now there are no separate administrative organs to handle civil execution. However, the important role still played in practice by public notaries has been highlighted above (Part 5.2), and they are accredited and regulated by the Ministry of Justice.

By contrast, there exists less scope for dealings between prosecutors or police and the enforcement authorities because compulsion by imprisonment is not allowed in Japan (Part 5.2.2). If debtors resist execution by committing other crimes (eg assault), of course, the police and prosecutors can (and do) become involved.

5.6 Process

After the bailiffs became part of the judiciary under the 1966 Law, they were moved to new offices inside the courts and an interview was added to the requirement of an examination. The latter can be waived for court clerks (*shokikan*) and many become bailiffs soon before reaching retirement age. Applicants were required to be Civil Service grade 7 staff or above and be 40 or more years of age.

However, the bailiffs retained the original system of fee-based income (subject to a minimum guaranteed out of the judiciary's budget). From 1966 they were also no longer allowed to engage privately their own deputies. Because execution cases dropped in the several years after that, {Bennett 1999} speculates that judgment creditors instead turned to the previous deputies or other private individuals (including *yakuza* gangsters) in order to enforce judgments that the smaller cadre of official bailiffs may have thought were more troublesome for the fees fixed by the Supreme Court. However, other factors may have been at work. More generally, Bennett argues that restricting (above-board) bailiff activity is likely to promote the growth of underground enforcement, although he does note that civil execution law and civil/procedure law reforms have subsequently occurred (see also {Bennett 2009}, {Nakajima 2006} and Conclusion below).

5.7 Mechanisms

Administrative

Mechanisms for administrative management (human resources and budget) for judgement enforcement agencies Fees for the courts of execution come out of the general budget for the judiciary. By contrast, bailiffs discharge duties on a fee basis paid to him or her by the applicant. However, by Cabinet Order (No 394 of 1966), if the fee income of a bailiff does not reach a specified amount, the state provides him/her with a subsidy. The schedule of fees for various services is fixed by a Supreme Court Rule (No 15 of 1966).

Oversight and Inspection

Mechanisms for oversight and inspection over the activities of judgement enforcement agencies.

Because civil execution is conducted through parts of the court system, under the separation of powers doctrine the oversight and relief mechanisms are provided only within the judiciary.

Sometimes the claim shown in a **title of debt** is alleged to be ill-founded and the execution thereon thus illegal. (Such an execution is not unlawful, as long as a valid title of debt exists and a competent execution authority properly follows the prescribed procedure.) Then the debtor can bring an action called an "action to object to a claim *(seikyû igi* no uttae: CEL Arts 35 and 33(2)). A judgment for the plaintiff-debtor in such an action renders the title of debt unenforceable and the underlying claim invalid. But if the validity of the title of debt attacked is protected by res judicata, typically resulting from an irrevocable judgment, an action to object to the claim must be based

only on facts that occurred after the judgment - specifically, after the close of the oral proceedings of the court rendering the judgment. For example, an allegation of payment before the close of oral proceedings is foreclosed by res judicata, but payment after the close could be invoked to justify judgment for the plaintiff. When the title of debt is not protected by a res judicata effect, typical with respect to notarial deeds, there is no such restriction; the plaintiff may always assert the invalidity of the contract embodied therein. Upon the debtor-plaintiff's application in the case of an objection action, the execution may be stayed, and it is vacated after judgment for the plaintiff (CEL Arts 36-7 and 40).

An unlawful refusal by the issuing authority to issue an execution clause can be attacked by filing an "objection to the refusal to issue an execution clause" (*shikkôbun fuyo kyozetsu ni taisuru igi*) with the district court to which the clerk is assigned in case of refusal by a court clerk, or to the court which exercises jurisdiction over the office of a notary public who has refused to issue the clause (CEL Art 32(1)).

If aggrieved, a party may attack a ruling of the court of execution by filing an execution-*kokoku*-appeal (*shikko kokoku*) with the court of execution (addressed to the high court) within one week only where the CEL specifically provides that such a *kôkoku*-appeal is permissible, whereas any other disposition of the execution may be challenged by filing an execution-objection (*shikko igi*) in the court of execution (Arts 171(2) and 33(2)). The CEL has made the relief system for the aggrieved party much clearer.

If a bailiff violates the law, the aggrieved party may raise an objection to the execution (*shikko igi:* CEL Art 11). Since 1947 bailiffs are no longer personally liable for damages caused by their unlawful acts in carrying out an execution. Such responsibility is placed on the State under the State Compensation Law (No 125 of 1947, *kokka baisho ho*). Art 1 thereof provides that when an official's illegal acts committed in the course of maintaining public order cause damage to other persons, the State is liable for such damages, and that if the official's transgressions were intentional or grossly negligent, s/he must indemnify the State for damages paid to the victim.

Conclusion

Assessment in relation to main strong points and weak points of the system of judgement enforcement; degree to which it meets the country's own goals, objectives visions for the justice system as a whole; illustrations of challenges and controversies and issues for reform Japan's system for enforcing civil judgments and other titles of debts has functioned much more effectively since the CEL was enacted in 1979, with minor further amendments in 1989 and in the 1990s, and has been further improved since 2003 following recommendations from the JRC. Well-qualified public notaries (as in other civil law tradition countries, like Germany) and fee-driven bailiffs (a more unusual feature) are important parts of this system. They help explain, for example, why Japan has a low ratio of judges to general population compared to other civil law based countries like Germany or even France (see {Supreme Court 2008}).

One of the biggest reforms in the 1979 CEL was to allow a bidder for the debtor's immovable subject to auction to place a bid confidentially (Art 34) without having meet face-to-face the unsavoury (often gangster- affiliated) *kyobai-ya* who started to emerge to interfere with the auction process. Although these *kyobai-ya* then largely vanished from the actual auctionplace, they or others emerged as unsavoury *senyu-ya* who interfered instead by obtaining a lease over the debtor's property which they provisionally registered with a government agency (*kari-toki*). To minimise this new problem, commentators and courts began to interpret liberally the CEL provisions on preservation measures (*hozen shobun*: Art 55) and transfer orders (*hikiwatashi meirei*: Art 83).

However there were limits to this re- interpretation and in 1996, following the jusen savings and loan companies collapse that resulted in many debtors holding immovables that creditors wished to claim against by enforcing judgments, Art 55 was amended (along with Arts 77 and 83) through a private member's Bill. Another private member's Bill in 1998, after the Hokkaido Takushoku Bank and other financial institutions failed in late 1997, further facilitated the disposal of immovables. For example, the powers of inspection for bailiffs were increased when making physical examinations of immovables, and auctions could be suspended or terminated if there was no expectation of a sale (see {Nakajima 2006} pp 175-6).

However, Japan's economic stagnation continued and in 2001 the JRC made these recommendations (Chapter II Part 1.6 at <http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html>) for "Strengthening of the Civil Execution System - Securing Effectiveness of Execution of Rights":

- New measures to improve the civil execution system should be introduced, such as the following:
- Measures to promote performance by obligors.
- Measures to determine the assets of obligors.
- Measures against obstruction of real estate execution by illegal occupants, etc.

A system should be established to secure the performance of obligation for the periodic delivery of small amounts of money, such as those obligations that are set by domestic affairs determinations and conciliation.

Under the existing law, which allows only direct enforcement with regard to compulsory execution based on a money claim, if the claim amount is small, the time and the cost required for implementing compulsory execution will be disproportionately more than the claim amount. And even if a money claim case has been decided in favor of the creditor, he or she may not be able to implement compulsory execution because he or she may not know what kind of assets the obligor has or because the obligor may intentionally conceal his or her assets. As to the obstruction of real estate execution, means that are available to the mortgagee or the successful bidder are increasing. For example, as a result of the revisions of the Civil Execution Law in 1996 and 1998, it has become possible, in proceedings for official auction, to evict more accurately and swiftly those occupying illegally based on abusive short-term leases. Furthermore, the Supreme Court, in its Grand Bench judgment of November 24, 1999, recognized subrogation of the claim for obstructive eviction against an illegal occupant of foreclosed real estate. Even so, cases of abuse of short-term leases and cases of execution obstruction by so-called *sen'yu-ya* (illegal occupants) are being reported.

In light of these problems, new measures to improve the civil execution system, such as measures to promote performance by the obligor, measures to determine the assets of the obligor, and measures against obstruction of real estate execution by illegal occupants, etc., should be introduced from the standpoint of securing the effectiveness of execution of rights. It is also reported that the existing law is not adequate to secure the performance of obligations for periodic delivery of small amounts of money, such as those obligations that are set by domestic affairs determinations and conciliation (alimony, etc.). In light of such reports, a system to secure the performance of those obligations should be established from the standpoint of securing the effectiveness of execution of rights.

Furthermore, the personnel system of the courts should be improved and strengthened, including sharply increasing the number of judges and court officials engaged in civil execution, to achieve proper and prompt disposal of civil execution cases.

There is no comprehensive data readily available about expansions in personnel or budget since 2001. However, the other recommended reforms were all achieved through legislation enacted and implemented over 2003-5, after more concrete recommendations and proposals from two divisions with the MoJ's Legislative Reform Council (*hosei shingikai*). For example, for immovables, provisions for issuing preservation measures were further liberalised, and a system introduced allowing them to be issued even if an individual target for the measures could not be identified (Art 55-2) – some *senyu-ya* had adopted the tactic of replacing each other frequently in regard to the movable. Bidders were also allowed to inspect with bailiffs the interior of the movable (Art 64-2).

These legislative improvements also extended to security interests unrelated to auctions of secured immovables. For example, a system was introduced allowing a priority claim from income from mortgaged immovables (such as rents: see Art 180(2)). Improvements were also made regarding security interests over movables. In addition, for instance, a new procedure (often found in other countries) was introduced to obtain disclosure of financial affairs in order to facilitate execution of monetary obligations (CEL new Chapter 4: see {Nakajima 2006} pp 177-82). Overall, therefore, the civil execution system has now been comprehensively modernised and appears to work comparatively well. *Yakuza* and other unsavoury operators will have been further squeezed, as they have been over the last 15-20 years in many other fields as legal frameworks and personnel have been bolstered (see generally {West 2007}). However, past (and comparative) history shows that obstructive activities are always being (re)invented to interfere with orderly execution of civil judgments, making this area an important one to monitor continuously.

6. Lawyers and Other Legal Services

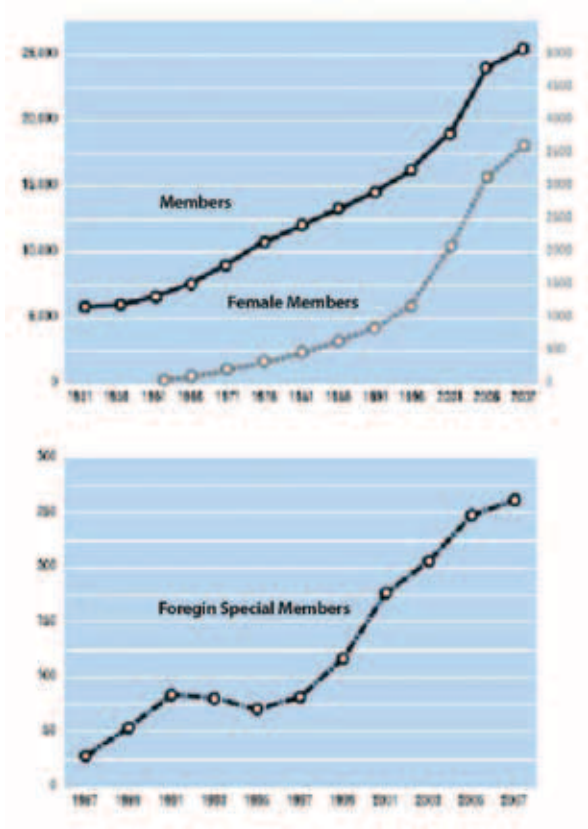
Within the overall analytical framework set out in chapter 1 above, chapter 6 should give more detail on the legal profession and other legal/dispute resolution services, including the degree to which their role and functions are shaped by political, ideological, cultural (etc) factors set out above).

6.1 Organisation

6.1.1 Bengoshi Lawyers

(see <http://www.nichibenren.or.jp/en/about/profile.html>)

The total number of qualified lawyers in Japan – including judges, public prosecutors, and *bengoshi* private practitioners – is about 29,000. The ratio of such lawyers to the total population is one of the lowest among developed countries, but the numbers have been expanding significantly since the late 1990s – especially for *bengoshi*:



Japan has 52 local bar associations, which make up the Japan Federation of Bar Associations (JFBA or nichibenren: see Figure below). There is one for each of the 50 district court jurisdictions with the exception of Tokyo, where three bar associations remain that pre-existed the Practicing Attorneys Law (bengoshi ho). Local bar associations comprise the following (see statistics maintained at <http://www.nichibenren.or.jp/en/about/index.html>):

individual attorneys (numbering 28,812, plus 11 quasi- or special members mostly in Okinawa); legal professional corporations (395, allowed since 2001 to facilitate law firms setting up branch offices – partly underpinned by JRC recommendations: see Part 1.1(3) at <http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html>); and foreign lawyers (325 gaikokuho jimu bengoshi, allowed since 1987 to give advice out-of-court primarily only regarding their home jurisdiction's law).

Any person qualified to practice law in Japan becomes an attorney as well as a member of the JFBA by being listed on the JFBA's Roll of Attorneys through the bar association which s/he chooses to belong to. Despite their growing numbers overall, eg from 15,900 in 1996 to 22,059 in 2005, bengoshi remain heavily concentrated in Japan's major urban areas: in 2005, 16,390 (74%) were in the eight cities with High Courts, including 10,699 in Tokyo (48%) and 2,977 in Osaka (13%: see {Ii 2009} p60).

6.1.2 Other "Quasi-Lawyers"

Many quasi-lawyers must also be considered, especially when adopting a functionalist approach to comparative law {Abe and Nottage 2006}. There are about 8,000 patent attorneys (*benrishi*), who advise on certain intellectual property matters, and have been granted joint rights of representation (*with bengoshi*) in lawsuits concerning certain intellectual property cases since 2003. There are about 19,000 judicial scriveners (*shiho shoshi*), whose main functions are drafting legal documents and filing them with courts, public prosecutors, and the Ministry of Justice's Legal Affairs Bureaus which manage the registration of persons' legal status and title to real estate on behalf of those who are not represented by lawyers. Since 2003, judicial scriveners also have been granted right to represent litigants in summary court proceedings.

There are also about 39,000 administrative scriveners (*gyosei shoshi*), who draft legal documents to be submitted to organs belonging to the executive branch on behalf of their clients. There are about 71,000 tax attorneys (*zeirishi*), whose primary roles are the calculation of taxes and drafting of documents to be filed with the tax offices on behalf of their clients. Since 2002, tax attorneys may also assist their clients in lawsuits concerning tax matters provided their clients are represented by lawyers. There also around 32,000 Social Insurance Labour Consultants. About 550 public notaries (*koshonin*), appointed from retired public prosecutors and the like, authenticate and preserve certain legal documents, such as contracts, which may gain additional force in civil litigation (see Part 5 above). Some notaries are also involved in ADR (see Part 6.6 below).

In addition, many people who hold a Bachelor of Laws but are not qualified lawyers are employed by governmental authorities and private corporations, where they are engaged in law-related jobs such as examining legal documents submitted by citizens or drafting contracts. Corporate legal department staff have steadily increased in numbers and sophistication since the 1970s {Kitagawa and Nottage 2007}.

Each of these quasi-lawyer groups (except for government-employed legal experts) has its own professional association and/or federation, usually with some legislative backing, but with much less influence in policy- making than the bar associations and JFBA. Nonetheless, the JRC did recommend some expansion in their roles, resulting in the above-mentioned changes and summarised as follows by {Ishida 2009} p24:

(Number of licensed individuals)	**Major areas of practice BEFORE the Reform**	**Expanded areas of practice AFTER the Reform**
Judicial Scriveners (19,225: as of August 2008)	Draft documents for submission to court and represent clients in real property registration proceedings	Conditionally represent clients in summary court and ADR, and provide legal advice on matters that they are authorized to handle

Administrative Scriveners (39,203: as of Spring 2008)	Draft documents for submission to administrative agencies and represent clients for submission proceedings	Draft contracts and provide legal advice
Patent Attorneys (7,790: as of July 2008)	Register intellectual property, represent client in arbitration proceedings and contract negotiations	Conditionally represent clients in patent infringement cases
Tax Attorneys (71,160: as of August 2008)	Deal with tax laws, draft documents, represent clients in tax proceedings, and on issues pertaining to tax laws	Appear in court as assistants to attorneys
Certified Social Insurance Labor Consultants (32,332: as of March 2008)	Deal with particular social insurance and labor laws, draft documents, represent clients in administrative proceedings, and consult on issues about labor and insurance laws.	Represent clients at labor dispute committees of the prefecture

6.2 State Regulation

(a) Post-War Legislative Framework for Bengoshi Lawyers

Within the legal profession, bengoshi therefore comprise one of the largest, certainly most influential and most independent groups. The Constitution does expressly provide for the Supreme Court to makes rules regarding bengoshi (see Art 77). Commentators also believe, given its language and history, that the Diet also impliedly has power to regulate the Bar through legislation – and this has taken the form primarily of the Lawyers Law (No 205 of 1949, bengoshi ho). Art 72 of that Law prohibits the unauthorised practice of law by those not members of Bar Associations (see Part 6.6 below), and the Ministry of Justice (through its prosecutors) does remain responsible for punishing violations. Essentially, however, "self- regulation by the Bar is now the rule rather than the exception and, even when the government designs some regulatory control over the Bar, the attorneys have considerable influence over the nature and extent of that regulation" {Ishida and Taylor 2008: para 7-050}.

(b) Self-Governance & Code of Ethics

(see <http://www.nichibenren.or.jp/en/about/attorney_system.html> at 4.)

The JFBA and the local bar associations have a high degree of self- governance, in contrast to pre-War lawyers' associations. They are empowered to examine the qualifications of and take disciplinary action against attorneys (see Part 6.5 below), and the activities of attorneys and their regulations do not fall under the supervision of the courts, public prosecutors, or administrative institutions. Bar associations differ from other professional associations in that they are not governed by a regulatory agency and from a financial perspective are operated entirely from dues and other revenues collected from members (for current membership fees, making up 80% of an annual budget of around 5 billion yen, see <http://www.nichibenren.or.jp/en/about/profile.html> at 3.). Self- governance is considered essential to maintaining the independence of the legal profession because the legal services provided by attorneys may at times require them to oppose

state authority. Relatedly, membership in bar associations is mandatory and unregistered attorneys are not allowed to practice law.

In November 2004 the JFBA replaced its "Code of Ethics" with the new "Basic Rules on the Duties of Practicing Attorneys". It is essential that attorneys maintain the trust of society and the general public in order to strengthen the self-governance of bar associations. This requires that each individual attorney maintain high standards of ethics and provide quality legal services. The 2004 Basic Rules define both a code of ethics and a code of conduct for attorneys with chapters covering such issues as basic ethics, relationships with clients (confidentiality obligations and prohibitions against conflicts of interest), criminal defence, legal practice within organisations, joint practices, rules for legal professional corporations, and rules governing relationships with other parties, other attorneys, and bar associations. They also articulate basic standards for the supervision and discipline of attorneys.

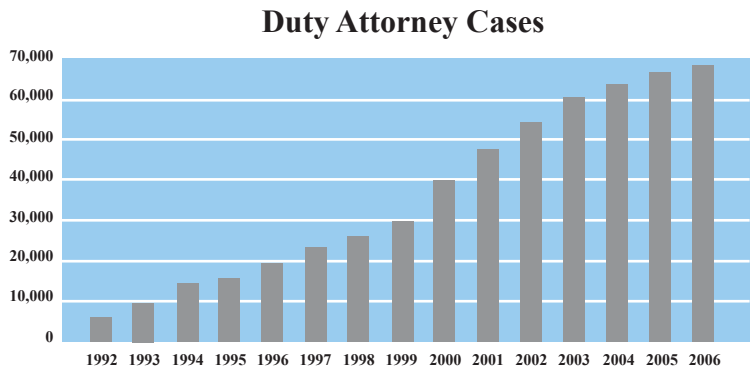
6.3 Lawyers

In both criminal and civil cases, the lawyer is not only allowed to gather evidence (eg by interviewing potential witnesses) but also is generally expected to do so as part of his or her professional obligations to the client (see Article 37(2) of the Nichibenren's 2004 Basic Rules on the Duties of Practising Attorneys at <http://www.nichibenren.or.jp/en/about/pdf/basic_rules.pdf>).

The procedure is generally similar to any other citizen seeking out relevant evidence (eg s/he may not break any laws in doing so, such as wiretapping or theft of documents). However, s/he must also not over-zealously act for the client (eg by "coaching" the client or a witness about what exactly to say when giving evidence to the Court) because Article 4 of the Basic Rules require him or her to "protect the independence of the judicial system and strive to contribute to the sound development of the judicial system". The lawyer also benefits from several special means to gather evidence. One is a provision in the Lawyers Law allowing a request to the President of the local Bar Assocation for the latter to request any documentation any private or public entity – although that entity has no legal obligation to agree to the President's request and provide the requested documentation. Another example is the ability of a party (but in fact usually the client's lawyer) to see pre-action disclosure of information under the 2003 amendments to the Code of Civil Procedure {see {Nottage 2005}}, although again the other party is not obliged to disclose – in which case the action has to be commenced and a Court order sought. [Q.2.8(c)]

Role in Criminal Cases

As a defence lawyer, s/he must assist and advise the defendant on the pre- indictment and post-indictment processes. In the Constitution and the Criminal Procedure Code, the defendant has right to counsel for the post- indictment process but not the pre-indictment process. Because the scheme of the state-appointed lawyer is limited for the post-indictment, a volunteer-based pre-indictment scheme was launched by the bar itself in 1990s. The Duty Attorney System (toban bengoshi) system was a successful initiative of bar associations in order to effectively guarantee the right of suspects to court-appointed attorneys before there existed any system of providing court-appointed attorneys at the suspect stage (see <http://www.nichibenren.or.jp/en/about/activities.html> at 4.).



When requested by a suspect, the duty attorney quickly visited the suspect's place of detention and interviewed the suspect, regardless of nationality or visa status. If the suspect was a foreign national, an interpreter attended too. The first consultation with a duty attorney was free of charge. Interpreting fees were likewise free and borne by the local bar association. Fees were charged if after the first consultation the suspect requests representation from the attorney. However, the scheme had no support from the public purse for many long years.

Finally, from 2006, felony cases have been covered by state-appointed lawyers managed by the *Ho-terasu* (Japan Legal Support Centre: LSC, see Part 6.6.1 below). This new scheme was implemented by judicial sector reform after 2001 and it was achieved because of increasing the number of lawyers based on the JRC recommendations. Each Support Centre appoints a lawyer as state-appoint lawyer in the pre-indictment process for a felony defendant. The defendant can have right to counsel under restraint in detention cells in the police station. One of the big legal issues in that process is restriction of communication between the defendant and the lawyer. The prosecutor has the power to restrict the time and opportunity of communication in the view of investigation, although there is possibility to violate the defendant's constitutional right to counsel. The Supreme Court decided the restriction could violate the legal rights of defendant but it recognised the prosecutors' discretion for restriction of time and opportunity for communication between defendant and defender. Many civil actions against the prosecutors' discretion were taken to the court and in over one hundred cases the defendants won damages. However, prosecutors do not stop using their discretionary powers to intervene in defendant-lawyer communication at this moment, because Art 39 of the Civil Procedure Code permitting the power is still constitutional in Japanese courts, although the Human Rights Committee in the United Nations repeatedly argues that such intervention could be in violation of international Human Rights Conventions.

What happens if the law requires "mandatory counsel" but one is not appointed in case that ends up in Court? If the prosecutor notices this breach, s/he should bring this to the attention of that Court (or even bring an appeal to the higher Court to have even a conviction set aside), pursuant to the prosecutor's duty to ensure convictions are obtained in accordance with the law. If instead the Court notices the lack of mandatory counsel, it should suspend pending proceedings and/or bring the matter to the attention of the prosecutor and the accused. Any further "sanctions" would have to be stipulated in relevant legislation. [Q.2.8(a)]

Role in Civil Cases

(a) Increasing Transactional Advice

Although bengoshi still predominantly work in small law firms concentrating on court-related dispute resolution, a growing proportion of *bengoshi* work comprises legal advice on planning transactions and risk management or avoidance. A survey in 1988 of lawyers in Tokyo, where

most lawyers are congregated, confirmed small but significant shifts over the 1980s (see {Hamano 2007} especially pp166-70). This was an era when the Japanese economy was booming and lawyers' annual incomes rose considerably (from 7.6 million yen in 1980 to 17.9 million in 1998 – almost doubling, even after accounting for inflation). Litigation-related work declined somewhat, with corresponding rises in settlement-related or completely non-contentious work. But the most noticeable growth was in work for larger corporations (25% of Tokyo *bengoshi* work by 1989, almost the same as work for smaller corporations at 29%, although remaining work was mostly for individual clients). The most common work involved real property and debt collection litigation, but also "preventive legal work" or transaction planning.

The shift towards corporate law practice continued from the 1990s despite the economic slowdown, although this was driven partly by insolvency cases and new types of work related to waves of corporate law and other law reforms, such as the internationalisation and deregulation of financial markets in the late 1990s. Very large law firms began to emerge in Tokyo by the turn of the century. This process accelerated after the Japanese economy revived from 2002 and international law firms were allowed full profit-sharing partnerships from 2004 {Aronson 2007}. Growth in the big Japanese law firms has been underpinned primarily by mergers, lateral hiring of bengoshi and especially a large intake of LRTI graduates (see {Chan 2009} pp 160-1 including his Table 2 reproduced below):

Table 2: The Change in the Number of *Bengoshi* in the Large Law Firms and Some Medium Sized Law Firms (1999-2008)

Firms (Number of *bengoshi)* 1999	**Firms ((Number of *bengoshi)* 2003**	**Firms ((Number of *bengoshi)* 2006**	**Firms ((Number of *bengoshi)* 2008**
Nishimura & Partners (65)	Nishimura & Partners (134)	Nishimura & Partners (209)	Nishimura & Asahi (384)
Nagashima & Ohno (78)	Nagashima Ohno & Tsunematsu (169)	Nagashima Ohno & Tsunematsu (222)	Nagashima Ohno & Tsunematsu (292)
Mori Sogo (67)	Mori Hamada & Matsumoto (151)	Mori Hamada & Matsumoto (209)	Mori Hamada & Matsumoto (240)
Asahi (65)	Asahi Koma (112)	Asahi Koma (157)	-
Mitsui Yasuda Wani & Maeda (N/A)	Mitsui Yasuda Wani & Maeda (71)	-	-
TMI (30)	TMI (không có số liệu)	TMI (102)	TMI (173)
Tokyo Aoyama (43)	Tokyo Aoyama Aoki (62)	Baker & McKenzie GJBJ Tokyo Aoyama Aoki (70)	Baker & McKenzie GJBJ Tokyo Aoyama Aoki (99)

Tokyo City (24)	City Yuma (48)	City Yuma (74)	City Yuma (92)
Oh-Ebashi (28)	Oh-Ebashi (N/A)	Oh-Ebashi (71)	Oh-Ebashi (81)
Atsumi & Usui (N/A)	Atsumi (N/A)	Atsumi (42)	Atsumi (70)
Ushijima (27)	Ushijima (N/A)	Ushijima (41)	Ushijima (42)

Source: The 1999 data (except the Big Four: from Nagashima and Zaloom, *supra* n. 5, 143) are as of the end of the year and are from *Hōritsujimusho Jinjyō o Zōkyō —Hōkajimusho Bengoshi Ruizō1200nin* (Law Firms Strengthening their Line-up—Top Ten Law Firms Doubling to 1200 Lawyers), *Nihon Keizai Shimbun* (morning edition), 25 February 2005, 1. The 2003 data are from "Counting the Competition" (2003) 25(11) *American Lawyer*. The 2006 data are from Nikkei BP, *supra* n. 26, 5. The 2008 data were obtained by searching the online directory available at the website of the Japan Federation of Bar Associations, www.nichibenren.or.jp, accessed 23 June 2008.

(b) Dispute Resolution

There have also been some (smaller) changes in the role of lawyers in civil dispute resolution, which still forms the bulk of the practice for most *bengoshi*. During the economic stagnation of the 1980s there were absolute and some proportionate increases in settlements (and presumably some withdrawn cases) resulting from conciliation both by Judge(s) and through Conciliation Committees (see Part 4.12 above). Much of this activity involves *bengoshi* representation or advice, and for example in divorce cases it has become common for *bengoshi* to participate in (compulsory) conciliation (see {Murayama 1999}). This background also helps explain the inauguration of the *part-time* chotei-kan system, although over 2004-7 only 165 bengoshi had been appointed to those positions as Conciliation Committee chairpersons (see {Takahashi 2009} p56, with further background; and Parts 4.11 and 4.12 above). Lawyers have also become more involved in Alternative Dispute Resolution outside the court system, beginning especially with Bar Association based Arbitration and Mediation Centre work, although those Centres' caseloads remain very law compared to court caseloads and *bengoshi* also do not get much involved in other privately- supplied ADR due to the still relative stagnation of that field (see Part 6.6 below).

In actual litigation, the role of *bengoshi* has become more collaborative vis-à-vis judges, as the relative status of *bengoshi* has improved since the 1960s and their self-image has started to change. Until then the major vision that *bengoshi* had for themselves was that of a "noble opposition", providing a democratic check for citizens against state power, especially prosecutors in criminal or public law cases (see {Hamano 2007} pp 179-80) - but also, to some extent, the judiciary and in civil cases more generally. From the 1970s, however, bengoshi emerging from the LRTI system began increasingly to adopt the more Anglo-American model of lawyers as "officers of the court" building up a legal profession as colleagues of judges and prosecutors. Since the 1980s, moreover, a growing proportion of *bengoshi* has begun redefining this notion of a shared "legal profession" to view themselves as providers of legal services, promoting private rights and interests without unduly emphasising public interest. But others are concerned that this is too self-interested and commercially-driven, instead emphasising the broader duty to promote human rights and social justice (Art 1 of the Lawyers Law: see generally also {Tanase 2010}). Nonetheless, the shift away from the first model resulted in lawyers and Bar Associations collaborating more with the judiciary in civil dispute resolution.

An example is the experiment in some courts with *wakai ken benron* in the early 1990s, influencing provisions in the new Code of Civil Procedure enacted in 1996 – and the heavy involvement of Bar Associations in that amendment process overall {Taniguchi 1997}. The effects of better collaboration can also be inferred from significant declines in case disposition times over the last 20 years. For example, 1990 saw a peak in average delays in resolving first-instance district court cases: 12.4 months over all cases, and 20.9 months for contested cases (with both parties appearing) resulting in judgments. These had declined steadily by 2007: to 6.8 and 11.9 months respectively. Similarly, cases that had been pending for more than two years peaked at 32,088 in 1972, but then declined almost steadily to reach 6,078 in 2007. Delays have also declined over the last two decades in complex disputes such medical malpractice and IP law, identified by the JRC as areas needing further attention. Declines are even evident in Summary Courts (3.1 months on average in 1990 compared to 2.2 months in 2007) and Civil Conciliation Law cases (4.1 versus 2.1 months: for all this data see {Supreme Court 2008} pp 70-80).

6.4 Education and Training of Lawyers

Professional Legal Training

(see http://www.nichibenren.or.jp/en/about/activities> at 3.)

As mentioned above (Part 1.3 and elsewhere), to practice law *bengoshi* lawyers must pass the National Legal Examination, like judges and prosecutors. All must also complete the same (now one-year) apprenticeship at the Legal Research and Training Institute. Most legal apprenticeships are provided by the courts, public prosecutors offices and local bar associations (through law offices), and the JFBA is now preparing more opportunities for apprenticeships as the number of Examination graduates continues to grow.

Many attorneys now teach in the postgraduate Law Schools inaugurated in 2004 as the primary new route to passing the Examination, within the "practitioner" sub-category of professors demanded by the Ministry of Education. The JFBA has also organised the Committee on Law Schools to enhance curricula and provide assistance to practitioner teachers. The JFBA monitor the Examination to ensure that it actively reflects the education taking place in law schools.

The Bar Associations also increasingly offer formal Continuing Legal Education (CLE) seminars for their members (also generally open to others). This complements a long history of special study groups and committees within the Bar Associations and JFBA, aimed mostly at research etc for new policy initiatives or to monitor implementation of past reforms, but which also serve to (re-) educate *bengoshi* about important issues of law and policy.

Other Involvement in Legal Education

(see http://www.nichibenren.or.jp/en/about/activities> at 2.)

The Recommendations of the government's Judicial Reform Council (JRC: see Part 1.3 above) advocated enhancements to law-related education and encouraging legal practitioners to play a more active role. Previously, attorneys had conducted education for the public at large on a broad range of legal issues, including consumer issues, general civil issues, human rights issues, and constitutional issues. But in 2002 the JFBA began to study basic questions of how "law-related education" could go beyond merely communicating knowledge and facts about the law, and has become a strong advocate of this kind of education. As Japanese society moves away from "prior regulation" by administration to "after-the-fact relief" by the judiciary, as emphasised by the JRC, it is more important than ever that the general public, particularly children, understand the role

and value of the law and the importance of participating in the legal process and have the skills necessary to take self-directed action in accordance with legal principles.

More specifically, the JFBA has formulated and implemented law-related education policies, conducted information exchanges with legal practitioners, educators, and others, developed law-related education materials to be used in schools, and published picture books regarding laws to educate primary school children. In addition, the JFBA has advocated the establishment of law-related education programs in local bar associations, has conducted training activities for attorneys and educators, and has also performed international studies.

Local bar associations work in coordination with schools to offer classes, summer school programs, junior law schools, and training for educators, and the JFBA provides them with support and information-gathering services in conjunction with this.

6.5 Disciplining Lawyers

(see <http://www.nichibenren.or.jp/en/about/attorney_system.html> at 4.) While attorneys in Japan do not fall under the supervision of any government power, they do submit to the disciplinary authority of their local bar associations and the JFBA. The following actions are subject to disciplinary measures:

- violations of the Practicing Attorney Law or the Articles of Association of the local bar association or the JFBA;
- conduct that jeopardises the good order of or the trust in the bar associations; and
- misconduct of a disgraceful nature, whether in the course of or outside professional duties.

The 2004 Basic Rules on the Duties of Practicing Attorneys articulate the ethical and professional codes of attorneys and serve as effective guidelines for determining whether attorneys have committed "misconduct of a disgraceful nature."

Anyone may file a complaint for disciplinary action against an attorney with the local bar association to which the attorney belongs. When a complaint is filed, bar associations are obligated to initiate disciplinary procedures and have the matter investigated by their Discipline Maintenance Committee. If the Discipline Maintenance Committee finds the claim to be grounded, it passes a resolution calling for a formal investigation of the case by the Disciplinary Actions Committee and the Bar Association is obligated to have the Disciplinary Actions Committee conduct an investigation. Should it deem disciplinary action appropriate, the Disciplinary Actions Committee passes a resolution explicitly stating the disciplinary actions sought, and the Bar Association is obligated to discipline the attorney accordingly. There are four types of disciplinary sanctions that can be imposed: (a) disbarment (loss of qualification for a period of three years); (b) order to withdraw from the bar association (loss of status); (c) suspension from the practice of law for up to two years (no impact on status or qualifications); and (d) reprimand (no impact on status or qualifications). Attorneys who are subject to a disciplinary sanction may file a request for re-examination to the JFBA for cancellation of such sanction, which will be conducted by the JFBA Disciplinary Actions Committee.

Should the party filing the complaint be dissatisfied with the decision made by the local bar association, including when the local bar association decides not to impose disciplinary sanctions based on the decision made by the Discipline Maintenance Committee or the Disciplinary Actions Committee, she/he may file an appeal to the JFBA, and the JFBA Discipline Maintenance Committee or Disciplinary Actions Committee will investigate. However, it is not possible to file

a complaint directly with the JFBA without first going through the local bar association. Should the JFBA Discipline Maintenance Committee find grounds for the complaint, then the JFBA refers the matter to the local bar association (to their Disciplinary Actions Committee). Should the JFBA Disciplinary Actions Committee determine to impose punishment or to impose a heavier punishment, the JFBA shall impose its sanctions on the attorney.

Should the JFBA decide to reject the appeal based on a resolution by the Discipline Maintenance Committee, the filer may seek a review by the JFBA Complainants' Grievance Panel. If the JFBA Complainants' Grievance Panel passes a resolution finding grounds for a disciplinary investigation, the case is referred back to the Disciplinary Actions Committee of the local bar association.

At both the local and the Federation levels, the Discipline Maintenance Committee and the Disciplinary Actions Committee are comprised of members including those non-*bengoshi* chosen from outside the bar association, such as judges, prosecutors, and others such as professors. The JFBA Complainants' Grievance Panel is comprised of persons with specialised knowledge other than current or past attorneys, judges, and prosecutors. Disciplinary sanctions imposed by local bar associations and the JFBA are published in the JFBA's monthly journal, *Jiyu to Seigi* (Liberty & Justice) and the official government gazette.

JFBA data show that cases in which *bengoshi* or legal profession corporations have been disciplined increased from 22 in 1990 to 69 in 2006 (a 214% rise), compared to only a 60% increase in *bengoshi* population. None of these cases seem to have involved the large law firms (Part 6.3.2(a) above – that pattern would be consistent with studies of lawyers in the US and other developed countries, where the large law firms tend not to be involved in disciplinary actions and in fact often drive up ethical rules). However, it has been argued that the probable continued expansion in large law firm size will cause challenges in four of six major ethical norms: competence, client loyalty, confidentiality and independence (see {Chan 2009} p. 163 et seq).

More generally, the number of complaints has been increasing recently (eg from 1030 in 2000 to 1268 in 2004, or around 5.7% of the then *bengoshi* population). Although this is similar for example to the numbers and ratio in Washington State in the US, {Ishida 2006} argues that the latter involves much more "public collaboration" (involvement over various stages) compared to Japan's "public persuasion" model (minimising involvement to the levels needed only to persuade the public that the disciplinary system is functioning well). She argues that the Washington model can work because of the much higher ratio of lawyers to citizens, making the latter entitled and interested to become involve in reviewing lawyer complaints. Therefore her hypothesis is that disciplinary action numbers but also their process will change also in Japan as it raises the number of *bengoshi* per capita.

6.6 Dispute Resolution

Informal dispute resolution and advice – including conciliation, mediation etc. -- (to include the organisation of these services, whether provided by the state or preivate sector, etc., relationship between conciliation/mediation and the formal justice system)

Facilitating Access to Justice

(see http://www.nichibenren.or.jp/en/about/activities.html>)

(a) Legal Counseling Centres (Horitsu Sodan Senta)

Local bar associations have long established these Centres so as to provide citizens with better access to attorney consultations. The types of consultations provided and consultation fees charged differ

from Centre to Centre, and many bar associations go beyond ordinary legal consultations to include issues such as multiple consumer loan problems, family problems and other specialist problems. Some also provide night-time consultation services. The JFBA supports the establishment and operation of Legal Counseling Centres as part of its program to alleviate shortages of attorneys. As a result of these efforts on the part of the JFBA and local bar associations to provide services in line with community needs, more than 250 new legal counseling Centres have been established over the last 10 years, with a total of 305 in operation around Japan by 2008. The JFBA continues to encourage the establishment of Centres and is also examining other programs to improve the quality of the legal counseling available, such as the use of videoconferencing systems, better access to specialty consultations, and better schemes for dealing with complaints.

(b) Legal Aid (horitsu fujo)

The JFBA has overseen the legal aid system in Japan since 1952 when it founded the Japan Legal Aid Association. However, as demand for aid has expanded, the Japanese legal aid system has been subject to serious and chronic fiscal deficits and has been slow to develop in comparison with legal aid systems in other countries. The Civil Legal Aid Law was enacted and took effect in 2000 to remedy this situation by providing legal grounds for legal aid services in civil cases. While criminal cases are still not covered, the Law does institutionalise and stipulate government responsibility for legal aid and provide for government funding - improvements long requested by the JFBA.

The Comprehensive Legal Support Law was enacted in 2004 as well, also following recommendations from the JRC. This Law articulates the basic principle of "realizing a society where the information and services required for the resolution of legal disputes can be accessed throughout the country" (Art 1). The Japan Legal Support Centre established under the law started offering services in October 2006 as an independent administrative institution {Murayama 2007}. The Japan Legal Support Centre is opening offices in all (50) areas where the district courts are located across the country as well as in (15 or so) areas suffering from a shortage of attorneys, and staff lawyers have grown steadily (24 in 2006, 96 in 2007, directly recruited from LRTI after that with the aim of involving 300 *bengoshi*: {Ii 2009} p63). Collectively these offices provide a wide range of legal services to citizens:

1. Information Services - Free information over the telephone and the Internet that may help people involved in legal troubles to settle disputes. For example, the Centre maintains a database of contact information for bar associations, judicial scrivener associations, local government agencies and other institutions providing consultations around the country, and refers users to the one(s) most suited to their situation.
2. Civil Legal Aid Services - Free legal consultations and loans for attorneys' fees, etc. for people who require the assistance of legal experts but for economic reasons are unable to pay for attorneys and court costs.
3. Legal Services for Communities with Attorney Shortages - Coordination with local bar associations to establish law offices and assign attorneys to areas suffering from shortages across the country, thus providing them with legal services.
4. Services Related to Court-appointed Attorneys for Defendants including Suspects - Creation of a "duty attorney" (*toban bengoshi*) system to provide additional legal services for suspects (see Part 6.3.1). Under the new Comprehensive Legal Service Law and the Japan Legal Support Centre system, court-appointed attorneys for suspects have been realised, ensuring a consistent public defense system. It is expected that the cases subject to the system will be increased and more defence activities will take place.

5. Victim Support Services - Coordination with a number of other support organisations, including local bar associations, to refer victims to attorneys and consultation services with expertise in victim support.
6. Other Legal Services – Including legal services for criminal suspects and juveniles as well as legal aid to crime victims, refugee adjudications (with the UNHCR), foreigners (not otherwise covered by legislation), those with mental disorders, the elderly, etc.

(c) Public (or "Himawari") Law Offices

There are some areas of Japan where the number of attorneys is extremely low in comparison with the population under the jurisdiction of the court. Since issuing its "Declaration on Judicial Reform" in 1990, the JFBA has endeavoured to make the judicial system more accessible and open to the general public, and one of its goals has been to create a system that would ensure that attorneys are available and nearby throughout the country so that the public can quickly and appropriately seek protection of its rights. It has therefore declared its commitment to alleviating the regional discrepancies in the numbers of attorneys available, eliminating areas where the number of attorneys is extremely low.

As part of this, the JFBA, local bar associations, and local bar association federations established law practices to alleviate regional shortages. These practices, which have commenced services from June 2000, are operated by individual attorneys. But they are "public law offices" as they are provided with financial assistance to cover their opening and administrative costs, as well as the operations thereof by the JFBA and local bar association (although so far working expenditures have only been necessary in a few cases), on condition that they provide a certain level of public services in the form of court-appointed defence attorneys and providing legal aid in civil cases. The costs required to operate offices are paid from a fund to which is allocated a certain percentage of bar association member dues. Some bar associations and local bar association federations have also opened urban "public law offices" to train attorneys and candidates for judgeships who intend to work with the Japan Legal Support Centre or to practice in areas suffering from a shortage of attorneys. These practices provide a certain level of public services and make legal representation more accessible to urban areas.

As of July 2008, 86 of such Himawari firms had been set up, employing 120 bengoshi (with 19 settled in the relevant region – all Himawari firm lawyers are employed for fixed terms but these can be renewed). They are prohibited from acting as legal advisors to companies and organisations. In North-East Japan, for example, they are extremely busy mainly with civil and family cases, debt consolidation (with the Miyako firm from Iwate Prefecture being particularly successful in consumer credit litigation: see generally {Kozuka and Nottage 2008}), and criminal defence work. Job applications have been much greater than for (salaried) positions in the Japan Legal Support Centre, but the latter is also now becoming quite popular as LRTI graduates continue to burgeon. Nonetheless, life and legal practice in rural areas in Japan remain difficult for example the Tohoku Federation of Bar Associations has established the Yamabiko Foundation Law Firm to train and dispatch more young lawyers to district court areas with few lawyers (see {Ii 2009} pp 62-80).

Arbitration and Mediation

(a) Arbitration and Mediation Centres

(eg Tokyo Niben: see http://niben.jp/english/ac_outline.html>)

Niben Arbitration and Mediation Centre is an organisation for dispute resolution run by the Dai-ni Tokyo Bar Association. It was established in March 1990 as the first system of ADR to be run

by a bar association in Japan. Since its establishment, it has dealt with more than 2,000 cases and successfully resolved more than 800 of them. Conciliation proceedings in court (see Part 4.11) are similar to mediation at the Arbitration and Mediation Centre in that they both aim to assist parties to reach an agreement through hearing the parties' arguments, legal or otherwise. However, in the case of conciliation proceedings in court, there are certain restrictions on court-based conciliation proceedings under laws such as the Civil Conciliation Law. Accordingly, conciliation proceedings lack flexibility as, for example, parties may not choose the conciliator and cannot expect a quick on-site investigation. In contrast, mediation proceedings at the Arbitration and Mediation Centre are much more flexible and are based on the needs of users.

By 2009 about half (25) of all local Bar Associations have some such ADR Centres. They often have to be cross-subsidised by the Associations as the *bengoshi* earn more in their other work yet the Centres want to keep costs down for users – although generally they still have to pay more than for Court-annexed conciliation (see {Yamada 2009} pp 12-13). Another problem that has been identified is that the Centres (even the Dai-ni one following amendments to its Rules in 2000) do not clearly distinguish between mediation and arbitration procedures (see {Sato 2001} pp 308-10). Almost all cases are resolved by mediation, but Rules of the Centres usually allow the *bengoshi* mediator to seek parties' consent to appoint him or her as arbitrator, and as in Court-annexed conciliation the style of mediation becomes evaluative rather than facilitative. If parties do appoint the *bengoshi* as arbitrator, s/he is empowered to facilitate settlement and in practice often attempts mediation (Arb-Med). This also reflects Court practice, but raises questions about informed consent and natural justice, especially when ex parte meetings occur between the *bengoshi* and each party separately. (In JCAA and international commercial arbitration generally, with *bengoshi* increasingly serving as international arbitrators in Japan, see eg{Nottage 2004b} and <http://blogs.usyd.edu.au/japaneselaw/2009/07/arbmed_and_new_international_c_1.html>.)

Despite such concerns, the development of Bar Association Centres since the 1990s has been very important in pointing the way towards more privately- supplied ADR services, which the JRC pointed out in 2001 had continued to languish in Japan compared to court- or government-supplied services. The development is also arguably a further reflection of the evolving vision that *bengoshi* hold of themselves (see Part 6.3.2(b) above). They have come to see themselves not as a "noble opposition" fighting cases out in the court (especially against the government), and therefore sceptical about compromising strict rights through court- or private-ADR. Instead, *bengoshi* have come to see themselves as collaborators with the rest of the legal profession (including courts) in resolving disputes for citizens, in the public interest (even if this means having to sacrifice some fees or contribute funding to operate ADR Centres). A minority now even consider their main role to be private service providers, offering whatever their clients need.

One turning point away from the "noble opposition" concept was the JFBA's agreement to cooperate with the Centre for Resolution of Traffic Accident Disputes, established in 1978 after the judiciary worked with the JFBA, Police, prosecutors and insurers to largely standardise fact-finding, liability and quantum of damages (see {Foote 1992}). JFBA also agreed to become involved because insurers provided Center funding from insurers and agreed to one-sided arbitration or *henmen chusai*, namely to be bound by the Centre's Adjudication Committee's ruling even though the claimant/victim was not – like in Anglo-Commonwealth industry Ombudsman schemes for consumers (see generally {Yamada 2009} p 12).

Another outcome of the different vision of themselves and of ADR itself, increasingly held by *bengoshi*, was the JFBA's change in policy regarding appointments of *bengoshi* as part-time *choteikan* or Civil Conciliation Committee chairpersons. The JFBA had opposed a similar

proposal from the Supreme Court in 1973, but it became amenable to the idea by 2001, when the possibility re-emerged in their joint Conference on the Recruitment of Judges from Practicing Attorneys (*bengoshi ninkan ni kansuru kyogikai*) triggered by JRC recommendations. Part of the reason was the expectation that experience as *choteikan* might assist *bengoshi* who might later apply to become full-time judges, especially when combined with the Consultative Committee for Nominating Lower-Court Judges set up in 2003 (see {Takahashi 2009) pp 50-6}. But the background was also arguably a broader shift in *bengoshi* attitudes towards the role of ADR within the Japanese justice system.

(b) 2004 Law to Promote the Use of Out-of-Court Dispute Resolution Procedures

This shift in *bengoshi* attitudes, underpinned also by the slowly changing nature of their work generally as well as the emergence of corporate law firms, helps explain too the quite swift enactment of the 2004 Law to Promote the Use of Out-of-Court Dispute Resolution Procedures, following another JRC recommendation in 2001. Out of the reform debates emerged the view that promoting ADR, not just better court procedures, was consistent with the rule of law – the ultimate aim of judicial sector reform. ADR could complement court proceedings if it could help bring disputing parties closer together "in the shadow of the law" cast by an improved system of courts (and, of course, predictable substantive law). ADR could also advance the vision of the JRC (and the government more generally) of more informed and active citizens, taking greater responsibility for their own actions rather than relying passively on guidance from public authorities.

A second debate that emerged, particularly within the Study Group set up in late 2001 to propose concrete elements of the new legislation to promote ADR, was whether ADR providers should be licenced, certified or completely deregulated (see {Yamada 2009} pp 15-16). Ultimately, although not mentioned by the JRC recommendations, the Group and the Law provided a MoJ certification scheme. The rationale was that this was needed to promote public trust in ADR, given already the active use of court-annexed conciliation (see Part 4.12) as well as the continuing involvement of *yakuza* gangsters and other undesirable providers of dispute resolution "services" in Japan. This view prevailed over those who argued that liberalisation would have been more consistent with the goal of promoting *private* ADR and the broader deregulatory program of the government. Liberalisation was also seen as too much of a shift from the starting point, which was close to licencing: Art 72 of the Lawyers Law (criminally) prohibited legal services provided other than by *bengoshi* except when (i) not offered on a (continuing) business basis, (ii) a legitimate act, or (iii) other legislation provided differently.

The Law's certification scheme represented a compromise aimed to placate *bengoshi* by coming within exception (iii), while appealing to those sceptical about too much government control over the ADR services industry. It offers a "carrot" (to encourage certification by ADR providers) rather than using a "stick" (forcing providers to get licenced before they provide services). Providers do not need to become certified, although then there is a risk that they may violate the Lawyers Law unless they fit within another exception to Art 72. But if they do get certified, they obtain three specific advantages:

If their procedure ends without the parties settling and one sues within a month, the prescription period is calculated as if the suit had been brought on the date the claim was filed with the certified ADR procedure (Art 25);

If a suit is pending but parties agree to use the certified procedure or it is already underway, the court may suspend litigation proceedings for up to four months (Art 26; cf court-annexed conciliation, where there is no time limit);

Parties can elect to use certified ADR instead of the court-annexed system (Art 27) if other legislation requires conciliation before litigation (eg land or building rent disputes under Civil Conciliation Law Art 24-2(1) or divorces under the Domestic Relations Adjudication Law - *kaji shimpan ho*).

Certification also provides the more diffuse benefit or marketing point of showing the public that the private institution (or individual) has fulfilled minimum standards detailed in Art 6, and is not disqualified under Art 7(eg a yakuza member). These standards are mostly procedural (eg it must clarify a standard process from commencement to termination, including notices and grounds for termination), and mostly consistent with international standards (eg ISO 10003, but not including a confidentiality requirement). After a slow start (only 5 by November 2007) there has been an almost exponential growth in certified ADR providers (26 by January 2009 and 61 by March 2010): see (in Japanese) <http://www.moj.go.jp/KANBOU/ADR/jigyousya/ninsyou-index.html>. Of the current 61 institutions, 4 are local Bar Associations but 9 are local Judicial Scriveners Associations (many *shihoshoshi* being engaged now eg in resolving consumer credit disputes) and one is the Tokyo Administrative Scriveners Association.

There is no comprehensive data on whether certification has led directly to much more filings and cases being resolved through these providers of ADR (which the Law defines as processes to encourage settlement, thus excluding arbitration from its scope). Anecdotal evidence suggests that this has not yet occurred, and that public knowledge and trust remains lower than for court- or government-administered ADR. However, businesses do seem to be settling cases more often at an earlier stage through the certified bodies (or even in direct negotiations) because they wish to avoid the more formalised mediation process (see {Yamada 2009} pp 20-1, also on the following three other likely effects of the Law so far).

A second effect is a growing diversification in ADR providers. Many certified are smaller and/or newer bodies specialising eg in labour or social security related disputes. The Japan Industrial Counselors Association also adopts a more facilitative style of mediation, in contrast to Court-annexed (and even Bar Association Centre) evaluative mediation. (Others like the JCAA or the Sports Arbitration Centre have obtained certification with the goal of expanding their services to include mediation.) Other government agencies have become more interested in privately-supplied ADR. For example, METI in 2008 allowed those certified under the MoJ to obtain further METI certification to become involved in mediations under the Law on Special Measures for Industry Revitalisation.

Thirdly, due to the certification standards the providers have started to become more conscious about the need for transparency and structure in designing and implementing their various dispute resolution processes. For example, in the industry-association based PL ADR Centres for consumers' product defect related claims (2 of which are now certified), many cases have been resolved by Centre staff engaged in "shuttle diplomacy" (often by free-dial phone or by exchange of documentation: see {Nottage and Wada 1998}) without proceeding to a cheap but formal mediation. However, now they are more conscious of the need to maintain due process standards (including confidentiality, adopted voluntarily by the Centres) even at this stage.

Lastly, networking is emerging among ADR providers. For example, the (certified) Osaka Bar Association tries to work in with other providers, as do now some of the *Ho-terasu* offices. Mediators registered under the Civil Conciliation Law are also starting to up-skill through training offered by private certified ADR providers.

These amount to small but very significant changes, underpinned by earlier attempts from *bengoshi* to become more involved in ADR and in turn likely to reinforce their involvement (although not necessarily so much in Bar Association ADR Centres). However, court-annexed ADR is extremely well- established due to its long history, public trust in the judiciary, and low cost (with registered mediators so far accepting low wages for the honour and opportunity of serving in CCL proceedings). Another challenge to (even certified) privately-provided ADR services comes from a further round of reforms to the Code of Civil Procedure, in effect from 2004 (and also reflecting some JRC recommendations). This opens more avenues to the courts and may also make it easier to settle disputes within the litigation process (see {Nottage 2005b}). For example, these amendments:

- allow parties to seek opinions from expert advisors before formally lodging suit;
- encourage more use of expert witnesses (*kanteinin*) during proceedings; and
- introduce a system of "expert commissioners" (*semmon i'in*) who can provide explanations in writing or orally before the parties and, with their consent, even attend settlement conferences to facilitate settlement or attend witness examinations to ask questions.

Conclusion

Assessment of strong points, weak points of the legal profession and informal justice in relation to the country's own objectives and visions for the justice sector; challenges, controversies and issues for reform Japanese bengoshi lawyers, as the most influential group within the legal profession, are at a crossroads. Until the 1960s, *bengoshi* and the JFBA were primarily concerned at increasing their status vis-à-vis prosecutors and the courts – implying the need to cap numbers passing the National Legal Examination – and serving as a "noble opposition" to government as well as promoting a strict vision of the rule of law. By the 1980s, more confident in their status and financial circumstances, they had mostly shifted towards a more collaborative relationship aimed at extending the rule of law even for example through ADR mechanisms.

From the 1990s, prompted by more radical proposals from certain business and government interests for deregulating and expanding the legal profession, some *bengoshi* (eg in corporate law firms) began to see themselves as advancing the public good and the rule of law by becoming mainly private suppliers of even more varied legal services {Hamano 2007}. This vision not only implies a greater willingness to increase bengoshi numbers, but also to allow expansion in numbers and roles of (more or less) competing "quasi-lawyers" and even non-legal professionals specialising in ADR. The influence of this view even among *bengoshi*, in combination with other factors introduced above (Part 1.3) and detailed below (Part 7), helps explain many recommendations emerging from the JRC in 2001 and their implementation over 2001-4.

7. Justice Sector Reform

7.1 Initiation

As outlined above (Part 1), the initiator of judicial sector reform for most of the post-War era was the *hoso sansha*: judges, prosecutors and *bengoshi* lawyers. A policy impasse often resulted due to the convention that these groups required consensus, yet the *bengoshi* and the JFBA often maintained an adversarial relationship with both the government and the courts. (The following is summarised from a convincing account by {Vanoverbeke and Masschalck 2009}.)

For example, in the 1950s the JFBA campaigned fruitlessly for changes in the Supreme Court to deal with a large backlog of cases there, as well as for *bengoshi* to be appointed as judges (or one version of "unification of the profession": *hoso ichigen*). In 1964 the JFBA rejected a Final Report of the Extraordinary Investigative Committee on the Judicial System (*rinji shiho seido chosakai*), established in 1962 under the chairmanship of Tokyo University Professor Sakae Wagatsuma, partly because it proposed broader reforms including large increases in the legal profession.

In the late 1960s and early 1970s, some *bengoshi* became increasingly critical of all three branches of the profession. They formed the Young Lawyers Association (*Seinen Horitsu Kyokai*) to press for more radical reforms challenging the status quo within the legal profession and in Japanese society generally. Around 1970 this had attracted some 1500 lawyers, 230 judges, 250 scholars and intellectuals as well as many LRTI graduates. But the conservative Justices within the Supreme Court reacted, arguing that this would undermine the reputation and independence of the judiciary, and the Court demanded that all judges formally quit membership of the Association. This preserved therefore the *hoso sansha* groups as central to justice sector policy-making, and specifically an impasse regarding any major reforms, despite the growing number of social problems that continued to emerge over the 1970s (eg traffic accidents, debt collection case increases). At the macro or political level, however, there was not great concern about the justice sector from the 1950s-70s because of Japan's overall strong economic growth. This was also tied into a vision of Japanese as "unique" in achieving growth without completely adopting "Western" values and practices, such as high litigation rates.

However, the political mood started to change from the 1980s. Yasuhiro Nakasone was appointed Prime Minister in 1982, arguing that Japan should no longer just emphasise economic growth under the security umbrella provided by the alliance with the US. He established new deliberative councils and hand-picked members to circumvent the power of bureaucrats and other established interests, in order to develop new policies including deregulation (eg the Second Ad Hoc Deliberative Council on Administrative Reform, rincho, created already in 1981). Experts with strong leadership skills were appointed, for example Tokyo University Professor Akira Mikazuki in the division charged with reform of the Code of Civil Procedure (achieved 1996) within the overarching Legal System Deliberative Council (*hosei shingikai*) established within the MoJ in 1990. The TV and other media also became more critical, investigative (eg of scandals involving bureaucrats) and interested in legal affairs. Lastly, by the end of the 1980s the US in particular (through the Structural Impediments Initiative) exerted growing pressure on Japan to change its established practices in order to reduce international trade friction.

After the LDP lost power in 1993, a new electoral law promised to further complicate future elections, and even conservative politicians realised that the old "iron triangle" mechanisms could become a hindrance rather than a benefit. Both sides of politics therefore pushed for a new system with less role for bureaucratic guidance, deregulation to allow businesses to compete more freely

and respond to growing internationalisation of the Japanese economy particularly from the 1980s, and a correspondingly more robust legal system. Ongoing economic stagnation highlighted the risks of doing business. The business sector therefore emerged from the mid-1990s, for the first time in Japan (and quite unusually in comparative terms), as a major force pressing for justice sector reform.

These broader changes at the political level lay behind Prime Minister Obuchi's establishment in 1999 of the JRC, as the new originator of justice sector reform (see Part 1.3 above). The Justice System Council Establishment Law of 1999 had set a broad mandate, and its 13 members were nominated by name and approved by the Diet. Only three came from the *hoso*, and to avoid indirect control by the *hoso* through the Council's secretariat (within the MoJ) the Council divided up major topics with each member taking responsibility for initial reports. The JRC also held public meetings, conducted a survey of court users, held meetings open to the press, disclosed minutes to the public and issued an extensive interim report in 2000.

7.2 Responsibility

When Koizumi became Prime Minister in 2001, with the professed goal of attacking "sacred cows" in order to reform the LDP from within, he enthusiastically supported the JRC and its detailed final recommendations presented in June 2001 (see, also for the following details, {Foote 2007} pp xxi-xxv).

In November 2001 PM Koizumi created the Act for Promotion of Justice System Reform, and accordingly the next month the Headquarters for Promotion of Justice System Reform with a mandate until December 2004. Under the Law the Headquarters was to be "within the Cabinet" (and it was in fact housed in the Cabinet Office that took over from the Prime Minister's Office from 2001). In fact, however, the Headquarters comprised the entire Cabinet, with the PM serving as chair (and the JRC's chair, Kyoto University Koji Sato, becoming a special advisor).

7.3 Design

As detailed above (Part 1.3), the JRC designed its reforms around "three pillars" or guiding principles:

- A justice system meeting public expectations (more reliable, easier to use and understand);
- A legal profession (rich in quality and quantity) supporting the justice system; and
- A popular base for the justice system (participation by citizens in order to heighten trust in the entire system).

7.4 Review

Reform proposals from the JRC were reviewed by the new Headquarters, as described next (Part 7.5). However, some aspects were left to be dealt with by existing law reform bodies, especially the MoJ's Legal System Deliberative Council, eg regarding another round of reforms to the Code of Civil Procedure enacted in 2003 (see {Nottage 2005a}) and to civil execution (see Conclusions to Part 5). Minutes were provided online, like other Deliberative Council meetings nowadays {Noble 2002}, and considerable debate sometimes emerged concerning proposals not only among the legal profession and academics but also the mass media. However, some do argue that the reform still remained too dominated by MoJ and other officials (see {Miyazawa 2007}).

7.5 Implementation

Pursuant to the 2001 Law (see Part 7.1), in March 2002 the Headquarters formally issued a Cabinet Resolution entitled "The Plan for Promotion of Justice System Reform", and established eleven Expert Advisory Committees (*kentokai*) responsible for these areas:

- Labour
- Access to justice
- ADR
- Arbitration
- Administrative Litigation
- *Saiban'in* system and criminal justice
- Publically provided defence counsel
- Internationalisation
- Legal education
- Legal profession (*hoso seido*)
- Intellectual property.

Quite specific mandates were set for each, based largely on JRC recommendations, and many legal professionals and professors served on these Committees. A fairly detailed timetable was set and, in typical Japanese fashion, this was largely adhered to. The second pillar of the JRC reforms (Part 7.3) was seen as so important that measures to improve the legal profession were placed first on the agenda at this implementation stage.

Almost all necessary legislation was enacted by the end of 2004, but some (more difficult) issues were given extra time by longer periods for the legislation to come into effect. The most prominent example was the *saiban'in* system, enacted in 2004 but scheduled not to take effect until 2009. This gave extra time to all involved – especially the Supreme Court through drafting its Rules, and sending judges for comparative study all around the world – to try to work out how best to implement this completely new system.

7.6 Evaluation

How reform is evaluated depends on the relevant area of the justice system. For example, the *saiban'in* system has already received some public evaluation by the Supreme Court allowing – indeed, encouraging – jurors to speak in press conferences about their general impressions of the new process. However, it remains to be seen whether this will lead to a broader relaxation of the confidentiality obligations imposed under the legislation (cf eg {Wilson 2009}), for example regarding access by independent academics to jurors for survey or interview research (even when findings are published after making the respondents anonymous). Such research seems essential to proper evaluation of the system, although already many qualitative and some quantitative studies have been carried out of potential jurors to try to anticipate how best to operate the new system.

Legal education in the new Law Schools, by contrast, is being actively – some say, too actively – monitored by the Ministry of Education and a newly created accreditation body. It will still be some time before any Law School can lose its accreditation. However, the drop in numbers allowed annually to pass the National Legal Examination will put financial pressure on many smaller Law Schools and highlight the question of what they are designed for (cf {Nottage 2005})

and hence how they should be evaluated – primarily to get students through the Examination, or to provide a broader education and range of legal skills even if this is more difficult to assess?

7.7 Remedies

A major problem for Japan is that since 2005 there has been no ongoing equivalent to the Headquarters, charged with comprehensively evaluating all the reforms since 2001, let along remedying any problems that emerge. This has been impliedly devolved to individual Ministries or organisations. For example, if the Supreme Court finds that its Rules for the *saiban'in* are not functioning well, it can amend them – probably but not necessarily after consultation at least with the procuracy and the JFBA, as well as professors and others within the general public (see Part 4.12 above under "oversight"). But if it or someone else identifies a problem with the 2004 Law itself, there is no obvious place to go to seek amendments – proposals might go to the Minister of Justice, the Prime Minister (depending on his or her interests) or perhaps even some individual parliamentarian. However, the MoJ may see this problem as primarily outside its jurisdiction.

More generally, although the MoJ has established a unit internally to monitor developments in its areas of judicial sector system reform (see, in Japanese, <http://www.moj.go.jp/KANBOU/SANYOKAI/index.html>), this seems to be meeting only occasionally and certainly does not have a high- profile role compared to the Cabinet Headquarters over 2001-04.

7.8 Oversight

As can be seen from the above, large-scale reform recently in Japan's justice sector (and the earlier attempt over 1962-4) has been dependent on the leadership and oversight of the Prime Minister and his Cabinet (Office).

Parliament or its Committees have played a very limited role, although we have noted for example that some civil execution law reform in the mid-1990s had been achieved through private members' bills (Conclusions to Part 5). Japan does not have an Ombudsman system responsible to Parliament. Nor does it have a permanent Law Reform Commission staffed by senior professors, lawyers, judges and others typically engaged in longer-term and more strategic reform projects.

Provincial government has played no role, and probably only would have done so if the Police had been a target of JRC attention.

Conclusion

Following an international conference in 2002 Tokyo University Professor Dan Foote wrote that the Japanese justice system sector, and Japanese law as a whole, is "in the midst of period of major change" and to "stand at a turning point"; "in many ways these changes represent a reshaping of Japanese society itself". He emphasises that through its three pillars the ultimate aim of the reform program recommended by the JRC is to strengthen popular sovereignty (not just popular participation) and citizen empowerment vis-à-vis all branches of government. He also relates this to three other broad shifts in Japan especially since the 1990s: political reform, deregulation, and reforms to promote transparency and accountability. All these amount to fundamental philosophical shifts, but it may take decades to "reveal just how successful these reforms ultimately prove to be in transforming Japanese society" (see {Foote 2007} p xix and xxxv).

The timing and method of JRC establishment does suggest a significant "punctuation" in Japan's policy-making system, resulting from macro-level political changes and policy vision as well as a new policy-making arena no longer dominated by the *hoso sansha*. There have subsequently

been "fundamental changes in the judicial system in Japan", but "questions remain whether the aim of the reform, ie improving the quality of justice system and enhancing trust in it, is being realised" ({Vanoverbeke and Masschalck 2009} at pp 36). They query example the Japan Legal Support Centre remaining under MoJ jurisdiction, prosecutors not disclosing information for use in the new Law Schools, lower-than-expected Examination passers, and even declining civil and administrative case filings since 2003. They suggest that "the old equilibrium may restored rather than a new equilibrium being established". This possibility seems heightened by the winding up of the Cabinet Headquarters and the lack of a new comprehensive oversight mechanism for ongoing evaluation and policy innovation regarding the justice sector.

8. Conclusions

8.1 Strengths and Weaknesses

Criminal Justice

Criminal justice in Japan provides both one of its biggest strengths and one of its largest weaknesses. Japan is one of the safest countries in the world with a very low rate of crime and violent crime in particular. It is also a success story with regards to being able to rehabilitate criminals and restore justice with a very low recidivism rate. In this regard, the Japanese justice system—policing, prosecuting and judging crime—has much to emulate. However, practitioners and commentators argue that despite the JRC reforms there remain a large number of problem areas, outlined further below (Part 8.2.1).

Civil Justice

The Japanese court system now deals quite effectively with common civil disputes, and is also improving its capacity regarding more complex cases. There is strong public trust in the system and overall costs (including fees to legal advisors) are not very high, although the up-front court filing fee is almost always based on the amount in dispute (unlike most Anglo-American jurisdictions). The bigger problem is lack of *bengoshi* or even quasi-lawyers like *shiho shoshi* judicial scriveners outside Japan's urban areas, although judges faced with self-represented litigants often assist them by exercising their power to elucidate issues and facts (*shakumei-ken*). Delays have diminished significantly since the 1990s, although first-instance data can be misleading given the high proportion of cases appealed at least once. However, sometimes this can lead to arguably excessive pressure to settle cases through court-annexed mediation, which moreover tends to be conducted in an evaluative rather than facilitative style.

Other Issues

The legal profession has a very strong core in the *hoso: bengoshi* have gained in stature relative to judges, who also have improved independence and status compared to pre-War prosecutors. However, despite their shared National Legal Examination qualification and LRTI training, there is very little mid-career movement among these groups (*hoso ichigen*), especially from *bengoshi* into the judiciary or procuracy. Each group has its own distinctive professional ethos, with both judges and prosecutors placing a strong emphasis on predictability and consistency in the application of law.

Legal education produces a very large cohort of law graduates from universities. Only a small proportion sits or passes the Examination – or, indeed, becomes a "quasi-lawyer" such as a judicial scrivener. This situation does generate considerable "legal literacy" among the general public, but at a generalist level. The low number of Examination passers was increasingly seen as problematic, by various groups especially from the 1990s, and the JRC recommendations in 2001 in particular led to considerable increases as well as the establishment of new postgraduate "Law School" programs. However, both the Examination and Law School systems are attracting increased controversy, and the JRC reforms had relatively little focus on "quasi-lawyers" as part of the legal profession as a whole.

8.2 Challenges and Controversies

Criminal Justice

Much of Japan's criminal justice is dependent upon a number of very questionable aspects that have raised United Nations and international NGO criticism. These include the 23 Day Detention

Period, wide and largely unsupervised discretion of police and prosecutors, absolute reliance on confessions, largely dossier presented trials, and extremely harsh sentencing culminating in the death penalty for certain criminals. What is unclear is the extent to which Japan's success in criminal justice is dependent upon the harshness of the weaknesses noted here. Moreover, it is also unclear to what extent the criminal justice system is culturally dependant or more institutionally universal.

Civil Justice

Japan continues to see comparatively few claims brought against the government, including damages claims under the State Compensation Law (seen as special type of civil litigation). Other types of claims against administrative agencies have not risen significantly from 2004, when the Administrative Case Litigation Law was revised. This situation is controversial, although it can be argued more positively that the amended Law partly codified changes (such as reduced standing requirements) that had emerged anyway from prior case law interpretation, or that government agencies recently have improved their performance due to fears of being sued.

In civil litigation per se, Japanese courts and parties still find it difficult to deal with more specialised and complex disputes, such as IP, construction or medical malpractice, although delays have come down. Increased scope for lay participation since 2004 reforms to the Code of Civil Procedure has not made a dramatic difference. Relatedly, litigants and other interest groups are calling for better collective redress mechanisms (such as American-style class actions), briefly mentioned by the JRC as worthy of further consideration.

Other Issues

Doubts remain about the personnel practices particularly within the judiciary. Although it is difficult to prove that judicial independence has in fact suffered, there is at least the risk that the job rotation system creates that risk. It seems anachronistic to stick to a principle that judges should move every 3 years or so, given the gradual decline in the corporate world's "lifelong employment" tradition, which similarly had included considerable discretion for employers about where to assign employees as well as frequent job rotation in order to train generalists rather the specialists. The Supreme Court at least to publish better justifications for retaining its judge rotation practice, eg fairness to all judges in that most would like to be assigned to major cities like Tokyo.

An even more visible problem is what to do about the numbers allowed to pass the National Legal Examination. As mentioned in the Conclusion to Part 5, the new JFBA President campaigned for a cap of 1500, half the number for 2010 proposed by the JRC in 2001 and which the government endorsed when allowing (initially) 68 Law Schools to become established. Such a cap risks not only curtailing citizen access to justice, but also a change in bengoshi self-image that might unwind its more collaborative relationship with the judiciary since the 1990s as well as the development of the ADR system. It will also accelerate the demise of many Law Schools, many of which were already struggling because the pass rate was never anything like the 70-80% envisaged by the JRC.

8.3 Current Reforms

Criminal Justice

The present situation is changing significantly and this will impact both the formula for the success and dependence on the weaknesses in Japan's criminal justice system. Major changes being introduced include liberalisations such as the Lay Judge System and introduction of taped police

and prosecutor interrogation. On the other hand, a conservative trend towards penal populism can be seen in reforms such as greater victim participation, stricter approaches to juvenile crime, and prison reform. Like the conundrum of explaining how Japan can be both a restorative beacon and one of the most penal countries, the current reform trends will continue to seemingly pull in opposite directions.

Civil Justice

There are now few outstanding reform issues, but collective redress mechanisms are presently being subject to comparative law study, particularly by the Cabinet Office regarding consumer access to justice.

Legal Profession, Education, etc

Law School education is also being reviewed, particularly through the Ministry of Education and the new accreditation body, related to the low Examination pass rate.

8.4 Issues for Future Reform

Criminal Justice

The most obvious candidate for future reform is the Police. This is due to the large discretion it holds in dealing with crime, yet the lack of scrutiny it attracted within the JRC process and recommendations (pointed out by Johnson at <http://www.law.usyd.edu.au/anjel/documents/ResearchPublications/Johnson2004_JusticeSystemReform.pdf>). It is also very likely that the saiban'in quasi-jury system (Part 4.12) will need at least significant fine-tuning over the next few years.

Civil Justice

Apart from collective redress mechanisms, which will probably not be reformed in Japan until the European Union completes its own current inquiry, a major issue will be how Japan moves from a fairly well- established system of evaluative mediation towards more facilitative ADR. The latter is likely to emerge if and when litigation costs increase (eg through ongoing growth in big corporate law firms) and/or quasi-lawyers expand in numbers. It will also depend on the success or otherwise of the ADR Basic Law scheme (see Part 4.11) and the JRC's other attempts to develop public trust in privately supplied ADR.

Other Issues

The legal profession also leaves many issues to be resolved. Increased mid- term hiring or lateral movements among law firms may need to become more commonplace, perhaps if more Continuing Legal Education becomes required or advanced university study becomes common, before the courts become willing and able to attract *bengoshi* as full-time judges. *Bengoshi* also need to consider more efficient relationships with quasi-lawyers, including multi- disciplinary partnerships, to generate a sense of a truly unified legal profession in its broadest sense (see {Ishida and Taylor 2008}). This may come as the profession continues to be exposed to international developments, but "internationalisation" has not been achieved to the extent recommended by the JRC in 2001, despite allowing full profit-sharing partnerships with foreign law firms from 2004.

Internationalisation of Law School curriculum and hiring practices has also not advanced very much. Even more problematic is that undergraduate legal education has not seen much "trickle down" reform from the Law School initiatives (see {Nottage 2005a}). That is partly due to the enormous investments and energy devoted to setting up those Schools, which is likely now to be

undermined by closures related to low Examination pass rates and caps probably being re-imposed on those allowed annually to pass.

A final challenge for Japan, as mentioned in Chapter 7, is to establish mechanisms to monitor judicial sector reform on an ongoing and comprehensive basis. This is a major gap left in 2005 following the JRC's two-year consultation process followed by the Cabinet's three-year implementation plan, which otherwise collectively brought about wide- ranging and sometimes very significant reforms to Japan's justice system.

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GLOSSARY

bengoshi - lawyer

bengoshi ho – Lawyers Law

bengoshi ninkan ni kansuru kyogikai – Japan Federation of Bar Associations joint Conference on the Recruitment of Judges from Practicing Attorneys

benrishi – patent attorney

chokusetsu kyosei – mode of execution involving direct compulsion where if the obligation to be enforced is to pay money or to surrender specific property, the execution authority sells the debtor's property to obtain the money or takes the property from the debtor and turns it over to the creditor (cf. kansetsu kyosei)

chosho – written documents

chotei-kan – a lawyer who has been appointed as a part-time judicial officer empowered to conduct civil or domestic relations conciliation procedures with the same level of competence as a judge

daitai shikko - obligation which can be performed by a person other than the debtor him/herself may be enforced through execution by substitute

dori – supplementary moral principles as applied in pre-Modern laws and judicial decisions cf. jori

genbatsuka - larger trend toward increasingly severe punishments in Japanese criminal justice, illustrated by the recent increase in the number of executions

gyosei shoshi – administrative scrivener hakengata kenshu – short term study tours

henmen chusai – one-sided arbitration (where only one party is bound by the award/decision)

hikiwatashi meirei - transfer orders

himawari law office – public law offices which receive financial assistance from local bar associations and the Japan Federation of Bar Associations on condition that they provide a certain level of public services in the form of court-appointed defence attorneys and providing legal aid in civil cases

hira kenji - low-rank prosecutor ("operator")

hosei kyoku - House of Representatives' Legal Affairs Division

hoso seido – legal profession (usually in its narrow sense – see hoso or hoso sansha)

hosei shingikai - Legal System Deliberative Council hoso – see hoso sansha

hoso ichigen – unification of the legal profession (see hoso sansha)

hoso sansha – judiciary (especially those who have passed the National Legal Examination), public prosecutors and lawyers, comprising the three key stakeholders traditionally in the legal profession (a term borrowed from Chinese)

ho terasu – colloquial reference to Japan Legal Support Centre hozen shobun - preservation measures

jimukan – administrative official

jimu sokyoku - General Secretariat of Supreme Court responsible for judicial administration

jitsumu kyougikai – Conference on Legal Practice ran by the Supreme Court to encourage unified practices among lower courts dealing with pressing socio-legal issues

jiyu to seigi – Liberty and Justice (monthly journal published by the Japan Federation of Bar Associations)

jokoku appeal - appeal with the Supreme Court against the judgment of the court of second instance as a final appeal

jori – sound reason, recognised in 1875 as a source of modern Japanese law (cf. dori), but increasingly marginal in practice joshi – higher-level prosecutor ("manager") jiwtsujo – actual circumstances

juku – cram school

jusen - housing-loan corporation

kaji shimpan ho – Domestic Relations Adjudication Law kanbu - executive

kankai - Commended settlement modeled on the French conciliation

preliminaire kansa - audit

kansetsu kyosei – the mode of execution involving indirect compulsion where if the nature of the obligation is such that it does not permit performance by a third party, an indirect form of personal compulsion is used; the court may award damages to be paid by the debtor unless and/or until he/she performs (cf. chokusetsu kyosei)

kanteinin – expert witness

kari sashiosae - provisional seizure under the Civil Provisional Measures Law

kari shobun - provisional dispositions or temporary measures under the Civil Provisional Measures Law

kari toki – provisional registration of immovable property

keidanren – Japan Federation of Economic Organisations (now see Nippon Keidanren)

keiji bengo – criminal law practice(cf. minji bengo)

keiji saiban – criminal litigation (cf. minji saiban)

keiretsu - conglomeration of businesses linked by cross-shareholdings and/or supply-chain ties, etc

kensatsu – prosecutor or prosecutorial examination kentokai – Expert Advisory Committee

kessai – literally 'approval', in reference to the system of consultation between prosecutors and their superiors about case dispositions

kettei – judicial orders (in contrast to judgments = hanketsu, with usually stricter requirements and more extensive legal consequences)

kisozen no wakai - pre-commencement compromises, a type of title of debt koban – neighbourhood police box or small office

kokoku appeal – appeal against execution order kokyosei no kukan – space of the public good

kosei shosho - executions on deeds notarised by a public notary koshonin – public notary

koso appeal – appeal from judgment at first instance (cf. jokoku appeal)

kyobai ya – colloquial term referring to persons who interfere with auction processes in civil execution

majime – serious (adj)

minji bengo – civil law practice (cf. keiji bengo)

minji chotei ho – Civil Conciliation Law

minji saiban – civil litigation (cf. keiji saiban)

minji shikko – civil execution

naikaku hosei kyoku - Japan's Cabinet Legislation Bureau naisai – settlement out of court (cf. kankai)

nichibenren – Japan Federation of Bar Associations nikkeiren - Japan Federation of Employers' Associations nippon keidanren - Japan Business Federation (formerly Keidanren)

omawari-san – A friendly term for police officer

saiban bunya betsu kenkyuukai – Area Specific Legal Seminars organised by the Legal Research and Training Institute

saiban-in - quasi-jury system saibansho jimukan – Court Officials

saimu meigi – title of debt necessary for civil execution by a creditor seikyu igi no uttae - action to object to a claim

seikyu no nindaku - admissions of claim, which is a type of title of debt seinen horitsu kyokai – Young Lawyers Association

seisaku hisho – policy secretary

senmon i'in – specialist lay advisor appointed by Courts under revised Code of Civil Procedure, to help in complex cases such as construction or IP disputes

sen'yu-ya – illegal occupants who interfere with auction by obtaining a lease over the debtor's property which they provisionally registered with a government agency

shakumei-ken – judges' right to ask for explanations or clarifications, from lawyers or parties, as to law and fact at issue in civil litigation

shiharai tokusoku - the payment demand note, which is a type of title of debt

shiho kaikaku sokushin honbu – Headquarters to Promote Justice System Reform in the Cabinet Office

shiho seido kaikaku no iken – A report entitled "Opinions on the Reform of the Judicial System" adopted by the Keidanren

shiho shiken – National Legal Examination shikkobun – execution clause for civil execution

shikkobun fuyo kyozetsu ni taisuru igi - objection to the refusal to issue an execution clause

shikkokan – Court enforcement officer (bailiff)

shikkokan ho – Bailiffs Law

shikko kokoku – appeal against execution order by aggrieved party

shikko igi – execution-objection in the court of execution to challenge the disposition of the execution

shikko saibansho – court of execution

shikko seihon – enforceable exemplification – i.e. an instrument of title of debt accompanied by the execution clause

shikko shosho - notarial deed serving as a title of debt shingikai – deliberative council (for law reform)

shinjin – informal examination shinpankan – patent examiner

shinshiho shiken – New National Legal Examination shiho shoshi – judicial scrivener

shobun kessai – system where in order to charge persons and make sentencing

shokikan – court clerk

shokumu donyu kenshu – induction courses on professional legal duties ran by the Supreme Court through the Legal Research and Training Institute

shomu kenji – public prosecutor for civil, constitutional and administrative litigation cases involving the central government (including many judges seconded from the Supreme Court)

shori kyukei kijunshu – Guideline for Prosecution Standards shufuren – Housewives Association

sogo bunya kenkyukai – Seminars concerning areas of failure in legal practice organised by the Legal Research and Training Institute

sosho-jo no wakai – settlement during civil litigation

toban bengoshi – duty attorney (part of a system to provide additional legal services for suspects)

tokusoku cases – demand for payment cases tokutei chotei ho – Specific Conciliation Law

wakai - settlement agreements during the proceedings, which is a type of title of debt

wakai ken benron – the combining of settlement negotiations, which can occur privately with the judges, and the open-court preliminary procedure, which is aimed at narrowing the issues for the oral hearing phase of a trial. This procedure was used by courts prior to the enactment of the Code of Civil Procedure in 1996.

wakai ni kawaru kettei – order in lieu of settlement wayo - compromise

yakuza – member of the Japanese mafia

yameken – term referring to prosecutors who have quit their office (usually then becoming lawyers)

yoken jujitsu ron – theory to determine the factual premises on which a claim depends

yokin hoken kiko – Social Insurance Agency

zaibatsu - literally plutocrats or financial clique, a term referring to industrial and financial business conglomerates in Japan, often family- based, whose influence and size allowed for control over significant parts of the Japanese economy from the Meiji period until the end of World War II (especially from the 1930s)

zeirishi – tax attorney

KOREA

FINAL REPORT

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1. Political, Cultural, Historical and Socio-economic Context

Like Vietnam, Korea is an ancient civilization that has operated at the periphery of the Chinese empire. As a result it has been both profoundly influenced by Chinese thought and institutions, while also overcoming significant challenges to remain a distinct nation. In this sense the Korean experience has special significance for the prospects of legal reform and economic modernization in Vietnam. Like Vietnam, but unlike Japan or China, Korea was a colonized society, and has experienced national division caused by the Cold War. But Korea has also had several decades of phenomenal economic development, which has both contributed to and been affected by legal reform.

This section provides a brief overview of Korean legal and political history to set the groundwork for the chapters that follow.

1.1 Major historical events

Korea to 1945: Confucianism and Colonialism

For several centuries before contact with the west, Korea was governed by the Choson dynasty (1392-1910) which is usually considered to be the longest lasting ruling dynasty in all of East Asia. This was a period of great advances in science and culture, the creation of the distinctive and efficient Korean alphabet (hangul), and a great emphasis on neo-Confucianism as the governing ideology. Indeed, most scholars would agree that Confucianism was more entrenched in Korea than in China during this period, especially compared with the Yuan and Qing dynasties. A class system was introduced, with a hereditary class of yangban landowners and bureaucrats providing the backbone of the regime. Chinese ideas about law were dominant, and Korea was governed by a series of codes implemented by competitively selected scholar-bureaucrats.

The magistrates were not specialists in law, but relied on staff experts to guide the course of the legal process. Most law was public in character, with private law issues left to Confucian ritual or notions of custom. There was no formal constitutional constraint on the rulers, but the norms of Confucianism did provide some practical constraint on the decisions of the King. Furthermore, a drum was set up in front of the palace whereby people could appeal directly to the King for justice, and this strategy was sometimes effective.

The arrival of the West was a challenge for all East Asian societies. Korea's response was shaped, for better or worse, by its proximity to Japan, the one Northeast Asian state that was able to successfully avoid colonialism and modernize on its own terms. Having adopted Western style legal institutions in the early Meiji period, the Japanese began to pressure Korea to do the same, but the conservative Choson dynasty resisted. A peasant rebellion in 1894 prompted the weak Korean monarchy to turn to the Qing for assistance, but Japan sent its own troops and effectively severed Korea's long tributary relationship with China with the Treaty of Shimonoseki in 1895. At the same time, the Korean monarchy passed a Court Organisation Law, along with other statutes as part of a series of last-ditch measures to establish modern legal institutions. These laws abolished hereditary groups and established a principle of equality before the law. Most of these laws, however, were in fact copied from Japan.

Japan's planners sought to create modern bureaucracy and rationalized government structure, including a new judicial structure with professional judges functionally differentiated from other government officials, a change from the Confucian generalist administrative structure. Japanese advisors were placed throughout the Korean government including the Ministry of Justice, and

Japanese taught in a new government-run law school established by the Koreans as well. Japanese influence grew as it imposed a protectorate in 1905, and then annexed Korea formally in 1910.

From at least 1910, then, modern law was adopted in Korea not as an instrument to maintain independence in the face of Western colonialism, as it had been in Japan and Thailand, but as a tool to deprive Korea of independence in the interests of Japanese colonialism. Rights of petition and redress that had existed under the Confucian system were eliminated. In a number of areas, basic rules of the Japanese Civil Code were modified to fit colonial exigencies, such as a rule that mortgagees could take mortgaged properties immediately upon default. Even though the form of modern law was introduced, the colonial character of the state meant that notions such as judicial independence, separation of powers, and constitutional rights were minimal, and the paradigmatic function of the legal system was social control through criminal law (Choi 1980: 80).

At the same time, the institutions adopted by the colonial authorities did provide a basis for further institutional development after independence. Law schools were set up, and some Koreans began to study the subject. Because of restrictions on entry into other professions, talented Koreans were drawn to legal study, and eventually some were allowed to become judges in the colonial administration (though the bulk of such positions were reserved to Japanese nationals). And the technology of law was adopted. These institutional legacies laid the basis for the subsequent development of the legal system.

Korea to 1945-87: Rapid Growth in an Authoritarian State

After independence from Japan, Korea was governed by the American occupation authorities for three years before becoming independent in 1948. Shortly thereafter, however, the North Korean army invaded and the Korean War began, only ending with an armistice in 1953. Korea remained a military dictatorship for most of the next four decades, with only a brief period of civilian control in the early 1960s.

During this period, there was some American influence on substantive Korean law, such as the Constitution and some of the major regulatory statutes. But the main structure of legal institutions reflected the Japanese legacy. Three features stand out. First, there was a relatively high status, small legal profession. Passage of the Korean bar exam was extremely difficult, and most of the passers went into the procuracy or courts. Second, the administration was not subject to effective judicial control. Administrative law was quite under-developed and the bureaucracy was the central institution. Third, the judges were relatively conservative and formalistic. Justice was of fairly good quality, though confined to a small realm of private law. For criminal and constitutional issues, the courts were at best irrelevant.

This was the period of rapid growth in Korea. The dictatorship of Park Chung-hee (1961-79) initiated the export-oriented industrialization program that helped vault Korea into the ranks of the OECD. But his regime is remembered by many for its internal repression, which was very severe. The National Security Act was used to punish anyone suspected of sympathy with communism, and many thousands were jailed.

Park was assassinated in a coup d'état in 1979, and replaced with General Chun Doo-Hwan. Chun amassed a vast fortune in his few years in power, and presided over the deaths of civilian protestors at Kwangju in 1979. In 1986, as preparations for the Olympic Games were under way, mass protests erupted in the streets. Chun negotiated with two major opposition figures to allow a new democratic constitution to be produced, providing for direct election of the president. The negotiated constitution of 1987 also created a new constitutional court to adjudicate constitutional disputes.

Korea 1987- : Democracy and Judicialization

Chun's designated successor, General Roh Tae-woo, won the subsequent election when the two Kims, representing different regions of the country, could not agree on a common strategy. In the years following the 1987 election, democratization advanced significantly despite Roh's military background and association with Chun. Many political rights were restored, and the military moved decisively out of politics during this period. Other liberalizing steps included greater freedom of the press, freedom of labour, and resumption of local government elections.

Since the launch of reforms in 1987, Korea has experienced major changes in its political system, economic structure, and society. The authoritarian regime has faded away and been replaced by a vigorous, if contentious, democratic politics. The economy has been through booms and busts that have reduced, if not eliminated, the central role of the dominant *chaebol* conglomerates. The pace of social change continues to be dramatic as well, with new interest groups and social problems emerging.

In 1997, the country underwent a severe economic crisis leading to intervention from the International Monetary Fund ("IMF"). The IMF made demands for legal and institutional reforms in exchange for bailout funds. Korea made some of the reforms, resisted others, and initiated a major program of economic restructuring that allowed it to pay back the IMF loans on time.

Politically, Korea has been governed by a series of presidents, each limited to a single term of five years. President Kim Young-Sam (1992-1997) was the first civilian to be elected President, and was followed by Nobel Peace Prize winner Kim Dae-Jung (1997-2002). Both men left office with their popularity in severe decline and beset by scandal. The next president, Roh Moo-hyun, was himself an activist labour lawyer who had passed the bar without going to university. (His opponent in the election was also a lawyer, reflecting the importance of lawyers in politics.) Though Roh's administration was marked by major political conflict (including an attempted impeachment in which the constitutional court decided that he could remain in office), it was notable for significant legal reforms, including the overhaul of legal education and the introduction of a system of lay participation in criminal trials, as well as the establishment of a Human Rights Commission. Roh, however, was dogged by corruption scandals after leaving office, In 2009, he leaped to his death from a cliff behind his home village amid a mounting prosecution probe into allegations that his family accepted a large amount of money from a businessman. The current president, Lee Myung-bak, is former Chairman of Hyundai and considered to be a conservative.

Reforms of the legal system have both reflected and contributed to the profound changes in Korea. Compared with two decades ago, Koreans are much more likely to rely on legal mechanisms to solve disputes and to seek redress from the government. Whole areas of legal practice have emerged from the shadows, including administrative law, bankruptcy, and corporate mergers and acquisitions. Political discourse has also shifted in more legalistic directions, as the courts have become a central arena for dealing with popular demands against corruption and the abuses practiced by the former regime. The Constitutional Court has emerged as a major locus of decision-making, quite a change from a society traditionally dominated by personalistic conceptions of power. A series of scandals involving former presidents and other high level political figures has placed corruption at the centre of the agenda, and brought the prosecutors' office into the limelight. At the same time, reform of legal institutions itself has also been a major political issue.

In all of this, of course, Korea is not alone, but rather one example of a global process of judicialization or legalization (Tate and Vallinder 1995). Many of these changes not only reflect

internal dynamics of political and economic liberalization, but they also reflect broader global processes. Indeed, in the past two decades Korea has grappled with every major force affecting world affairs, including democratization, a major economic crisis, pressures from international financial institutions for reform, confrontation with a militarized enemy, and the emergence of civil society as a major force. Korea provides a window into how these broader regional and global processes play out in the legal system.

1.2 Economic system

At independence in 1948, Korea adopted a constitution that reflected collectivist and socialist influences. Chapter VI of the constitution included the principle that economic order should strive to realize social justice, meet every citizen's basic demands, and develop an equitable economy (Art. 84). It also provided for state-ownership of most natural resources (Art. 85), and government management of most public utilities, including transportation, banking, and insurance (Art. 87). Article 86 constitutionalized land reform and the distribution of farmland to the tenants. These ideas reflected a number of influences, including the constitution of the Korean Provisional Government established in China by anti-Japanese forces; the American New Deal advisors; competition with socialist North Korea; and even Confucian ideas about the economic basis of social order.

Land reform was carried out in the early 1950s, and was mostly completed by the outbreak of the Korean War in 1950. (Unlike the counterpart program in North Korea, compensation was given to landowners.) But the wartime economy and the division of the peninsula during the Cold War had profound changes on the economic structure. Korea was effectively integrated into the global capitalist order under the leadership of the United States.

With the rise of Park Chung-hee in the 1960s, Korea turned to a developmental state economic model. The developmental state model was a mixed one in which capitalism provided the main underpinning, but with heavy state direction as a matter of national strategy. State bureaucrats were involved in channelling capital to favoured sectors, in guiding business planning, and in setting a favourable regulatory environment.

The economy was dominated by the super-conglomerate *chaebol*, sustained by cheap directed credit from state authorities. Courts did not interfere with the family-dominated corporate governance of the *chaebol*. Intra-conglomerate transactions and insider dealings were widespread, while statutory prohibitions against monopolies and insider dealing were for the most part unenforced. *Chaebol* were considered "too big to fail," and the state provided funds and strategic direction.

Legal insulation of the state was a central element of this "developmental state" model. Under authoritarianism, the government limited legal services by tightly controlling the size of the legal profession. This minimized legal challenges to the economic planning process. The government also enhanced its power through an administrative law regime that insulated government discretion from outside purview. Like counterpart in Japan, the regime utilized "administrative guidance," that is, informal "suggestions" that private parties had to follow or risk collateral punishment.

In economic ordering, formal contracts were seen as less important to governing economic transactions than informal, ongoing relationships. Contracts were loosely written and could be adjusted to fit changing business conditions. Networks of informal contacts crossed business-government lines and ensured a constant two-way flow of information among the key players. Civil disputes did occur among those who could not rely on connections with the government to resolve problems, but the courts did not play much of a role in the most important sectors of the economy.

This system was in turn subject to pressures in the 1990s, when Korea began to aggressively embrace a liberal model of globalization under the presidency of Kim Young Sam (1992-97). This trend continued after the Asian economic crisis in 1997, allowing Korea to recover quickly and to join the ranks of the OECD. In short, Korea has embraced at least three different economic models in the postwar period, adjusting periodically as world conditions change.

1.3 Political system

Leadership and Authority

The Korean constitutional system is centred on a directly elected president who serves a single term of five years. Re-election is prohibited, which reflects to some degree a desire to prevent a return to dictatorship. Since 1987, five different men have held the office, and the current president is Lee Myung-bak. There is a prime minister, but it would be a mistake to interpret South Korea as a "semi- presidential" system with a split executive. The President has all important executive authority and the prime minister can be viewed as equivalent to a vice-president. The parliament is a unicameral National Assembly, with 299 members elected through a mixed system of districts and proportional representation.

Aims, objectives and visions for the justice sector

Traditionally, the justice sector was seen as being of fairly high quality but covering a fairly narrow scope. The primary aim was social control rather than the facilitation of a private market sphere. Many believe that the legacy of colonialism is partly to blame for the excessive emphasis on the social control functions of law. Law was a tool to repress regime opponents rather than protect citizens from the state and from each other. The goal was not "rule of law" but "rule by law".

Litigation rates were low, and many argued that Koreans were not an adversarial people. But the limited use of law was not so much a matter of culture as much as systematic under-capacity in the legal system. Korea, like the more well-known case of Japan, required all legal practitioners to pass an entrance exam for a specialized judicial training academy, the Judicial Research and Training Institute (JRTI). Graduates of the Institute join the prosecutors' office, the judiciary, or the private bar, with the government offices traditionally receiving the top graduates. There were strict limits on the number of legal professionals (discussed in Chapter Six below.) This effort was supported by the existing private bar, which enjoyed very high fees because of limited entry into the profession. The interests of private and public actors converged to support the status quo of a limited legal profession.

One theme that is of interest is the extent of the Confucian legacy. This legacy is complex, but several elements of it have drawn attention as having particular consequences for the Korean legal system. First, Confucianism is usually seen to incorporate an aversion to litigation and a preference for social norms as the primary regulatory mode. Second, Confucianism is based on notions of social hierarchy, which contrast with liberal assumptions of formal equality. Third, Confucianism reflects a notion that positive law is to be understood in instrumental terms as primarily a tool of the state, rather than an external constraint on state power. The traditional attitude can be characterized as rule by law, as opposed to the rule of law. The paradigmatic area of law was criminal; other areas like civil justice and administrative law, in which the courts serve as a forum to challenge state action, were totally neglected.

These overall objectives of the justice system have changed dramatically in the last two decades, when there has been great increase in the use of law in all aspects of Korean society. In the economy,

litigation rates have increased. A set of nongovernmental organisations has self- consciously sought to use the legal system to advance a vision of social change in many arenas, from environmental regulation to labour to the rights of immigrants. This has led to an inevitable "judicialization" of politics, as political issues become resolved in the courts. Altogether, the system has become basically liberal in orientation in which the law serves to facilitate and underpin market interaction, protect people from government, and resolve social and political disputes.

Institutions

The design of the Korean legal system is fairly similar to most civil law jurisdictions. At the apex of the judicial system are the Supreme Court and Constitutional Court, which have complex inter-relations but discrete jurisdictions, at least in theory. Below the Supreme Court are six high courts with appellate jurisdiction, 13 District Courts (with 40 branch offices), and several courts of specialized jurisdiction, such as the Family Court and Administrative Court. There are municipal courts that exercise jurisdiction over minor disputes and misdemeanours for which the maximum sentence is not more than 30 days in jail or a fine of roughly US $200.

The Supreme Public Prosecutors' Office has a monopoly over prosecution of criminal offenses. Part of the Ministry of Justice, it has branches throughout the country, including 5 High Prosecutors' offices, 18 District offices, and 38 branch offices of the District Prosecutors. The bar is organized along municipal lines, with several associations in various cities, and an umbrella organisation, the Korean Bar Association. Roughly half of practitioners are in Seoul and environs, so the Seoul Bar Association is particularly important.

Korea's post-1987 governance structure has featured a number of independent monitors designed to promote rights of citizens, including an Ombudsman, an Administrative Appeals Commission and a Counter-Corruption Commission. In 2008, these three were combined into a single body, the Anti- Corruption and Civil Rights Commission.

In 2001, Korea established a National Human Rights Commission. This body serves to take complaints and promote human rights, though it does not have formal legal power to order remedies. Many of the issues it deals with involve local criminal justice authorities, as well as national policies that involve discrimination of one kind or another.

Accountability

Despite the institutionalization of alternation in power, old patterns of personalistic politics have remained in place to a certain extent, calling into question the institutionalization of the rule of the law. Each incoming President since 1987 has continued the pattern of purging associates of the previous regime, most recently under the auspices of generational change. This has called into question the extent to which old notions of rule by man had given way to an autonomous legal control of authority.

Corruption allegations have plagued every President since 1987, probably exacerbated by a combination of weak political parties and presidential term limits so that each President has an incentive to grab as much as possible as quickly as possible. The combination of corruption allegations and a history of presidential control over the prosecution has meant that each incoming President has been in the position of deciding whether or not to prosecute his predecessor for alleged corruption. Kim Dae Jung's administration suffered many prominent scandals, including criminal proceedings against Kim's two sons and a nephew. In December 2003, Kim's Chief of Staff Park Jie Won was sentenced to 12 years in prison for bribery charges and for his role in the Hyundai payment to North Korea for the North-South summit. The same week saw sitting President Roh Moo Hyun's right hand man Lee Kwang Jae arrested for election finance violations, to which

Roh's remarkable response was that he knew about the illegal campaign funds, but had taken much less than the opposition Grand National Party (which was simultaneously under investigation). As Roh's Presidency quickly degenerated into the usual cycle of accusations and scandals, the prospects for the clean politics to which Koreans aspire seemed dim indeed. After retiring, Roh himself was investigated for corruption, as mentioned above, and this led to his suicide. It remains to be seen whether Lee Myung Bak will suffer a similar fate: his private wealth might in fact insulate him from the need to seek corrupt gains.

Constitutional Structures

Korea's Constitution, originally adopted in 1948, has been subjected to five major amendments, most recently in 1987. Each of these ruptures has occurred during the context of regime change and so we are now in the period of what is called the Sixth Republic. During most of the period before 1987, there was weak enforcement of nominal rights, with negative ramifications for human rights and economic freedoms. Regime opponents were persecuted under the draconian National Security Law, and insulation through the law served the interests of those in power.

This has changed dramatically. The presidential system, though often criticized, has become institutionalized. The National Assembly has also begun to operate with greater independence. Of special relevance to our inquiry is the Constitutional Court, which has emerged as a major player. Of the five designated constitutional courts in East and Southeast Asia (the others being found in Indonesia, Taiwan, Thailand, and Mongolia), it is arguably the most important and influential in its context (Ginsburg 2003, 2009). The Court was established in late 1988 as part of the 1987 constitutional formation of Korea's Sixth Republic. Though expected by the constitutional drafters to be a relatively quiescent institution, the Court has become the embodiment of the new democratic constitutional order of Korea. The Court is routinely called on to resolve major political conflicts and issues of social policy. Since its establishment in late 1988, the Constitutional Court has rendered over 7000 decisions.[96] It is consistently related one of the most effective institutions in Korea by the public. In a recent poll, for example, it was rated the highest of any government body (and just behind several large corporations) in terms of influence and trust (Ginsburg 2009).

1.4 Other Actors

The *chaebol* economic groups have been the backbone of the post-war Korean economy, and include world-class firms like Samsung, LG and Hyundai. These groups traditionally interacted with government in an informal manner, with information flowing back and forth easily across networks, and human relations being the crucial channel. In recent decades the chaebol have been beefing up their corporate legal departments, suggesting that formal rules of law are becoming more important in business-government relations, and in private market transactions. While many have attacked the *chaebol* for cosy business-government relations and their preferred position in the economy, Koreans also admire the groups for their success.

An array of non-governmental organisations have emerged in recent years to utilize the law. The most famous of these was the Peoples Solidarity for Participatory Democracy, established by a well- known activist lawyer, Park Won-Soon. These groups sought to use the law to restructure Korean society and combat public corruption, and have used litigation in many different spheres. While it is difficult to find data on success rates, the groups claim that the litigation strategies have produced many profound changes in government policy. In some cases, the litigation has been used to call attention to significant social problems, and to help mobilize supporters to pressure

[96] Constitutional Court statistics, http://www.ccourt.go.kr/home/english/statistics.jsp

for change. In this sense, the litigation strategies have had more impact than simple cases statistics would identify.

Conclusion

South Korea is an extremely dynamic society. In the early 1950s, it was a poor ex-colony devastated by war, with about the same level of per capita GDP as Egypt. Today it is a member of the OECD and one of the most successful economies in the world. During the high-growth period to 1997, Korea transformed its industrial structure using a kind of developmental state model. In the last two decades, the law has assumed a much more prominent role in Korean governance and society, with groups seeking to use the law to advance particular agendas. The prominence of the constitutional court has made the law more visible to average Koreans. Administrative law and corporate law have evolved to emphasize transparency. These shifts have increased the legitimacy and responsiveness of the justice system.

Yet some aspects of Korea's system continue to constrain the use of law, particularly the cartelized legal profession that will be discussed in Chapter Six below. This limits access to justice, which remains an issue for the Korean justice system. No doubt reform processes will continue in years to come.

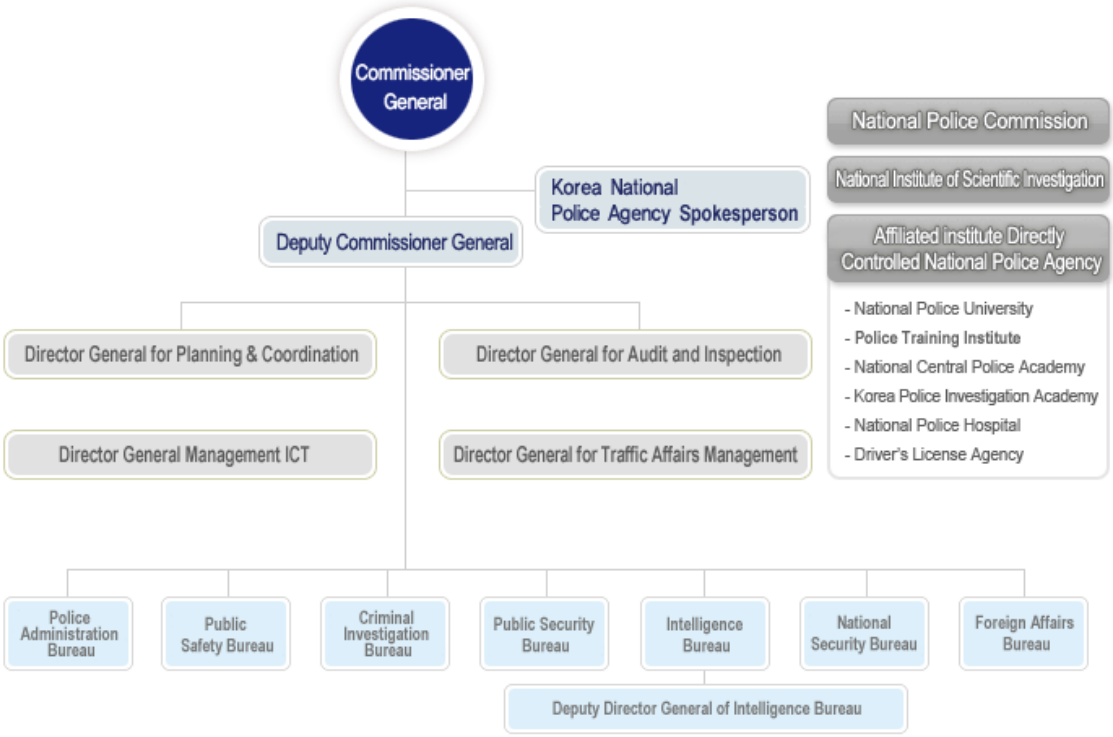
2. Criminal Investigation

2.1 Organisation

Organisation

Criminal investigation is carried out by judicial police officers,[97] public prosecutors and assistant public prosecutors. The police organization is structured similar to regional governments, but because security conditions differ by region, they do not exactly accord to regional governments, and as demand for security rises, additional police stations and police stands are being installed. Police officials belong to the National Police Agency and are referred to as 'judicial police officers' in the Criminal Procedure Act, divided into officers and constables. The two differ in the degree of competence they hold under the Criminal Procedure Act (Article 196 (1), (2) Criminal Procedure Act). These terms are not official titles or designations of official duties, but reflect qualifications to act within the Criminal Procedure Act. To secure political neutrality there is a 'Police Commission' installed under the Ministry of Public Administration and Safety, which is the highest order consultation and legislative organ of the police administration. The organization of Korea National Police Agency is as follows:

Figure 1: The Organization of Korea National Police Agency



There are also "special" judicial police officials, whose powers are created by statutes in areas including forestry, maritime affairs, taxation, customs, monopoly, and military affairs and other special matters. In addition, there is a National Intelligence Service, which investigates national security crimes such as espionage, insurrection, inducement of foreign aggression, rebellion and

[97] Within the police force, "judicial police" are those assigned to the investigation of crimes. The judicial police are under control and supervision of the prosecutor, and include police administrative officials, superintendents, captains, lieutenants, and patrolmen.

violation of the National Security Act[98] (Article 3 of National Security Act). It also performs analysis and collection of intelligence concerning national security.

Functioning

Investigative agencies have the approval to investigate any crimes. Thus, both public prosecutors and judicial police officers have authority to investigate criminal cases. In reality, the police initiate the investigation of most criminal cases, including not only routine crimes such as thefts, violence or traffic related crimes but also other serious crimes.[99] However, since prosecutors have the authority to supervise and instruct the police investigation under Criminal Procedure Act (Article 195), the police should report important cases to the prosecutors and conduct investigation under instruction of the prosecutor. In case of complex offences such as large-scale bribery cases involving politicians or high ranking public officials, economic offences, narcotic offences, environmental offences, cases involving organized crime, and tax evasion, the public prosecutor can initiate the investigation ex officio or without prior investigation by the judicial police officer.

After the initial investigation by police is concluded, the case is then transferred to the public prosecutor's office where a public prosecutor continues with the investigation by questioning the suspect and related persons, examining documents and other evidence. The public prosecutor may conduct additional investigations as necessary. At the conclusion of the investigation, the prosecutor in charge decides whether the suspect should be prosecuted. The theoretical reason for the foregoing arrangement is to charge the public prosecutor with the responsibility of ensuring that the police observe the law and due process by giving instructions in advance during the investigation process by the police.

2.2 Model

Introduction of New Criminal Procedure Act of 2007

The system of criminal investigation has been radically changed in the New Criminal Procedure Act of 2007 taking effect from 2008, a result of the process of democratization. Under authoritarian regimes, judicial independence was often constrained by the strong executive powers, especially in criminal cases related to politically sensitive matters. With political democratization, the model of criminal investigation has been transformed from a model focused on crime control to one focused on due process. The right of defence has been strengthened throughout the entire stage of criminal investigation. Although the Criminal Procedure Act enacted in 1954 has been revised several times, the revision in 2007[100] is considered to have been a major overhaul and reformation in the criminal justice system including the criminal investigation system. As many

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[98] Law No. 5454 of 13 December 1997 taking effect from 1 January 1998.

[99] While prosecutor is responsible for criminal investigation by law, police carry out and take responsibility of investigating 96% of all recorded criminal cases in reality. See Pyo, Changwon, "Prosecutor, Police and Criminal Investigation in Korea: A Critical Review" Journal of Korean Law Vol. 6 No. 2, 2007, p. 192.

[100] Law No. 8496 of June 1, 2007. The "121 provision" revision was designed to systematically rectify the act by rationally improving the regulations on arrest and detention and the rights and interests of the accused and suspects in criminal procedure; introducing trial-centred court examination procedures; and widening the scope of "*Jaijeung Shinchung*"(an application of re-examination of the public prosecutor's decision not to issue an indictment). It also aims to guarantee the public's human rights and due execution of the government's right to dispense punishment by rectifying shortcomings in criminal procedure as currently handled, including expanding the scope and availability of criminal trial records that can be made public.

as 121 provisions were revised, marking the largest change in the entire judicial system in a half century, and transforming the criminal trial. The revised Criminal Procedure Act seeks to establish an advanced criminal justice system in accordance with international standards by:

- realizing the defendant's right to defence;
- enhancing the legitimacy of investigation procedure;
- improving the arrest and detention system;
- strengthening the protection of victim's rights; and
- strengthening court-oriented trials.

Adoption of Fundamental Principle of Un-custodial investigation

Article 198 of the Revised Criminal Procedure Act proclaims that a criminal investigation shall be conducted principally on a suspect in a non-custodial status. This creates a presumption against detaining the criminal suspect. Factors to be considered in determining the use of detention are: the severity of the crime, the danger of recidivism, and concern for the peril of a victim or important witnesses. Because of this newly adopted clause, suspected criminals have the prima facie right to ask for non-custodial investigation against criminal investigations.

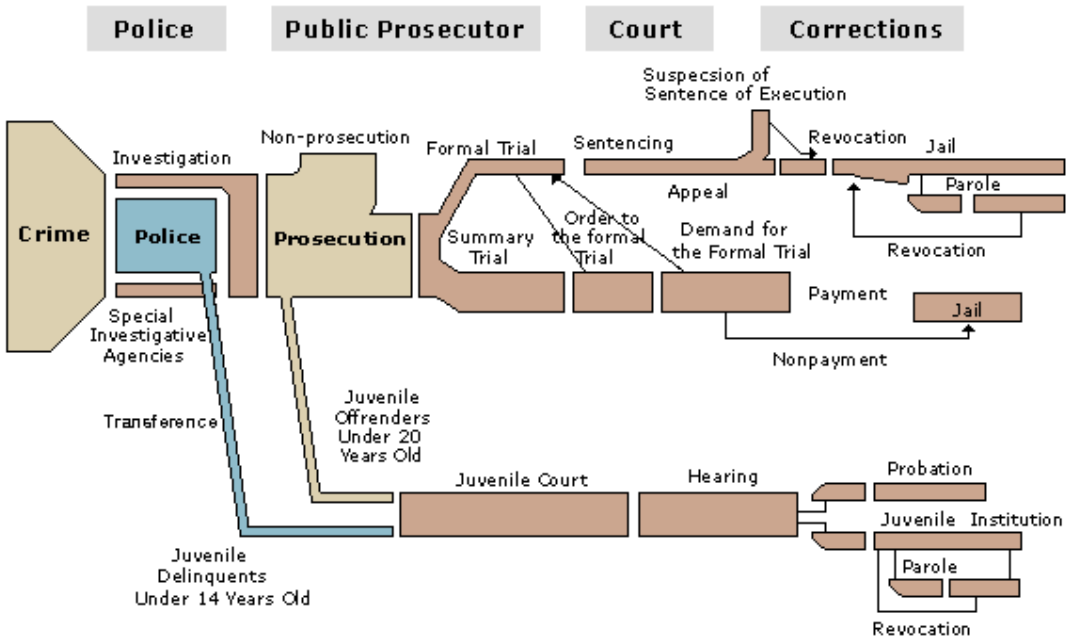
Advance Notification of the Right to Refusal

Article 244-3 of the Revised Criminal Procedure Act strictly requires that interrogating prosecutors and police officers give a suspect advance notification that she may refuse to answer questions. This requirement is different from the generally recognized Miranda Warning that is stipulated in Article 200 (2) of the Revised Act. This revised Article 244-3 of the Criminal Procedure Act is introduced to overcome the common interrogation practice in which the Miranda Warning is delivered pro forma. Because of this provision, a suspect must be informed in advance of interrogation that: (i) she has a legal right to refuse to answering any or all the questions; (ii) she will not be subjected to unfavourable treatment of she refuses to answer; and (iii) all of the statement given to the interrogator shall be used as evidence against her. The fact that the notification is given and the response from a suspect as to whether she exercises her right to have an attorney must be recorded in the dossier, the formal document required by the Criminal Procedure Act to be submitted as written evidence at trial. This article will enhance a suspect's awareness of her rights with respect to her response to the interrogation.

2.3 Tasks and Functions

Under the current Korean criminal justice system, a formal investigation can only be conducted by public prosecutors. A general overview of the criminal justice system is as follows:

Figure 2: General View of Criminal Justice System in Korea



Police officers and other investigative authorities can conduct investigation only under the direction and supervision of a public prosecutor. But, in reality, prosecutors cannot investigate all crimes because of capacity limitations. Thus, most criminal investigations are in fact conducted by judicial police officers rather than prosecutors. According to the statistics, 97% of all criminal suspects every year are initially investigated by the judicial police, and the prosecutor's role is to screen the cases conducted by judicial police officers.

There are two kinds of investigation methods in Korea. One is compulsory investigation which is conducted under a warrant issued by a judge and the other is voluntary investigation which is conducted without a warrant.

Compulsory Investigation

1. Arrest

First, we will describe arrest and detention during compulsory investigation. Before January l, 1997, the Criminal Procedure Law only had a detention warrant system. . But, through a revision of the Criminal Procedure Act, an arrest warrant system was introduced from the beginning of 1997. If there is probable cause to suspect that a person committed a crime and she refuses to appear in an investigative agency's offices without any reasonable ground, or there is a concern that she may disappear, the investigative authorities can arrest a suspect with an arrest warrant issued by a judge (Article 200-2 Criminal Procedure Act). A request for a warrant may be made only by a public prosecutor; police officers must apply to a public prosecutor for a warrant.

2. Emergency Arrest

The following cases are exceptions to the warrant requirement for arrest:

i. Any person may arrest, without a warrant, an offender who is committing or has just committed an offence (so-called *in flagrante delicto*).
ii. The police or public prosecutor may arrest a person who is believed to have committed an offence punishable by death, life imprisonment or up to three years imprisonment when there

is not sufficient time to obtain a warrant in advance (Previous Article 200-3 Criminal Procedure Act). The New Article 200-3 of the Revised Criminal Procedure Act added two supplementary clauses as cases of urgency: (i) concern about the destruction of evidence, or (ii) the suspect is on the run or a flight risk.

Article 200-4 of the Revised Criminal Procedure Act mandates that a prosecutor must request a warrant 'without delay' when a suspect has been arrested under the emergency provision. This newly adopted article is, however, very limited in its application for the time being since 'without delay' is not clearly defined in the law. Police officers and prosecutors prefer to interpret 'without delay' as meaning within 48 hours.[101] A request for a warrant may be made only by a public prosecutor; police officers must apply to a public prosecutor for a warrant. This article also includes a measure to prevent abuse of the system. If a prosecutor releases a suspect without requesting a warrant, the prosecutor must notify the accused with respect to the emergency arrest and subsequent release. The released suspect, her attorney, or his or her relatives may review the notification document for any illegalities with respect to the emergency arrest.

3. Detention

The public prosecutor requests a detention warrant from a judge after screening the case if the following conditions are met: (i) The suspect has no fixed dwelling; or (ii) There are reasonable grounds to believe the suspect may flee or destroy evidence (Article 201 Criminal Procedure Act).

4. Mandatory Court Hearing on the Request of the Arrest or Detention Warrant

Article 201-2 of the Revised Criminal Procedure Act demands that a court provide a hearing for all suspects under arrest. Previously a court hearing was provided only at the request of a suspect. The hearing under this article must proceed promptly and be completed by the next day if the warrant is requested. With this revision, the criminal procedure system in Korea has finally overcome suspicions from peers based on the lack of explicit provisions guaranteeing a suspect's fundamental right to be heard by a competent judge before the arrest.

5. Court's Review of Arrest and Detention

Article 214-2 of this Revised Criminal Procedure Act allows all suspects to have their arrest reviewed by a court whether they have been subject to a warrant or have been arrested without warrant under the emergency exceptions. Previously, only suspects arrested under a warrant were allowed court review. This article also requires arresting criminal investigators to notify the suspect's attorney, relatives, family members, etc for the purpose of facilitating this review system. Once the request for review is received from a suspect, , a court must complete.

In practice, this article has had a great impact, because approximately over 60% of all suspects under arrest are emergency arrest cases.[102] Although this new system review system received relatively

[101] The previous emergency arrest system has been arguably misused to secure premature confession or a suspect's unprepared answer because a prosecutor has the right to have the suspect detained for 48 hours without a warrant. According to the Previous Article 200-4 of the Criminal Procedure Act, if the arresting police officer thinks that detention of a suspect is necessary, a detention warrant must be requested from a judge through the same procedure as in an arrest warrant within 48 hours from arrest.

[102] According to the unofficial statistics of the Supreme Prosecutor's Office, as quoted in a journal article, for 5 months from January 1997 to May 1997 detention warrants against 31913 suspects were requested by the prosecutors. Among 31913 suspects, only 2878 suspects were previously arrested under arrest-warrants, the number of suspects under *flagranto delicto* arrest was 10976, and the number of suspects under emergency arrest was 17878 (approximately over 60%). See Ryu, Jee-Young, "Ginguepchepo-ui munjejeom-gwa gaeseonbangan (Problems of Emergency Arrest System and Their Improvement)" in *Hyeongsabeop Yeongu (Journal of Criminal Law Association)* No. 20 (winter 2003), p. 285, footnote 27.

little attention when it came into effect in January 2008, it became prominent in the aftermath of the so-called 'Candlelight Vigil Demonstration' protesting President Lee Myung-bak's policies. For the more than three months in the spring of 2008, mass protests held a candlelight vigil to protest a Korea-U.S. deal to fully open the local market to American beef. The new review system became very important in reviewing the emergency arrest of citizen activists. So far, the implementation of Article 214-2 of the Revised Criminal Procedure Act appears to be functioning well in practice. The statistical report of the Supreme Court does not distinguish between cases brought under arrest warrants and detention warrants, but according to its statistics, 1120 arrests out of 1140 were reviewed by the courts. 406 persons were released by court' order (36.3%), while 495 persons' requests were dismissed by the courts after review.[103]

6. Time Limits of Arrest and Detention

When the police detain a suspect, the suspect must be transferred to the public prosecutor within 10 days or else released(Article 202 Criminal Procedure Act). After the completion of the investigation, the police transfer the suspect to the public prosecutor's office. The public prosecutor can detain the suspect for 10 days (Article 203 Criminal Procedure Act). The 10 days detention in police custody and a further 10 days detention under the public prosecutor are granted by a detention warrant. If more investigation is necessary, the judge can grant detention of an additional 10 days upon the public prosecutor's request (Article 205 Criminal Procedure Act). The maximum term of pre-prosecution detention is thus 29 days, since the detainee's transfer day from the police to the prosecutor is calculated in the detention period on both sides. Before questioning, the police or a public prosecutor must inform a suspect of his/her right to remain silent (Article 12 (2) Constitution; Article 200 (2) Criminal Procedure Act).

7. Suspect's Right to have an Attorney Participate in the Interrogation

A suspect also has the right to consult with a lawyer during pre-trial detention (Article 12 (4) Constitution). Suspects in police custody are held in police detention cells, while those who have been transferred to the public prosecutor's office are detained in official pre-trial detention houses. The Constitution provides detainees with the right to request the court to review the legality of detention before indictment. Article 243-2 of the Revised Criminal Procedure Act articulates the suspect's right to have an attorney participate in the criminal interrogation. This Article requires that a judicial police officer or a prosecutor must allow an attorney to interview and communicate with a suspect in the interrogation process. This Article is aimed at substantiating the right to attorney in Article 12(4) of the Constitution and codifying the judicial opinion in the Korean Constitutional Court case (2004. 9. 23, 2000 Heon Ma 138), which recognized the suspect's right to obtain, upon request, access to an attorney during interrogation.[104] The suspect's attorney, however, is not allowed to interfere with an investigation into the crime other than the suspect's interrogation.[105] All of the attorney's opinions delivered during the interrogation of her client shall be recorded in the interrogation dossier (Protocol) which is required to be submitted as written evidence at trial and verified by the attorney. This right of suspect is enormously important, and

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103 Source: The Supreme Court, Bopwontonggyewolbo (Monthly Statistic of the Courts), January 2009 – December 2009.

104 Even before this landmark decision of Constitutional Court there was a similar decision from the Supreme Court: Decision of 11. November 2003, 2003 Mo 402 [Gongbo 2004, 271].

105 Originally the government bill of revision included the process of all the stages of investigation in the area where the suspect's attorney may participate. During the deliberation at the National Assembly, the area of participation had been narrowed by worries that the secrecy of the criminal investigation was compromised too much.

broader than the right upheld in other nations that usually allow an attorney to be present at the place of interrogation.

Before the introduction of Article 243-2 of the Revised Criminal Procedure Act this constitutional right of the suspect was unstable because of the lack of clear legal provision, though rulings by the Supreme Court and the Constitutional Court had emphasized the rights as mentioned above. In line with the democratization process, the Supreme Prosecutor's Office voluntarily introduced 'Managerial Regulation on Attorney's Participation in the Interrogation' in 2003. Now Article 243-2 of the Revised Criminal Procedure Act of 2007 has instituted a clear requirement that investigators must, upon application from a suspect, his counsel, or relative, allow defence counsel to have an interview with the suspect or participate in the investigation "unless there is any justifiable reason otherwise." It also provides that the investigator may designate counsel if the suspect does not have representation. However, contrary to expectations, the new provisions have not been much utilized, as the following table demonstrates:

Table 1: Cases in which attorney participated in the interrogation

Year	2003	2004	2005	2006	2007	1/2008 – 9/2008
Cases handled by the prosecutors	1,914,979	2,057,194	1,845,624	1,809,624	1,948,306	1,499,261
Cases in which attorney participated	112	158	303	367	541	580
Percentage	0.01%	0.01%	0.02%	0.02%	0.03%	0.04%

[Source: Peopnyulsinmun (Legal Newspaper) of Jan 20, 2009.]

It is believed that the main reason that attorney representation during interrogation is so rarely utilized is because of the costs. In Korean practice, an interrogation can last over 8 hours once a day. Only a few suspects can bear the expenses of attorney and, even if a suspect wants his or her attorney to participate in the interrogation at any cost, his or her attorney will not usually have the time to participate in the entire interrogation. On the other hand, some assert that the conditional clause 'without justifiable reasons otherwise' may be a factor. However this allegation may be at least partially unfounded allegation, because these days the prosecutors or police officers don't seem reluctant to enforce this Article. Some Prosecutor's Offices voluntarily introduced the prior notification system of an attorney's right to participate in the interrogation. Therefore, for the brisk and vigorous use of this system, the various strategies that could give incentives for the voluntary participation of attorney are urgently needed.

Search and Seizure

Another component of the so-called compulsory investigation rules is search and seizure. The procedure of issuing a search and seizure warrant is similar to that of an arrest and detention warrant. The investigative agencies can search and seize places and things when they have a search and seizure warrant issued by a judge (Article 215 (1) Criminal Procedure Act). A request for a warrant may be made only by a public prosecutor; police officers must apply to a public prosecutor for a warrant (Article 215 (2) Criminal Procedure Act). So, at this stage, a public prosecutor can screen the cases applied for by police officers. But the following cases are exceptions to the warrant requirement for search and seizure:

1. When the police or a public prosecutor arrests or detains a suspect, they can search and seize without a warrant at the crime scene (Article 216 Criminal Procedure Act).
2. The police or a public prosecutor can search and seize things, which are owned or possessed by a suspect who has already been under urgent arrest within 24 hours from arrest (Article 217 (1) Revised Criminal Procedure Act).[106]
3. the police or a public prosecutor can seize things which are brought forward by the owner or possessor (Article 218 Criminal Procedure Act).

Wiretapping

As in other countries, secrecy of communication is protected by the Constitution in Korea (Article 18 Constitution). But in some crime investigations, the police and a public prosecutor need to wiretap in order to apprehend fugitives and investigate criminal activities. On this point, there is a conflict of interest between the constitutional right and the investigative need. We restrict the legal wiretapping strictly to those cases covered by a special law, the Communication Secrecy Protection Act. Under this Act, wiretapping can only be permitted under strict conditions and by restricted procedures, and a request for wiretapping permission may be made only by a public prosecutor; police officers must apply to a public prosecutor for permission (Article 6 (1) Communication Secrecy Protection Act). So, at this stage, a public prosecutor can screen the case applied by police officers.

The public prosecutor requests a written permission for wiretapping from a judge under the following conditions:

1. There is enough ground to suspect that some specific crimes which are enumerated in the Act are planned, performed or were performed.
2. It is difficult to hinder commitment of crime, apprehend a criminal, or collect the criminal evidence with methods other than wiretapping (Article 5 Communication Secrecy Protection Act).
3. The maximum period for wiretapping is three months, but an additional three months can be granted by a judge, if necessary (Article 6 (7) Communication Secrecy Protection Act).

Voluntary Investigation

In Korea, "voluntary" investigation processes include interrogation of a suspect by summons, inspection at the scene, interrogation of a relevant witness and so on. If it is necessary for criminal investigation, a public prosecutor and the police can demand the appearance of a suspect and listen to the suspect's statement (Article 200 Criminal Procedure Act). A public prosecutor and the police must notify the suspect that he/she has the right to remain silent in advance before listening to the suspect's statement (Article 12 (2) Constitution). But a public prosecutor and the police can't force the suspect to appear without an arrest or detention warrant because interrogation by summons is considered to be voluntary. As in other countries, interrogation of a suspect is one of the most important investigation methods. When a crime is committed, investigative agencies usually perform on-site inspection at the crime scene, if necessary. At the on-site inspection, they try to recreate the crime situation, analyse the crime and collect the relevant evidence. This is a

[106] Previously, in case of emergency arrest, investigators were allowed to search and seize items in the suspect's possession, custody, or under suspect's management for 48 hours without warrant under the Article 217 of previous Criminal Procedure Act. This practice was largely criticized because of its rampant absuse. Article 217 of the Revised Criminal Procedure Act limits the scope of the emergency search and seizure to be incidental to the emergency arrest that has already been executed. The new emergency search and seizure is allowed when a seizure of a necessary item is time pressed, so as to obtain warrant for the period of 24 hours.

very important criminal investigation method, especially when serious and violent crimes such as murder, robbery, rape are committed. A public prosecutor and the police can demand appearance of a witness by summons and listen to the witness's statement. But a public prosecutor and the police can't force the witness to appear.

Video Recording

Article 244-2 of the Revised Criminal Procedure Act introduces a technical advance in establishing a video recording system for interviews with witnesses or interrogation of criminal suspects. Even though video recording has had very limited evidentiary value, restricted to roles such as establishing the genuineness of an interrogation document, serving as an interview document in or helping to refresh witness memory, it will be henceforth be utilized to ensure the strict observance of the law in all criminal investigations. Video recordings, however, have a lot of potential to distort the true facts through editing and manipulation of the scene. Considering the risks, the Revised Criminal Procedure Act strictly requires that (i) a suspect and/or her attorney be informed in advance of the scheduled video recording, (ii) the recording must cover the entire investigation process without omitting any scene, and (iii) when finished, the video recording shall be sealed under signature before a suspect or her attorney. This measure is designed to reduce the risk of manipulation.

Recording of an Investigation Process

Article 244-4 of the Revised Criminal Procedure Act requires that a judicial police officer and an investigating prosecutor record in a separate document items such as (i) the time when a suspect arrives at the place of interrogation, (ii) the time when the interrogation is initiated and ended, (iii) other facts that are need to review the process of interrogation. This revision is aimed at ensuring an interrogation process that is transparent and thus results in the legality of the evidence, the voluntariness of the suspect's statement, and the possibility of effective review of the investigation.

2.4 Relations

Relationship between Prosecutor and Judicial Police Officer

Under the Korean Criminal Procedure Act, the relationship between prosecutor and the judicial police officer is not one of cooperation, but rather a hierarchical one (Article 196 Criminal Procedure Act). Accordingly, the public prosecutor directs and supervises the judicial police officers in connection with criminal investigation and the police officers should obey the prosecutor's official order (Article 53 Public Prosecutor's Office Act). In case a judicial police officer does not comply with a prosecutor's order, the prosecutor can, through his/her chief prosecutor, request that the police officer stop the investigation or request a superior to replace him/her (Article 54 Public Prosecutor's Office Act).

Prosecutor's Authority to Inspect the Place of Arrest or Detention

To deter unlawful arrest or detention, the chief prosecutor of the district public prosecutor's office or its branch offices dispatches prosecutors once a month to the place of the investigation where a suspect is being arrested or detained. The inspecting prosecutor examines relevant documents and questions the arrestee or detainee (Article 198-2 (1) Criminal Procedure Act). If there is reasonable ground to believe that any suspect has been arrested or detained in violation of due process, the prosecutor should release the suspect or order the judicial police officer to transfer the case to the prosecutor's office (Article 198-2 (2) Criminal Procedure Act). The purpose of this system is to protect individual rights from unlawful infringement. This provision emphasizes the prosecutor's role as an advocate of human rights.

Private Complaint Crimes

Some offenses, known as "private complaint crimes," require a private complaint to be brought prior to prosecution. For example, the crime of granting an illegal contract based upon illegal demands (Article 30 of the Fair Contract Awards Act) requires a notice or private complaint from the Chamber of Fair Trade as a pre-condition to prosecution. Another example is tax offenses. There is a requirement of notice from the relevant government official prior to the initiation of proceedings to collect penalties for tax violations under the Tax Evasion Control Act, and a notice of demand from administrative officials in regard to certain proceedings under the Custom Act.

Co-operation for Scientific Investigation

Relying only on traditional investigation methods, it is difficult to solve new kinds of crimes, which are getting more sophisticated and ingenious. For forensic criminal investigation there are several laboratories in the Supreme Public Prosecutor's Office (a lab for DNA Analysis Section, Drug Analysis Section, Polygraph Section, Document Examination Section, Criminal Photography Section, Phonetic Analysis Section and Psychological Analysis Section). Public prosecutors and the police utilize various advanced devices, for example, computer systems, VTRs, poly-graphs, the most state-of-the- art identification equipment such as Automatic DNA Sequencer, Computer Polygraph System and other equipment in performing their prosecutorial functions in order to enhance the efficiency of criminal procedure. Also, investigation equipment such as Passive Night Vision System, Wireless Video Camera, Cellular Telephone Interceptor are also available for scientific investigation. A criminal DNA Data Base is planning to be established and fully operated in the near future. In addition, there is the National Scientific Investigation Laboratory that assists scientific investigation which the police perform. The laboratory is under the direction of the Ministry of Government Administration and Home Affairs and it actually performs a central function and duty in the police's scientific investigation.

2.5 Mechanisms

Coordination

The National Intelligence Service (NIS) is charged with collection, coordination, and distribution of information on the nation's security and strategic environment. The Korean NIS has a duty to maintain documents, materials, and facilities related to the nation's classified information. In this context, the NIS is entitled to investigate the crimes affecting national security. These include violations of the Military Secrecy Protection Law and the National Security Law[107] which prohibit the incitement of civil war, foreign troubles, and insurrection. In addition it investigates crimes related to the missions of its staff. In this limited area the NIS belongs to the category of special police officers.

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[107] The National Security Law dates back to 1948. After liberation from Japan, conflicts between leftists and rightists reached a peak on the Korean Peninsula. The Yeosu-Suncheon Revolt took place on Oct. 19 1948, when troops stationed in the two South Jeolla cities refused to put down a civilian uprising on Jeju Island. The Syngman Rhee government, only two months into its term, acted quickly and mercilessly, suppressing the revolt in eight days. Alarmed by the incident, the government established the National Security Law in December 1948. Both communism and pro-North Korea activities were deemed illegal. During the Chun Doo Hwan administration of the 1980s, the law was merged with the Anti-communism Act. Throughout Korea's modern history, debate about the law has been continuous. Numerous constitutional challenges have been attempted, and the latest ruling came in 2004. The Supreme Court upheld the law's legitimacy, citing the nation's security situation as justification.

Administrative

Organized by the United States Army Military Government in 1945, the Korean National Police Agency (KNPA) was formally activated in 1948 by the new Korean government and placed under the Ministry of Interior. Under the Police Act of 1991, the KNPA is an independent organization from the Ministry of Public Administration and Safety, which is also in charge of overseeing elections. The National Police Board, which is a civilian organization, has been established to advise the Commissioner General of the KNPA regarding various police matters such as promotions, budget, equipment and investigation of alleged human rights abuses by the police. The structure of the KNPA itself is a highly centralized and vertical paramilitary structure. The KNPA consists of a headquarters, sixteen metropolitan/provincial police bureaus, the Combat Police, the National Maritime Police, an antiterrorist unit, the Central Police Academy, and other support services, such as a forensics laboratory, a hospital, and other police schools. As of January 2010, there were 244 police stations and 760 police substations (*Jigudai*), 793 police boxes (*Pachulso*) and detachments throughout the country. The National Police Headquarters[108] exercises authority over all police components. Metropolitan and provincial police bureaus are responsible for maintaining public order by directing and supervising their own police stations. The police station is responsible for maintaining public peace within its own precinct.[109] The police substation or police box takes initial actions in all criminal incidents, civic services, and accidents. Police boxes are the South Korean equivalent of the cop on the beat. They provide direct contact between the people and the police. Police box personnel are supposed to know their areas and the people who live and work in them. Police boxes are commanded by lieutenants or sergeants and have reaction vehicles available on a twenty-four-hour basis.

Oversight and Inspection

Control Measures over the Police

Owing to the political instability of the twentieth century in Korea, the political neutrality of the Korean National Police Agency (KNPA) has not been secured. Instead, the power of the police had been significantly abused in favour of illegitimate ruling governments as a political tool. The KNPA often participated in manipulating various elections, including a presidential election in 1960. A significant portion of police personnel and resources had been allocated to suppress political opponents and democratic movements, consequently neglecting the primary roles of the police in preventing crimes and serving the public. Under these undemocratic and authoritarian regimes, abuse of human rights and acts of brutality by the police were pervasive. The police used various torture techniques and harsh maltreatment against political suspects, resulting in numerous

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108 As of January, 2010, the national police agency consists of 1 Deputy Commissioner General, 7 Bureaus, 4 Authorities, 1 Spokesperson, 1 Deliberator, 10 Director Generals and 28 Divisions. Subsidiary facilities are the Korea National Police University, Police Training Institute, National Central Police Academy, Police Investigation Training Center, National Police Hospital and Driver's License Agency.

109 The police station had seven functioning sections: an administration and public safety section, responsible for operation and supervision of police substations and boxes, litigation of minor offenses, traffic control, and crime prevention; a security section, responsible for maintaining public order; an investigation section for investigating criminal incidents, lawsuits, booking criminals, custody of suspects, detention-cell management, and transference of cases and suspects involved in criminal cases to prosecution authorities; a criminal section responsible for crime prevention; a counterespionage section; and an intelligence section, responsible for collection of intelligence and information.

human rights abuses and torture-related cases of death.[110] One of the most well-known cases is the death of *Pak Chong-chol* during a police investigation in 1987. A 21-year-old student Pak was being interrogated regarding an anti- government student organization and subjected to a forced water intake torture by repeatedly forcing his head under water. Except in a few well-known cases, however, few police officers were criminally charged or disciplined internally because of the violations of human rights.[111]

With the founding of the Sixth Republic, such reports declined. To ensure and enhance the political neutrality of the KNPA, some external and internal control measures have been implemented since the 1990s.[112] First, the current KNPA has been established, which is an independent organization from the Ministry of Interior (now Ministry of Governmental Administration and Safety Affairs), which is in charge of overseeing elections. Second, the National Police Board, which is a civilian organization, has been established to advise the Commissioner General of the KNPA regarding various police matters such as promotions, budget, equipment and investigation of alleged human rights abuses by the police.

Despite the introduction of control measures and intensive reform efforts, the KNPA has not secured political neutrality and it is still vulnerable to political influence in many ways. For example, the external control measures implemented have been ineffective to ensure political neutrality of the KNPA. The structure of the KNPA itself, which is a highly centralized and vertical paramilitary structure, from top to bottom, can be easily manipulated to serve the interest of the ruling government. Since there has not been a fixed tenure system, the Commissioner General has been frequently changed at the will of the President. In addition, the National Police Board, which was intended to ensure political neutrality and increase transparency of the KNPA, cannot have any influence on the KNPA. The Board belongs to the Minister of Public Administration and Safety as an advisory committee, thus significantly diminishing the political neutrality of the Korea Police Board itself. Worse, the board is only responsible for advising on police policy such as budget, equipment, and personnel administration. It is not given actual power to supervise the operation of the police and thus becomes a perfunctory organization, making it useless for ensuring and enhancing the political neutrality and transparency of the KNPA. To be reborn as a democratic and politically neutral police organization, more structural reforms are necessary. In particular, the structure of the police should be decentralized, to avoid the concentration of police power.[113]

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110 See Pyo, Chang-Won, "Policing: the past", *Crime & Justice International*, Vol. 17 No. 50, pp.5-6.

111 See in detail, Cohen, J., Baker, E. (1991), "US foreign policy and human rights in South Korea", in Shaw, W. (Eds),*Human Rights in Korea: Historical and Policy Perspective,* Harvard University Press, Boston, MA.

112 Recognizing the serious problems caused by the lack of political neutrality of the police, reform plans were proposed several times (i.e. 1955, 1960, 1972, 1980, 1985, 1989). Finally, with the enactment of the Police Act in 1991, the current police, KNPA, which is out of the direct control from the Ministry of Interior, were established and the National Police Board was also created to ensure political neutrality and autonomy for the police

113 In order to decentralize police power, each local police headquarter should be given authority and command to perform police works, while a central police headquarters is responsible for coordinating and supervising the police work of local police headquarters. This modified centralized police system, which Japanese police have adopted, has been known to be very effective in decentralizing police power, while maintaining the advantages (i.e. efficiency and effectiveness) of a centralized police system. See in detail, Reichel, P.L., *Comparative Criminal Justice system: A Topical Approach,* Prentice-Hall, Upper Saddle River, NJ (2002).

Role of Anti-Corruption and Civil Rights Commission

The Anti-Corruption and Civil Rights Commission (ACRC)[114] performs the following three functions:

- Handle and address public complaints and improve related unreasonable systems
- Build a clean society by preventing and deterring corruption in the public sector
- Protect people's rights from illegal and unfair administrative practices through the administrative appeals system. Thus, ACRC has the function of oversight and inspection over the activities of criminal police officers.

2.6 Criminal Investigators

Recruitment and training of police officers is done through the Central Police Academy, the National Police College, and the Police Consolidated Training School. The Central Police Academy was established in 1987. It is capable of simultaneously offering a six-week training course for police recruits, a two-week training course for draftees of the Combat Police,[115] and a variety of basic specialized training courses for junior police. The National Police College had graduated some 2,879 (159 women[116]) officers since its first class graduated in 1985. Each college class had about 120 police cadets, divided between law and public administration specializations. The cadets share a collective life for four years at the college. The goal was to establish a career officer's corps similar to those created by the military academies. The Police Training Institute provided advanced studies, basic training for junior police staff, and special practical training courses for security and investigative officers from the counterespionage echelons of police agencies. It also trained Maritime Police instructors, key command personnel for the Combat Police force, and foreign-language staff members. Police Investigation Training Centre provided advanced courses for the scientific investigation skills.

According to the White Paper on Police published by KPNA, the number of police officers (except of the Combat Police) on its payroll is 99,554 in 2009. Recently, in May 2010, the Government Cabinet has approved a bill to add hundreds of riot troops and special crime investigators that will increase the total from 99,554 to 100,611, exceeding the 100,000 mark for the first time since its establishment in 1945. The KPNA celebrates the fact that the number of the nation's police officers is about to surpass 100,000. As of 2009, there is one police officer for every 498 people in Korea, a relatively low ratio compared to other developed countries. According to White Paper the per capita population per policeman in Hong Kong is 249, France is 273, Germany 310, the U.S. is 354, Australia is 450, and Japan is 499 as of 2007 (Korea was 507 that year). Therefore, to improve police service the increase of the number of police officers seems necessary. The annual budget

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114 Legal ground for the foundation of ACRC: Act on Anti-Corruption and the Establishment and Operation of ACRC (Law No. 9402).

115 The Combat Police force was technically subordinate to the Ministry of National Defence, but the Ministry of Public Administration and Safety and the Korean National Police were responsible for its operational management and budget. During hostilities, the Combat Police reverted to the Ministry of National Defence. The members of the Combat Police were conscripted at age twenty or older and served for approximately two-and-a-half years. Divided into companies, the Combat Police force was assigned to the metropolitan police bureaus. Except for supervisory personnel who were regular KNPA officers, the Combat Police were paramilitary; their primary responsibilities were riot control and counter-infiltration. Under normal conditions, they did not have law enforcement powers as did regular KNPA officers. In 1967 the Combat Police force was organized to handle counter-infiltration and antiriot duties.

116 The National Police College began admitting women in 1989.

for the Korean police (Korean Won 175,985,200,000 = approx. US$ 146,349,438) accounts for 4.0% on average of the annual governmental budget (Korean Won 6,968,400,000 = approx. US$ 5,794,927,234). Toward improving public safety, the KPNA regularly demands the increase of the annual budget, but the increasing rate per year (5.6% on average) is lower than the rate of whole governmental budget (7.7% on average).[117]

Conclusion

The practice of criminal investigation in Korea has been changing very rapidly. This rapid change has raised some conflicts among institutions involved in criminal justice, for example between the police and prosecutors in the context of investigation. In several countries, the police have criminal investigation departments. In Korea, that role is taken by the Special Investigation Division of the prosecutor's office. Currently, there is a strong push by the police force to gain certain investigation rights, but it is being strongly resisted by the prosecution. There is also a struggle between judges and prosecutors. In the past, judges used to issue arrest warrants requested by prosecutors virtually as a matter of course. Currently, the Seoul District Court denies some 40 percent of arrest warrants. In the past, lawyers did not resist the prosecutors. Now, they fight back. As Korean lawyers become more westernized, their voices in court are getting louder. At the same time, there is an increasing number of NGOs adding to the chorus of demands for improvement. As a result, a lot of cases, which would have been judged guilty as a matter of course, are now being found not guilty.

In the meantime, the Korean police, siding with investigating prosecutors, due to the political manipulation of the police under the authoritarian governments, have been violating constitutional and human rights in the investigation process, especially in political cases such as the above-mentioned *Pak Chong-chol* case that ironically served as a momentum for the 1987 democratization movement. The Revised Criminal Procedure Act of 2007 has more new stipulations and provisions in the process of trial, evidentiary rules, discovery procedure, bailment, judicial review of prosecutor's decision of non-indictment, etc. Those other stipulations are closely related to the investigation conducted by a judicial police officer and an investigating prosecutor. Criminal investigation should be performed in the light of these principles.

In the investigation process, the Revised Criminal Procedure Act stresses procedural due process in which the rights of defence for a suspect are secured and detention of a suspect is legally checked: adoption of fundamental principle of non-custodial investigation (Article 198 of Criminal Procedure Act), Suspect's Right to have an attorney participation in the interrogation (Article 243-2 of Criminal Procedure Act), the introduction of the video recording system into the criminal interviews with witnesses or criminal interrogation with suspects (Article 244-2 of Criminal Procedure Act), advance notification of the right of refusal (Article 244-3 of Criminal Procedure Act), and the recording of an investigation process (Article 244-4 of Criminal Procedure Act). One of the most important revisions is the request for warrant 'without delay' after emergency arrest. Article 200-4 of the Revised Criminal Procedure Act mandates a prosecutor to request warrant 'without delay' when a suspect is under the emergency arrest, to prevent criminal investigators from abusing the emergency arrest system. Article 201-2 of the Revised Criminal Procedure Act requires a mandatory court hearing on the arrest. Article 214-2 of the Revised Criminal Procedure Act allows all suspects, whether arrested with or without a warrant, access to a court to review the detention. With the revision in 2007, the Korean criminal investigation system has been finally modernized to guarantee the rights of the suspect.

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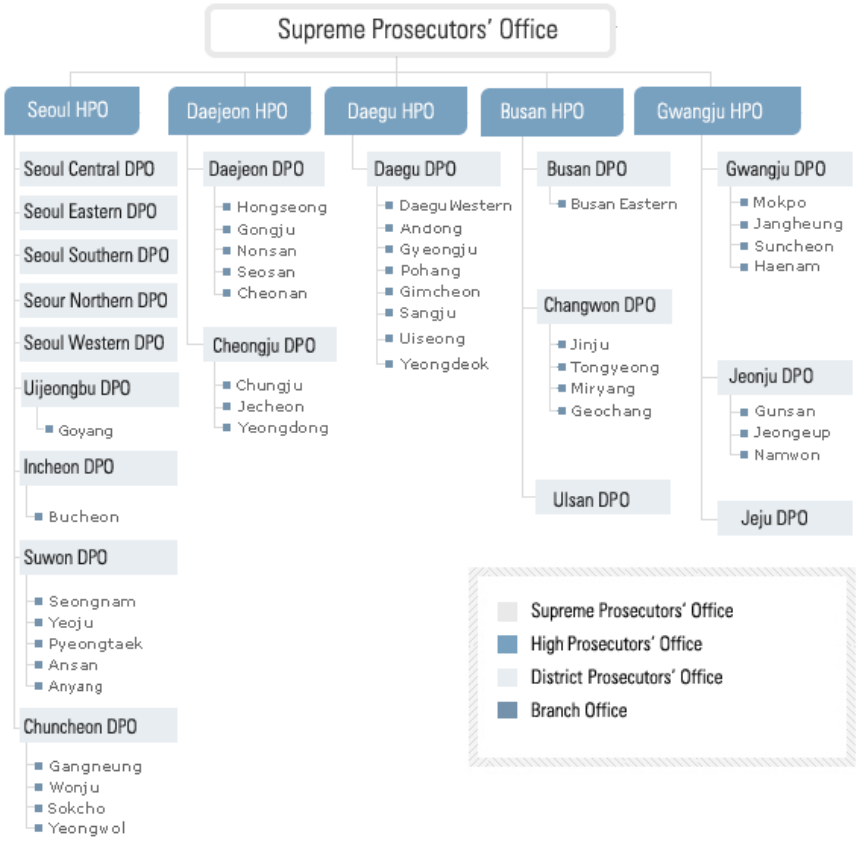
[117] Source: KNPA, *Gyeongchalbaekseo* (White Paper on Police) 2009, p. 341, Table 7-35.

3. Prosecution/Procuracy

3.1 Organisation

The organisation of public prosecutor's office in Korea has already been briefly described (See above 1.3 and 2.1 A). The prosecution has exclusive authority as there is neither a grand jury system nor private prosecution in Korea. The organizational structure of public prosecutor's office is as follows:

Figure 3: Structure of Public Prosecutor's Office



3.2 Model

Two Faces of the Prosecutors' Organization: quasi-judicial status

The organizational model of the Korean prosecution system is rooted in a concept of prosecutorial independence that corresponds to the idea of judicial Independence. The concept of judicial independence originates from the principle of separation of powers, and is designed to ensure checks and balances among government organs. In other words, it is generally accepted that judicial independence means that organizations and operations of the judicature shall be independent and separated from the administrative and legislative powers. But the prosecutors' character is in between the judicial and the administrative powers: it is judicial in that it involves indictment and participation in the trial, but executive because the ultimate purpose of the prosecutors' organization is the imposition of appropriate punishment upon criminals.

The prosecution in Korea has occasionally been criticized for being influenced by politics. Such claims are less common since democratization began in. However, there are still some 'political'

cases that raise doubts about the investigation motive of the prosecutor's office. For example, on April 23, 2010, the Seoul District Court's ruling on a bribery case involving former Prime Minister Han Myung-Sook exposed the prosecution's political bias. The court found Han not guilty of bribery charges.[118] Han, a well-known Roh supporter who served as Prime Minister in the Roh administration, was running for the mayor of Seoul. She hoped that strong public sympathy for the late leader Roh would help her win the June 2 local elections, but it appears that she lost the election. Conservative Koreans, many of them in the government of President Lee Myung-Bak, despise Roh as a failed left-leaning politician, but supporters have criticized the prosecution for bringing false charges against Han as well as Roh without solid evidence from the political motive. (As mentioned in the Introduction, Roh, who served as president from 2003-2008, took his own life in 2009, about three weeks after appearing at the prosecutor's office for questioning.)

Under Korean law, each prosecutor has independent authority to exercise his/her power in the investigation of crime, participation in the trial process and the execution of judgments. In this respect, prosecutors have the same independence in performing their works as judges have. On the other hand, to enable prosecutors to effectively achieve their purpose, prosecutors form a pyramid organization, at the top of which is the Prosecutor General who can be directed and supervised by the Minister of Justice.[119]

Paradigm Shift of 2004

Previously, the monopoly power to prosecute and the significant discretionary power to suspend prosecution were so central to Korean criminal justice that many regarded the system as embodying "prosecutorial justice (*kumch'al sabop*)."[120] In practice, Korean prosecutors normally indicted only when they accumulated what they considered to be overwhelming evidence of a suspect's guilt, and the courts, historically, were predisposed to accept the allegations of fact in an indictment. In other words, the prosecutors reported the result of their investigation (prosecutor-made dossiers) to the trial courts, and the courts' decisions were widely based on those reports, as a practical matter.[121] This predisposition was reflected in both the low acquittal rate, less than one or two percent, in criminal cases and in the frequent verbatim repetition of the indictment as the judgment.[122] The principle of "innocent until proven guilty" applied in practice much more to the pre-indictment investigation than to the actual trial. This was called "skeletonizing (*Hyunghaewha*) of the trial."

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118 See Korea Times of 23 April 2010.

119 Article 8 of the Public Prosecutor's Office Act states that the Minister of Justice may "generally" direct and supervise public prosecutors but for "specific cases" can only direct and supervise the Prosecutor General. Thus, in order to secure the independence of public prosecutors from political influences, the role of the Prosecutor General in Korea is extremely important in the criminal justice system. So, the term of the Prosecutor General shall be 2 years, and he shall not be re-appointed, and he shall not promote or join any political party within a two-year period after he retires from office.

120 For example, Kuk Cho, 'The Unfinished "Criminal Procedure Revolution" Post-democratization South Korea', 30 *Denv. J. Int'l L.* & Pol'y 377 (2002). Japanese criminal procedure is similar to the Korean in this respect.

121 The previous Article 312 (1) of the Criminal Procedure Act (Law No. 341, Sept. 23, 1954, revised July 19, 2006 as Law No. 7985) has given exceptionally strong evidentiary power to the prosecutor-made dossiers even if they are hearsay. The Supreme Court recognized the legitimacy of this Article 312 (1). See Decision of the Supreme Court of March 8, 1983, 82 Do 3284; Decision of the Supreme Court of June 26, 1984, 84 Do 748. The Constitutional Court also held this article to be constitutional. See Decision of the Constitutional Court of May 26, 2005, 2003 Heon Ka 7.

122 Statistic in Korea also shows the conviction rate is over 97% in average.

Thus, the Korean prosecutors might be considered "half-judges"[123] or "de facto judges."[124] Those phenomena of "prosecutorial justice" and "skeletonizing of the trial" have led to criticism that the court seemed to put more emphasis on investigative documents for efficient and speedy trial rather than the courtroom proceeding. The courts themselves aggravated this problem by their accepting the evidentiary power of prosecutor-made dossiers. However, the Supreme Court's ruling on December 16, 2004, has changed nearly everything.[125] It no longer infers the actual genuineness of a transcript from the fact that the accused has signed it. From the beginning of 2005, the paradigm shift could be clearly seen in Korean legal circles, and the noisy quarrel between the Judiciary and the Ministry of Justice erupted into newspapers and TV reports.[126] The 2007 revision of the Criminal Procedure Act has "nearly" confirmed the paradigm shift from prosecutorial justice to concentrated trial. The hot debate over Article 312 (1) of the previous Criminal Procedure Act[127] ended in a compromise: Article 312 (1) of the 2007 revision of Criminal Procedure Act keeps the evidentiary power of the prosecutor-made interrogation dossiers alive but imposes stricter requirements.[128] Previously, all of the investigation documents were presented to the judges to be read and reviewed before the beginning of the actual trial. At present, however, the judges are to only review the written indictment prepared by the public prosecutors, and they are not to review the investigation documents before the trial actually begins.[129]

Thus, in the new system, which might be called "a concentrated and open trial" or "oral argument-oriented trial," the investigation documents are to be presented to the judges in the courtroom only when each and every document is legally admissible.

3.3 Tasks and Functions

Introduction

Article 4 of The Prosecutor's Office Act declares the powers and duties of prosecutors as the following:

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123 Kim, Heekyoon, "The Role of the Public Prosecutor in Korea: Is He Half-Judge?" *Journal of Korean Law,* Vol. 6 No. 2, 2007, pp. 163.

124 Cho, Kuk, "The 2007 Revision of the Korean Criminal Procedure Code" " *Journal of Korean Law,* Vol. 8 No. 1, 2008, pp. 18.

125 Judgment of the Supreme Court of December 16, 2004, 2002 Do 537.

126 Kim, Heekyoon, "The Role of the Public Prosecutor in Korea: Is He Half-Judge?" *Journal of Korean Law,* Vol. 6 No. 2, 2007, pp. 176.

127 Before the 2007 revision, it provided that interrogation dossiers, which can include defendants' statements or confessions, may be admissible at trial (i) if they contain a defendant's signature and were made by prosecutors, and (ii) "if there exist special circumstances which make the dossiers reliable," without cross-examination of the interrogators even if the defendants contend that the contents of the dossiers do not match what they stated during interrogation. Assuming that interrogation by prosecutors itself may fulfil the requirement of "special circumstances which make the dossiers reliable," the Supreme Court recognized the legitimacy of Article 312 (1). Thus, prosecutors enjoyed a significant evidentiary advantage. However, Article 312 (1) was strongly criticized because it made it extremely difficult for defendants to escape guilty verdicts at trial once they made self-incriminating statements in front of prosecutors.

128 See in detail, Cho, Kuk, "The 2007 Revision of the Korean Criminal Procedure Code" " Journal of Korean Law, Vol. 8 No. 1, 2008, pp. 18-21; Kim, Heekyoon, "The Role of the Public Prosecutor in Korea: Is He Half-Judge?" *Journal of Korean Law,* Vol. 6 No. 2, 2007, pp. 175-177.

129 See Kim, Heekyoon, "The Role of the Public Prosecutor in Korea: Is He Half-Judge?" *Journal of Korean Law*, Vol. 6 No. 2, 2007, p. 176.

- To carry out criminal investigation, prosecution and presentation of a criminal case at court.
- To direct and supervise police regarding criminal investigation.
- To require the court to justly apply law.
- To direct and supervise the execution of court decisions.
- To carry out, direct or supervise law suit or tribunal where the state is involved.
- Other powers as provided by other laws or regulations.

Under Korean law, prosecutors have the discretionary power to suspend prosecution even if there is sufficient evidence to convict a suspect (Article 247 (1) Criminal Procedure Act). This is called the Principle of Discretionary Indictment, and is the opposite of the Principle of Compulsory Prosecution. The purpose of the Principle of Discretionary Indictment is to enable the prosecutor to take into consideration criminal policy in deciding whether to prosecute a specific suspect. However, some lawyers are critical of this principle in that: (1) such a principle cannot effectively control a prosecutor's arbitrary decision, and (2) it is possible that the exercise of the prosecution authority might be influenced by political pressure.

Discretionary Power and its Criteria

Section 1 of Article 247 of the Criminal Procedure Act provides that the prosecutor may decide to suspend prosecution considering the factors enumerated in Article 51 of the Criminal Act. The prosecutor may decide not to prosecute a suspect taking into account the suspect's age (either young or old), character, pattern of behaviour, intelligence, circumstances, relationship to the victim, motive and method for committing the crime, results and circumstances after the crime. These are non- exclusive, so that prosecutors may exercise their discretionary power considering factors other than those enumerated in the article. In Korea, many cases are dropped under the procedure as suspension of prosecution. As for the offences stipulated in the Criminal Code such as theft, violence, suspension of prosecution is exercised in about 60 percent of the cases.

Procedure for a Decision of Suspension of Prosecution

1. Written Oath

In principle, the prosecutor reprimands the suspect for committing a crime and has him/her write an oath stating that he/she will not commit a crime again in the future. Irrespective of whether the suspect is detained or not, the prosecutor summons, admonishes the suspect and has that person write an oath. Sometimes in reality, however, the prosecutor sends an admonishing letter to the suspect instead of having him/her write an oath when he/she is not detained, as a means of reducing the prosecutor's work load. When the suspect is a juvenile or student, the prosecutor also has the suspect's parent or teacher submit a written oath to the prosecutor stating that he/she will supervise the suspect well so that the suspect will not commit a crime again in the future.

2. Arrangement for the Suspect's Protection

When deciding to suspend prosecution, the prosecutor may entrust the suspect to his/her relative or a member of the Crime Prevention Volunteers Committee. In the event that there is no person to accept the suspect or if it is inappropriate in the prosecutor's opinion to entrust the suspect to someone, the prosecutor may request social organizations such as the Korean Rehabilitation and Protection Corporation to protect the suspect.

3. Disciplinary Action

In principle, when the prosecutor decides to suspend prosecution against a public official because the crime committed is a trivial one, the prosecutor should ascertain the result of the disciplinary

process held by the organization to which such public official belongs. Moreover, within 10 days from the beginning of the investigation against a public official, the prosecutor is obliged to notify the organization to which that official belongs of the fact that investigation is going on. Generally speaking, such organization does not proceed with disciplinary action against the public official. Consequently, it is rare for the prosecutor to ascertain the results of disciplinary action before making a suspension-of- prosecution decision against a public official.

Suspension-of-Prosecution Decision for Juvenile Offenders on the Fatherly Guidance Condition

Prosecution for juvenile offenders under the age of 18 can be suspended under the so-called fatherly guidance condition. It is a suspension-of-prosecution decision on the condition that the offender is subject to the protection and guidance of a member of the Crime Prevention Volunteers Committee for a period of six to twelve months after the decision, depending on the possibility of committing a crime again in the future. The volunteers are nominated by the chief prosecutor of the district public prosecutor's office. Korea has operated this system nationwide since January 1, 1981 to prevent juvenile offenders from becoming repeat offenders and to rehabilitate them into sound and reasonable citizens. In light of the low rate of such offenders committing another crime and the high rate of usage of this system, we can say that it has worked very effectively so far.

Suspension-of-Prosecution Decision on the Probation Committee Guidance Condition

A similar system operates with regard to adult offenders under a 'Probation Committee.' For offenders who need probation and guidance by experts for a period of six to twelve months, the prosecutor can entrust the offender to a member of the committee.

3.4 Relations

Jaijong Sinchong

The Criminal Procedure Act provides the court with instrument to check the prosecutor's wide authority in indictment (*"Jaijeong Sincheong"*; Court-ordered-indictment System). In the event the prosecutor has decided not to indict, a person who lodged a complaint with a right to such a complaint may make file a petition with the appropriate High Court for adjudication as to whether the prosecutor's disposition was proper (Article 260 Criminal Procedure Act). The court must render a ruling to institute public prosecution, if it is held that the petition has a ground (Article 262 Criminal Procedure Act). The chief public prosecutor of district public prosecutor's office shall, upon receiving a written decision on adjudication, assign a public prosecutor to take charge of the case and the assigned public prosecutor shall institute the public prosecution accordingly. In the past, this system was restricted to certain crimes such as abuse of official authority, illegal arrest and detention, etc., but with the revised act of 2007, all crimes are covered under the system. To formally institute an indictment, a public prosecutor must file and submit a written indictment form with the name of the accused, the alleged crime, the facts thereof, and the applicable provisions of law (Article 254 Criminal Procedure Act).

Special Prosecutor System

The special prosecutor system is designed to allow independent lawyers, other than prosecutors, play a prosecutor's role in investigating a case. Under the system, developed by the United States, lawyers who are independent of the administration are designated as special counsel to investigate alleged irregularities or other illegal activities of high-ranking government officials. The system was introduced to Korea for the first time in 1999, just as it was going out of favour in the United States after the impeachment of President Clinton. Special prosecutors require specific legislation

for appointment. A special prosecutor, who may appointed by President, Assembly or Chief Justice, acts independently and has the power to indict anyone based on its investigation.

3.5 Mechanisms

Prosecutorial oversight

The dangerous of the Principle of Discretionary Indictment is that the prosecutor might abuse the power or that the decision will be affected by political pressure. So, it is necessary to set some limitation on the prosecutor's discretionary power. The criteria for the exercise and control of discretionary power should be consistent with the ends of criminal justice. In this sense, the discretionary power is to be exercised and controlled on a standard of rationality. There are several controlling devices which can be classified into two categories: internal controls and external controls.

Internal Control: Control by Superior

All decisions made by a prosecutor are subject to the control of his superior. The superior is required to review and check the propriety of the decision. Also, he must review whether or not the decision complies with the criteria of prosecutorial policy. In practice, the Deputy Chief Prosecutor reviews all cases disposed of by prosecutors prior to the review by the Chief Prosecutor who actually checks only selected cases. The Deputy Chief checks not only the propriety of the decision but clerical mistakes in the case files. The prosecutors are required to write the reason for the decision not to prosecute. The reasoning must be succinct and precise. Writing the reason of the decision not to prosecute is regarded to be important in terms of the control of discretion. The prosecutor is psychologically restrained by this requirement of writing reasons. The Chief or the Deputy Chief Prosecutor usually reads the decision document which is written by the prosecutor. If the Chief or the Deputy Chief thinks that the Decision is inappropriate, then he asks the prosecutor for an explanation of the reasoning for the decision. They discuss the matter thoroughly until they reach a common conclusion. This practice is generally based on the theory that the assigned prosecutor knows more than his superior about the case. In this case, they call the prosecutor to explain the case and the reasoning of the decision. In case of a conflict of opinion on legal issues, superiors are likely to yield to prosecutors, because the legal responsibility for the specific decision is charged not to the superior but to the prosecutor. In the matter of policy, however, prosecutors usually concede to superiors. If a prosecutor anticipates conflict on opinion with a superior, he may discuss the case with them prior to making the decision.

Control by General Guidelines

Prosecutorial discretion is also controlled by general guidelines of instructions issued by the Prosecutor General. Since the Prosecutor General has a duty to carry out a coherent prosecution policy, he, from time to time, issues direction or instruction in the form of general guidelines. The legal character of an instruction as a form of general guideline issued by the Prosecutor General is usually regarded as an internal notification that is in effect merely inside of the prosecutor's office. Nevertheless all the guidelines regarding investigation inside the prosecutor's office are open to the public. Every guideline is numbered, and can be easily found on the internet website of the Supreme Prosecutor's Office. There has been no case in which the prosecutorial guideline or instruction was the basis for an appeal in the courts' criminal procedure, as it has only 'internal' effects. But prosecutors are bound by these official guidelines. If a prosecutor wilfully disregards these guidelines, he may be subject to disciplinary punishment within the administrative structure. And, the Prosecutor General annually dispatches an inspection team which consists of one Supreme Prosecutor and several Senior

Prosecutors to all subordinate prosecutors' offices in order to review the propriety of decisions made by prosecutors. Normally, the emphasis of the inspection is given to the decisions not to prosecute. If they find any impropriety, they may issue a mandate in the name of the Prosecutor General to re-investigate or institute prosecution. The outcome of this inspection is utilized as reference material in the formation of prosecution policy for the next year.

Administrative Management

The qualifications to become public prosecutor are identical to that of a judge and an attorney. Anyone who wants to be appointed as a public prosecutor must pass the Judicial Examination held by the Ministry of Justice and then complete the two-year training course at the Judicial Research and Training Institute, which is supervised by the Supreme Court. The appointment and assignment of all prosecutors are made by the President upon the recommendation of the Ministry of Justice. There are 4 ranks of public prosecutor: Prosecutor General, Senior Chief Public Prosecutor, Chief Public Prosecutor, and Public Prosecutor. Requirements for appointment and assignment to each rank are different. In the mechanisms for administrative management, the "One Body Principle" or the "Principle of Identity of Public Prosecutors" plays a great role. The Principle of Identity of Public Prosecutors means that all prosecutors, each of whom is an independent office, form a uniform and hierarchical organization, at the top of which is the Prosecutor General. This principle was designed to have all prosecutors perform their work as one body and cooperate with each other. Accordingly, even if a specific prosecutor's work is done by another prosecutor, it does not make a difference in terms of legal effect.

Oversight and Inspection Mechanisms

Terms of appeal (Article 10 Prosecution Office Act)[130]

If the prosecutor decides not to indict, the victim has the right to appeal to a higher prosecutor's office within 30 day from the notification. If the appeal is denied, the victim then has another 30 days to appeal his case to Supreme Prosecutor's Office. This procedure is relatively effective compared to other measures, but has a limit, because the higher prosecutor's offices are usually deferential toward their own "family" of fellow prosecutors. This has led to wide use of constitutional petitions when internal appeal in the prosecutors' office ends in failure.

Constitutional Petition (Article 68-78 Constitutional Court Act)

Article 68(1) of the Constitutional Court Act[131] provides that a constitutional complaint can be filed by "(a)ny person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power". The act does not define the concept of "exercise" or "non-exercise" of governmental power; however, the Constitutional Court of Korea ruled that a prosecutor's decision not to indict is within the scope of the concept. Therefore, the Court can examine the legality of a prosecutor's decision. The victims or suspects may communicate the petition to the Court with the argument that there has been an infringement of his basic rights. The main purpose for having the Constitutional Court deal with the legality of a prosecutor's decision may be to check and balance the discretionary power of the prosecutor to control the indictment decision. The petition must be submitted to the Court after all other remedies are exhausted, meaning the internal appeal ('Geomchal Hanggo') mentioned above (Article 10 of Prosecution Office Act). According to statistics, however, the Court has admitted only a very few cases (103 cases of the total 15705 filed claims as of May 2010), because the constitutional petition

130 Law No. 9815 of 2 November 2009.

131 Law No. 10278 of 4 May 2010.

mechanism has caused an overload at the court. As of May 2010, the number of constitutional petitions under Article 68 (1) is 15,705, over 70% of total filings at the Court(18,982).[132]

3.6 Career and transparency issues

As quasi-judicial officers, prosecutors must remain truly objective and impartial in carrying out their duties. To achieve these goals, prosecutors must be independent which means being free from any interference. So in the performance of their duties, prosecutors should be subordinated only through laws in order to insulate the criminal justice system from being abused by political opportunism. As the keeper of the rule of law, prosecutors must make sure that all are equal under the law regardless of their status in society. Particularly, if powerful politicians are breaking the law themselves, it is very important that prosecutors be in a position to stand up and demand that justice must prevail. In order to ensure the independence of prosecutors, Korean laws provide the following:

Guarantee of Prosecutor's Status

The President has the authority to appoint and assign public prosecutors upon recommendation from the Minister of Justice. As mentioned above, the qualifications for the public prosecutor are identical to those of the judge. In addition to these requirements, some professional experience is needed to be appointed as a high-ranking public prosecutor (Article 27 Public Prosecutor's Office Act). The status of the public prosecutor, like that of the judge, is guaranteed by law. The public prosecutor may not be dismissed or suspended from the exercise of his/her powers or be subject to a reduction in salary other than through impeachment, conviction of crimes punishable by imprisonment or more severe penalties or other disciplinary actions based on relevant laws and regulations (Article 37 Public Prosecutor's Office Act).

Limitation of Justice Minister's Direction

In view of the importance of the public prosecutor's role in criminal proceedings, the Public Prosecutor's Office Act states that the Minister of Justice, as the chief supervisor of prosecutorial functions, may generally direct and supervise public prosecutors but for specific cases can only direct and supervise the Prosecutor General (Article 8 Public Prosecutor's Office Act). This is to safeguard the public prosecutor's quasi-judicial status by ensuring each public prosecutor's independence from outside influence with regard to the case in hand.

Status of Prosecutor General

The Prosecutor General in Korea is in charge of affairs of the Supreme Public Prosecutor's Office, exercises general controls over the prosecution, and directs and supervises public officials of public prosecutor's offices. So, the role of the Prosecutor General in Korea is extremely important in the criminal justice system. In order to ensure the independence of the Prosecutor General from political influence, the term of the Prosecutor is 2 years, and he shall not be re-appointed. The Prosecutor General may not promote or join any political party within a two-year period after he retires from office (Article 12 Public Prosecutor's Office Act).

Prohibition of Prosecutor's Political Movement

In order to secure the independence of public prosecutors from political influence, the Public Prosecutor's Office Act provides that "No public prosecutor shall commit any of the following acts while in office: (1) To be a member of the National Assembly or a local council, (2) To participate in any political movement, (3) To be engaged in a business the purpose of which is to obtain any

[132] Constitutional Court, Case Statistics of Constitutional Court of Korea, 2010.

monetary profit, (4) To be engaged in any remunerative duties without permission of the Minister of Justice" (Article 43 Public Prosecutor's Office Act).

Conclusion

Consider what might have happened to a suspect in the past, before the 2007 revision of the Korean Criminal Procedure Act. The first move was to take the suspect into custody. Prosecutors could hold suspects for 30 days before indicting them. After indictment, they could continue to investigate the defendant and interview witnesses. Under Anglo-Saxon law, suspects are usually released on bail, but this did not happen in Korea. Summons for investigation were delivered whenever prosecutors felt like it. And if a suspect was really unlucky, prosecutors would alert the press cameramen to one's imminent arrival, thus ensuring that the initial trial would be in the court of public opinion. During interrogation, the suspect was often alone. Customarily, defence lawyers were not allowed to attend investigations of their clients, though some aggressive law firms sometimes insisted on this right, which was guaranteed by law. Historically, confession had been the prime source of evidence. Questioning sessions could be lengthy, repetitive and highly stressful.

If by western standards some of these practices and means might seem a bit excessive, one needs to put the system into its cultural context. For the prosecutors, getting a guilty verdict could be more about saving face and advancing ones career than about justice. If the prosecutors would lose a highly publicized case because they had simply presented no credible evidence, those involved might face an adverse impact on their future. The bright side was that a good prosecutor would only take to court those cases he or she believed were fully winnable. At the same time, the prosecutors could display a remarkable amount of sympathy and indulgence for first time lawbreakers — provided that the guilty showed sufficient remorse and contriteness. Some foreigners were too quick to judge the Korean legal system when they learned of the conviction rate over 99 percent.[133] But many of these critics failed to grasp the informal, often compassionate actions by prosecutors who settled many cases without going on to court.

The Supreme Court's ruling on December 16, 2004 (2002 Do 537) started to change this system of prosecutorial justice. The change in a Supreme Court' ruling startled the prosecutor's office as well as subordinate courts because it practically meant that it became much easier for the defendant to wipe out the admissibility of the Record by simply refusing to verify the content of it.[134] In this vein, the revision of Criminal Procedure Act in 2007 was a major crossroad. The Jaijeong Shincheong (court- ordered-indictment system)[135] was just one among several institutions to limit the discretionary power of prosecutors. In the past, this system was restricted to certain crimes such as abuse of official authority, illegal arrest and detention, etc., but with the Revised Criminal

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133 See, e.g., "The percentage of acquittal is fluctuating between 0.4% and 0.6%," Park, Sang Ki et al., *Hyeongsa Jeongchaik (Criminal Policy)*, Hanguk Hyeongsa Jeongchaik Yeonguwon (The Korea Institute of Criminology Press), 7d ed. 2003, Seoul, p. 432.

134 See, Park, Yong Chul, "Does It Matter Who Wrote It? The Admissibility of Suspect Interrogation Record Written by Prosecutors in Korea", *Journal of Korean Law* Vol. 6 No. 2 (2007), p. 187.

135 In the event the prosecutor has decided not to indict the case, a person who lodged a complaint with a right to such a complaint may make file a petition for adjudication to find whether such disposition is properly made with the High Court having jurisdiction (Article 260 Criminal Procedure Act). The court shall render a ruling to institute public prosecution, if it is held that the petition has a ground(Article 262 Criminal Procedure Act). The chief public prosecutor of District public prosecutor's office shall, upon receiving a written decision on adjudication, assign a public prosecutor to take charge of the case and the assigned public prosecutor shall institute the public prosecution accordingly.

Procedure Act of 2007, all crimes are covered under the system. In this respect, the court is getting away from relying on investigative documents compiled by the investigative institutions as it did in the past, but instead focuses on the oral arguments by the public prosecutor and the defendant in court as well as the evidence examined in court. In addition, the "prosecutorial neutrality" has been at issue in some political cases. Therefore, the introduction of American style "special prosecutor" as the cure for all the problems with the prosecutors has been one of the topics hotly debated for the recent years. The system was introduced to Korea for the first time in 1999, but the range of application was limited by a special act (so-called "one-point solution"). In conclusion, the judicial reform in Korea has begun to consider the prosecutor as the commander of the investigation and, as the proper party in an trial, not as a half-judge; at the same time, the prosecutor still has to do a lot of things as a "representative for the public interests Therefore, the Korean prosecutor is still a unique system that has combined aspects of the common law system and the civil law system.[136]

[136] On my evaluation, combined with cultural trails, see, Cho, Byung-Sun, "Reform Trends of Criminal Procedure in South Korea: Transition to Constitutional Guarantee of Human Rights" *Miguk Heonbop Yeongu (Study on the American Constitution),* Vol. 17 No. 2 (2005), pp. 41-76; Cho, Byung-Sun, "Reform Trends of Criminal Procedure in South Korea: Transition to Globalization and Rule of Law" Cheongdai Hagsul Nonjip (Journal of Cheongju University), Vol. 6 (2005), pp. 31-105; Cho, Byung-Sun, "'Confucian Legacy' in Korean Criminal Justice: An Example of the Capital Punishment Dialogues" *Cheongdai Hagsul Nonjip (Journal of Cheongju University),* Vol. 8 (2006), pp. 23-52.

4. Court system

4.1 Role and Position

The judicial branch refers to the national authority that exercises judicial power separate from the administrative and the legislative branch. Article 101 of the Constitution stipulates that judicial power belongs to courts consisting of judges and Article 27 of the Constitution further states that all citizens possess the right to have a fair and prompt trial by legitimate legal procedures. These provisions, along with the ideal of judicial independence, enables the judicial branch to serve as a bastion that protects the basic right of citizens. To have a fair trial that fully protects human rights of defendants and plaintiffs, Article 109 of the Constitution requires an open trial, hearings and rulings. In particular, an open trial during criminal trials is protected as a basic right by the Constitution. Exceptions can be made when hearings may jeopardize national security or social customs. The Korean judicial system is based on the three instance trial system; District Court, High Court and the Supreme Court. Except in Military Courts (Court-Martial),[137] adjudication proceedings are presided over by judges qualified and appointed by and under the Constitution and the relevant statute. A trial is presided either by a single judge or a panel of three judges. For certain categories of relatively serious criminal offenses, trial by way of lay participation was introduced on a pilot program basis in January of 2008.[138]

4.2 Organisation

There are six types of courts in Korea, which are the Supreme Court, the High Courts, the District Courts, the Patent Court, the Family Court, and the Administrative Court.[139] The District Courts, the High Courts and the Supreme Court form the basic three-tier system. Other courts exercise specialized functions with the Patent Court positioned on the same level with the High Courts and the Family Court and the Administrative Court positioned on the same level with the District Courts. The District Court and Family Court may establish a Branch Court and/or a Municipal Court and registration office if additional support is necessary to carry out their task. The Branch Court of both the District Court and the Family Court may be established under one roof. In addition, there is the Constitutional Court established by and under the Constitution as an independent institution. As of 2009, the number of judges in the Republic of Korea including the Chief Justice and the Justices of the Supreme Court and those in special service as, for example, the professors of the Judicial Research and Training Institute is approximately 2,300.[140]

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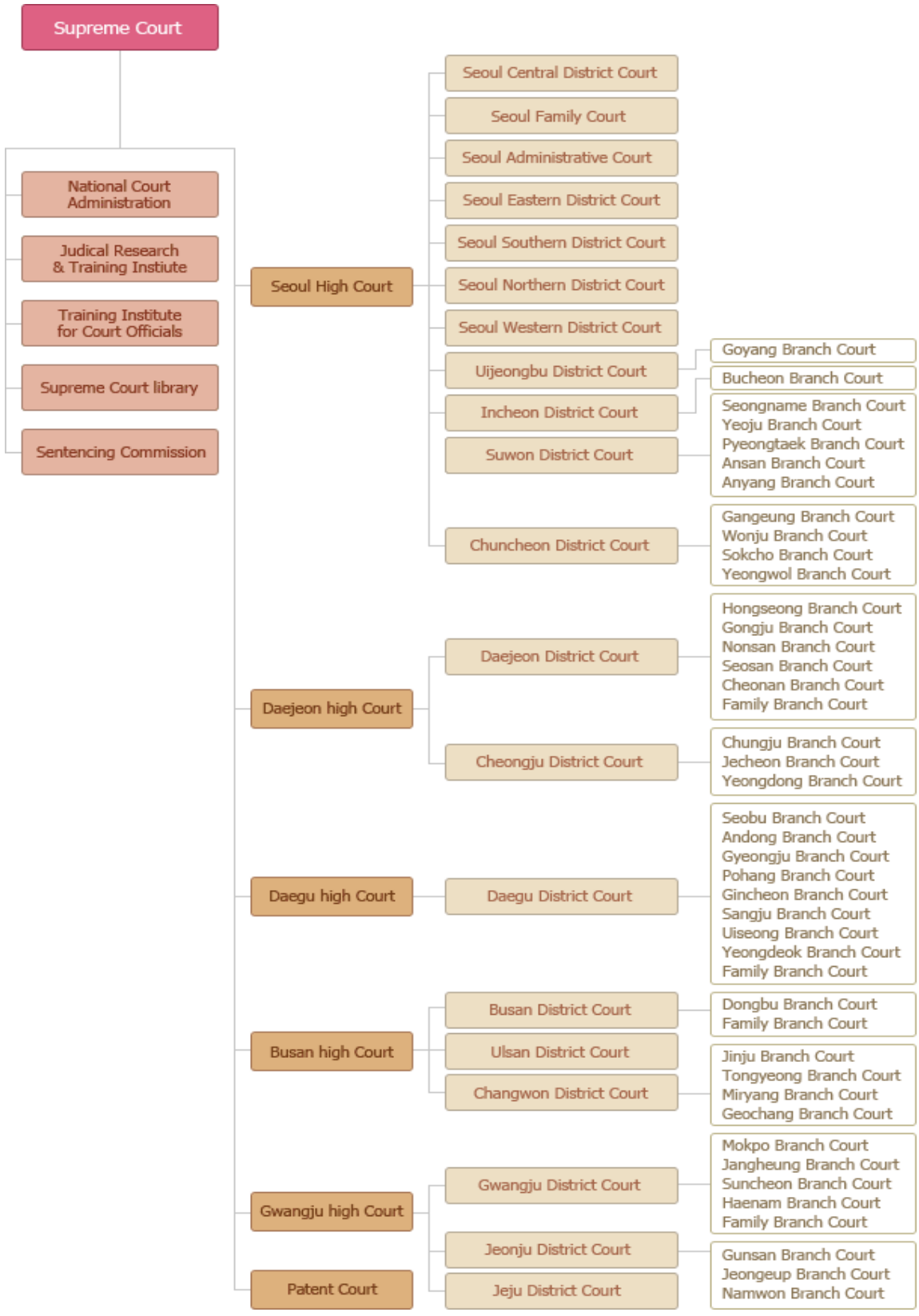
137 There is also other special court such as the martial court. The difference between military court and non-military court is that military officers who are not qualified as judges hear cases in military court, whereas in non-martial court only judges may adjudicate cases under the Constitution and the Court Organization Act. However, the Supreme Court has the final appellate jurisdiction over all cases including those adjudicated in military trials. See generally, Lee, Jang-Han, "The Korean Military Justice System" 1986 *Army Law* 37 (1986).

138 The Civil Participation in Criminal Trials Act (Law No. 8495) that came into effect in January 2008 provides the statutory grounds for South Korea's unique jury system.

139 The Court Organization Act (Law No. 8794, as most recently revised in 2007) establishes five types of lower courts under the Supreme Court. The Act also provides that the branch courts and/or the municipal courts may be established under the District Courts as necessary.

140 See Rhee, Woo-young, "Judicial Appointment in the Republic of Korea from Democracy Perspective" *Journal of Korean Law,* Vol. 9, p. 57.

Figure 4: Court Organization in Korea



4.3 Model

Judicial System under the Constitution of First Republic

After Korea became independent from Japan in 1945, the Constitution of the Republic of Korea was written and promulgated on the 17th of July 1948. The Constitution declared the separation of powers and provided independence of the courts, term and age limit system of judges, and legal qualification and status guarantee of judges. Ordinary judges were to be reappointed after a ten year term. Based on those provisions of the Constitution, the Court Organization Act was promulgated on the 26th of September 1949 and thereafter a modern judicial system began. While the Constitution formally ensured judicial independence to a significant extent, judicial independence was not firmly secured in practice during the dictatorial period. The President rejected reappointment of some judges when their 10-year-terms expired.

Judicial System under the Constitution of Second Republic

In the constitution of Second Republic established on the 19th of April 1960, Article 78 and Article 81 were amended, and a new article providing for a constitutional court was inserted in Chapter 8. Article 78 in the original Constitution had provided that the Chief Justice of the Supreme Court should be appointed by the president. The Article was amended to provide that the justices of the Supreme Court would be elected by an electoral college consisting of members with qualifications for judges. Ordinary judges were to be appointed by the Chief Justice with the consent of the Supreme Court Justices Council. However, before the election of Chief Justice and other Justices of the Supreme Court could be held, the military revolution on the 16th of May 1961 broke out.

In addition, the Second Republic established a Constitutional Court along the lines of the German model. As with elections to the Supreme Court, these provisions were never effectuated.

Judicial System under Emergency Procedure Act

After the May 16th military revolution, the revolution committee organized the National Rebuilding Supreme Committee, and legislated and promulgated a National Rebuilding Emergency Procedure Act. This Act replaced the constitution for practical purposes, and the Constitution of Second republic was effective only to the extent that it was not in conflict with the Nation Rebuilding Emergency Procedure Act. Under the judicial system under The National Rebuilding Emergency Procedure Act, judicial administrative powers and the right of personnel management of the judges were concentrated in National Rebuilding Supreme Committee, and so the judicial independence could not be secured firmly.

Judicial System under the Constitution of Third Republic

Revulsion against the centralization of power under the National Rebuilding Emergency Procedure Act led to pressure to reinstate systems guaranteeing judicial independence. The Constitution of Third Republic entitled the Supreme Court to the power to adjudicate the unconstitutionality of laws and to dissolve political parties, uplifting the Supreme Court to one of the highest organizations of state power. It was even possible for the judicial power to attain superiority over other powers depending on its operation. But the so-called Siwol Yushin Reforms of in October 1972, again hampered judicial power with a variety of restrictions.

Judicial System under the Constitution of Fourth Republic

The October Revitalizing Reform carried out on the 17th of October 1972 led to the establishment of the Constitution of Fourth Republic on the 27th of December in the same year. It was a beginning of so-called dark days of judicial independence. The Constitution abolished the Judge

Recommendation Council, and entitled the president to appoint and assign every judge including the Chief Justice and Justices of the Supreme Court. Judges could be dismissed through disciplinary measures, and the Supreme Court was deprived of its power to review constitutionality of laws, having only the power to request the Constitutional Committee to decide the unconstitutionality of laws.

Judicial System under the Constitutions since Fifth Republic

In the process of establishing the Constitution of Fifth Republic, judicial independence was particularly emphasized. It was to grant the power of appointment of judges and the power of the review of constitutionality that mattered. Under the Constitution of Fifth Republic, as under the Constitution of Fourth Republic, the president appointed the Chief Justice and the Justices of the Supreme Court, while other judges were appointed and assigned their positions by the Chief Justice of the Supreme Court. A disciplinary dismissal was not admitted and the courts were entitled to request a decision of the Constitutional Court when the Constitutionality of a law was at issue.

4.4 Tasks and Functions

Supreme Court

1. Structure

The Supreme Court is comprised of the Chief Justice and 13 Justices. The Chief Justice then appoints one Justice as the Minister of National Court Administration, in a non-adjudicatory capacity. Therefore, in practical effect, the Chief Justice and 12 Justices discharge the adjudicative functions. As the court of last resort, the Supreme Court hears appeals from judgments or rulings rendered by the High Courts, the Patent Court, and the appellate panels of the District Courts or the Family Court in civil, criminal, administrative, patent and domestic relations cases. It also has the authority to review the ruling rendered by the Korean Maritime Safety Tribunal. In addition, it has exclusive jurisdiction to determine the validity of the presidential or parliamentary election. The Supreme Court has the power to make a definitive review on the constitutionality or legality of orders, rules, regulations, and actions taken by administrative entities.

The jurisdiction of the Supreme Court is exercised either by the Grand Bench composed of more than two-thirds of all the Justices with the Chief Justice presiding, or by the Petty Benches each composed of three Justices or more. Currently, 12 Justices are equally divided into three Petty Benches, so that each Petty Bench has four Justices. While judgments are made by consensus in the Petty Benches, those are sometimes made by a majority of the members present in the Grand Bench. If the members of the Grand Bench are split into two opinions and each opinion does not reach a majority, then the Supreme Court cannot reverse the judgment of the lower court. Most cases are handled in the Petty Benches. However, the case is referred to the Grand Bench in the event that a Petty Bench fails to reach a consensus or a case falls under the categories:

- where it is deemed that any order, rule, or regulation is in contravention of the Constitution;
- where it is deemed that any order, rule, or regulation is contrary to the law;
- where it is deemed necessary to modify the previous opinion of the Supreme Court on the interpretation and implementation of the Constitution, laws, orders, rules, or regulations; and
- where it is deemed that adjudication by a Petty Bench is not appropriate.

The Supreme Court is assisted by a staff of officials, including junior judges on career rotation, and court administration personnel who are selected through competitive examinations (See Section 4.19 below).

High court

Each High Court consists of the chief judge and a certain number of judges. Currently, the High Courts are located in five major cities of Korea - Seoul, Busan, Daegu, Gwangju and Daejeon. The High Courts hear appeals from judgments or rulings rendered either by a panel of three judges of the District Courts or the Family Court, or by the Administrative Court. The High Courts also hear appeals from judgments or rulings in civil cases rendered by a single judge of the District Courts or Branch Courts when the amount in controversy exceeds 80 million Korean won (approximately US$ 80,000). The jurisdiction of the High Courts is exercised by a panel of three judges. As of 2009, approximately 290 judges serve at the high court level. In each High Court, there is an administration bureau for internal management and supervision of the court officials.[141]

District court

Each District Court consists of the chief judge and a certain number of judges. There are 18 District Courts around the nation. As in the High Courts, each District Court has an administration bureau which deals with administrative affairs. A Branch Court, Family Branch Court, Municipal Court may be established under the District Court. The District Courts or Branch Courts retain original jurisdiction over civil and criminal cases. In general, a single judge presides over a trial. However, a panel of three judges[142] is required to sit for cases deemed of greater importance, which are as follows:

- Jurisdiction in Civil cases - cases involving an amount in controversy exceeding 100 million Korean won (approximately 90,000 US$), or if the amount is incalculable. There is an exception for cases involving the claim for payment of checks or bills, or the claim for repayment of loans which are presided over by a single judge regardless of the amount in controversy.
- Criminal cases - cases for which the penalty is death, life imprisonment, or imprisonment for a minimum of one year. There is also an exception for such cases as check counterfeiting, habitual use of violence, habitual larceny, etc. which are presided over by a single judge though they fall under the above mentioned penalties.

In addition, the District Courts have jurisdiction over appeals against the judgments or rulings rendered by a single judge of the District Courts, Branch Courts, or Municipal Courts, except for those which fall under the jurisdiction of the High Courts. This appellate jurisdiction is exercised by a panel of three judges, which is called an appellate panel and different from a trial panel of three judges.

The Municipal Courts exercise original jurisdiction over minor cases. Currently, there are currently 101Municipal Courts across the nation.[143] The Municipal Courts have jurisdiction over small claim cases in which the amount disputed does not exceed 20 million Korean won (approximately US $18,000) and misdemeanour cases in which the courts may impose penal detention for less than 30 days or a fine not exceeding 200,000 Korean won (approximately US $180).[144]

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141 See Rhee, Woo-young, "Judicial Appointment in the Republic of Korea from Democracy Perspective" *Journal of Korean Law,* Vol. 9, p. 59.

142 According to the Rule on the Jurisdiction in Civil and Family Law Adjudication, the Supreme Court Rule No. 2163.

143 According to the Act on the Establishment and the Jurisdiction of the Judicial Courts, Law No. 8244.

144 According to the Rule on Limited Jurisdiction Case Adjudication, the Supreme Court Rule No. 1779.

Specialized Court

Patent Court

The Patent Court was newly established on March 1, 1998 and was accorded a level equal to the High Courts. The Court operates in a two-tier system. When a party is dissatisfied with the decision of the Intellectual Property Tribunal, which was also newly established as an affiliate to KIPO, a lawsuit may be filed with the Patent Court and later to the Supreme Court. The Patent Court has technical examiners to assist judges in highly technical matters.

In patent cases, the court decides on whether the decision of the Intellectual Property Tribunal (IPT) on the rights of patent, utility model, design, or trademark is illegal and should be revoked. The IPT makes decisions on legality of refusal to accept an application for patent registration, on invalidation of patent registration, and on affirmation of the scope of a patent right. The party who is dissatisfied with the decision of the IPT may file a suit seeking to revoke the decision with the Patent Court within 30 days from the date the decision is served. When decision on legality of refusal is challenged, the defendant of a suit shall be the Commissioner of the Korean Intellectual Property Office. When decision on invalidation of patent registration or decision on affirmation of the scope of a patent right is challenged, the defendant of a suit shall be the opposite party in the decision process. On the principle of separation of powers, the Patent Court can only revoke the decision of the IPT and neither permits patent registration of any invention nor invalidate a patent right.

In Korea, the Patent Court exercises exclusive jurisdiction over patent issues. Under the three-tier system, the Patent Court is situated on the High Court level and has territorial jurisdiction over the entire nation. At the Patent Court, a panel of three judges hears cases. The pleading process and hearings are held as in civil proceedings. As a patent case is a kind of administrative case, the court may examine evidence ex officio if it is deemed necessary. In addition to lawyers, patent attorneys are also permitted to represent the parties in the proceedings at the Patent Court. When the case relates to patent rights or utility model rights, the court normally holds pre-trial hearings where the parties, or their attorneys, are granted the opportunity to fully state their positions and to produce evidence. The Patent Court has technical examiners to assist judges in highly technical matters. They have degrees in various fields such as chemistry, mechanics, metal engineering, life science, electrical engineering, electronics, etc. They may participate in pre-trial and trial proceedings with the presiding judge's approval. To precisely understand the technical aspects of patent- or utility model- related disputes, the Patent Court may hold explanatory sessions where parties or relevant experts can make presentations using drawings, real objects, models, computer graphics, or video devices. When the case relates to design rights or trademark rights, the court does not hold pre-trial hearings because the issues have become evident during IPT decision process. A party who is dissatisfied with the judgment of the Patent Court may appeal to the Supreme Court.

The Patent E-Court: The Patent Court is seeking to introduce an electronic filing system which enables submission, acceptance, and service of documents through electronic devices and a modernized courtroom equipped with high-tech multimedia facilities such as computers, electronic boards, voice recognition cameras, LCD projectors, etc. and a teleconferencing trial system. This kind of move is expected to ease the inconvenience caused by logistical problems, which are inevitable when one court exercises territorial jurisdiction over the entire nation as well as to contribute to establishment of a paper-free court.

Family Court

1. Overview

Currently, there is only one Family Court in Korea located in Seoul. In other areas the functions of the Family Court are performed by the respective District Courts. In addition to domestic relations and juvenile offense cases, the Family Court came to exercise jurisdiction over domestic violent cases in1988 with the special act relating to Punishment for Crimes of Domestic Violence newly in force. Domestic relations cases are presided over either by a panel of three judges or by a single judge while juvenile offense and domestic violence cases are presided over by a single judge. The Family Court has a conciliation committee to conduct conciliation proceeding and several investigative officers to perform necessary investigations.[145]

2. Juvenile Offense Case

In case a juvenile aged between 12 to 19 years commits a crime or is delinquent, the chief of the police station, the public prosecutor, or the court may forward the case to the juvenile division of the competent Family Court or District Court. The judge of the juvenile division directs the investigative officer to investigate the crime, the environment of the juvenile, and then decides the case based on the report of the investigative officer. The judge may make protective disposition against the juvenile. Under protective disposition, the juvenile may be left to the care of a guardian, be placed under the supervision of a probation officer, or be sent to a juvenile protection institution, a hospital, or a juvenile reformatory. A community service order or an order to attend a lecture may be issued concurrently with such disposition. However, the protection disposition imposed on the juvenile shall not in any event affect the juvenile's future status.

3. Domestic Violence Case

In case of violence between members of the same household such as spouses or lineal relatives, which results in physical or mental injury, or property damage, the public prosecutor or the court may forward the case to the competent Family Court or District Court. The judge of such court may make a protective disposition, which is aimed at restoring the peace and stability disturbed by the violence as well as improving the constitution of a household. If it is deemed necessary for protection of the victim or proper investigation, the judge may take the following provisional measures: order the offender to leave the dwelling and stay apart from the victim or other family members or order the offender not to enter within a 100 meter radius from the victim's dwelling, etc. In general, the judge directs the investigative officer to investigate the case and decides the case based on the report of the investigative officer. The judge may make one or more protective dispositions against the offender, such as restriction on approach to the victim, a community service order, an order to attend a lecture, probation, and consignment of the offender to an institution for the purpose of preventive custody, rehabilitation, or consultation.

Administrative Court

The Administrative Court was established on a level equal to the District Courts, on March 1, 1998. The Administrative Court is only located in Seoul. Elsewhere, the respective District Courts perform the functions of the Administrative Court. The Administrative Court hears tax, eminent domain, labour, and other administrative cases. In administrative cases, the court decides on whether feasance or nonfeasance of administrative entities is illegal and resolves disputes surrounding legal relationships in public law. Most administrative cases relate to revocation or affirmation

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[145] See generally, Cho, Byung-Sun, "Juvenile Delinquency and Juvenile Justice System in Korea" *Beophak Nonjip (Journal of Cheongju University Law College)*, Vol. 16 (1999), pp. 81-134.

of nullity of dispositions or decisions of administrative entities.[146] Dispositions include levy of taxes, suspension or revocation of driver's license, refusal to pay industrial accident compensation insurance money, disciplinary measure against civil servants, suspension or revocation of business license, refusal to accept an application, etc.[147] Decisions include decision of eminent domain by Central Land Tribunal, review decision by National Labour Relations Commission, decision of reparation by the Board of Audit and Inspection, etc.[148] Action for affirmation of status as a civil servant and action regarding a contract in public law are examples of actions that concern legal relationships in public law. Moreover, action for affirmation of illegal nonfeasance is allowed if the administrative entity fails to respond to the application by the public. Only a person who holds a direct and concrete legal interest from revocation of the disposition in question may bring an action before the court. If interest to be restored is indirect or abstract, then the action is not allowed. In general, an action may be instituted without first resorting to a remedy arranged by an administrative entity. However, in regard to levy of taxes, suspension or revocation of driver's license, etc., "exhaustion of administrative remedy"[149] is a prerequisite to filing an action with the court. Legal relationships in administrative law need to be stabilized promptly since there are far-reaching consequences of these influences. In this regard, actions challenging legality of a disposition must be filed within the period prescribed by Administrative Litigation Act or other applicable laws.[150] In principle, administrative proceedings and civil proceedings have similarities in the way they are held. However, as administrative proceedings are more deeply related to the public interest, there is a greater need for the court to intervene ex officio in administrative proceedings rather than in civil proceedings. In administrative proceedings, the court may examine evidence ex officio and consider facts not averred by the parties, though the parties also bear the responsibility to make allegations and to produce evidence. When a disposition is deemed groundless, or, excessively harsh and severe with all circumstances taken into account, even if it has some basis, the court is to revoke disposition in favour of the plaintiff. However, even where a demand of the plaintiff is deemed reasonable, if revocation of disposition is deemed remarkably inappropriate to the public welfare, the court may reject the demand of the plaintiff. The losing party, as in other proceedings, may appeal against the judgment rendered by the trial court to the High Court and then likewise to the Supreme Court. As institution of an administrative action does not preclude the effect or execution of disposition, the judgment in favour of the plaintiff may turn out to be useless if it takes a long time to obtain such judgment. In this regard, the Administrative

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146 See generally, Cho, Byung-Sun, "Juvenile Delinquency and Juvenile Justice System in Korea" Beophak Nonjip (Journal of Cheongju University Law College), Vol. 16 (1999), pp. 81-134.

147 In 2003, the number of administrative cases at first trial was 11,411 and at the final appeal (the Supreme Court) 1,564. http://www.scourt.go.kr/scourt_en/jdc_info/statistics/cases/adm_cases/index.html.

148 See generally, Lee, Hee-Jung, "The Structures and Roles in Judicial Review of Administrative Litigation in Korea" , *Journal of Korean Law* Vol. 6 No. 1 (2007), pp. 43.

149 Administrative Appeal is the quasi-judicial administrative remedy procedure whose ground is found in the Constitution. Before amending the Act in 1994 one could not bring an administrative litigation without exhaustion of administrative appeals. However, since 1994 amendment, the Act allows in principle a complainant to choose whether to bring an administrative litigation directly or to resort to administrative appeal first and then depending on its result to administrative litigation. Otherwise it is only in case individual statutes have a provision to make obligatory to resort to the administrative appeal before instituting a suit.

150 Professor Ginsburg points out the enactments of Administrative Litigation Act and Information Disclosure Act as a major administrative law reform after 1987. Ginsburg, Tom, "The Politics of Legal Reform in Korea", in Ginsburg, Tom (ed.), *Legal Reform in Korea,* Routlege Curzon, NewYork, 2004, p. 7.

Litigation Act[151] empowers the court to provisionally suspend, upon a request from the plaintiff or ex officio, the effect or execution of disposition under certain circumstances. However, suspension of execution is not permitted if it is feared to have a seriously negative effect on the public welfare.

The Constitutional Court

The current Constitutional Court was adopted in 1987 at the creation of the Sixth Republic. The Constitutional Court retains jurisdiction over such constitutional issues as the constitutionality of the statute, impeachment, dissolution of a political party, constitutional petitions filed directly to the Constitutional Court, and jurisdictional conflicts involving State agencies and/or local governments. Three factors are necessary to deem an issue of a law's constitutionality a precondition of a court's judgment: first, a concrete case is pending before the court, second, a law applies to the concrete case and third, whether the law's constitutionality affects the outcome of the decision. Of nine Justices of the Constitutional Court who are commissioned by the President of the Republic, three are elected by National Assembly, and three are designated by the Chief Justice of the Supreme Court.[152]

Dispute Resolution System

1. Small Claim Case

A small claim is a case in which the plaintiff claims payment of money, fungibles, or securities not exceeding 20 million Korean won (approximately US$ 17,170). A district court, a branch court, and a municipal court take charge of small claim suits, which amount to over 70 percent of all civil suits. The trial for a small claim adopts various procedures to expedite the resolution of the cases. Here are some examples: When a complaint is filed and there seems no real dispute between the plaintiff and the defendant, the court may render a decision urging the defendant to discharge his/her obligation without asking the reaction of the defendant (a dissatisfied defendant may raise an objection). Some persons in intimate family relations with the parties may represent the parties without court's permission. Evidence may easily be taken. The reasons need not be stated in the judgment. The judgment may be rendered on the same day just after hearings are closed. The grounds for final appeal are strictly limited. The trial proceedings on a small claim, which feature expeditious and convenient processes for resolving disputes, contribute to the protection of the rights of the public. Only about two percent of the judgments rendered by the trial courts on small claim cases are appealed.

2. Civil Conciliation Proceedings

A civil conciliation is a legal proceeding whereby a judge or a conciliation committee hears allegations of the parties in dispute, and taking various factors into account, either advises them to make mutual concessions and to seek a compromise solution or renders a compulsory decision to that effect. The civil conciliation proceedings are very useful methods for dispute resolution in that they are more convenient, expeditious and inexpensive than adjudication proceedings, and lead to the ultimate resolution of disputes through an agreement by the parties.

With the enactment of a general statute in 1990, namely the Civil Conciliation Act[153], all types of civil disputes are now encompassed under the court-annexed conciliation. Under court-annexed

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151 Law No. 6627 of 26 January 2002 taking into effect from 1 July 2002.

152 See generally, Rhee, Woo-young, "Democratic Legitimacy of Law and the Legislative Function of the Constitutional Adjudication in the Republic of Korea", *Journal of Korean Law* Vol. 6 No. 1 (2007), pp. 17.

153 Fully revised by Law No. 10200 of 31 March 2010.

conciliations, the judge may undertake the conciliation procedure by himself or refer to a conciliation committee composing of three members, including the judge and two other non-judges. Under Article 21 (1) of the Civil Conciliation Act, in cases where it is deemed particularly necessary for conciliation, the conciliation judge may, upon application of one party, order the other party or other persons interested in the case not to change the status quo, or to dispose the goods, and may prohibit other activities which make it impossible or considerably difficult to accomplish the purpose of the conciliation, before the conciliation procedures begin. If conciliation fails, the judge may render a conciliation settlement award. The party who does not accept the award, must file an objection within two weeks from the date the award was served on the parties. If the parties file an objection, the matter will be litigated in court and a judgment will follow trial whereas if they do not file an objection, the settlement award will be finalized. Anyway, if any of the parties object to the conciliation proposal by the judge, the case will be referred back to the ordinary civil process. The settlement award derived from such a conciliation process has the same effect as a judicial compromise and can be readily enforceable. The Supreme Court has been encouraging more frequent use of conciliation proceedings. The number of civil cases resolved in conciliation proceedings has been steadily increasing each year. About 45,715 civil cases were disposed of in conciliation proceedings as of 2006.

3. Labour Dispute Resolution System

The Trade Union and Labour Relations Adjustment Act (TULRAA)[154] regulates dispute settlement. Mediation and arbitration are adjustment procedures. Mediation can be requested by either party and must be completed within 15 days in public services, in general businesses even within 10 days (Arts. 53 and 54 (1) of the TULRAA). It is conducted by either a tripartite committee or a single mediator authorized by the Labour Relations Commission.[155] The mediation proposal needs to be accepted by both parties, for it to have the same effect as a collective agreement (Art. 61 (1) and (2) of the TULRAA). An arbitration procedure must be agreed on by both parties or may be requested by only one if the possibility is established in the previously applicable collective agreement (Art. 62 of the TULRAA). It is conducted by an arbitration committee, which is composed of three members representing the public. After arbitration has started, industrial action must not be taken for 15 days, and the arbitration award of the committee has the same effect as a collective agreement (Arts. 63 and 70 (2) of the TULRAA).

4. Alternative Dispute Resolution

The definition of Alternative Dispute Resolution (ADR) is not simple, and may vary according to scholars' opinions. Generally ADR in Korea refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, conciliation and consultation. The two most common forms of ADR in Korea are arbitration and mediation. As costs of litigation rise and time delays continue to burden litigants, ADR, which is designed to be a less formal and less complex means of resolving disputes quickly and cheaper than court proceedings, is regarded as an important tool in settling disputes. Arbitration Act which was promulgated in 1966, is an independent body of law which is separate from Civil Procedure Act, and Korean Commercial Arbitration Board is a popular site of dispute resolution.

As with mediation, procedures such as above-mentioned court-annexed conciliation and statutory conciliation have long been used in Korea. Both judicial and administrative procedures may require the parties in dispute to submit to conciliation before adjudicating the matter before a

[154] Revised partially by Law No. 9930 of 1 January 2010

[155] Labour Relations Commission Act, Law No. 8474 of 1 January 2008.

court. Korea has established various Conciliation Committees such as the 'Financial Dispute Conciliation Committee,' the 'Copyright Deliberation and Conciliation Committee,' Consumer Dispute Settlement Committee which was established in the 'Korean Consumers Protection Board,' and the 'Electronic Commerce Mediation Committee.'

4.5 Relations

Investigation, Security and Prosecution Agencies

The exercise of the power of investigation agencies, security agencies and prosecutors can be reviewed by the court, especially through the warrant system, mandatory court hearing on arrest, and review of arrest and detention.

State Agencies

The Administrative Litigation Act empowers the court to decide on whether feasance or nonfeasance of state agencies is illegal. In addition, when the Chief Justice is requested by another government agency to dispatch a judge, the Chief Justice may grant permission if it is deemed proper in light of the nature of service, should the judge consent to it (Article 50 of the Court Organization Act). Currently, judges are dispatched to National Assembly, the Constitutional Court, the Ministry of Unification, and the Ministry of Foreign Affairs and Trade.

Legislative Branches

The Chief Justice is appointed by the President with the consent of the National Assembly. The Justices of the Supreme Court are also appointed by the President with the consent of the National Assembly on the recommendation of the Chief Justice. If it is deemed necessary to enact or revise laws in connection with the organization, personnel affairs, operation, judicial proceedings, registrations, family registration, and other court affairs, the Chief Justice may present in writing his/her opinion thereon to the National Assembly. The Minister and the Vice Minister of National Court Administration have the right to attend and speak in the National Assembly or the State Council if the issue is related to court administration affairs.

Executive Branches

The judicial branch occupies a strong position, but it is also subject to various restraints under the system of check and balances. The executive branch exercises some role through its involvement in the appointment processes for supreme court justices as described in the last section.

4.6 Judicial education and training

Legal Professional Training System in Korea

To become a judge, one must first pass the Korean Bar Exam and complete a 2-year course offered by the Judicial Research and Training Institute (JRTI) so as to be licensed to practice law in Korea. JRTI was established in 1971 under the Supreme Court to provide training for those have passed the Bar Exam. Since its inception, JRTI has been the only institution that trains and educates prospective legal professionals. JRTI is comprised of President, Vice President, professors and lecturers. The President is appointed by the Chief Justice from among the judges with the rank of chief judge of a High Court.

The Training Institute for Court Officials (TICO) plans and provides a training and development program for court clerks, marshals and other staff of the judiciary. The Institute was founded on

September 1, 1979. TICO is headed by a President and has its faculty members. The President carries out all the tasks of the Institute under the direction of the Chief Justice and supervises all the staff members of the Institute. The President is appointed from among the judges or court officials (grade I official). The faculty is appointed among grade III or IV court officials.

Continuing Education of Judges

1. History

JRTI established a training course for the continuing education of judges in 1978. This course, which has been conducted in the form of seminars since 1983, is aimed at improving specialized legal knowledge and practical skills among incumbent judges.

2. Training for Newly-Appointed Judges

In 1988, JRTI established training courses for apprentice judges. After completing these courses, which are held in February, they receive practical training during their two-year apprenticeship, under the guidance of senior judges. Upon completing their apprenticeship, they are formally appointed to the bench. JRTI also has a program designed exclusively after their appointment to the bench. Newly- appointed judges are required to complete a one-week program, which is designed to help them to acquire know-how in dealing with actual cases in the courtroom.

3. Periodic Training

Apart from seminars, since 1992 JRTI has conducted in-service training for judges at least once every five years after their appointment to office. This periodic training is comprised of four training courses for judges of all levels. Through this course, judge update their professional information on law and related legal issues and acquire a balanced perspective through discussion sessions.

4. Training Courses in Diverse Fields

These training courses include criminal cases, administrative cases, bankruptcy cases, and orientation programs for newly appointed chief judges of branch courts. In addition, a seminar which concentrates on highly debated current issues in the legal practice is held annually.

Overseas Training Programs

The Supreme Court implements and finances overseas training programs to help judges gain advanced work skills, job expertise and motivation and to allow a systematic development of human resources with expertise. Such programs are also intended to introduce an advanced judicial system and operation methodology of other nations as well as to establish a more efficient and optimal legal system in line with rapid changes and the trend of internationalization. Recently, in 2009, the Supreme Court has improved this program, and emphasized long term stays of one year or greater over shorter six month stays. It has also begun to send trainees to more diverse foreign legal systems, including non-English language countries.[156] Overseas training programs for judges can be classified as follows:

- Long-term Training Program - through sponsorship and recommendation of the Supreme Court, participants to this program receive training or participate in research in a university, educational institution or research center located overseas.
- Internationalization Training Program - this program aims to promote understanding of diverse cultures and different systems with currently expanding and accelerating global arena as well as to develop new ideas and vitality for the judicial environment.

[156] See Beopnyulsinmun (Law Times) of 16 August 2009.

4.7 Career issues

The Chief Justice is appointed by the President with the consent of the National Assembly.[157] The Justices of the Supreme Court are also appointed by the President with the consent of the National Assembly on the recommendation of the Chief Justice.[158] For the appointment of the Justices, an Ad Hoc Advisory Committee for Nomination of Justices, which consists of six to eight persons from various disciplines (mainly legal) is established within the Supreme Court. Currently, the applicable Supreme Court Rule (Rule No. 295; issued July 25, 2003) mandates that the above Advisory Committee should include the Chief Justice of the preceding term, the most senior Justice on the current bench at the Supreme Court, the Minister of the National Court Administration, the Minister of the Department of Justice, the chairperson of the Korean Bar Association, and the chairperson of the Korean Law Professors Association (Article 3 of the Rule), and vests the Chief Justice with discretion to appoint up to two additional members to the Committee as deemed necessary. Upon hearing the advisory opinion of the Committee, which is non-binding, the Chief Justice submits recommendations for the appointment of the Justices to the President.

The Judges of the lower courts are appointed by the Chief Justice with the consent of the Council of Justices (Article 104 (3) Constitution; Article 44 Court Organization Act).[159] Of nine Justices of the Constitutional Court who are commissioned by the President of the Republic, three are elected by National Assembly, and three are designated by the Chief Justice of the Supreme Court. Like many other civil law countries, Korea is taking the "career judge system"[160] whereby those who qualify as judges are immediately appointed as judges.

The Constitution of the Republic of Korea provides that qualifications for judges shall be set by the law (Article 105 (3) Constitution). In accordance, Article 42 (2) of the Court Organization Act states the qualifications for judges as persons who have passed the National Judicial Examination and completed the two-year training program at the Judicial Research and Training Institute or those who have obtained qualifications as lawyers. Private attorneys or public prosecutors can also be appointed judges because they have the same qualifications as judges.[161] After finishing the training, one will be nominated as an apprentice judge for two years. After that period, the person will be appointed a judge. In other words, most of the judges in Korea are generally appointed

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157 The National Assembly confirmation hearings were newly introduced in February 2002 under the National Assembly Act (Law No. 9129, as most recently revised in 2008) and the Confirmation Hearing Act (Law No. 8867, as most recently revised in 2008).

158 The Chief Justice and Justices of the Supreme Court are appointed from among those who are either a judge, public prosecutor, lawyer, qualified lawyer who is engaged in legal affairs at the state organs, local governments, state-run/public enterprises, state-financed institutions or other juristic persons, or a qualified lawyer who is an assistant professor or higher in the field of jurisprudence at an accredited college or university. The candidate must be more than 40 years of age, with an experience of 15 years or longer in one or more of the capacities mentioned above. Former Chief Justices and other Justices, for the most part, were judges before their appointment to the respective position.

159 The Chief Justice annually appoints around 110 new apprentice judges, considering their records in the National Judicial Examination and in the Judicial Research and Training Institute, their ability of sound judgement, and their good sense etc.

160 In the non-career system that is adopted for example in the United States and England, all qualified judges first become attorneys and will be appointed judges only after acquiring sufficient experience.

161 The Act on Establishment and Operation of the Professional Graduate School of Law (Law No. 8852) or so-called "Law School Act" was promulgated in 2007 and came into effect in 2008, under which the new graduate-level professional law schools are now in operation as of 2009. The ensuing legislation for the new system for the qualifications to obtain license to practice law in South Korea is currently on the way.

from among apprentice judges. Some complain that this system produces judges that are very young - most of them are in their twenties or thirties - and not so widely experienced.[162]

In response, on 26 March 2010, the Supreme Court announced a reform under which judges must be appointed from among legal practitioners who have had at least a ten-year career, beginning in 2023.[163] This year was chosen because it will be the year in which graduates from Korea's new system of law schools will reach the milestone of ten years of practice.

The career system is one of rotation. Starting as an associate judge in a collegiate division, a judge would trace several steps of becoming a single presiding judge, a chief judge in a collegiate division of district court, a chief judge in a collegiate division of appellate court, and so on as time passes.[164] The most harsh debate relating to this kind of promotion system is focused on promotion from the chief judge in a collegiate division of district court to the chief judge in a collegiate division of appellate court. Judges who fail to get promoted in this step typically resign, usually becoming practicing lawyers (see Section 4.18 below). Some argue that this system is producing a bureaucratic hierarchy among judges. It has been criticized that this system may jeopardize the independence of judges and so endanger the freedom of judgment on the reason that they may weigh options in deciding cases with consciousness of their senior judges' or Chief Justice's opinion.[165] Therefore, according to the above mentioned reform program of the Supreme Court, judges at district courts' level (first track) and judges at appellate courts' level (second track) must be from the earliest stage strictly separated. This so-called two-track system will aim at the prohibition of transfer or shuffling between two tracks and no promotion in each track. This reform program of March 2010 for two-track system is said to look like the American or English life-time career judge system actually.

4.8 Guarantee of tenure

The tenure of the Chief Justice and Justices is 6 years. The age-limit of the Chief Justice is 70, and he/she must not serve consecutive terms. But the Justices whose age-limit is 65 may be reappointed. Although the tenure of other judges is 10 years, they usually serve consecutive terms until they retire either voluntarily or at the age of 63 (Article 45 Court Organization Act). No judge may be removed from office except either by impeachment or by a sentence of imprisonment or heavier, nor may a judge be suspended from office, subject to a reduction in remuneration or other unfavourable treatment except by disciplinary measures (Article 106 (1) (2) Constitution). Remuneration of judges must be suited to the duties and dignity of judges. A judge is subject to disciplinary measures if he/she has committed a serious breach of his/her duties or been negligent in performance of his/her duties. Disciplinary measures may also be taken against a judge who has degraded himself/herself or maligned the dignity of the court. The Judges Disciplinary Committee established within the Supreme Court decides disciplinary actions regarding judges (Article 48 of the Court Organization Act). A resolution of the Committee requires the quorum of majority of all the members and the consent of a majority of the members present.

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162 Therefore, Korean Judiciary has sometimes appointed judges among experienced lawyers or public prosecutors as a supplementary measure.

163 See Internet Newspaper 'Ohmynews' of 26 March 2010.

164 The Judges Personnel Committee was established as an advisory group to the Chief Justice to plan and coordinate personnel issues. The Chief Justice can evaluate service of the judges and the outcome may be reflected in personnel management.

165 In consideration of this criticism, the Supreme Court submitted a bill of abolishing the unequal treatment between the chief judges of district and appellate courts to the National Assembly.

4.9 Judicial interpretation

Korea follows a civil law approach to judicial interpretation. The starting point of legal reasoning is almost always a statute or code provision. Judicial precedents play a secondary role. However, in actual practice prior decisions are widely followed by the courts, though there doesn't exist the doctrine of stare decisis. Judicial opinions are often characterized as syllogisms. The provisions and their interpretations are the major premise, the proposition stating the crucial facts in the case before the court is the minor premise, and the judge's decision is the conclusion. This type of legal reasoning is a kind of "deductive reasoning." Reasoning by analogy that involves the extension of a legal rule to a fact situation not covered by its express words, but deemed to be within the purview of a policy principle underlying the rule, is actually widely used, though in criminal law reasoning by analogy is strictly prohibited according to the constitutional principle of legality. The grounds consist in the difficulties to distinguish between reasoning by analogy and permissible interpretation of a provision. Although case law is no legal source, court decisions are of central importance to criminal law and procedure, since the "law-in-action," i.e. the law characterizing day-to-day legal practice, is judicial case law to the greatest extent. Thus, in interpreting criminal statutes, the Supreme Court orientates itself to a great extent by publications of legal scholars.

4.10 Adjudication

Except in military courts, adjudication including hearings and rendering judgment is presided over by a judge. Trials are presided over either by a single judge or a panel of three judges. In general, all hearings and rendering of judgments are open to the public.[166] The court conducts its affairs in Korean. Interpretation can be arranged whenever deemed necessary. Procedural formation and substantive formation continue till the case is ripe for adjudication. Adjudication means a final substantive determination on the part of state to apply the law to the particular case. According to the form of adjudications, adjudications can be classified as judgments, decisions and orders. All important final adjudications must be rendered in the form of a judgment which must be based on oral proceedings (Article 37 (1) Criminal Procedure Act). Decisions are also adjudications by a court, but need not be based on oral proceedings (Article 37 (2) Criminal Procedure Act). An order is an adjudication by a judge, and likewise need not be based on oral proceedings (Article 37 (2) (3) Criminal Procedure Act). In terms of the function of adjudication, adjudication can be classified as final adjudication and adjudications prior to final adjudication. Although final adjudication must be rendered basically in the form of a judgment, there is a decision that has character of final adjudication like the acquittal on procedural grounds.

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166 If there is any possibility that opening of hearings to the public could be subject to impairing national security, public peace and order, or be contrary to good morals, the court may decide to close the hearings to the public. In either case, rendering of judgments must be open to the public under all circumstances. The court may confine for not more than 20 days, or fine for not more than 1 million Korean won (approximately US$ 820), or both on a person who interrupts the conduct of a trial by harsh language, disturbance, etc.

4.11 Jurors

Role

The Citizen Participation Trial introduced in 2008[167] is a unique system that has combined and made partial modification of the jury system of the common law and the lay-judge system of the civil law.

The jury, in principle, hands out the verdict without intervention from the judge (an element of the jury system). However, in the event they have not agreed unanimously, they must hear the opinion of the judge (an element of the lay-judge system). Discussion about appropriate punishment is made with the judge who has presided over the hearing (an element of the lay-judge system), but such an opinions are presented to the judge without taking a vote (an element of the jury system). The type of cases can be brought to Citizen Participation Trial is stipulated by law: crimes with the capital punishment, crimes resulting in intentional death, crimes combining burglary, rape, injury, killing, and corruption bribery as well as cases designated by the Rule of the Supreme Court. Cases involving the most serious penalties, capital punishment or life imprisonment, require nine jurors while most others require seven jurors, unless the defendant has admitted guilt in which case five jurors is sufficient.

Defendants (including foreigners) have the right to a Citizen Participation Trial, but the right can be waived and the defendant can choose a conventional trial before a judge only. In addition, the court may decide not to hold the Citizen Participation Trial upon hearing the opinions of the prosecutor, the defendant or the defence counsel. In a recent sexual violence case indicted at the Seoul Central District Court, the defendant wanted a Citizen Participation Trial, but in the face of fierce objection from the victim, the court made the decision to make an exception and deny the right.[168]

Appointment and Training

The juror, the alternative juror and the prospective juror who appeared that day is given a per diem. The prospective juror that appeared on the designated date is paid 50,000 Korean Won (approximately US $40) and those that have performed duties by taking part in the trials after being designated as the juror and alternative juror is paid the per diem of 100,000 Korean Won (approximately US $80). A juror is selected randomly among the citizens of this country who are over 20 years of age and who live in the jurisdiction of the corresponding district court. The head of the district court compiles the list of the prospective jurors annually by using the resident

[167] As for selected criminal cases, lay participation trials will be implemented on a pilot basis from January 2008. "Citizen Participation Committee" to be formed in 2010, will be composed of members from legal probationers, academia, and NGO groups. The Committee will design a final form of Citizen Participation System to be implemented starting 2012, utilizing the evaluations from the Pilot system. Citizen Participation will be applied to serious criminal cases at first. Applicability of the Citizen Participation System to other types of cases will be determined after reviewing the Citizen Participation's application to criminal cases. The final form of the citizen participation trials particularly suited for the Korean judiciary is planning to be launched by 2012.

[168] During the one-year period of January 2008 through January 2009 since the inception of the jury system in South Korea, among approximately 2,500 potential cases (i.e., those cases where the defense could request or could have requested jury trial), the defense requested jury trial in 249 cases or less than 10% of the possible cases. Among 249 cases where the defense requested jury trial during the above period of time, the court decided not to provide a jury trial in 61 cases (24.5% denial rate). See Judicial Statistics, the Supreme Court of the Republic of Korea (http://eng.scourt.go.kr/eng/resources/statistics.jsp).

registration data. When the court holds the Citizen Participation Trial, the necessary number of prospective jurors necessary is randomly selected and notified to the candidate. After questioning the prospective jurors on the date of selection (Voir Dire), the court may make a decision not to select them ex officio.

Relationship with Judges

In the Citizens Participation Trial, there are special regulations regarding trial preparation and trial procedures. Procedures for the trial preparation and trial preparation date are stipulated as mandatory procedures, and the shorthand, audio and video recording of the trials are made mandatory. Intervention by the jury regarding trial on the admissibility in court is prohibited. Following the pleading, the jury deliberates on the guilt or innocence of the defendant without intervention from the judge and renders a verdict unanimously. The representative of the jury is designated who will perform the duty of presiding over the deliberation, requesting the judge to make a statement and compiling the result of the verdict. For a unanimous verdict, the opinion of the presiding judge can be heard at the request of the majority of the juror. In the event the opinion on guilt/ innocence is not unanimous, the verdict is rendered through decision by majority upon hearing the opinion of the judge.

One distinctive feature of lay participation in Korea is that the verdict and sentencing opinion of the jury does not bind the court. This is because it has been argued that the constitutional guarantee of a right to trial by judge means that a jury cannot issue a final decision. Even though the decisions are not binding, they have been followed in roughly 90% of cases during the first several months of the system. It is also the case that the document compiling the result of verdict and opinion is attached to the records of the trial. When the sentence is pronounced, the presiding judge must notify the result of the verdict. The judgement is other than the verdict, the reason must be explained in the written judgement.

Oversight

There are certain legal grounds for which a juror may be challenged for cause and excused, such as a juror incapable of being impartial (Challenge for Cause). In addition, each side can excuse a certain numbers of jurors without giving any reason (Peremptory Challenge). For the safety of the jurors and for their protection, in the court room, jurors are not called by their names.

4.12 Regional delimitations

Every court has territorial competence in cases in which the place of the crime is within its jurisdictional territory or in which the defendant has his domicile or residence or happens to be present within such jurisdictional territory. If it deems it appropriate, a court can by decision transfer a case pending before it to another court having concurrent competence. This can be done at any stage of the proceedings.

4.13 Judicial Independence

Article 103 of the Constitution stipulates that judges should follow the Constitution, law and regulation, and conscience to declare judicial independence. It is one of the most symbolic parts of a nation that faithfully respects the rule of law and is the request for the separation of three branches. It enables the judicial branch to serve as a bastion that protects the basic right of citizens. To secure the “independence of adjudication” from political or social influences, the personal status of judges is guaranteed as follows:

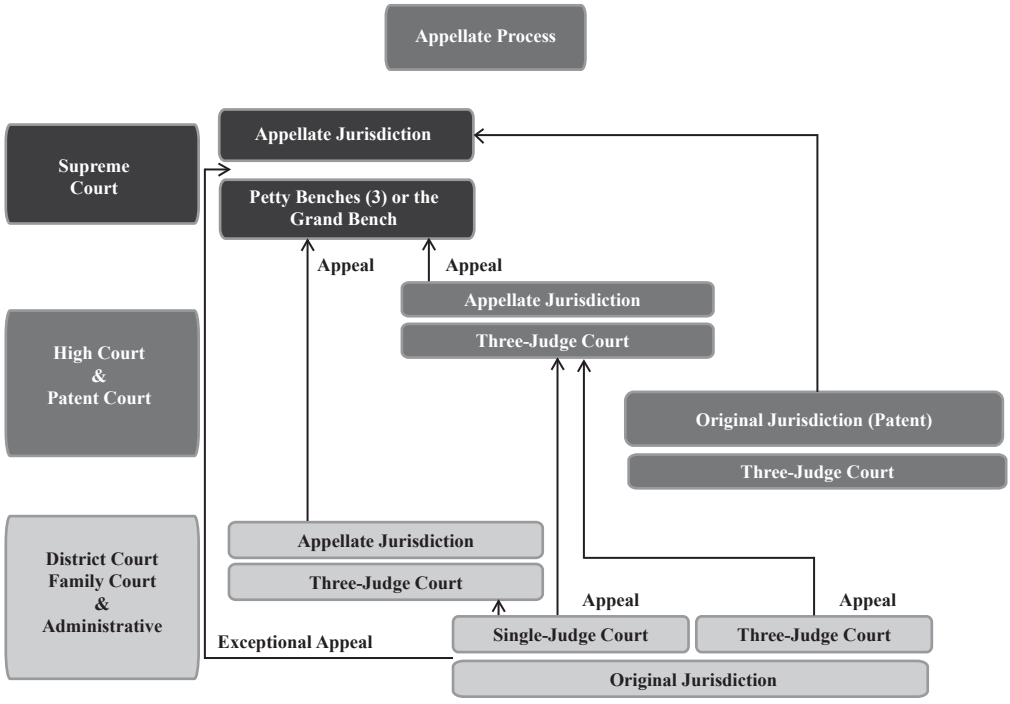
1. No judge may be dismissed from office, except by impeachment or criminal punishment
2. No judge may be suspended from office or have a reduction in salary, except by a disciplinary action of the Judicial Disciplinary Committee of the Supreme Court.
3. To secure political neutrality of judges, the political activities of judges are fully restricted.

4.14 Appeals

Overview over Civil and Criminal Cases

In criminal cases, either the defendant or the prosecutor may initiate an appeal against a judgment of first instance for a review of law or fact. Appellate tribunals can also alter the sentence. The grounds for appeal to the Supreme Court are specifically prescribed in Criminal Procedure Act. In civil cases, a party who is dissatisfied with the judgment of a single judge on any question of fact or law may appeal to the appellate division of the District Court. An appeal against the judgment of a panel three judges of the District Court is lodged with a High Court. Appeal against the rulings or judgments of either the High Court or the appellate division of the District Court must be filed with the Supreme Court, where only question of law may be heard. The organizational structure of the court regarding appeals is as follows:

Figure 5: Organizational Structure of the Court Regarding Appeals



Appeal against Minor Offence Summary Trial Procedure

Some minor offences, which are punishable by fines of not more than 200,000 KRW (approximately US$ 180) or detention for less than 30 days, may be brought before the court without a formal indictment. A Summary trial for minor offences is instituted by the chief of a local police station. If the judge considers the summary trial inappropriate, the case may be dismissed. The chief of a local police station should then forward the case to the prosecutor's office. The defendant is entitled to request an ordinary trial, if the defendant is not satisfied with the judgment. In the summary trial, the strict rules of evidence may be waived.

Appeal against Small Claim Action Procedure

For more expeditious and simpler procedures for the settlement of small claims actions, civil cases involving claims not exceeding 20,000,000 KRW (approximately US$ 18,000) are brought as small claim trials. In such trials, the plaintiff can institute an action by making an oral statement to the court clerk instead of filing a written petition to the court. The court clerk must then put such statement record and notify the defendant. The defendant is entitled to request an ordinary trial, if a party is not satisfied with the judgment.

District Court

The District Court is generally the court of original jurisdiction. However, District Court also have jurisdiction over appeals filed against the decisions of a single judge of a District Court, a branch court, or a municipal court. This appellate jurisdiction is exercised by the collegiate division of three judges.

High Court

High courts hear appeals from judgments or rulings rendered either by a panel of three judges of the district courts or the family court, or by the administrative court. High courts also hear appeals from judgments or rulings in civil cases rendered by a single judge of the district courts or branch courts when the amount in controversy exceeds 50 million Korean won (approximately US$ 42,920 as of September 2009). The jurisdiction of high courts is exercised by a panel of three judges.

Supreme Court

As the court of last resort, the Supreme Court hears appeals from judgments or rulings rendered by the High Courts, the Patent Court, and the appellate panels of the District Courts or the Family Court in civil, criminal, administrative, patent and domestic relations cases. Under special circumstances, the Supreme Court hears exceptional appeals from the first trial judgments. It has the authority to review rulings rendered by the Korean Maritime Safety Tribunal. It also has exclusive jurisdiction over the validity of the presidential or parliamentary election. The Supreme Court has the power to make a definitive review on the constitutionality or legality of orders, rules, regulations, and actions taken by administrative entities.

In criminal cases, an appeal to the Supreme Court may be made on the following grounds:

- a violation of the Constitution, law, order, or regulation material to the judgment of the lower courts;
- the abolition, alternation, or excuse of penalty after the judgment has been rendered by the lower courts;
- existence of a reason to request for a review; or

a grave error in fact-finding or extreme impropriety in the sentencing where the death penalty, a life imprisonment, or an imprisonment of more than 10 years has been imposed. In the Supreme Court, either the Grand Bench composed of the Justices sitting en banc or the Petty Benches, each usually composed of three or four Justices, preside over the cases.

In civil cases, the grounds are limited to the constitutional and legal questions material to the appealed judgment. The six specific grounds for appeal are:

- cases where a court rendering a judgment has not been constituted in compliance with law;

- cases where a judge who was precluded by virtue of law from participating in a judgment has participated therein;
- cases where provisions relating to exclusive jurisdiction have been contravened;
- cases where there has existed a lack of authority on the part of the legal representative or attorney for commencing procedural acts;
- cases where the provisions regarding open pleading have been violated; or
- cases where a judgment has not been supported with reasons or there exists inconsistency in the reasoning.

4.15 Positioning

Strengthening the Role of the Courts in Criminal Cases

As mentioned above, the Revised Criminal Procedure Act of 2007 was designed to systematically improve the regulations on arrest and detention and on the right to legal defence, with the goals of: guaranteeing rights and interests of the accused and suspects in criminal procedure; introducing trial- centred court examination procedures; and widening the scope of "*Jaijeong Shincheon*g" (an application of re-examination of the public prosecutor's decision not to issue an indictment).

Article 308-2 of the Revised Criminal Procedure Act explicitly introduces the exclusionary rule of evidence similar to that of the U.S.A. This article pronounces that any evidence which has been gathered in the violation of due process shall not be admitted as effective evidence. Previously, the Korean Supreme Court applied this rule on the interrogatory document submitted as a dossier even though there were no provisions in the Korean Criminal Procedure Act. The rule, however, had a limited application by the Court. Physical evidence, as distinct from an interrogatory document, has been accepted as competent evidence to establish a fact in a case on the grounds that the physical character of evidence cannot be tainted by a violation of the due process. This newly introduced article is not as specific and detailed to resolve the entire dispute on the range of its application. But, the words 'in violation of due process' signifies that any violations of the investigator in gathering evidence against a suspect shall not be tolerated.

Article 316 of the Revised Criminal Procedure Act allows investigators to testify on the statement of a suspect. Previously the Korean Supreme Court has not allowed investigators to testify against suspects for fear that the defendant's power of defence would be severely damaged.[169] The newly inserted Article 316 would be inconsistent with the previous 1995 decision of the Supreme Court and Article 312 (3) of Criminal Procedure Act, denying the admissibility of investigators' interrogation protocol if a defendant does not admit its contents in a trial or in a preparatory hearing. During the deliberation of the revised article, the conclusion was reached that the interrogators' testimony is desirable so long as the interrogators were to be subject to cross-examination by defendants. If defendants take advantage of the cross-examination, they may find significant violations of due process and human rights. Even if investigators testify on the statement of a suspect (which is admissible evidence under Article 316 (1) of the Criminal Procedure Act), the testimony may not carry much weight. This is because, in a case of confession, some independent evidence other than the confession of the accused is necessary to find guilt (so-called 'principle of supporting evidence to confession'). This is of course also true in non-confession cases. Therefore, allowing investigators to testify on the statement of a suspect may have little impact on the defendants' right to defence.

[169] Decision of 24 March 1995, 94 Do 2287.

The 'preparatory hearing' has been introduced in the revised act of 2007. In order to facilitate the efficiency of the newly concentrated public trial, the court may hold preparatory hearing date to organize the points of contention and to discuss the contentions and plans of the prosecutor, the defendant and the attorney (Articles 266-5, 266-10 Criminal Procedure Act). The Revised Criminal Procedure Act of 2007 has somewhat restricted the admissibility of hearsay evidence. For example, if an investigative document records a statement of any person other than the defendant, it will be admissible as evidence only if it was prepared in compliance with the due process and proper method, is verified by the original speaker (declarant) at trial, and the defendant or defence counsel has an opportunity to cross-examine the speaker about its content. In addition, such evidence is admissible only when it is proved that the statement was made in a particular reliable situation (Article 312 (4) Criminal Procedure Act).

Establishment of Oral Hearing in Civil Cases

As for civil trials, the courts tried to strengthen the oral hearing system and realize trials based on the date of pleading. Using only written records for a trial could not sharply bring out the contentious points and it could also cause unnecessary misunderstanding and distrust because parties concerned with the case had no way to know how the conclusion was reached by judges. By establishing the oral hearing system in court, judges will better understand arguments of the parties concerned and at the same time the parties will better understand how their trials proceed. As the oral hearing has strengthened, the work of judges has been carried out more in court than their office. In the past, one trial a week was common but it has gradually changed to twice a week. And to increase the chance that judges and parties concerned meet each other more easily and often, various forms of courtrooms have developed including small courtrooms and electronic courtrooms.

To realize oral hearing trials, the case management method to mandatorily designate the date for pleading in advance has been emphasized. The method of pleading preparation after written pleading can be conflicted with principles of immediacy and publicity, and unnecessary written pleadings can delay the case settlement process. In 2007, the Rules of Civil Procedure[170] were revised and the method of fixing the date of pleading in advance was emphasized. In 2008, revision of the Civil Procedure Act[171] related to the date of pleading was proposed. Before 2002 when the Civil Procedure Act was revised, there were many cases proceeding in the existing way and the method of written pleading had been adapted in principle taking into account the heavy workload of judges. While maintain the old way, the courts pursued to gradually implement the method of fixing the date for pleading in advance by making case classification earlier and reducing the number of written pleading if the heavy workload somewhat reduced. As the intensive hearing method has been established and the number of written pleadings reduced, earlier dates for pleading were adapted. If the system of the date for pleading at an early stage is fully established, judges will meet parties concerned and decide contentious points more quickly and the trials will be more accordant to principles of immediacy and publicity. The enhancement in court communications is also one of the major changes. Based on the idea that the right communications in a courtroom is the prerequisite to realize courtroom-oriented trials, the trial process in a courtroom was video-recorded and judges could monitor and review it for future improvement.

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170 Supreme Court Rule No. 2115 of 1 January 2008; revised again through Supreme Court Rule No. 2259 of 3 December 2009.

171 Law No. 9171 of 26 December 2008.

Strengthening a Sponsorial Function of Court in Family and Juvenile Cases

Since 2006, there have been steady changes in trials for family and juvenile matters. In 2007, the performance achievement of the Reform Committee of Family and Juvenile System was reflected in legislative efforts and revisions of the codes of civil, domestic and juvenile procedures. It laid the ground to operate the system of divorce by consent, focusing on children's welfare, and to operate juvenile trials focusing on protection of their rights and promotion of the better future. According to the Revised Civil Act,[172] the judiciary introduced the system to provide information of divorce by consent, deliberation period and recommend counselling services. And it became mandatory to submit an agreement on child-raising and parental authority. Courts made and distributed audio/video materials and a small handbook to give detailed information about divorce by agreement. Courts also improved the information and counselling services about trials and mediation related to family affairs and confirmation of divorce by agreement. As a result, courts recommend married couples to receive counselling services from professional counsellors so that they can reach a desirable agreement on who will have parental authority and take care of children in terms of their children's welfare and resolve their dispute peacefully. This helps to ultimately heal fundamental problems of their family. In addition, according to the Revised Juvenile Act,[173] the court-appointed assistant system was introduced and protection measures were diversified. The court order system for counselling and education and the special order system for education of carers were adapted. The judiciary tried to enhance effectiveness of the juvenile care system by strictly implementing and monitoring protective measures such as volunteer custodian care system and child care facilities system. The judiciary also needs to make efforts to settle newly adapted systems such as the court order system for counselling and education and the special order system for education of carers, victim's right to present statement, the recommendation system of reconciliation between victims and offenders. These changes require family courts to play a sponsorial role in family trials and juvenile protection trials. The family courts has began to come up with more concrete measures to expand their roles in resolving disputes and problems related to family and juvenile matters in a more fundamental way.

4.16 Judicial administration

Overview

Judicial administration refers to administrative management affairs including organization, human resources, budgets, accounting, facilities, etc., which are necessary to operate the Judiciary. The Chief Justice exercises general control over judicial administrative affairs, and directs and supervises the officials concerned in regard thereof. The Chief Justice may delegate part of the authority to direct and supervise to the Minister of National Court Administration, the chief judge of each court, the President of Judicial Research and Training Institute, the President of Training Institute for Court Officials, or the President of Supreme Court Library. Important judicial administrative affairs require resolution of the "Council of Supreme Court Justices."

Council of Supreme Court Justices

The Council of Supreme Court Justices is the highest deliberative body in judicial administration. The Council is composed of all the Justices and presided over by the Chief Justice. A resolution of the Council requires a quorum of more than two-thirds of all the Justices and the consent of a

[172] Law No. 8720 of 21 December 2007; revised again through Law No. 9650 of 8 May 2009 taking effect from 9 August 2009.

[173] Law No. 872 of 21 December 2007 taking effect from 22 June 2008.

majority of the members present. The Chief Justice has a vote in a resolution, and in case of a tie, the casting vote. The Council passes a resolution of consent to the appointment of the lower court judges, establishment or revision of the Supreme Court Rules and Regulations, accumulation and publication of judicial precedents, request for budget, expenditure of reserve fund, settlement of accounts, and such matters as deemed of particular importance and as referred to it by the Chief Justice.

Ministry of National Court Administration

Judicial administration refers to administrative management affairs including organization, human resources, budgets, accounting, facilities etc., which are necessary to operate the Judiciary. The Chief Justice exercises general control over judicial administrative affairs, and directs and supervises the officials concerned in regard thereof. The Chief Justice may delegate a portion of his/her power to direct and supervise the Minister of National Court Administration, the chief judge of each court, the Dean of Judicial Research and Training Institute, the Dean of Training Institute for Court Officials, or the Chief Librarian of Court Library. Important judicial administrative affairs require resolution of the Supreme Court Justices Council. The Supreme Court may establish rules and regulations concerning judicial proceedings, internal discipline of the courts, or management of business insofar as they are not contrary to the laws. This is the realm of judicial law-making power. Approval by the Supreme Court Justices Council is required when establishing the Supreme Court Rules and Regulations.

Budget

The Supreme Court has the exclusive power for judicial administration. It produces the budget of the judicial branch through the consultation with the executive branch, plans judicial policy, personnel management of judges and court officials, training and re-education of lawyers and court officials, etc. For this purpose, the Ministry of Court Administration and the Judicial Research and Training Institute belong to the Supreme Court. In practice, the drafting of the court budget is done by the Ministry of Finance and Economy based on estimated revenue and expenditure submitted by the Chief Justice. The National Assembly, after deliberating on the draft budget, passes the court budget bill. Therefore, the independent right of preparing a court budget does not vest solely in the Supreme Court. However, where the government proposes to reduce the amount of budget requested by the Supreme Court, the government should consult with the Chief Justice. The fact that the government has the power of making up a budget of the courts means in some sense, that the government has the actual power to influence judicial policy substantially. Consequently, it is necessary for the judiciary to make up its own budget in order to acquire complete and substantial independence from the government or from the legislature.

4.17 Oversight and accountability

Well Known Problematic Practice of Jeonkwan Yewu

The practice known as “Jeonkwan Yewu” in Korean consists of affording preferential treatment during litigation to recently retired judges. Despite official denial by the Korean judiciary, the Korean public widely believes that the practice of judicial cronyism is quite damaging to a fair trial. The practice operates as follows: a recently retired judge who files suit as a private attorney receives favourable treatment from the courts during the legal process. Although such preferential treatment raises questions about impartiality, the Korean legal profession has nonetheless long accepted this unethical practice. Because of the high probability of a favourable outcome, former judges can charge fees significantly above normal rates and, in so doing, make a considerable sum

in a short time after retirement. This cronyism pressures Korean judges, by custom, to help former colleagues in this way.

This a practice that undoubtedly undermines substantially the public's trust in the judiciary, reflected in the popular saying, *"Yujeon Mujoe, Mujeon Yujoe"* in Korean, which means "innocence for the rich, guilt for the poor."[174] The two most embarrassing episodes for judicial independence took place, one in 1998, and the other in 1999, when two lawyers, one a former judge and the other a former prosecutor, became were successfully able to almost monopolize all the cases filed at the particular courts in the local cities where they had practised and to amass a fortune within only a short period after entering legal practice. The secrets of their success had consisted in managing with varied methods of remuneration for service a network of several tens of "brokers" who were in fact officials of the courts and the prosecutorial offices and policemen. These officials referred to the lawyers potential clients whom they encountered in the line of their official duties. At the same time, the lawyers were also known to have cultivated particularly close ties with individual judges and prosecutors in their respective localities, inviting them to the first class restaurants, drinking parties, and golf tours at the lawyers' expenses. They were also known to have extended to judges and prosecutors "friendly" gifts including monetary gifts of modest but varying amounts handed in time of holidays or on arrival or on departure of individual judges and prosecutors. In turn, some of the judges and prosecutors were known to have even referred to the lawyers a few clients whom they happened to encounter, for example, when the latter asked the former for advice for a lawyer. It seems probable that the clients represented by these lawyers must have also received a favorable attention from judges and prosecutors.

In these cases, the particular lawyers, many of the officials of the court and the prosecutorial office and policemen, and others were arrested and tried on various criminal charges. In the meantime, several judges and prosecutors were subjected to various disciplinary measures including dishonorable discharges. Many other judges, prosecutors, and practising lawyers take the incidents as the most severe embarrassment and great disgrace to their face. The question is whether these were single incidents or whether they were only the tip of the iceberg, the bigger part of which was hidden under water.[175] In any case, the public outcry against the kinds of practice was such that now the nationwide serious "judicial reform" is about to be undertaken, although its directions and contents are not fully known yet. If this type of unethical practice is not rectified, representation by a mere lawyer will become meaningless when the other party hires a recently retired judge. A similar problem arises in case of prosecutorial discretion practice.

Disciplinary Measures

A judge can be subject to disciplinary measures if she commits a serious breach of duties or has been negligent in performance of the duties. Disciplinary measures may also be taken against a judge who has degraded oneself or maligned the dignity of the court. Disciplinary measures are divided into three kinds: suspension from office, a reduction in remuneration, and a reprimand. Suspension involves an unpaid leave of between one month and a year. Reduction in remuneration involves a pay cut of one-third for the same period. Reprimands are delivered in writing. Discipline of judges is up to the Judges Disciplinary Committee established in the Supreme Court (Article 48 Court Organization Act). A resolution of the Committee requires a quorum of a majority of all the members and the consent of a majority of the members present.

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174 See Han, In Sup, "A Dilemma of Public Prosecution of Political Corruption" in Yoon, D. K. (ed), *Recent Transformations in Korean Law and Society,* Seoul National University Press, 2000, p. 367.

175 See Choi, Dai-Kwon, "The Judicial Functions and Independence of the Judiciary in Korea" *Seouldae Bophak (Law Journal of Seoul University)*, Vol. 40 No. 2 (1999), pp. 63.

Code of Conduct

Judges and court officers shared the need to raise people's trust in the judiciary and to strengthen their ethical attitudes. As a result of their effort, the ethics audit office was formed in the Court Administration Office in 2006, the code of ethics for judges was more specified and the code of conduct for judges and court officers was developed.[176] Property registration requirements were strengthened and ethical education using previous cases was expanded. Special audits were conducted in structurally vulnerable areas to prevent ethical violation in advance. An Inspector General for Judicial Ethics is responsible for all the activities and measures with regard to enhancing overall judicial ethics. The ethical environment will be constantly improved through special audits and persons who violate ethical codes of conducts will be strictly held accountable for their wrong doings. In this way, courts will lay the foundation to become trustworthy and even respectable institutions.

The Sentencing Commission since 2007

The Sentencing Commission was created in accordance to the provisions of the Court Organization Act amendment of 2007, especially in order to attack the problematic practice of Junkwan Yewu. The Commission was established under the Supreme Court in May 2007 to implement fair and objective sentencing practices to strengthen public trust toward the judiciary. The Sentencing Commission is an independent agency of the judicial branch of the government. The principal purposes of the Commission are to establish and revise sentencing guidelines and to analyze, research and collect information of the related policies. The sentencing guidelines are not mandatory but must be respected by the judges in rendering decisions. Reasons for departing from the guideline must be provided in the decisions. The Commission is comprised of 13 members including the Chairperson and one Standing Commissioner. The Chairperson is appointed by the Chief Justice among those with 15 years of legal experience. The Chief Justice appoints the Commissioners among those who are engaged in professional legal sector such as judges, public prosecutors, lawyers, etc. Public prosecutors and lawyers require recommendation from the Minister of Justice and the President of the Korean Bar Association respectively. A commissioner serves a two-year term and can serve multiple terms. The sentencing guidelines, which are open to the public, may not be legally binding but must be respected by the judges in rendering decisions as which to the category and period of sentencing should be involved. The General Secretariat Office of the Commission provides the necessary administrative support and assistance. Phase 1 of the Sentencing Commission which ended on May 2009 established sentencing guidelines on the following type of crimes: homicides, bribery, sex crimes, perjury, slandering (false accusation), embezzlement, misappropriation, and robbery. These guidelines have been applicable from July 1, 2009 to all cases that are indicted. On May 7, 2009 launching of Phase 2 took place. During Phase 2, the Commission has devoted its efforts toward precise application of the pronounced guidelines and prepare to set sentencing guidelines for other types of crimes other than those types mentioned in the course of Phase 1. Despite the lack of the legal effect of sentencing guidelines, from July 1 through December 31, 2009 it has been reported that the sentencing guidelines were respected in 89.7% of a total of 2920 cases that belong to 8 types of crimes applied by sentencing guidelines.[177] Before the introduction of the sentencing guidelines judges have often been too lenient with politicians, bureaucrats and businessmen accused of bribery, influence peddling, embezzlement, and other forms of corruption. As the

[176] Judicial Code of Conduct of the Republic of Korea (the Rules of Supreme Court), enacted on June 23, 1995; revised on June 11, 1998; revised on May 25, 2006.

[177] See Internet Newspaper 'Ohmynews' of 28 February 2010.

Supreme Court insisted, the goal of sentencing guidelines has been to restore the public trust in the justice system.

4.18 Other Court Staff

Court Officials

Court officials work in various fields including judicial administration, technical examination, library custody, interpretation, facilities, industrial management, and health. Judicial administration field can further be divided into subfields such as court affairs, registration affairs, information technology, statistics, stenography, and bailiff duties. The court officials working in subfield of court affairs range from Grade I through Grade IX. The court officials engaged in court affairs assist judges with court proceedings. They take charge of recording court activities, keeping court records, issuing various certificates proving litigious matters, and serving documents. They also handle non-litigious matters such as registration, family registration, deposit, etc. Court officials dealing with court affairs are appointed after passing an open competitive examination. They can be promoted to higher posts if they serve at one post for a fixed period of time, with the exception of posts in grade V and grade VII, which require passing an examination for promotion thereto. In general, the court officials are appointed by the Chief Justice. However, a portion of the Chief Justice's power to appoint court officials is delegated to the chiefs of the institutions to which the court officials belong.

Marshals

Marshals are independent, extra-judicial officers affiliated with the District Courts. They are engaged in the execution of judgments and the service of documents. Though the marshals are not public officials in a strict sense of the word, they are under the supervision of the chief judge of the competent District Court. However, the marshals receive fees not from the court, but from the party concerned. The chief judge of a District Court appoints the marshals from among the persons who have served as public officials for a specified period of time in the courts or public prosecutor's offices.

4.19 Litigation Costs

Basic Principles

The legislature has the power to decide what expenses can be recovered as costs in a lawsuit. In criminal cases there is no reimbursement of any litigation costs, while in the other cases there are statutory rules and regulations. According to Civil Procedure Act, the general rule in the Korean civil procedure system is that the losing party to a court action will be ordered to pay the litigation costs of the winning party, up to a statutory limit (Article 89 of Civil Procedure Act). Every final judgment must contain a decision on the costs of proceedings. If in final judgment the amount of reimbursement is roughly described, the winning party can bring a separate lawsuit to recover the litigation costs (Article 165 of Civil Act).

In practice the court has discretion as to whether costs are payable by one party to another. If the court renders a judgment in favour of only a part of the claim, the court may determine the percentage of the costs to be borne by each party. Litigation costs in Korea consist of "court costs" (filing fees and court disbursements), "out-of-court costs" (parties' costs) and "lawyers' fees."[178] Filing fees and lawyer's fees are statutorily provided in Korea. Article 2 (1) of Civil Action Filing

[178] See Chon, Byung Seo, "Sosongbiyoung-ui budam-e gwanhan yakgwan-ui geomto (A study on litigation costs)" *Minsasosong (Journal of Civil Procedure)* Vol. 13 No. 2 (2009), 147-177.

Fees Act provides that if the litigated amount is more than Korean won 10 million and less than Korean won 100 million, the filing fee is "litigated amount x 45/10,000 + 5,000." Filing fees payable depend on the initial value of the claim. For example, the filing fees for a claim of Korean won 50,000,000 are amounting to Korean won 230,000 (225,000 + 5,000). Payment of filing fees is made by affixing revenue stamps ('Injidae'). Attorney's fees may, within limits prescribed by the Supreme Court Rules, be included in the calculation of the litigation costs. In practice, full recovery of the actual attorney's fees is, therefore, almost impossible. According to Article 92-2 of Civil Procedure Act and the Supreme Court Rule (Rule on Calculation of Attorney's Fee in Litigation Costs of 12 March 2009), merely 8% of the litigated amount can be calculated as attorney's fees. In practice, there is really a big gap between actual lawyers' fees and the fixed amount of lawyers' fees recoverable under the Supreme Court Rule. Recoverable expenses regarding litigation costs are relatively diverse by statutes. For example, Security Class Action Act and Securities and Exchange Act provide the reimbursement of "full" litigation costs (e.g. Article 193-13 (6) of Securities and Exchange Act), while Commercial Act provides the reimbursement of "reasonable or appropriate costs." (Article 405 (1) of Commercial Act)

Problems of Litigation Costs Regarding Access to Justice

It has been sometimes pointed out that litigation costs hinder access to justice by increasing the risks of litigation, both setting up the risk of having to pay both sides' costs in the event of losing the case. It is necessary to set proportionate litigation costs in order to promote access to justice. Access to justice is problematic not only in ordinary civil cases but also in class actions, recently introduced in some fields of Korean law. Class actions in Korea are likely to impose a huge financial burden on lead plaintiffs or lead counsels. First of all, they have to incur filing fees. The Securities Class Action Act does not provide for a flat rate; instead, the filing fees are, in principle, determined according to the amount of damages claimed as in ordinary lawsuits. This amount is too large as to discourage filing of a class action. Another financial burden are expenses which must be paid in advance. The Securities Class Action Act requires the plaintiff to post security to cover damages the company might suffer, just as provided in a derivative suit. In addition, the plaintiff must pay in advance the costs incurred in the court's notice to the public and appraisal process in the lawsuit. In general, the costs incurred in a class action are borne by the attorney, and they are compensated by the contingent fee arrangement if the plaintiff prevails. Taken together, the initial investment which attorneys have to make to file a class action is too large to encourage filing a class action.

Legal Aid System

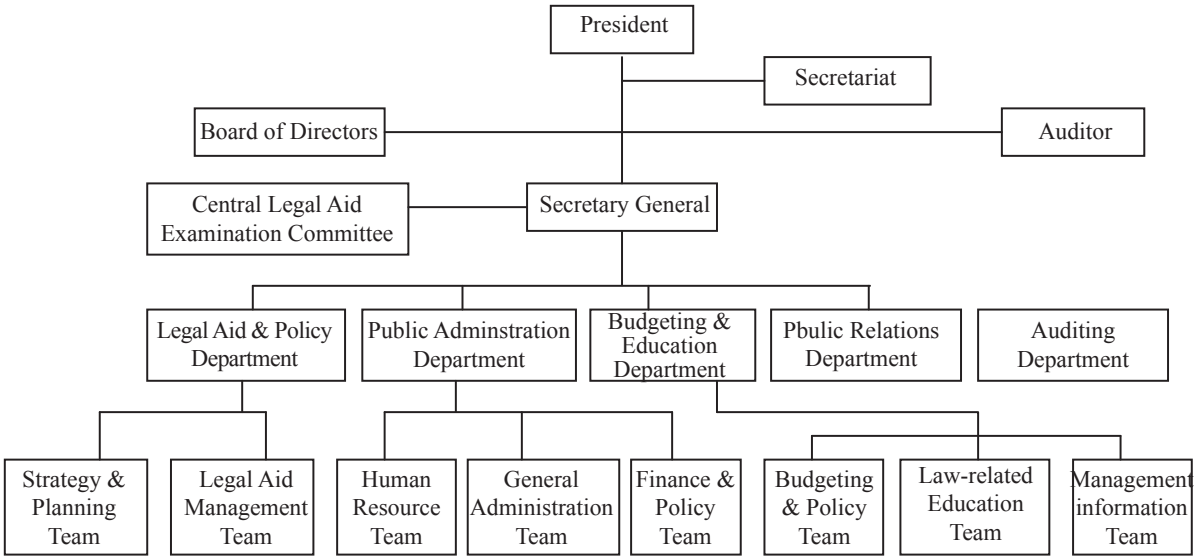
Expensive litigation costs hinder access to justice. As costs of litigation rise, it is more necessary to develop legal aids system. The legal aids system in Korea is mainly carried out by the Korea Legal Aid Corporation (KLAC), a public organization, and several private organizations such as the 'Korea Legal Aid Center for Family Relations,' 'Chamyeoyeondae (Peoples Solidarity for Participatory Democracy)', the Korea Bar Association and consumer groups such as 'Minbyun (Lawyers for a Democratic Society).' KLAC is a public institution which provides legal aid such as legal counselling, or representation in court for individuals who cannot afford to hire a lawyer. Prescribed by the Legal Aid Act[179] (Article 8) of 1987, the KLAC was found in 1987 as a private, non-profit corporation, which

was funded by the government and supervised by the Ministry of Justice. The KLAC currently as of May 2010 has 18 district offices and 38 branch offices throughout the nation. The KLAC began

[179] Law No. 3862 of 23 December 1986 taking into effect from 1 July 1987, the most recent revision through Law No. 9717 of 28 November 2009

to handle criminal cases since June 1996, though at the beginning stage it handled merely legal counselling regarding civil cases. According to the annual report of the KLAC the number of free legal advices is 3,372,301 in 2008, and the number of criminal matters as legal aid cases is 25,952 in 2008. The number of legal representation in civil, family, and administrative matters is 98,853 in 2008. The statistics indicate a significant growth in the number of cases handled by the KLAC. The representation in lawsuits by the KLAC is limited to people whose gross monthly income before deduction is under Korean won 2.6 million (about US$2,500). Farmers, fishers, foreign workers, veterans, low ranking government officials and military personnel are also eligible for such representation (Article 7 of Legal Aid Act). These days the KLAC plays a great role in the legal aid system in Korea. The organization of the KLAC is as follows:

Figure 6: Organization of Korea Legal Aid Corporation



Meanwhile, the court-assigned defence counsel program for criminal cases and civil litigation assistance program are also part of legal aid system. The Criminal Procedure Act stipulates that, if there is no defence counsel, trial judges shall appoint a defence counsel *ex officio* in certain cases where the defendant is a minor, seventy years of age or over, deaf or mute, or suspected of mental disorder (Article 33). The Criminal Procedure Act also provides that public trials shall not be conducted without a defence counsel where the offense charged is punishable with death or imprisonment for a minimum period not less than three years (Article 282). The court may appoint counsel at its discretion to an indigent defendant only if he or she makes such request (Article 33). The total number of cases in which court-appointed counsel represent criminal defendants in 2009 was 70,322 (77,921 persons) which amounted to about 29.5% of all criminal cases (238,382) during that year.[180] Although these figures imply that the court-appointed counsel system carries with it some degree of significance, the actual performance of that counsel has frequently been criticized as too perfunctory.[181] This type of court-appointed counsel is therefore called so-called "*Duleory Byunhosa* (attorney as a foil)," who instead of sufficiently representing the client complete simply their duty nominally. Such a nominal representation is certainly attributed to the low legal fees as well as the lack of devotion resulting from the shortage of a true public-interest consciousness among lawyers. According to the report of Court-Martial, the number of guilty verdict in the court-

[180] See Ministry of Court Administration, *Sabeop yeongam (Judicial Yearbook), 2009.*

[181] See Kim, Jae Won, "Emerging Legal Aid Activities in South Korea" *Dong-A Beophak (Journal of Dong-A University Law School)* No. 30 (2002), 85-103.

appointed counsel cases is 221 in 2005, 245 in 2006, 311 in 2007, 274 in 2008, and 102 in 2009 (the total of number is 1,153). In contrast, the number of guilty verdict in normal counsel cases is 74 in 2005, 55 in 2006, 56 in 2007, 50 in 2008 and 16 in 2009 (the total of number is 251). The rate of guilty verdict in ordinary counsel cases amounts to about 25% of all of the court-appointed counsel cases.[182]

Conclusion

The judiciary is the final stronghold to guarantee fundamental rights of the people, the only non- political organization to check the administrative and legislative powers, and the guardian of the constitutional state. However, the history of the Korean judiciary showed the challenges in achieving judicial independence. In the 1960s and 1970s the threats to judicial independence took the form of intimidation of individual judges who were not cooperative enough with the administration. A typical example was the practice of letting police detectives follow target judges closely to turn up any possible irregularity or improper behaviour so as to later on embarrass, intimidate, or criminally charge them. A particular incident of this kind in 1971 led a large number of judges, especially young ones, nation-wide to rallying to the cause of judicial independence. They had threatened to resign en masse in protest of the government's practices which they saw as impairing judicial independence. That episode, the so-called "judicial crisis," came to the end with the withdrawal of the resignation at the persuasion of their senior judges and with the show of conciliatory gestures by the government.[183]

Often cited as an example of the misuse of capital punishment, the so-called Inhyeokdang (People's Revolutionary Party) incident of 1975 is also an example of "court murder." In that incident, eight dissident activists were framed as North Korea collaborators, summarily sentenced to death by the court-martial and the Supreme Court, and hastily executed.[184] Thirty-two years later, on 21 January 2007, the Seoul Central District Court acquitted the 8 dissidents of treason.[185]

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182 Source: unpublished report of Representative Lee Han-Sung from the Court-Martial at the National Assembly in 2009.

183 See Kim Tschol-Su, Honbophak ha (*Constitutional Law Vol. 2*), Jihaksa, Seoul, 1972, pp. 940-953.

184 The posthumously acquitted 8 individuals were executed 18 hours after the Supreme Court sentenced to death on 8 April 1975. Thus the day of their death was henceforth known as 'the black day in the Korean courts' history' or 'the day of court murder.' See, Cho, Byung-Sun, "South Korea's changing capital punishment policy. The road from de facto to formal abolition", 10 *Punishment & Society* 171 (2008), 177.

185 In December 2005, a Seoul Central District Court ordered a retrial of the case after a presidential truth commission found no evidence that the eight defendants were guilty, and that the students were also tortured into making false confessions. The commission also found official documents showing that the government had issued orders to execute the activists hours before the Supreme Court announced its verdict. Since the announcement of commission on Sept 11, 2002, relatives of the victims had demanded a retrial for years, claiming that the state intelligence agency framed the suspects with false charges. An internal National Intelligence Service (NIS) probe also concluded that its predecessor, the Korea Central Intelligence Agency, manipulated two cases involving *Inhyok-dang* on the orders of former President *Park Chung-Hee*, who was facing increasing demonstrations from activists and college students against his dictatorship. The report of the truth commission was summarized in Chosun Ilbo (Chosun Daily Newspaper) of Sept 12, 2002. In its ruling, the Seoul Central District Court cleared the executed dissidents of all charges, including violation of the National Security Law and the Anti-Communism Law and treason charges for plotting to overthrow the government. The court concluded that the prosecution's interrogation records and the defendants' written testimonies could not be held accountable as evidence, since intimidation, coercion and other forms of mistreatment are suspected

Although since the 1987 Democratization the present Constitution and the justice system secure judicial independence substantially, it can be maintained only with a mature citizenship that demands protection of human rights. In this context, the actual practice in the judiciary has a critically important meaning in Korea's democracy. The Korean practice in the judiciary shows both strong and weak points. Despite the short history of democracy in Korea, the fruit of firm efforts to protect the democracy under the past dictatorship regime has supported the role of the judiciary.

Now, instead of the danger from outside, the Korean judiciary is faced with the danger from inside. Most of all, the practice of "Jeonkwan Yewu" described above in Section 4.18 (affording preferential treatment during litigation to recently retired judges) is undermining the appearance of impropriety and the public trust in the judiciary. Another complaint is against the career judge system is that judges are young and inexperienced. This is exacerbated by the involuntary early retirement of experienced judges as the number of available positions along the upward hierarchy diminishes[186] . In addition to the loss of judicial expertise accompanying such early retirement, as these retired judges go into private practice, it enhances the risk of Jeonkwan Yewu.

The final important problem to be solved quickly is the large docket of the court. South Korean courts at practically all levels, including the Supreme Court, have an overwhelmingly large size of workload or are faced with excessive number of cases.[187] As of August 2008, the number of judges across the nation was 2,352. The applicable law in this regard of the Act on the Number of Judges at Respective Courts (Law No. 8412, as enacted in 2007) and the applicable Rule (Supreme Court Rule No. 2222) provide that the number of judges will increase to 2,844 by the year 2010. A distinct way to cure this problem will be to increase the number of judges including creating a new appellate division at the High Court level or increasing the number of Supreme Court Justices.

The South Korean judiciary has established and enjoyed its independence. However, recently the independence of the courts has assumed a serious dimension, because the present conservative Lee Myung-Bak administration has tried to exercise its influence over the courts. On March 24, 2010, the governing Grand National Party (GNP) presented seven reform bills on the judiciary to the National Assembly.[188] The reform bills have been motivated by a series of somewhat progressive court rulings on politically sensitive issues. Seoul District Court acquitted Kang Ki-Gab, a lawmaker of the minority Democratic Labour Party, of charges of violent behaviour at the National Assembly in January 2010. Several district courts ruled in favour of unionized teachers who issued statement opposing state

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to have been made against the detained. The court also said that the prosecution failed to prove that the defendants were involved in organized actions in a plot to overthrow the government. See, Cho, Byung-Sun, "South Korea's changing capital punishment policy. The road from de facto to formal abolition", 10 *Punishment & Society* 171 (2008), 177.

186 On average, a judge in South Korea retires from her or his judicial position in less than twenty years of service from the initial appointment. As of 2008, the average age of newly appointed judges was 29.0 years of age; for a period from 1990 to present, the average age of newly appointed judges is approximately 30 years of age. The Office of National Court Administration, *Past, Present and Future of the Judiciary*, Judicial Development Fund Inc, December 2008, at 249 [available only in Korean].

187 In 2008, the District Courts with 1,910 judges in eighteen facilities across the nation heard approximately 18,243,000 cases; the High Courts with 303 judges in five facilities across the nation heard approximately 43,000 cases; and the Supreme Court with the Chief Justice and thirteen Justices including the Minister of the Office of National Court Administration, and also with 80 research judges, heard approximately 31,000 cases. See Judicial Statistics, the Supreme Court of the Republic of Korea (http://eng.scourt.go.kr/eng/resources/statistics.jsp); The 2008 Introductory Book of the Supreme Court of Korea.pdf (available at http://eng.scourt.go.kr/eng/ resources.jsp).

188 On the government blueprints of judicial reform in detail, see e.g. Korea Times of 29 March 2010.

policies and participated in anti-government rallies. Another court ruling cleared MBC TV's staff of defamation charges for allegedly falsely reporting about the dangers of mad cow disease in the U.S. beef. Such rulings ignited ideological conflicts between conservative and progressives. One of bills is planning to create a personnel management committee for judges. Opposition parties accused the GNP of attempting to interfere in judicial affairs by allowing the Minister of Justice to appoint some of the committee members. Another striking point is the GNP's proposal to set up a sentencing guidelines panel under the presidential office. This raised concerns that such a panel might violate the fundamental principle of democratic check and balance among three branches of government. Another GNP proposal is to increase the number of Supreme Court Justices from the current 14 to 24, fearing that the executive branch might increase its voice over the judiciary by appointing more pro-government justices. However, the proposals have been criticized for trying to exert influence on the judiciary, so that judges may make rulings to the taste of the conservative government in politically sensitive cases. It remains to be seen what will become of these proposals.

5. Civil and criminal judgement enforcement

5.1 Types of Enforcement

Civil

A civil execution procedure includes a procedure of compulsory execution as well as a procedure of foreclosure. In the past, the provisions of civil execution formed a part of the Civil Procedure Act. However, with the introduction of the new Civil Procedure Act, the provisions on civil execution have been separated to constitute the Civil Execution Act.[189] The Civil Execution Act contains a vast number of new provisions aimed at improving execution procedure.

Criminal

In Korea, prosecutors direct and supervise the execution of all criminal judgments, e.g., direction and supervision of the execution of arrest warrants, search or seizure warrants and final criminal judgments. This was designed based upon the belief that the appropriateness of warrant execution and the protection of individual rights in connection with such execution could be secured best by entrusting those duties to the prosecutors who represent the public interest.

Administrative

Once a judgment to revoke an administrative action or decision is finalized, the action or decision becomes ineffective with no other procedure required. In this case, the administrative office concerned cannot take the same administrative action against the same person based on the same reason. There is room for the same action to be taken basing different reasons. Once a judgment to confirm the revocation or invalidation of the action concerned is made, the responsible administrative office should take an administrative action as the judgment says (Article 30 Administrative Litigation Act).

Labour

As explained above in section 4.4, the Labour Relation Commission hears labour cases regarding dispute settlement (mediation and arbitration procedure) between a registered trade union and an employer. Individual labour disputes are settled by the Labour Relations Commission or the Civil Court. In case of a possibly unjustified dismissal, the employee can file a criminal case or a civil case with the Labour Relation Commission. If any of the parties object to the dispute settlement proposal by the Labour Relation Commission, the case would be referred back to the ordinary courts' procedures, civil or administrative. The administrative Court has the right to hear labour cases on disciplinary measures against civil servants. Usually individual labour disputes are settled by the Civil Court. Thus, the enforcement of labour case judgment is the same as the enforcement of decisions of the Administration Court, Criminal Court or Civil Court.

5.2 Organisation

There is no independent organization for the enforcement of court decisions. The District Courts are responsible for the civil execution, while the District Public Prosecutor's Office supervised by the Ministry of Justice is responsible for the criminal execution. In the civil execution, the marshals who are independent, extra-judicial officers affiliated with the District Courts, are engaged in the execution of judgments and the service of documents. Though the marshals are not public officials in a strict sense of the word, they are under the supervision of the chief judge of the competent District Court. The chief judge of a District Court appoints the marshals from among

[189] Law No. 9525 of 25 March 2009 taking into effect from 26 September 2009.

the persons who have served as public officials for a specified period of time in the courts or public prosecutor's offices. Those sentenced to imprisonment, imprisoned for the non-payment of fines or held in remand custody are executed under the responsibility of the Ministry of Justice. The prison administration covers closed and open prisons.

5.3 Model

The Civil Execution Act contains a vast number of provisions on civil execution procedure. In the civil execution, the marshals who receive fees not from the court, because they are not public officials in a strict sense of the word, but from the party concerned, are also responsible for the enforcement of civil execution. However, in the enforcement of criminal sentence, the court usually does not participate in the enforcement process. Enforcement of the criminal sentence is under the direction of a public prosecutor assigned to the public prosecutor's office corresponding in jurisdictional territory to the court which entered the adjudication.

5.4 Tasks and Functions

Civil Execution Procedure

The Civil Execution Act contains a vast number of new provisions aimed at improving execution procedure. Compulsory execution is the procedure whereby the creditor obtains a satisfaction of his/her claim, with the assistance of the state, from the property of the debtor who does not voluntarily perform his/her obligation even though the judgment has been rendered against him/her. Authorities other than the judgment, such as a payment order, or a notarial deed can also be a basis for execution. The property of the debtor, which is subject to execution, includes real property, ships, automobiles, construction equipment, aircraft, movable property, and bonds. It is the court that enforces the compulsory execution on most property. However, in case of movable property, the marshal enforces the compulsory execution. The most frequently used compulsory execution is execution sale of real property whereby the court seizes and sells real property of the debtor by an open tender. The proceeds are distributed among creditors. Foreclosure is a legal proceeding instituted by the lender (the mortgagee) to force a sale of the mortgaged property in order to satisfy the unpaid debt secured by the property. The procedure of foreclosure is similar to that of execution sale of real property.

Statement of Property, Debt Defaulter Roster, and Property Inquiry

These methods are devised to secure the effectiveness of compulsory execution as well as to enable the judgment creditor to easily obtain satisfaction of his/her claim. In the event that a debtor does not discharge a pecuniary obligation and it is difficult to ascertain the property of the debtor, the creditor who is entitled to motion for compulsory execution, may request the court to order the debtor to tender a list of property, which clearly specifies property in his/her possession. If the debtor fails to comply with the court's order or tenders a false list of property, he/she is subject to imprisonment, fine or confinement. If the debtor does not discharge his/her obligation within six months after a monetary judgment becomes final and conclusive, fails to comply with the court's order to tender a list of property, or tenders a false list of property, the creditor may request the court to enter him/her in the debt defaulter roster. When the debtor is listed in the debt defaulter roster, such information is provided to financial institutions and the debtor may face difficulty in carrying on future credit transactions. The Civil Execution Act introduces a new method through which inquiries about the debtor's property can be made. If the debtor fails to comply with the court's order to tender a list of property, or tenders a false list of property, the creditor may request the court to make inquiries about the debtor's property. The court, pursuant to the creditor's request, makes inquiries at the institutions, which keep information on the debtor's real property or financial assets in the form of

electronic data, and orders them to submit such information. The creditor, then, can make use of information submitted by the institutions and move to the execution stage.

Provisional Attachment and Provisional Disposition Procedure

If the debtor hides or disposes of his/her property before the compulsory execution procedure is commenced, the creditor is obstructed from obtaining satisfaction of the claim. To prevent such attempts and to secure the debtor's property, the court may order provisional attachment or provisional disposition, pursuant to the creditor's request. If it is necessary to preserve the execution of the monetary claim, the court may order the debtor's property to be put under provisional attachment. Provisional disposition may be granted for the purpose of setting the temporary state of affairs in regard to disputed legal relations or preserving the execution in regard to the claim for delivery of specific immovable or movable property.

The Prison System (Correctional Institution System)

The Korean government has been established in 1948 and enacted Penal Administration Act in 1950. This Act was revised in 1961 to fortify the function of rehabilitation. In that amendment, the name of Penal Facility changed from 'prison' to 'correctional institution.' Since then the correctional institution authorities has introduced many kinds of advanced inmate treatment systems to strengthen the rehabilitation of prisoners through the revision of the Penal Administration Act several times. In central organization, the general control belongs to the Direct General of Correction Bureau, attached under the Minister of Justice. 4 Regional Correctional Headquarters were established on November 1, 1991, for the purpose of improving management and supervising 44 correctional institutions throughout the nation. 44 correctional institutions consist of 26 Correctional Institutions (1 Branch), 2 Juvenile Correctional Institutions, 1 Women's Correctional Institutions, 1 Open Correctional Institution, 8 Detention Centers, and 3 Branch of Detention Centers. Accommodation and management in the detention center are for the criminal suspects and criminal defendants who have been subject to the execution of an arrest warrant. Exemplary inmates selected from each correctional institution can be transferred to the Open Correctional Institution where self-governing system is practiced. Moreover, the work release system has been put into force that allows inmates to be employed outside the institution. This system is designed to cultivate skills for adaptation to society prior to release. In accordance with the amendment of the Penal Administration Act (December 12, 1996), the pre- existing Parole Examination System was abolished and new Parole Examination Committee was initiated under the Minister of Justice. The Committee chaired by the Vice-Minister of Justice examines whether prisoner is eligible for parole and submits its report to the Minster of Justice. Paroled prisoners may be placed under the supervision for the remainder of their original sentence. If the paroled prisoner commits a new offence during this period, the court must decide whether or not the prisoner is to be returned to prison to serve the remaining period. Loss of parole is also possible for behavioural infractions. In this case the decision is made by the Committee.

5.5 Relations

Especially in case of civil matters, cases are annually increasing and an efficient trial has limitation in responding to the increasing number. In this respect, the judgment enforcement cannot guarantee the social integration, but intensify the social conflicts. Thus, in addition to trials and its enforcement, dispute resolving methods like mediation and arbitration need to be vitalized so that people can have various ways to resolve their disputes and judges can be relieved from their heavy workload.

5.6 Process

Enforcement of Civil judgment

The enforcement process is relatively simple by the relevant laws. In civil enforcement, if the voluntary enforcement without outside intervention fails, a party with a court judgment may then seek the process according to the Civil Execution Act. Enforcement of civil judgments is governed by the Civil Execution Act, which became effective as of July 1. 2002. Previously, this act was only a part of the Civil Procedure Act. A final judgment is eligible for enforcement. Also the provisional enforcement order by the court, or foreign judgments recognized by the Korean court are eligible for enforcement. It is only a performance claim that is qualified for enforcement. A monetary claim is enforced through seizure and sale of a debtor's nonexempt property at public auction. Claims other than that are enforced in other various forms. A claim for delivery of movables or immovables is executed by a court-appointed marshal. A claim for performance other than giving something is executed by either substitutional execution,[190] when it can be performed by a third party, or indirect compulsory performance,[191] when it should be performed by a debtor herself.

In Korea, the fundamental difference between general mediation[192] and litigation procedures (including arbitration) is in the enforcement mechanisms. The arbitration procedures are institutionalized in Korea whereby the arbitral awards rendered by a committee (for example Korean Commercial Arbitration Board) are analogous to judgment of the court that is fully enforceable. The arbitration is sometimes almost as same as statutory conciliation. If the conciliation procedures are institutionalized by the governmental agencies, that is called statutory conciliation. A kind of this statutory conciliation is civil conciliation proceedings above mentioned. The difference between general mediation and statutory conciliation is in the enforcement procedure where a settlement agreement made at the statutory conciliation has the same effect as a judicial compromise making it readily enforceable unlike its counterpart made at a mediation which has no such effect.

Enforcement of Foreign Judgment

Judgments rendered by a foreign court should be recognized in order to be enforceable in Korea.[193] The following requirements are to be met for the recognition (Article 217 Civil Execution Act). In the first place, a foreign judgment needs to be final and conclusive in order to be recognized and enforced by Korean courts. It is final when there is no possibility of further appeal within civil procedure. Whether or not this requirement of finality has been met is determined on the basis of the foreign law by which the decision was rendered. Secondly, the international jurisdiction of the foreign court is required. This is determined in light of the acts and subordinate statutes of Korea, or to the treaties. According to the spirit of Article 2 of the International Private Law Act, the substantial relationship between the case and the forum is the major standard by which

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190 Substitutional execution is a way of execution by the third party. The debtor, however, is subject to all the costs incurred in the above process (Article 260 of the Civil Execution Act).

191 For general explanation on recognition and enforcement of foreign judgment, see Lee, Sung Hoon, "Foreign Judgment Recognition and Enforcement System of Korea", Journal of Korean Law, Vol. 6 No. 1, 2006, p. 110.

192 For mediation, an agreement between parties to resolve their disputes through mediation is not required. In mediation, the mediator's role is primarily to encourage open communications by helping the disputants identify the specific areas of dispute and agreement and ultimately reaching a negotiated settlement. Therefore, the settlement agreement between parties made at mediation is not readily enforceable.

193 See generally, Kwon, Youngjoon, "Litigating in Korea: A General Overview of the Korean Civil Procedure" , Journal of Korean Law, Vol. 7 No. 1 (2007), p. 108.

an international jurisdiction is measured. In considering the substantiality of the relationship, the court should consider not only private interests such as fairness, convenience, and predictability of the litigating parties, but also public interests such as adequacy, swiftness, efficiency of the trial as well as the efficacy of the judgment.[194] Thirdly, lawful service of a summons or a document is needed. A defeated party should have received, pursuant to a lawful method, a service of a summons or a document equivalent thereto, and a notice of date or an order, with a time leeway sufficient to defend himself (excluding the case pursuant to a service by public notice or similar service). When she responds to the lawsuit even without being served, this requirement is deemed to have been satisfied. Fourthly, the foreign judgment should not violate good morals and other social orders. This is to prevent a foreign judgment from being recognized and enforced in contravention of the public policy in Korea. What constitutes the violation of good morals and other social orders is left at the discretion of the competent court. There was an interesting lower court decision that dealt with the acceptability of the punitive damage award by the U.S. court.[195] According to this decision, the court stated that the punitive damage award with its function of criminal sanction might violate good moral and social orders in Korea where only compensatory damage for torts is allowed. Subsequently, the court recognized only half amount of the award. Finally, there is a requirement of reciprocity. The foreign judgment will be recognized and enforced only when the Korean judgments are recognized and enforced under the same or more lenient condition in the concerned nation.

5.7 Mechanisms

Administrative

There are three different types of budget for correctional administration: first, national general account, secondly, special accounts for prison industry based on an autonomous accounting method and thirdly, national assets special account for construction of judicial facility such as correctional institution and prosecutor's office.

Oversight and Inspection

Though the marshals are not public officials in a strict sense of the word, they are under the supervision of the chief judge of the competent District Court. This provides effective oversight in most cases.

Conclusion

The enforcement of civil and criminal judgments is not an issue of concern in the context of legal reform in Korea, because the enforcement of court judgments itself has always been undertaken in a timely fashion. Instead, the concerns of crime victims have increasingly been taken into consideration. The number of criminal offences is rising and with it the number of victims of crime. Crime control policy or criminal enforcement policy therefore is to be considered not only with regard to the repressive measures against offender, but also in regard to the protection of the victim against future crimes.

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194 Decision of the Supreme Court of Jan. 27, 2005, 2002 Da 59788.

195 The East Branch of Seoul District Court, 93Gahap19069, decided on Feb. 10. 1995. This case was appealed and re- appealed afterward. However, the Seoul High Court (95Na14840, decided on Sep. 18. 1996) and the Supreme Court (96Da47517, decided on Sep. 9. 1997) upheld the decision by the court of first instance, without touching on the issue of the acceptability of the punitive damage award in the context of Korean tort law.

Since 1980, a comprehensive victim protection program with regard to the criminal enforcement has been proposed and advocated by social groups to the public.[196] Victims who have suffered financial losses in criminal crimes may request that their damages be compensated in the criminal trial proceedings. As a result, the victim may seek compensation according to Victim Compensation Act without having to file a separate civil action. However, such damages shall be restricted to physical damage, theft and fraud and other damage to the assets in order not to hinder the original objective of criminal trial proceedings. The Revised Criminal Procedure Act of 2007 also seeks to make institutional improvement to protect the rights and interests of the victim through the system of petition for adjudication as well as the rights of victim to make a statement in court. A victim of a crime has a right to make statements and the court shall, upon receiving a petition from a victim of a crime or his legal representative admit such a victim as witness for examination (Article 294-2 Criminal Procedure Act). The victim may file an application for inspection or copying of the litigation record with the court (Article 294-2 Criminal Procedure Act). Special measures have also been regulated to protect the victims of crime. Victims of sexual violence crimes such as rape may request to testify without the public in attendance (Article 294-3 Criminal Procedure Act). In other words, notwithstanding the general openness of trial proceedings, they can be closed when victims of sexual crimes testify. In the event it is recognized that the victim may not deliver full testimony with the defendant in the presence, the presiding judge may order the defendant or the third party to leave the court (Article 297 Criminal Procedure Act). The court may, if deemed that the victim is likely to feel severe uneasiness or tension in light of the age of the witness, his/her physical or mental state, or any other circumstances, allow a person has reliable relationship with the victim to sit in company with the victim (Article 163-2 Criminal Procedure Act).

196 Especially the Act for the Punishment of Sexual Violence Crimes and Protection of Victims (Law No. 8059 of 2006, last revised on Oct. 27, 2006, as Law No. 8059) introduced an expanding protective system for sexual violence victims.

6. Lawyers and other legal services

6.1 Organisation

For most of its modern history, Korea has had a severely restricted legal services market. The very conception of a private legal profession was suspect under classical Confucian thought. The Japanese colonial state emphasized legal training to produce bureaucrats, and the judicial exam was primarily designed to produce prosecutors and judges for the state apparatus. As mentioned in Chapter One, this was successful for a certain conception of law appropriate to the developmental state. But it has come under severe pressure in Japan (as well as Japan) in recent decades.

Lawyers are organized into bar associations at a municipal level. There are 14 throughout the country. The Seoul Bar association is the biggest, with more lawyers than all the rest combined. The Korean Bar Association is an umbrella of these municipal bar associations, in which membership is mandatory. The Bar associations organize the profession, lobby on its behalf, and manage a system of free legal aid for indigent defendants.

During the period of constraint on the profession, most practicing lawyers were in fact retired prosecutors and judges. Sometimes these professionals retired because someone of equal lower rank has reached a higher position and it would be unseemly to stay as a subordinate given strict seniority norms. In other cases the motive is simply to earn the lucrative fees available to the private bar.

The legal profession began to expand in 1981, when the Chun regime announced its decision to raise the quota of persons from 100 to pass the JRTI exam to 300. This meant that for the first time, there were significantly more graduates of the JRTI than were needed in the courts and prosecutors. Since liberalization began in 1987, the size of the bar has taken another leap and has now reached over 1000 graduates per year. The effect of this change is that the population per attorney has dropped to about 8000 persons for every attorney, and 5000 per legal professional (including judges and prosecutors). While still high in comparative terms, Korea is no longer such a complete outlier within the OECD.[197]

As pass rates grow, legal practice moves away from its traditional monopoly areas and penetrates new areas of social life. Competition among lawyers creates incentives to expand litigation and legal modes of social ordering elsewhere. Regulation of the legal profession can, therefore, be seen as the linchpin reform of legal institutions, whose particular modalities will create a class of powerful interested parties that influence substantive legal developments elsewhere.

One of the recent developments is the emergence of very large firms that do full-service corporate law work. The four largest are Kim and Chang, Lee and Ko (Plaza Law Firm), Bae, Kim and Lee (Pacific Law Firm), and Shin and Kim (Sejong Law Firm). These were the first four firms to have over 100 attorneys. These firms have branched out beyond Seoul and many have offices in China, as well as lawyers who can handle legal matters in various languages. These firms also work with accountants, patent lawyers and other professionals who are not strictly speaking members of the legal profession.

Besides the practicing attorney, the Japanese model features a number of quasi-legal professionals who are allowed to conduct some legal work. These include judicial scriveners, who play a role

[197] South Korea has 17.6 individuals who are licensed to practice law out of 100,000 as of 2008. The U.S. has 376.3 out of 100,000 as of 2006; Germany has 154.6 out of 100,000 as of 2004; and France has 72.8 out of 100,000 as of 2004. The Office of National Court Administration, *Past, Present and Future of the Judiciary,* Judicial Development Fund Inc, December 2008, at 251 [available only in Korean].

somewhat like the French notaire but also provide legal advice in certain matters that does not involve going to court. There are also patent agents and tax agents who help with filings before government bureaucracy. Each of these quasi-legal professions has its own professional association.

6.2 State Regulation

A Lawyer's Act, first adopted in 1949, provides the basis for the regulation of the legal profession. Until 1982, registration of lawyers was carried out by the Ministry of Justice, but in that year the Lawyers Act was amended to transfer it to the Korean Bar Association. The government has thus reduced its direct role in the regulation of the profession.

The Lawyer's Act has been modified periodically over time. In 2000, for example, a requirement that lawyers spend some time each year on pro bono activities was introduced.

6.3 Lawyers

Lawyers are involved in all kinds of cases, including criminal, civil, administrative and family law cases. Most lawyers work in civil area.

Role in criminal cases

The scarcity of lawyers in Korea led to a relatively small number who specialized in criminal defence. The high rates of confession have meant that in practice, most lawyers have not played an active role in an adversarial sense. This has changed somewhat with the emergence of the activist legal profession. In addition, major legal reforms in the past two decades have empowered counsel in criminal cases.

The 1987 Constitution provides for a right to counsel (Art. 12(4)). The Korean Supreme Court and Constitutional Court have both issued decisions that provide some content to the right. In 1990, the Korean Supreme Court excluded confessions extracted in interrogations under the National Security Act when the defendants request for counsel had been rejected by investigators. In 2003, the Supreme Court issued an important decision to recognize a right to counsel *during* interrogation, which had not been the previous practice.[198] The Constitutional Court has also made similar decisions.[199] Subsequent amendments to the Criminal Procedure Code confirmed these decisions.

Similar court decisions helped to guarantee the right of defence counsel to the investigative records kept by prosecutors. This helped to empower the defence counsel relative to the prosecution, and deliver on the promise of a truly adversarial system in Korea.

While there is no public defender system, there is some provision for state appointment of private counsel in some cases. In these cases, lawyers are paid by the state. A trial cannot proceed in the absence of defence counsel when the defendant has been charged with an offense punishable by the death penalty or a prison sentence of more than three years. The trial judge must also appoint counsel for defendants who are minors, seventy years or older, suspected of mental illness, or indigent.

Role in civil cases

The Korean Civil Procedure Act, first adopted in 1960, regulates the structure of civil proceedings. It was extensively reformed in 2002 to concentrate the trial; previously, civil trials had involved an extensive set of appearances. There is no requirement to have a lawyer in civil cases. Conversely, the

198 *See* Decision of November 11, 2003, 2003 Mo 402 [Korean Supreme Court].

199 *See* Decision of September 23, 2004, 2000 Heon Ma 138 [Korean Constitutional Court].

court can allow certain categories of non-lawyers (relatives or associates) to assist in representation for claims below a certain level. In many cases, people represent themselves without a lawyer. (A small claims procedure allows parties to introduce complaints orally, and so minimizes the need for lawyers.)

The lawyer's role is to assist the party with all phases of the civil procedure, including filing a complaint or an answer, participating in pre-trial conferences at which conciliation is often attempted, and then representing the party throughout the trial.

6.4 Education and Training of Lawyers

In the 1960s, legal education was carried out at the Seoul National University Graduate School of Law. However, as part of the Yushin reforms of President Park Chung hee, Korea adopted the JRTI in 1973. The JRTI system was modelled on that of Japan.

The centrepiece of the Japanese-Korean system of the legal profession is twofold. First, undergraduate legal training is widely available, and produces graduates who take a variety of jobs in business and government. It is quite a prestigious major and so may be helpful in spreading general idea of legality throughout the economic system. Most of the faculty are not themselves practicing lawyers, but academic specialists who work in the traditional civil law mode. Lectures, rather than interactive discussion, are the norm in legal education, with little emphasis on practical skills.

The second component is a specialized examination to enter a judicial training institute managed by the Supreme Court. (In Korea this was the Judicial Research and Training Institute.) This institute provided a shorter training and internship period (formerly two years) targeted at those who will actually serve in the courts: prosecutors, lawyers and judges. Traditionally, it was more prestigious to become a prosecutor or judge than lawyer. In recent years, however, some of the top graduates now join large corporate law firms that are expanding in Korea.

In substance, legal education and the judicial examination focused on the traditional "six codes" of the Japanese version of the civil law tradition. (The six codes are constitutional, civil, commercial, and criminal law, as well as civil and criminal procedure). The emphasis in the judicial examination has been on memorization. In turn, the system has produced criticism that it does not test the practical attributes needed to be a successful legal professional.

This exam to enter the JRTI had two components, a written part and an oral part. It operated as a quota system. For most of the period after the system was introduced the quota was less than 100 total passers per year, barely enough to provide for the needs of the ministry of justice and courts. The population of lawyers was probably the smallest per capita of any industrialized society. The result was a severely restricted legal profession. In turn this made it quite difficult to find a lawyer. Much of the alleged Korean aversion to litigation can be understood in institutional terms: if legal services are rationed, they will be expensive and difficult to find, and so parties will have to turn to non-legal alternatives to order their lives.

Because the few lawyers who passed the bar were guaranteed high incomes, there was tremendous pressure to pass the exam. People spent many years studying for the exam, a large waste of human capital, and multiple sittings are required. The overall rate of passage from 1949-1980 was only 1.7% (Yoon 2004). The average applicant passes after seven attempts, and so is in his or her late 20s by the time of entry into the profession.

But of particular interest here are the proposals to adopt American-style legal education in Korea — graduate law schools that prepare students for a nationally administered bar exams. These

proposals, not surprisingly, were advanced by academics, and opposed by those judges who controlled the JRTI. Initial efforts to pass these reforms met stiff opposition in the judiciary and Ministry of Justice and failed, and a subsequent proposal languished at the Ministry of Education. However, in the early 21st century, reformers were able to leverage the similar legal education reforms in Japan to adopt a new system. In June 2003 the Ministry of Education announced a general plan to adopt graduate law schools, and this was furthered by the report of the Presidential Commission on Judicial Reform in October 2004. This became a reality with the Law School Act, adopted by the National Assembly in June 2007. The system is similar to, but distinct from the Japanese system.

From April 2009, 25 new graduate law schools opened in Korea (out of 41 that applied). A substantial number (11) were set up at universities outside Seoul and its environs, reflecting a political push by the then-ruling Uri Party to move development outside the capital city. Regional distribution was important politically, given the dominance of Seoul in general, and President Roh himself wanted a balance of no more than 60% of the schools in Seoul. Because of the political need for regional balance, not all excellent universities in Seoul were able to obtain licenses for the new school. The geographic distribution of schools will likely affect downstream politics. Some regional schools have significant support in the National Assembly, and so will not be easily eliminated in downstream consolidation; if such is needed (there are currently major pressures to consolidate the number of schools in Japan.)

The Ministry of Education fought for jurisdictional control in the legislative process, and retains primary power of accreditation of the new schools through its Legal Education Committee. Though its membership consisted of 11 members, of which only four came from the traditional three corners of the legal profession. However, a 2/3 vote rule gave them a veto. The schools will be evaluated four years after opening, and every five years thereafter.

Each university that opened a new school had to close its undergraduate law faculty; in turn, some schools did not set up a graduate school and so are able to retain the undergraduate faculty. The basic model adopts some institutional structures from the United States, where law is only a subject of graduate study and not undergraduate study for the most part. Each student would have to take the full three year course, with no two year option available, in contrast with the Japanese system. The law requires a small student-faculty ratio, with 90 minimum credit hours required for graduation. There are legal research and writing requirements as well as skills training and moot court requirements.

Law schools are only allowed to admit an approved number of students, with the national total being 2000 students. The largest number (150) will be at Seoul National University, traditionally the pinnacle of the Korean educational system. Six other schools will have 120 students per class, and three others 100 each. All the others will be 80 students or less, with the smallest schools having 40 students per class.[200] This limited overall pool of students will, it is hoped, allow the bar passage rate to climb significantly, as the bar exam will be limited to the graduates of the new schools. This is a significant transformation to the system of legal education in South Korea.

The new schools required collateral institutions as well. Unlike Japanese law schools, which retain the tradition of individual entrance exams, Korea adopted a national Law School Entrance Examination Test (LEET), administered for the first time in Fall 2008. Reflecting the importance

[200] Korea, SungKyunkwan and Yonsei Universities in Seoul, and Chonnam, Kyoungpook and Pusan Universities outside Seoul will each have 120 students. Ehwa, Hanyang and Chungnam Universities will have 100 each.

of exam integrity, the exam questions are written by a committee that is sequestered for several days before the exam each August.

Still, observers expect continued reforms to be needed. While the students themselves are a diverse lot, the faculty are primarily the traditional ones who taught in the undergraduate programs. Faculty have heavy burdens in the interim period, while the last undergraduate students finish their courses: faculty must teach at both levels. The new law requires 20% of faculty to have had a career in law firm, public prosecutor's office or in the courts, so there has been some effort to hire practitioners. But it remains to be seen whether the new system will address the goals of producing law graduates who are suitable for the needs of the Korean market.

There are likely to be economic challenges as well. Retaining the undergraduate faculty, which was sizable, for the reduced number of law school students, will pose significant financial challenges to universities. This is true notwithstanding the much higher tuition levels. Some universities recognized this and decided not to apply, and have now risen in the hierarchy of undergraduate law programs, with the elite schools now out of the picture. This may prove to be the better strategy in the mid-term. Another economic concern arises from the high tuition cost, which has been criticized as putting legal education outside the reach of poor people.[201]

Another development that has been driven by the market has been the effort of some people to bypass the highly restrictive bar. Some South Koreans take an LLM degree in the United States, and, if they can pass the bar exam in one American jurisdiction, are able to return to Seoul to work as "legal consultants" in the law firms. Virtually every major law firm now has a stable of such foreign trained consultants.

6.5 Disciplining Lawyers

Lawyers are subject to the rules in the Lawyers Act, as well as ethics rules promulgated by the Bar Association. Until 1993, discipline was handled by the Ministry of Justice. In that year, the Lawyers Act was amended to empower the legal profession to become more self-regulating. The Association has established a Disciplinary Committee to take disciplinary action against any member who violates the Lawyers' Act, the by-law of the Korean Bar Association and/or the local bar associations, or who conducts themselves in a manner detrimental to lawyer's dignity. The rulings of these disciplinary cases have been published since 1998.

6.6 Dispute Resolution

[See Sec. 4.4 above]Conclusion

The Korean legal profession has emerged from being a kind of afterthought to a major source of innovation. The traditional system became the focus of other critiques as well. The low pass rate was one focus. Prospective lawyers would waste years of study preparing for the bar exam, taking it many times. Many repeat takers, of course, would never pass. The system thus wasted a good deal of human capital.

One problem with the Korean legal profession, mirroring broader issues in Korean society, is excessive concentration in the capital city of Seoul. As Korea has developed, the capital and its environs have become ever more desirable to live in, but the counter effect is that many rural areas are poorly served by law and other services. A 2007 report indicated that over half of Korean

[201] Chan-Gui Choi, 'Law School, A Party for the Privileged Class,' *Legal Journal* 378 (2007).

counties and cities had no lawyer.[202] As mentioned above, there are more lawyers in Seoul than the rest of the country combined, and no head of the Korean Bar Association has ever come from outside Seoul. The general lack of lawyers, especially in the rural areas, is has led many Koreans to represent themselves *pro se* (without a lawyer). This effectively means there is no right to counsel for many Koreans, though the legal aid system described in Sec. 4.20 supra does provide some support for many.

The practice of retirement from poor-paying but high-status judicial positions to the lucrative private bar has also led to controversy Seniority norms and personal connections mean that former judges who argue cases before the same court they used to serve in will generally be deferred to by their former colleagues on the court.[203] These ex-judges and ex-prosecutors are then sought out by clients, inducing more judges to leave. There have been pressures to reduce the practice, especially in the wake of scandals involving referrals by court staff to ex-judges and prosecutors now in the private bar. It has been argued that the code of judicial ethics should be modified to restrict such retirements or require recusals, but nothing has been achieved in this regard. Roh Moo hyun, however, has made merit and not seniority the basis of appointments in both the judiciary and prosecutors' offices, and this can be seen in one sense as an attack on Confucian norms.

One of the most dramatic developments is the increasing role of women in the legal profession in Korea. The percentage of female passers of the bar exam has risen dramatically in recent years, and now approaches 25 percent. Women are entering the judiciary, and the appointment of Minister of Justice Kang Kum-Sil is another benchmark. This is bound to have a major impact on the practice of law in a traditionally patriarchal society. Again, Korea is only one among many societies experiencing such a transformation.

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202 Solidarity Council of Legal Scholarship, Labor Group, Civil group and Human Right Group, Pamphlet for Public Debate for Law school System That Annual 3000 Lawyer, (2007) pp. 28.

203 This practice is known as *junkwanyewu* in Korean.

7. Justice sector reform

Reform has been a buzzword in Korean politics since 1987, and the legal system has been affected. An initial burst of institutional changes, such as an increase in the numbers of lawyers, has also been accompanied by major rounds of negotiated reform packages adopted by high profile commissions. The courts have also been a direct source of change, as constitutional decisions have affected the shape of the legal system itself.

7.1 Initiation

The legal system became a target of reformers in the 1990s. Many of the proposals reflected long-standing criticisms from academics that the system was too remote from the population. In this regard, the importance of academic commentators should not be underestimated, as many of the reforms that eventually emerged had been proposed for many decades.

In addition, a phenomenon of activist lawyers emerged in the 1980s and 1990s, centred around a group of lawyers called Minbyeon. Minbyeon lawyers sought to use the law to advance social change, and took up causes related to democracy and economic reform. The courts became a vehicle for the expansion of participation in society. The lawyers directly involved in activist causes also sought to transform the legal system itself, and so were active players.

The ideas of academics and activist lawyers, whoever, would not have come to fruition unless they fit the broader political context. One factor driving legal reform was broader attempts to reform the Korean state, to move beyond the legacy of government control that had operated during the high growth period. Under the Kim Young Sam administration, major programs of administrative reform were introduced as part of a globalization initiative. Kim set up a Globalization Committee to make recommendations as to how to transform the Korean state. The state transformation projects were continued by Kim Dae Jung.

One part of the emphasis was on reduction of corruption and diversification of the economy away from the chaebol industrial conglomerates. Administrative reform involved reorganisation and consolidation of the bureaucracy and administrative law reforms that expanded citizen recourse and made government decision-making more transparent. A massive review of regulation was undertaken using cost-benefit analysis, with more than 40% of government regulations removed (Kim 2000: 149).

It was in this context that the major proposals for legal institutional reform got under way. Without the political leadership of various reformist presidents, it is difficult to image how reform could have been achieved. But the initial impetus came from academics, from civil society activists, and others.

Beyond the macro level reforms that received a good deal of public attention, there were many smaller reforms that had an important impact. Special divisions of the court system were established in Seoul to handle international disputes and special disputes such as patent and securities law.

1994 amendments to the Administrative Litigation Law established a designated administrative court of first instance and made it easier to sue by abolishing the requirement that administrative plaintiff exhaust administrative remedies before bringing suit. New appeals mechanisms were set up inside the government and an Administrative Procedure Act ("APA") was passed to facilitate public challenges to the state. These reforms established procedural requirements for government bodies, requiring pre-publication notice of proposed rules and statutes, and setting a presumption against the use of administrative guidance. Another crucial reform that interacts with and contributes to increased administrative litigation is the 1994 Law on Disclosure of Information.

This law allows citizens to access government information for the first time in Korean history, and gives citizens more information on which to base their complaints against abuse of administrative authority.

These changes in state-society relations led to a new judicialization of politics. Civil society NGOs became increasingly important actors, using the law to challenge various traditional structures. They became involved in administrative litigation as well as monitoring corporate behaviour.

The 1997 crisis placed new pressures on the Korean legal system. Bankruptcies skyrocketed, and demand for court-supervised corporate reorganisation placed extra burdens on the Korean judicial system. Multilateral financial institutions apparently pressured Korea to adopt a special bankruptcy court, but this recommendation was not adopted.

The administration of Kim Dae Jung saw new impetus for legal institutional reform. It was only with the presidency of Roh Moo Hyun (2003-2008) that the broadest reforms were finally realized.

In short, there were several tracks of reform: internal reforms in the court and legal system that were being adopted continuously throughout the 1990s, specific reforms advocated by the international financial institutions, and major rounds of system-wide reform, proposed under a series presidential commissions.

7.2 Responsibility

The Presidential Commission on Globalization under Kim Young Sam produced a wide ranging series of recommendations, and focused in part on the need for "globalization of legal services and legal education." New ideas such as the introduction of US-style graduate legal education and a jury system were discussed extensively. The Commission's report included a proposal to increase the quota of bar passers from 300, by steps up to 1000 in the year 2000. The media followed with intensive coverage of shortcomings of the current system. The proposal, however, generated significant backlash. While the bar opposition was predictable, the opposition of the Supreme Court was fatal to many aspects of the reform. The proposal to expand the bar was indeed adopted, but other reforms were put aside for the moment.

The ideas to more radically transform the justice sector remained in place, however. As time went on, the legal reform pressure continued. Under President Kim Dae Jung, the Committee for Propelling Judicial Reform was established in May 1999 with representation of the various interest groups and agencies, such as judges, the ministry of justice, legal academics and the bar. It produced a report recommending some significant changes, thought the Supreme Court continued to be a barrier.

With the election of Roh Moo Hyun in 2003, reform received a new impetus. Roh had a populist streak, and sought to undermine cozy business-government relationships. He also sought to push legal reform. He was supported in this effort by civil society, which emphasized the expansion of the legal profession to serve consumer interests as well as civil society.

Crucially, the Supreme Court became supportive, which had not been the case in the mid-1990s. This was partially due to a change in leadership of the Court; the Chief Justice in the 1990s had been opposed, but the Chief in place in 2003 had a different view, seeing the possibility for enhancing judicial legitimacy through reform. But it also reflected the fact that Japan had already moved ahead with its reforms. Korean reformers were able to use this fact to mobilize support for change: Japan has special weight in that both American and German educated lawyers have some sense of familial relationship with the Japanese legal system. In addition, the strong pressure from

the Blue House was crucial. A Judicial Reform Committee was constituted under the Supreme Court in October 2003.

7.3 Design

A distinctive feature of legal reform in Northeast Asia is the use of deliberative committees to produce recommendations for reform. These committees have representation from the three pillars of the legal profession (lawyers, prosecutors and judges) as well as citizens, media and business. The most ambitious reforms were proposed by the Supreme Court's Judicial Reform Committee. The design reflected long-standing calls for reform, informed by the experience of several other countries, and reflecting much debate and discussions. After one year of vigorous discussion and research, the JRC submitted its final recommendations to President Roh Moo-hyun at the end of 2004. It made five recommendations: (1) it recommended a re-organisation of the court system by creating "appellate divisions of the last resort for certain cases in High Courts to alleviate the workloads of the Supreme Courts;" (2) the appointment of some judges from the ranks of experienced attorneys and prosecutors, to get more experience into the courts ; (3) the establishment of three-year graduate level law schools; (4) the adoption of a system of citizen participation in the trial process as lay judges; and (5) the reform of the judicial process by expediting certain minor criminal cases and payment of fines as well as instituting methods that would better protect the rights of accused and victims during criminal proceedings.

7.4 Review

President Roh then established a Presidential Committee on Judicial Reform to review and implement the 2004 JRC recommendations. The process itself was widely broadcast, with open meetings and vigorous discussion of various proposals. In May 2005, the Presidential Committee made public its decisions. Of the five recommendations made by the JRC in December 2004, the Presidential Committee formally recommended three to the National Assembly, Korea's parliament, for immediate approval, including a graduate level law school system and civil participation in criminal trials were included. The Presidential Committee also prepared draft legislation for specific reforms. The content of the legislation basically reflected the proposals designed by the Judicial Reform Committee.

There was, however, significant opposition. The prosecutors strongly opposed proposed amendments to the Criminal Procedure Act that would have removed automatic acceptance of prosecutorial investigation records as evidence. Under the reform proposal those records would be evaluated like any other piece of evidence. Prosecutors' succeeded in introducing a provision at the Presidential commission stage, subsequently adopted by the National Assembly, to ensure that investigation evidence would be automatically admitted if verified by video or photo showing the scene. In addition, some of the reforms were seen as being insufficiently aggressive. Law professors and civic groups reacted strongly against the retention of a relatively low quota for entrants to the profession. Still, the remarkable introduction of such major reforms makes the Roh administration a key juncture in legal reform. The National Assembly adopted the reforms after some debate.

7.5 Implementation

Most major reforms have been adopted by the National Assembly by statute. Each reform then goes through its own process of implementation. In the case of legal education, for example, a Legal Education Committee was established under the Ministry of Education to supervise the creation of the new law school system. Like other such committees, this one involved not only

those directly affected by implementation (law professors, members of the legal profession, but a senior bureaucrat and members of civil society). In the case of internal reform of the courts, implementation is up to the Courts and the Ministry of Court Administration.

7.6 Evaluation

Again, each reform is evaluated in a slightly different process. The new law schools are to be evaluated by a committee under the Korean Bar Association. This Committee's reports will inform the ministry of Education in its supervisory power over schools. The Supreme Court has an extensive program of evaluating reforms in the judiciary. In the case of the new system of lay participation, the statute calls for a review of the reform five years after implementation, so there will likely be new proposals for reform at the end of the trial period.

It is important to note that civil society in Korea plays an important role in evaluating reform. Non- governmental organisations have court-watch programs, and are deeply engaged in the legal process. Hence they are in a good position to provide information to policymakers on the actual performance of the judicial reforms. The bar associations, as well, have taken on a role of evaluating specific reforms. The efforts of these groups then feed back into the political process, either through legislative politics, or more frequently through intervention with the powerful executive branch.

7.7 Remedies

Reform in South Korea has been an iterative and recursive process. Proposals circulate for many years before adoption; once adopted there is a continuous process of evaluation, and in some cases corrective reform. The political system plays a role here. The election of conservative president Lee Myung-bak in 2008 has led to a slowing of the process of judicial reform, and has caused some concern among activist lawyers. Yet the institutional reforms have come so far that many are quite irreversible. No doubt there will be a good deal of tinkering with some of the reforms as the process goes forward for many years to come.

7.8 Oversight

Justice sector reform in Korea has been a complicated process. Because of the scale of the transformations, and the links between legal reform and other more obviously political reforms, there has been some attention and oversight of the process from the broader political system. As the law has become more prominent and the legal consciousness of the citizenry has developed, it is natural that there are greater calls for a more accountable and responsive political system.

The Parliament

Historically, politics in Korea has been centred around the executive branch, with parliament playing a role as an arena for politics rather than an independent overseer of policy. However, this dynamic changes somewhat during periods of divided government, such as those that marked the tenure of Presidents Kim Dae Jung and Roh Moo-hyun. At times, the National Assembly has been a locus of blocking judicial reforms. For example in the 1990s, the leader of the conservative party Lee Hoi- Chang was a former judge and lawyer who himself represented many of the entrenched interests in blocking reform. In more recent years, the National Assembly has become a site of passing reform proposals. In general, the Korean parliament is not major source of policy initiatives, which tend to come from the executive or from civil society. Parliament has thus been largely reactive in the legal reform process, responding to pressures and initiatives from outside.

Parliamentary committees

A judicial affairs committee in the National Assembly provides some oversight of justice sector reform and operations. It has not, however, been particularly active in the major reform episodes of the past two decades.

The Ombudsman

From 1997-2008, Korea had an independent office of the ombudsman, that has now become part of the broader Counter-Corruption and Civil Rights Commission. The office has focused on providing individual level remedies, and not played a systematic role in legal reform. However, individual ombudsmen have played a role through non-governmental organisations. And the Ombudsman's office can itself be considered part of the machinery of responsive government, designed to enhance the protection of the citizenry.

Local and Provincial Government

Local and provincial government are relatively underdeveloped in Korea, and have played no systematic oversight in reforms. However, the general concern about concentration of power and legal activity in Seoul has led the localities to push for a more decentralized justice system. These politics are mostly played out through the National Assembly. One example has been the push for new law schools to be located all around the country, an example of successful political influence into the legal reform process. This particular development is welcome, given the over-concentration of Korean society in Seoul.

Central Government

The central actors in Korea's judicial reforms have been elements of the central government. Besides the Courts, the Ministry of Justice has played a crucial role in organizing earlier discussion on reform proposals and trying to shepherd them through the process. In the most substantial instance of reform, that achieved under President Roh, it was the Supreme Court and the Presidency that played the leading role, with the Ministry sidelined somewhat. Nevertheless, the Ministry will play an ongoing role in monitoring reforms. In addition, the Ministry of Education has assumed a strong role in the legal education reform. This represented a compromise after bureaucratic struggles to play a role in legal education.

Conclusion

The process of leading justice sector reform has reflected the profound influence of non-governmental organisations, including the bar and law professors, who have struggled to shape reform. Academics have also played a leading role. But social pressure alone has not been sufficient. Instead, two key institutions were required for major reforms to issue: the Supreme Court and the President. Even with presidential leadership, such as exhibited by Kim Dae Jung in the 1990s, reforms could not progress without the cooperation of the Supreme Court, which then played a leading role in constituting the Judicial Reform Committee. Only when *both* the Supreme Court and presidency were aligned on the need for reform could reform actually progress in South Korea.

One feature of the reform process worth noting is the public nature of the reform debates. The fact that the Presidential Committee held an open process not only meant that legal reform could be monitored by the relevant groups and the interested public, but also that it became an issue of broader social importance. The media covered the discussions in detail and so the process helped to build political support for the reforms. In addition, the fact that most of the key players were involved in the committee structure meant that every major institution could contribute. Overall,

then, Korean legal reform has reflected a responsive process in which elite institutions and civil society had a voice.

It is worth reflecting how this remarkably successful reform project has occurred, and whether the conditions present in Korea might generalize elsewhere. As the impetus for many of the reforms came from civil society, the presence of the United States as a kind of reference society was important. Many of the activists had spent time in the United States, and had in their minds a vision of a role for law in social change (Ginsburg 2007). The particular political configuration of rapid democratization, accompanied by generational change among judges and lawyers, no doubt played a role. The politics of national executives has been mentioned as a crucial factor, sometimes constraining and other times facilitating rapid legal reform. And ultimately, a cultural factor may be relevant. Korea is a hyper-dynamic society in which the latest global developments spread quickly. As legal reform became identified with modernization of the political economy, it became perhaps inevitable that it would become popular.

8. Conclusions

8.1 Strengths and Weaknesses

Korea provides a fascinating environment to observe the dynamics of legal reform in a democratizing society. In comparative terms, the process of judicial reform in Korea has made remarkable achievements in a short period of time. Since 1987, the Korean legal system has undergone systemic changes that have increased its visibility, role, and political profile. The old equilibrium of little litigation, extensive bureaucratic discretion, and personalism served the interests of the state bureaucracy, business, and military government. Authoritarian rule was insulated from public scrutiny and challenge, business was able to secure protected markets, and disputes were suppressed. Political change, beginning in 1987, contributed to a more legalistic environment and appears to be the seeds of a shift toward the rule of law. These reforms in the legal system have encouraged more litigation, creating new interests that support continued openness. As government is less able to cut deals below the table, new groups are able to use litigation to advance social agendas.

The new environment has produced a politics of legal reform. Legal institutions compete among themselves for status and prestige within an environment in which public demands are higher than ever. The political competition that has transformed Korea since 1987 has also led to competition among legal institutions, with various institutions competing to define the public debate. At the same time, legal institutions have become the locus for broader political struggles. The political process of producing reform has been quite transparent, and interest groups have had some say in the process.

Democratization has improved the status of judges and hurt that of prosecutors. It has led to expansion of the legal profession, which is likely to impact the society in as-yet-unanticipated ways. As actors compete for status and resources in this changed milieu, international institutions and norms become ammunition in the political battles both within and among legal institutions.

One of the key strengths of Korean legal and judicial reform has also been a weakness, namely that it has depended in large part on political pressure that is quite contingent. When reformist presidents are in office, reforms move ahead; when conservatives are in power, reforms may stall.8.2 Challenges and Controversies

This is only natural in a democratic society. Yet it has led at times to certain incoherencies in the reform process. Timing, it is said, is everything in politics, and this seems to be a lesson of the Korean experience of legal reform.

The increasing prominence of law in Korean society has led inevitably to more political conflicts being carried out in the courts. This has led to conflict among legal institutions. The prosecutors, for example, are believed by many to have political motives in some of their prosecutions, but the courts seem willing to limit their reach. For example, in recent months an opposition member of the National Assembly was accused of assault and destruction of public assets in connection with actions taken in the parliament. (The Korean National Assembly is not infrequently the scene of physical violence.) He was found not guilty by the court. In another case, families of victims who died in a conflict with police, for which no prosecution was made, challenged the non-prosecution in court and were allowed access to the investigation materials. The court also rejected the prosecution of a television program charged with defamation of public officials during the so-called US beef controversy. There are many other examples. The public nature of these disputes

both highlights interest in the law; at the same time it might threatens its legitimacy if law becomes perceived as politics by other means.

8.3 Current Reforms

One issue that remains controversial is J*eonkwan Yewu*, the practice of retirement of judges and prosecutors to the practicing bar, as described above in Section 4.18. This has its origins in the limited size of the bar in the pre-reform period. Even if there is no actual distortion in the justice system that results from ex-judges appearing before their own former colleagues, there is to some extent an appearance of impropriety and there are likely to be moves to reform this practice.

8.4 Issues for Future Reform

One of the issues likely to be a continued topic of debate in Korea is the size of the bar. Reformers were unsuccessful at removing the quota on bar passage and letting the number of lawyers be determined by the market. But the presence of legal consultants who have been certified in another jurisdiction has allowed some market responsiveness for high-end corporate law work. The lower tiers of the legal profession that would provide services to individual Koreans who need criminal and civil representation remain quite limited in numbers. So there are pressures for expanding the bar, but these run right up against the Bar Association, which is fighting to reduce the number of bar passers. This issue is likely to remain alive for some time. Despite claims to the contrary by lawyers, the size of the legal profession remains low in comparative terms, but switching to a market model of entering the profession will be a major political challenge.

For further reading on the reform process, see Cho (2010), Yoon (2010), Ginsburg (2004) as well as other sources cited in the references.

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ONLINE RESOURCES OF KOREAN LAW

Ministry of Government Legislation http://moleg.go.kr/english/ Korean Law in English http://moleg.go.kr/english/korLawEng

The National Assembly of the Republic of Korea http://korea.assembly.go.kr/index.jsp Current Issues Resources: Constitution, National Assembly Act, Foreigner-related Laws, Recently Enacted

Laws Korea Legislation Research Institute http://www.klri.re.kr/ Law Search (Statutes Available)

Supreme Court of Korea http://eng.scourt.go.kr/eboard/NewsListActionwork?gubun=44&pageSize=15

Resources: Constitution, Acts and Regulations, Statistics, and References Recent Decisions

Supreme Court Library of Korea http://library.scourt.go.kr/jsp/html/sitemap.html Digital Library Legal Information Database Supreme Court Decisions

Patent Court of Korea http://patent.scourt.go.kr/patent_e/judicial/judicial_01/index.html

Supreme Court Decisions Case Statistics

Supreme Prosecution Service http://www.spo.go.kr/user.tdf?a=user.renewal.main.MainApp&lang=eng

Constitutional Court of Korea http://english.ccourt.go.kr/

Ministry of Justice, Republic of Korea http://www.moj.go.kr/HP/ENG/index.do Laws and Regulation Section under "News and Data" (PDF downloads were not properly functioning as of July 8, 2010)

University Research Guides with Links

Hauser Global Law School Program http://www.nyulawglobal.org/globalex/South_Korea1.htm Korean Legal Research at University of Washington http://lib.law.washington.edu/eald/klr/kres.html

Southern Illinois University Carbondale http://web.archive.org/web/20060904144937/http:/www.law.siu.edu/lawlib/koreanlaw/

RUSSIAN FEDERATION

FINAL REPORT

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1. Political, Cultural, Historical and Socio-economic Context

The Russian Federation, also officially known as Russia, is a country of some 145 million people whose spatial expanse extends from the frontiers with Poland and other Central European countries in the west to the Pacific Ocean in the east, from the Arctic polar regions in the north to the frontiers with Ukraine, Black Sea, Caucasus, Central Asia, Mongolia, and China in the south. It is geographically among the largest countries on this planet, rich in natural resources, having an advanced industrial, agricultural, and technological base, highly developed air and rail transport system, and is one of the two leading space powers.

There are more than one hundred ethnic groups on Russian territory, whose presence is extensively reflected in the administrative-territorial structure of the country. The largest group are the so-called Great Russians, who together with Belarussians and Ukrainians collectively comprise the dominant Slavic composition of the country. The Russian Orthodox Church is the largest religious denomination, but there are substantial numbers of other Christian groupings. Jewish, Islamic, and Buddhist populations are in some areas in the majority.

Politically and juridically, Russia is the legal continuer of Kievan Rus, Muscovy, the Russian Empire, and the former Union of Soviet Socialist Republics (USSR). However, large portions of the former Soviet Union have become Independent States in their own right (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kirgizia, Moldova, Tadjikistan, Turkmenistan, Ukraine, Uzbekistan), and the territorial boundaries of Russia have been abbreviated accordingly.

Russia is among the original founders of the Commonwealth of Independent States (CIS) established at Almaty, Kazakhstan, on 21-22 December 1991 with headquarters in Minsk, Belarus. Hundreds of international agreements and other documents have been adopted within the CIS to promote closer economic links and the harmonization of law and legal systems. To some extent the CIS has assumed on a more modest and limited basis the role performed from 1949 to 1991 by the Council of Mutual Economic Assistance (COMECON), headquartered in Moscow; Viet Nam had links previously with COMECON. The CIS presently has eleven members (Georgia withdrew in 2009). The CIS, especially within the Inter-Parliamentary Assembly, has devoted considerable efforts to the preparation of model codes and other draft legislative materials that have been influential in the law reform programmes of Russia and its neighbours.

1.1 Major Historical Events

Two major historical events dominate in Russian experience during the twentieth century that have an impact on law reform. The first was the 1917 October Socialist Revolution, and the second was the decision of the political leadership in Russia to dissolve the former Soviet Union in December 1991 and create in its stead a democratic, social, rule-of-law State.

The 1917 Russian Revolution led to the establishment eventually of a socialist legal system that served as a model for all of Central Europe, Mongolia, China, North Korea, Cuba, and Viet Nam. The dissolution of the USSR inaugurated a transitional period, still underway, to modify the socialist legal model and move towards a market-oriented legal system in which democracy and the rule-of-law would be paramount and social values would continue to be supported and expanded.

These two events are crucial to understanding how and why the Russian Federation has pursued and is continuing to pursue reforms of its legal system.

1.2 Economic System

Economists differ in their characterizations of the Russian economic system. The present writer regards it as a transitional economy with a transitional legal system. During the Soviet era, Russia was the leading model of a socialist planned economy and concomitant legal infrastructure, which were actively exported and transplanted. The declared intention is to move away from the planned economy, accomplished to a large extent by the abolition of directive national economic planning. But State ownership of the instruments and means of production continues to be substantial, especially in strategic sectors of the economy, and the legal infrastructure essential to support a significant State presence in the economy continues to be preserved.

The Russian Federation in November 2009 published a strategy for civil law reform which is expected to result in amendments to the Civil Code of the Russian Federation not later than 2011;[204] if the changes proposed are actually adopted, the legal infrastructure in support of a market-economy will be strengthened. The civil law is viewed in Russia as the central arena for market-oriented reforms; all else, including constitutional changes, turn on the efficacy of legal relations in this domain of private law.

1.3 Political System

Post-Soviet Russia is committed by the 1993 Constitution to creating and operating a federated political system that is democratic with a republic form of government, based on pluralism of political parties and social organizations and movements, is committed to protecting the social rights of citizens, and operates on the principle of the rule of law. The monopoly of political power enjoyed by the Communist Party of the Soviet Union has been formally abolished, although the communist movement still exists and has representation in the Federal Assembly of the Russian Federation (parliament). The legal status of political parties in Russia is regulated by the 1993 Russian Constitution[205] and the 2001 Federal Law on Political Parties (RPL, pp. 75-110), as amended. Initially after the dissolution of the former Soviet Union rather large numbers of political parties and movements were formed and registered. The trend has been to discourage the fractionalization of political parties by introducing minimum requirements for numbers of members and geographical distribution. Many political parties have merged into larger formations during the past five years.

As of 2010, four political parties have representation in the State Duma, although many others exist and took part in the 2007 parliamentary elections; most of these parties, however, did not collect the requisite minimum number of votes to be represented in the State Duma and lost their deposit in the elections. The four major political parties are: United Russia; Communist Party of the Russian Federation; Liberal Democratic Party of Russia; and A Just Russia.

Leadership and Authority

The President of the Russian Federation is the Head of State under the 1993 Russian Constitution (Article 80) and is popularly elected by secret ballot by the population who are of voting age and have registered to vote.[206] At present the Presidency is held by Dmitrii Medvedev. The competence

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204 See Концепция развития гражданского законодательства Российской Федерации [Conception of the Development of Civil Legislation of the Russian Federation] (2009).

205 Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 4-40. Hereinafter parenthetical references will be made to this volume in the text as RPL followed by pagination.

206 Russian electoral legislation is staggering in complexity and volume just for national elections and the more so when the 83 subjects of the Russian Federation are taken into account.

of the President is determined by the 1993 Constitution. Under amendments to the Constitution introduced on 30 December 2008, the President will at the next election serve for a term of six years.

The President may be elected for not more than two terms in succession; if he or she wishes a third term, there must be an interval between the second and third term of at least one term during which another person holds this office.

The President appoints the Chairman of the Government, subject to approval by the State Duma; may dissolve the Government; submits candidacies to the State Duma for the posts of Chairman of the Russian Central Bank, deputy chairmen of the Government and federal ministers; and in the domain of the justice system, submits to the Soviet of the Federation (the upper chamber of the Federal Assembly) candidacies for appointment as judges of the Constitutional Court, Supreme Arbitrazh Court, and Supreme Court; and judges of all lower federal courts; as well as a candidacy for the post of Procurator General of the Russian Federation (see Articles 83-86, Constitution).

The President forms and heads the Security Council of Russia, confirms the "Military Doctrine" of the Russian Federation, appoints and relieves from office ambassadors and envoys and the high command of the Armed Forces of the Russian Federation; appoints plenipotentiary representatives of the President to subjects of the Russian Federation and other institutions.

The Government of the Russian Federation is structured and performs tasks set out in the 1993 Constitution, the Federal Constitutional Law on the Government of the Russian Federation, adopted 17 December 1997, as amended (RPL, pp. 188-205); and the Reglament of the Government of the Russian Federation of 1 June 2004, as amended (RPL, pp. 206-229). Each subdivision of the Government within the apparatus of the Chairman operates on the basis of an individual Statute, and each ministry, federal service, or other component of the Government also has its own statute setting out its tasks, functions, and competence (for examples, see RPL, pp. 230-247).

The Government of the Russian Federation is headed by the Chairman of the Government (sometimes called the Prime Minister). The Chairman of the Government is appointed by the President of the Russian Federation with the consent of the State Duma, the lower chamber of the Federal Assembly of the Russian Federation. The present Chairman of the Government is the immediate past President of the Russian Federation, V. V. Putin.

The Government drafts the State budget, submits it to the State Duma (where it will undergo four readings), and adopts a report concerning its execution. If the State Duma rejects a draft budget submitted by the Government, the budget is submitted to a conciliation commission.

Aims, Objectives and Visions for the Justice Sector

In the twenty-first century the vision for the justice sector has been articulated by the Government of the Russian Federation in a Federal Special-Purpose Programme "Development of the Judicial System of Russia 2002-2006", confirmed by Decree of the Government of the Russian Federation, 20 November 2001, No. 805 (hereinafter: 2001 Programme),[207] which was superseded by the present Conception of the Federal Special-Purpose Programme "Development of the Judicial System of Russia for 2007-2011", confirmed by Regulation of the Government of the Russian Federation on 4 August 2006, No. 1082-p. (hereinafter: 2006 Programme).[208] The 2006m Programme, drawing by reference upon messages of the President of the Russian Federation to the Federal Assembly, indicates that a major purpose is to build in Russia a "… developed civil society and stable democracy" enabling human rights and civil and political freedoms to be ensured in full". Accordingly, the tasks of

[207] СЗ РФ (2001), no. 49, item 4623. The integrated text containing amendments of 2004 is available only on the commercial database Consultant Plus.

[208] СЗ РФ (2006), no. 33, item 3652.

judicial reform should be to expand judicial protection of the rights and freedoms of citizens, improve court procedure, enhance access to justice, and bring Russian legislation into conformity with modern international standards – all part of improvement of the democratic process in Russia.

It also is noted that the qualified and impartial consideration of cases by courts is among the factors which make Russia attractive to foreign investors. A strong and effective judicial system encourages commercial life and ultimately improves the competitiveness of Russia in the world economy.

The Russian approach to targeted planning for the justice sector has enabled priorities to be established, financing provided, and specific measurable results to be achieved. During the five-year period from 2002 to 2006 inclusive the emphasis was placed upon improving legislation regulating the procedures and introducing measures for protecting the rights of the individual and access to justice. These objectives were accomplished by recruiting and educating sufficient numbers of individuals to fill virtually all vacancies in the courts of ordinary jurisdiction and the arbitrazh courts. The institution of the justice of the peace was comprehensively introduced, salaries for judges were significantly increased, and courts were supplied with administrative and auxiliary personnel to enable them to operate efficiently. Much attention was devoted in 2002 to 2006 to bringing the physical premises of courts up to minimum standards. During the first four years of that period 7242,9 million rubles were spent on the construction or conversion of court premises and 106 buildings for courts of general jurisdiction were introduced into operation. 153 buildings were acquired for courts of general jurisdiction, and in 2006 12 buildings were occupied and a further 28 buildings were acquired as court premises. Lack of financing in 2006 precluded further expansion which could have been achieved. Within the arbitrazh court system, six new buildings were occupied and the conversion of an additional nine was completed.

During the 2006 Programme great emphasis is being placed upon the openness of the administration of justice to those participating in a judicial proceeding and to the general public. It also was noted in the Programme for Socio-Economic Development of the Russian Federation for the Medium-Term (2006-2008), confirmed by Regulation of the Government of the Russian Federation on 19 January 2006, No. 38-p, that a weak institutional infrastructure, including the inefficient functioning of the judicial system, is a serious obstacle to economic growth in Russia. This emphasis includes attention to the effectiveness of the system for the execution of judicial acts by the judicial bailiff service. According to some figures cited in the 2006 Programme, not more than 52% of judicial acts are successfully executed, for various reasons – a figure which "reduces to nil" all the work of the judicial system to consider and resolve disputes and undermines the authority of the judicial system.

The proper financing of the future vision of the Russian judicial system depends, in the view of most Russian jurists, upon the use of what is called the "targeted-programme" method of developing the system. It would be unsatisfactory to simply rely upon episodic individual requests for State support to cope with growing caseloads and individual identified shortcomings in the justice system. The judicial system needs to pass on to a qualitatively new standard of activity. Accordingly, all future developments should be planned, coordinated, and financed, attracting where necessary additional finances for various sources in addition to those of the State. In Russia courts may be financed only from the federal budget (Article 124, Constitution). Although there are annual budgets, budget planning takes place on a five-year basis. Short and medium-term planning, it is felt, creates the conditions and prerequisites for the maximum effective management of State finances appropriated for the judicial system. The failure to use this approach would result in the lack of a systemic approach to justice and to a lack of coordination among courts of different levels and jurisdictions. An increase of budget financing without using the targeted-programme method makes it more difficult to assess the effectiveness of budget expenditures.

Institutions

General responsibility for the Justice Sector lies, as noted above, with the President of the Russian Federation and the Chairman of the Government of the Russian Federation, More specifically, the Justice Sector encompasses the entire judicial system of the Russian Federation, the Ministry of Justice, the principal law enforcement agencies (Ministry of Internal Affairs, Federal Security Service, Federal Service for Control Over Turnover of Narcotic Means and Psychotropic Substances, among others), the bailiffs service, the marshalls' service, the Judicial Department attached to the Supreme Court of the Russian Federation, the Judges' Community, the Procuracy, the Notariat, the Advokatura, the Registry for Acts of Civil Status (ZAGS), and the regulation of private security and detective agencies. In addition there is the jurisconsult, for whom no special institutions exist but who is a key component of the legal profession.

Accountability

The courts constitute a unified system for the administration of justice. The Procuracy is a more or less autonomous institution accountable to the President of the Russian Federation. The Ministry of Justice is accountable to the Government of the Russian Federation, as are the law enforcement agencies. ZAGS is supervised primarily by the Ministry of Justice. The Judicial Department attached to the Supreme Court is accountable to the agency to which it is attached, and the Judges' Community is self- governing. The Notariat and the Advokatura are subject to some supervision from the Ministry of Justice, but are not part of the ministerial system and are, for the most part, self-regulating. The Ministry of Internal Affairs has some supervisory powers of private security personnel; jurisconsults are subject to their employer and not regulated as an individual profession.

In the post-Soviet era there is no longer any accountability of the judicial system or law enforcement bodies, the Procuracy, Notariat, and any other justice sector bodies to political parties in Russia. Any elements of accountability are based upon institutional subordination, constitutional provisions, and routine administrative behaviour.

Constitutional Structures

With the exception of the Procuracy, the President of the Russian Federation stands above and outside the Justice Sector as such. Only the Procuracy is accountable to the President and deliberately isolated from all other levels of and agencies of State power and administration. With respect to inter-agency cooperation, the President of Russia is constitutionally empowered (Article 85) to "… use conciliation procedures in order to settle disagreements between agencies of State power of the Russian Federation and agencies of State power of subjects of the Russian Federation". If his conciliation efforts are unsuccessful, the matter may be referred to the courts. There is no public record of such conciliation undertakings, if any have in fact transpired.

The Chairman of the Government of Russia has ex officio powers and responsibility to promote inter-agency cooperation and resolve inter-agency disputes over ministries and ministers which make up the Government.

Certain kinds of disputes within the components of the Russian judicial system may be resolved by such bodies as the Judges' Community, which in any event, by virtue of the fact that it includes all Russian judges irrespective of which branch of the judicial system they are associated, encourages dialogue and discussion of issues of this nature.

1.4 Other Actors

It is long-standing Russian practice, inherited from the Soviet era, to circulate draft laws and other normative legal acts among agencies, including the courts, for comment and reaction and to

convoke inter-agency conferences, meetings, and other occasions to discuss proposed changes in policies. The law faculties are routinely included in activities of this nature.

Non-governmental organizations and associations, the business community, religious bodies, and others routinely expressed their views with respect to the Justice Sector to members of the State Duma and at hearings conducted on matters of public concern or draft legislation in the State Duma or in the Soviet of the Federation. Russian advokats have from time to time run for political office as lawyers and registered, in the past, as a political party (e.g., Russian Guild of Advokats).

State-owned enterprises, which exist in significant number in Russia, have no specially designated role with respect to the Justice Sector. The business community, amongst others, makes its influence felt through professional lobbyists.

Conclusion

Russia has during the past two decades made more deliberate efforts to establish the foundations of an impartial and objective Judicial Sector than at any time in its prior history. Constitutional reforms reflect the institutional structures of this development, reinforced by individual legislative enactments devoted to particular institutions, including the judiciary. During the past decade the development of the Judicial Sector, especially the judicial system, has been the subject to conceptual medium- term planning with federal appropriations in support of the intended reforms. Although much remains to be done, by all the indicia of measurement Russia has made considerable progress in the directions of improvement that it intends to move.

Nonetheless, there remain elements the remote and recent Russian past which impede progress and shape the configurations and successes of law reform. With minor episodes to the contrary, Russia has been either an autocratic monarchical political system in which law and the administration of the legal system has mostly expressed the will of the ruler or a one-party authoritarian political order in which law has been subordinated to the will of the State and ruling Party. In neither political order has law been imagined to be "above" the State and the State subject to the rule of law. Russians have accordingly developed over the centuries a scepticism and cynicism with respect to the law, the courts, and the officials who administer them which is reflected in literature, humour, folklore, anecdote, and, above all, the media. Russians "demonise" law and the legal system in consequence, although in practice they are as litigious and as technically proficient in analysing legal issues as anyone else. Couple this propensity with the Russian penchant for exaggeration and overstatement, and you have a corpus of images quite divorced from reality.

Foreigners often take this body of reaction at face value and accept it as fact. Accordingly, the images of "telephone law" (this writer has never seen a proved case of such – if it existed it was contrary to Party policy and Soviet and post-Soviet legislation); of "Russian law being a contradiction in terms"; or of "Russian Law. Is there any?"; and so on. The Russian media (Soviet and post-Soviet) play on these stereotypes; they are each in their own way part of Russian legal culture.

While such stereotypes may be understandable against the political history of Russia, they impose a heavy price insofar as they distort perceptions of Russian legal realities and interfere with the rational consideration of desirable courses of action in law reform. The ideological authoritarianism of the twentieth century in Russia blocked the development of comparative legal studies. For decades the only scholarly references to foreign law were confined primarily to contrastive comparison intended to demonstrate the superiority of the Soviet legal system to bourgeois legal systems, rules, and practices. Paradoxically, this was true even when Soviet legal experience was having some impact on western legal developments.[209] In the post-Soviet period there continues to

[209] See J. B. Quigley, Jr., *Soviet Legal Innovation and the Law of the Western World* (2007).

be resistance not to the study of foreign law and legal experience, but to the establishment of chairs of comparative law free to pursue comparative research liberated from the constraints of theories of State and Law (to the extent they formally exist, comparative law centres in Russia are routinely attached to the Chair of the Theory of State and Law).

The legacy of ideological authoritarianism in Russia has extracted a further price by curtailing and skewing public discussions of legal policy and law reform to such an extent that even in the post-Soviet era empirical analyses of the efficacy of individual legal rules and institutions are uncommon, often unscientific, and politically motivated. Foreign non- governmental organizations (NGOs) in Russia engaged in law reform are treated with suspicion, even hostility. They are not perceived to be impartial or non-partisan, and their professed dedication to democratic values is regarded as a destabilizing form of foreign intervention in Russian affairs. As a rule, foreign NGOs seem to be more associated with opposition elements in Russia than governmental. As a result of these perceptions, the tax status of NGOs and grants made by them is less favourable than in the 1990s.

It is too soon in this author's view to develop a periodisation of Russia's experience as a transitional legal system. Russia was a self-proclaimed "socialist legal system", a category much discussed and debated even at the time as to what criteria should be taken into account when developing such a categorisation. Plainly the transition commenced while the Union of Soviet Socialist Republics (USSR) was still in existence; many associate the transition with the introduction of "perestroika" by M. S. Gorbachev and suggest 1986 as the appropriate date of commencement. In any event by 1988 the Soviet Union had commenced law reform processes and reached out to foreign legal advisors for assistance in preparing draft legislation intended to facilitate the transition to a market economy.

Russia as the legal continuer of the USSR accordingly has more experience than any other country in addressing the problems and opportunities such a transition entails. Most of the initial reforms at the level of the USSR and the Russian Federation originated within the country and not from foreign sources. The monopoly position of the Communist Party of the Soviet Union was removed from the USSR and RSFSR constitutions. Human rights provisions of the constitutions were adjusted to eliminate the requirement that such rights be exercised "in accordance with the purposes of communist construction" or analogous formulations. Judicial review, or something closely approximating it, was introduced of the constitutionality of normative legal acts. The institute of the Presidency was created at the USSR and Russian Federation levels. Constitutional adjustments were made to establish "checks and balances" between State institutions and officials in order to reinforce the "separation of powers". The role of parliament was transformed into an institution constantly in session and capable of enacting all of the principal legislation of the country. The judiciary was reorganised to transform the system of State Arbitrazh (a creature of the Planned Economy) into arbitrazh courts capable of serving a transitional market economy and to strengthen the authority and independence of the courts of ordinary jurisdiction. In due course the USSR Constitutional Supervision Committee was a model rejected, at the level of the Russian Federation, for a fully-fledged Constitutional Court. Justices of the peace eventually were established at the lowest level of the Russian judicial system within the system of courts of ordinary jurisdiction.

Sufficient time has elapsed for the successes and failures of the first and second generations of reform since 1991 to be evaluated in Russia. Without attempting to draw a temporal line sharply between the "first and second generations", it is instructive to distinguish when discussing law reform between the outcome of each generation and the approaches taken to law reform in each generation. Since the West did not imagine that the former Soviet Union would dissolve itself, no initial preparations of any kind existed with respect to law reform assistance. Even when the Soviet Union began to experiment with law reforms and involve some individual foreign legal specialists, foreign governments and international institutions did not foresee what was coming.

It should be noted that the provision of foreign legal assistance in and of itself has a lengthy tradition at the international level, certainly in the twentieth century from the League of Nations onwards. Missing in the Soviet situation was foreign legal assistance from non-Russian jurists who knew the Russian language and who knew Soviet law. These were very few in number; most foreign specialists in "Soviet law" were in fact political scientists, not lawyers, who shared the scepticism as to whether real law existed in the former Soviet Union. This "scepticism", widespread in almost all foreign governments and international institutions and based entirely upon their own preconceptions rather than first-hand knowledge, proved to be disastrous during the first generation of law reform in the 1990s.

If there had truly been no "Soviet or Russian law", that is, had there actually been a "legal vacuum" in Russia, perhaps the course of events might have been otherwise. But once the decisions were taken in the former USSR and post-Soviet Russia to introduce the infrastructure of a market legal system, the practical issues arose. First, the transition was itself without precedent; there was no map of law reform to follow. Second, the foreign community had absolutely no comprehension of what the legislation and legal culture in place actually was. Now many realised for the first time that they had uncritically swallowed expressions of Russian cynicism and scepticism rather than examined the reality of what legal infrastructure, legal culture, and legal consciousness was in place. Third, the normal corps of comparative lawyers who routinely were involved in law reform at the international level was linguistically disadvantaged and had no command of Russian legal terminology. Fourth, governments and international institutions did not have personnel who had sufficient background in law generally or in Soviet or Russian law to produce legal translations of draft legislation or commentaries on such drafts of the necessary minimum quality. Senior officials of international organizations were actually quoted in the media, for example, as saying "There is no law of contract in Russia", whereas in reality the Planned Economy had generated quite a sophisticated law of contract and a law of obligations generally. An early and imaginative law reform strategy commissioned by the European Union and elaborated by an experienced CIS/European team of legal experts was mostly ignored in practice.[210]

There commenced a competition in law reform initiatives. Foundations were active (Soros, among others), as were foreign governments through their foreign assistance programmes (Germany, Japan, United Kingdom, United States) and international institutions (World Bank, EBRD, and others). Whatever successes or failures such initiatives achieved, these were essentially uncoordinated undertakings with considerable overlap and even rivalry. All suffered from a lack of properly trained personnel, and their legacy is a certain bitter aftertaste in Russia.

With respect to legislation, the first and second generations of law reform are expressed in the enactment of first, second, sometimes third, and even fourth generations of laws on particular subjects, or massive amendments which amount to a new version of an enactment. Most of the key examples are outside the scope of this Report (e.g., bankruptcy, foreign investment). Each generation is successively more detailed than its predecessor and conceptually more rounded. The level of "perfection" is sometimes a political rather than a legal issue – the extent to which the parliament has come to a consensus on particular issues. During the 1990s, for example, the Communist Party in Russia had sufficient votes to defeat certain reforms and did so. Their presence in the Russian parliament is no longer sufficiently large to do so except in the most unusual

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210 *Shaping a Market-Economy Legal System: A Report of the EC/IS Joint Task Force on Law Reform in the Independent States* (1993); also available in the Russian language as: Формирование правовых основ рыночной экономики. Доклад Специальной проблемной группы по правовой реформе в Независимых Государствах (1994). The text of this Report would be instructive to any country making a transition from a socialist-type legal system to a market-orientated system.

situations. And experience plays a role too, as gaps and infelicities are exposed in the experience of applying one generation of legislation, the groundwork is laid for the next generation.

The legislation regulating the subject-matter of this Report, however, has been relatively "generationless". The initial post-Soviet generation of reform legislation has been tweaked rather than subjected to wholesale replacement during the past nearly two decades.

The problems exposed by Russian experience in law reform relate especially to the unpreparedness and ineptness of the foreign legal community in responding to requests or volunteering assistance and to the ideological unreadiness of the foreign legal community to cope with an extensively developed legal system and culture. These were all self-inflicted shortcomings endemic to groups abroad imprisoned by their own presuppositions.

As for generations of legislative reform, Russian experience suggests that an incremental approach is politically the most palatable and substantively the most realistic. There is no ideal model of legislation anywhere on the planet that can now or could in the past have been moved to Russia as part of a transitional policy. Whatever legislation is introduced will need to accommodate the special mix of State-sector and private-sector balance in existence in the legal system concerned. Some of the balance will require the accommodation of the political and business forces operating in the economy as represented in the legislative and executive branches of State at the time (in Russia, this meant oligarch interests).

The legislation will also need to reflect the standards and principles of legal science in the jurisdiction concerned. In Russia this exacerbated the role of foreigners in law reform. Foreigners not only were ignorant of the Russian legal system and language; they encountered a legal culture in which the role of the academic lawyer was considerably higher than in their own legal tradition. The Russian legal system is an "academic" legal system in the sense that the academician is the most senior jurist (not the judge) and legal theory plays a preponderant role in shaping the legal categories in which legal institutions and legal practitioners operate. Any dialogue about law reform needs to fit into these categories.

Moreover, the Russian legal tradition is strongly rule-oriented. It does not ask what the "policy" behind a rule is; literal interpretations of rules are preferred. This may also militate against empirical studies of law in action to the extent that rules or norms are derived by logic from the theory of law and State rather than devised as pragmatic responses to perceived legal problems. Socio-legal research, although not absent in the Russian Federation, accordingly plays a minimal role in the public discussion of law reform. Where such research is carried on by State institutions, the findings are not, as a rule, fully disclosed.

Law reform with respect to the justice sector of Russia has in and of itself a dimension not present in most other domains of Russian law reform: responses to decisions of the European Court for Human Rights. Russia became a party to the 1950 European Convention on Human Rights and Fundamental Freedoms in 1998; Russia has since then consistently been among the States most frequently complained against as measured by the number of filings with the European Court for Human Rights. Two major components of Russian judicial reforms are connected with accession to the 1950 European Convention: first, the decision to move the administrative of the correctional penal system from the Ministry of Internal Affairs to the Ministry of Justice; second, the decision to establish within the Procuracy the office of the Chief Investigator and to separate that official, to some extent at least, from the rest of the Procuracy. In introducing these changes, the Russian Federation considered that it was responding to criticism and recommendations made by the European Court for Human Rights.

2. Criminal Inquiry and Investigation

A Russian criminal proceeding may pass through several stages before trial. The term "preliminary investigation" is used as a general expression to describe the two forms which it may take: an inquiry or a preliminary investigation. A preliminary investigation is obligatory with regard to all criminal cases except for those enumerated in the 2001 Code of Criminal Procedure (Article 150[3]),[211] in which event an inquiry is conducted.

2.1 Organisation

The initiation of a criminal case is the beginning and obligatory stage of a criminal proceeding. At this stage the empowered State agencies and officials, having received information about the commission or the preparation of a crime from other sources, establish the existence or the absence of grounds for a criminal proceeding and adopt a decision to initiate a criminal case if such grounds are present. A case may be initiated on the basis of statements or oral complaints of citizens, or of someone giving himself up, or through direct discovery of the indicia of a crime by a procurator, investigator, or inquiry official.

The potential sources of information are essentially unlimited by the 2001 Code of Criminal Procedure, such that the Code introduces no limits on the basis for initiating a criminal case. However, if information is received from the mass media, only the procurator may initiate a criminal case; the investigator and agency conducting an inquiry must draw such material to the procurator's attention rather than acting independently themselves (Article 144). New to Russian criminal procedure is the requirement that the person reporting a crime must be issued a document confirming that the report was made, to whom, and the date; previously such requirements were regulated by departmental normative acts.

Anonymous statements may not serve as grounds for initiating a criminal case (although an anonymous statement contained in a report might so serve, in which case the person submitting the report would be responsible for its veracity). Oral statements are recorded in a protocol and signed. A case may be initiated only when there is sufficient data point to the indicia of a crime. The decision to initiate a criminal case must be taken within 72 hours of receipt, a period that may be extended up to 10 full days by a procurator, head of an investigation section, or head of an agency of inquiry and in specified instances up to 30 full days.

Only the investigator or inquiry official with the consent of a procurator, or the procurator himself, may set the procedure for initiation of a criminal case in motion by issuing a formal decree, whereupon measures must be taken simultaneously to prevent or suppress the crime or preserve any traces thereof. The decree to initiate adopted by an investigator or inquiry official is in force only from the moment when the procurator gives his sanction and not from the moment of issuance. A refusal to initiate must also be by decree of the same officials with reasons given (and the procurator notified of the decision) and may be appealed to the appropriate procurator or to a court. No investigative actions may be undertaken until a criminal case is initiated except when a inspection of the site of an incident, expert examination, taking of witness statements, detention of a suspect, or personal search is required urgently (Article 146). Initiation of a case is, as a procedural stage, subject to procuracy supervision. Either an improper initiation or refusal to initiate may be vacated by decree of a procurator.

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[211] A worthy English translation of the Code of Criminal Procedure does not yet exist.

Under the 2001 Code of Criminal Procedure the distinction between those cases in which a preliminary investigation is obligatory and those in which it is discretionary has virtually disappeared, although traces of the distinction can be found in individual provisions. The trend is in the direction of unifying the two types of pre-judicial proceedings.

In the great majority of instances a criminal case may be considered by a court only if an inquiry or a preliminary investigation has been conducted.

2.1.1. Organizational Structure of Investigative Agencies

Detailed accounts of the structure of investigative agencies in the Russian Federation are classified; only versions issued "for the press" are publicly available and are, of course, less detailed than the reality. The specific responsibilities of investigative agencies (e.g., which crimes or subject-matter to investigate) are, as noted above, set out in a vast variety of legislative acts. The Investigative Committee attached to the Procuracy of the Russian Federation contains a Central Apparatus and then bifurcates into two domains, one military and the other civilian.

The structure of the Central Apparatus is as follows:

Chief Investigative Administration

Administration for the Investigation of Especially Important Cases

Concerning Crimes against the Person and Public Security

Administration for the Investigation of Especially Important Cases

Concerning Crimes against State Power and the Economy

Administration for Methods and Analytical Provision

Section for Informational-Technical and Documentation Provision

Chief Administration for Procedural Control

Administration for Procedural Control Over Investigative Agencies

Administration for Procedural Control in Sphere of Counteracting Corruption

Section for Procedural Control over Investigation of Especially Important Cases

Organizational-Analytical Section

Section of Documentation Provision

Chief Organizational-Inspector Administration

Organizational-Control Administration Informational-Methods Administration

Administration of Operatonal-Technological Provision

Administration for Employment Verifications and Ensuring Personal Safety

Section for Documentation Provision and Corrections

Chief Administration of Criminalistics

Methods-Criminalistics Administration Technical-Criminalistics Administration

Administration of Organization of Expert-Criminalistics Activity

Section of Documentation Provision

Chief Administration for Ensuring Activity of Investigative Committee attached to the Procuracy of the Russian Federation

Financial-Economic Administration Administration of Material-Technical Provision Administrative Office

Section for Provision of Activity of North Caucasus and Southern Federal Districts

Section for Control over Expenditure of Budget

Chief Investigative Administration for North Caucasus and Southern Federal Districts

Administration for Investigation of Especially Important Cases

Control-Criminalistics Administration

Section for Documentary Provision[212]

Military Investigative Division Personnel administration

Administration for Interaction with the Mass Media

Legal Administration

Administration for International Legal Cooperation

Administration for Consideration of Recourses of Citizens and Documentation Provision

Administration for Protection of State Secrecy

Administration for Physical Protection

Section for Procedural Control Over Investigation of Especially Important

Cases in Federal Districts

Immediately subordinate to the Investigative Committee and its Central Apparatus is the Military Investigative Administration, which is responsible for the Military Investigative Administrations of military districts, fleets, and strategic missile forces. These in turn are responsible for administrating the military investigation sections of units and garrisons.

The civilian domain consists of the Investigative Administrations and Investigative Sections for the seven federal districts (Southern, Central, Northwestern, Volga, Urals, Siberian, and Far Eastern; plus a section at the Baikonur space center in Kazakhstan). Within each federal district there two parallel lines: first, investigative administrations for each of the 83 subjects of the Russian Federation and within them, investigative sections for districts and cities; second, specialized investigative administrations (for example, environmental crimes) and within them, a specialized investigative section having the rights of a district section. The structure parallels that of the Procuracy and combines elements that are primarily territorial-administrative with certain functional jurisdictions (e.g., environment, transport).

The allocation of investigative competence is consequently affected by several factors simultaneously. As between investigative agencies, it is a question of which crime is believed to have been committed. If several crimes have been committed which fall into the jurisdiction of more than one agency, the most serious crimes believed to have been committed will determine which agency has jurisdiction. Within the respective agency, the level at which the alleged crime is

[212] There are analogous Administrations or Sections and subdivisions for each of the other six federal districts.

investigated will turn on precisely where the crime is believed to have been committed (territory) and the gravity of the crime (e.g., whether the crime is especially dangerous, or falls into a category for which special investigative sections exist (e.g., terrorism, corruption). Within the investigative system, a superior agency always has the right to take a case under its jurisdiction from an inferior agency (as is also the situation in the Procuracy).

2.2 Model

The Russian model of inquiry and investigation would be classified as an "inquisitorial" model known in some variant to the Romano-Germanic legal tradition. The 2001 Code of Criminal Procedure combines elements of the pre-existing Soviet model and features incorporated from continental European and Anglo-American legal systems. The Russians have felt most uncomfortable with the "adversarial" elements adapted from Anglo-American experience and removed a number of these within months after the entry of the 2001 Code of Criminal Procedure into force.

2.3 Tasks and Functions

When a decree to initiate a criminal case is issued, the case is either referred by the procurator or judge for inquiry or preliminary investigation or an agency of inquiry sets about its respective task. "Agencies of inquiry" are defined by the 2001 Code of Criminal Procedure as "State agencies and officials empowered in accordance with the present Code to effectuate an inquiry or other procedural powers" (Article 5[24]). Several agencies have been empowered. Most commonly they are police agencies, but the commanders of military units, Federal Security Service agencies, heads of correctional labour or similar institutions, narcotics police, bailiff agencies, customs agencies, State fire supervision agencies, border guard agencies, masters of sea-going vessels, or heads of polar stations may act when necessary.

An agency of inquiry undertakes immediate steps to discover whether a crime has been committed and by whom. These measures include views, searches, seizures, detention and interrogation of suspects and interrogation of witnesses and victims, listening to telephone and other conversations, imposing arrest on property, and, when necessary, assigning expert examination. Agencies of inquiry also may take actions to discover and collect evidence which might disappear, spoil, be lost, or be falsified if not gathered promptly. The Code of Criminal Procedure contains an exhaustive list of measures to be taken by an agency of inquiry, and these are not subject to expansive interpretation. There are no time limits imposed for these specific measures.

The duty of the agency of inquiry is to take all steps to establish the facts that must be proved in the case. In performing these duties the agency of inquiry follows the rules established for the performance of a preliminary investigation. The Code of Criminal Procedure requires completion of an inquiry within 30 full days from the day of initiating the criminal case, subject to extension by a procurator but for not more than 30 full days. In exceptional instances connected with a request concerning legal assistance, the period of inquiry may be extended by a procurator of a subject of the Federation for a period of up to 12 months (Article 223).

If a criminal case is initiated with regard to the fact of the commission of a crime and in the course of the inquiry sufficient data is obtained giving grounds to suspect a person of committing the crime, the inquiry official draws up a written notification concerning suspicion of the commission of a crime, a copy of which is handed to the suspect and the rights of a suspect as provided in Article 46 of the Code of Criminal Procedure are explained to him. The suspect must be interrogated within 3 days of being notified that he is considered to be a suspect. A copy of the written notification is sent to the procurator.

When the inquiry is completed, the inquiry official draws up an act to indict (Article 225), which is confirmed by the head of the agency of inquiry and sent together with the materials of the file of the case to a procurator. An advocate is permitted to participate in the case from the moment the accusation is presented by the agency of inquiry, and if a person suspected of committing the crime is detained, or such person is confined under guard before the accusation is presented, the advocate may participate from the moment the protocol of detention or decree concerning confinement under guard is presented. There are exceptions for minors, blind, deaf, and dumb persons, individuals who do not know the language in which the proceeding is conducted, and others, in which event the participation of the advocate is obligatory from the moment of detention or confinement under guard.

A preliminary investigation may be conducted by investigators of the Procuracy, Federal Security Agency (FSB), internal affairs agencies, or narcotics control agencies (Article 151). The 2001 Code of Criminal Procedure stipulates which agencies are to investigate which crimes. In general the FSB investigates serious crimes against the State.

When performing an investigation, the investigator takes the decision to involve the suspect as a participant in the case or to deem a person to be a victim, civil plaintiff, or civil defendant; such decision also may be made by a judge, procurator, court, or inquiry official. The law requires that a decree be issued to deem, for example, a person to be a victim and inform the victim or his representative thereof. If material damage has been suffered by the victim, then these officials are obliged to explain his right to file a civil suit. If a civil suit is brought, a reasoned decree must be issued to deem the person to be a civil plaintiff or to reject such a suit. Arrest must be imposed on the property of the accused in order to secure the suit. The sanction of the procurator is required to impose arrest on monetary means and other valuables in accounts, deposits, or others held by credit organizations. The advocate, suspect, accused, victim, or civil plaintiff or defendant may not be denied the right to interrogate witnesses, conduct an expert examination, or perform other investigative actions or to collect evidence if the circumstances they petition to establish may be of significance for the case. A petition must be denied with reasons.

For his part, the investigator may engage an interpreter or summon specialists or witnesses to assist him. The preliminary investigation must be completed within two months from the date of initiating the case until the case is referred with an act to indict, transferred to a court in order to consider the possible application of compulsory measures of a medical character, or terminated or suspended. An extension of up to six months is possible, and in cases of great complexity, up to twelve months. A further extension may be made only in exceptional instances by the Procurator General of the Russian Federation or his deputies.

If having collected the evidence the investigator concludes that a particular person has committed a crime, the investigator renders a decree involving the said person as an accused. The significance of the decree is that it creates the legal fact giving rise to criminal procedure relations between the accused, investigator, and the procurator. This decree must be presented within 48 hours of being rendered or the date fixed for compulsory appearance. The accused must be informed of his rights to know of what he is accused, to offer explanations, present evidence, submit petitions, familiarize himself with the materials of the case, and, if he has not already retained the services of an advocate, to do so as provided in the Code of Criminal Procedure, among others. Interrogation may commence at once, but not at night except in an urgent situation. Witnesses and victims likewise are interrogated, and searches, views, and expert examination conducted. An accused or suspect may be committed for expert examination to a medical institution.

If the investigator decides there is no basis for prosecution, the accused is released; otherwise, the investigator draws up the act to indict. At that point he must invite the victim, civil plaintiff, or civil defendant, or their representatives to acquaint themselves with the materials of the case. Then the accused is informed that the evidence will support an act to indict and he too has the right to examine the materials of the case. The accused or his counsel may request further investigation, which must be granted or a reasoned refusal given.

At this point proceedings move rather rapidly. The accused may not have retained defence counsel yet, or his counsel may be occupied with other matters. Defence counsel has the right to meet with the accused alone, to acquaint himself with all the materials of the case and copy necessary information, to discuss the filing of petitions with the accused, to file petitions or challenge officials who took part in the investigation, to appeal to the procurator against investigative actions that prejudice or violate the rights of the accused or defence counsel, and to be present during supplementary investigative actions. A formal record is kept of the presentation of the materials of the case. The investigator must explain to the accused his rights to petition for a jury trial, to hold preliminary hearings, and to petition for a trial held as a special proceeding. The explanation of these rights to the accused and his reply thereto are formally recorded, dated, and signed.

When the crime is not serious, the investigator may with the procurator's consent decide not to prosecute, or transfer the case to a commission for minors, or refer the case to a court for the possible application of compulsory measures of a medical character. If the case is to be pursued, the conclusion to indict is issued which sets out the substance of the case, the place and time of committing the crime, the methods, motives, consequences, and other relevant circumstances, the evidence confirming the occurrence of a crime and the guilt of the accused, mitigating or aggravating circumstances, evidence referred to by the defence, data of the victim and the nature and extent of the harm caused by the crime. Information also must be given about the personality of the accused and the specific article(s) of the Criminal Code which make provision for the crime cited. The case must be referred immediately to the procurator. If a translation of the conclusion to indict is necessary, the investigator must arrange this.

The summary above is subject to complex and detailed documentation. Indeed, when the 2001 Code of Criminal Procedure was first adopted, nearly half the text of the Code consisted of documentary annexes; these have since been repealed and no longer comprise an integral part of the Code of Criminal Procedure. Nonetheless, they are an integral part of any criminal proceeding. By way of examples, there are model forms supplied to investigative personnel for: statements or protocols concerning the commission of a crime by the victim, witness, or criminal himself; forms to request relevant evidence, collection evidence, seek an explanation of facts, or conduct a view of the site of a crime; documents containing decisions taken in the course of the investigation (decree to announce someone or something is under investigation; decree to extend period for verification of a report of a crime for up to 10 days or up to 30 days; decrees to institute a criminal case (or not); decrees to take investigative jurisdiction over a case; decrees to recognize the procedural status of a person (victim, civil plaintiff, civil defendant, etc.), and so on. There are literally hundreds of such forms for every conceivable component of a criminal investigation.[213]

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[213] For a recent collection, see A. P. Ryzhakov, Процессуальные документы следователя и дознавателя: образцы [Procedural Documents of Investigator and Inquiry Official: Samples] (2009).

2.4 Relations

When investigating crimes all decisions concerning the direction of the investigation and the performance of investigative actions are taken autonomously by the investigator, who bears responsibility for the course and the results of the investigation unless the approval of a judge or the sanction of a procurator is required. He may appeal to a higher procurator against instructions of a procurator with which he disagrees. The superior procurator either repeals the instructions of the inferior procurator or assigns the case to another investigator. As a rule, one investigator is assigned to a case, but in a large or complex case a brigade or team of investigators may be involved; in the last instance one investigator is assigned the case and directs the actions of the others. He signs all important decrees and other procedural acts, although his colleagues also retain the right to investigator autonomy. The 2001 Code of Criminal Procedure regulates in greater detail the operations of investigative groups.

2.5 Mechanisms

Coordination

Responsibility for particular investigations is based primarily upon a view as to which crime(s) may have been committed. If the alleged or suspected crimes fall under the jurisdiction of two or more agencies, the more serious crimes will, as a rule, determine which agency pursues the inquiry or investigation.

Administrative

The personnel establishment and budget for inquiry and preliminary investigation personnel are determined as part of the general budgets for the respective agencies concerned. The great majority of investigations are performed by Procuracy, FSB, internal affairs, and narcotics agencies.

Oversight and Inspection

Direct guidance over an investigation and control over the work of the investigator is the responsibility of the head of the investigative committee, administration, service, section, or group of the agencies within whose jurisdiction the alleged crime falls. The head of the investigative department has the right to verify the file of the case, give instructions to the investigator, transfer a case from one investigator to another, decide whether to assign several investigators to the case, and take other decisions. The instructions of the head of the investigative department are binding upon the investigator, who may appeal them to the procurator. However, the decrees of an investigator may be changed or repealed by the procurator, but not by the head of the investigative department. Supervision over execution o the law by the head of the investigative department is effectuated by the procurators, whose instructions are binding upon the head of the investigative department but may be appealed to the superior procurator.

Under the 2001 Code of Criminal Procedure certain investigative actions may only be performed on the basis of a court decision, for which the investigator must petition with the sanction of the procurator. Such petitions must be considered within 24 hours of receipt.

2.6 Criminal Investigators

Investigators and inquiry personnel will normally be required to have a higher legal education and to undergo additional training within the agency in which they serve. The Procuracy, Ministry of Internal Affairs, FSB, and narcotics police all have special institutes or academies in which advanced instruction and research is undertaken for personnel chosen to undergo such training.

The standards for selection, appointment, and discipline of investigators are analogous to those for procurators. Applicants must have Russian citizenship, a degree in law from an accredited institution, the requisite moral and professional qualities, and good health. Exceptionally, individuals who have completed only three years of legal education may be appointed to lower investigative sections (Article 401, 1992 Federal Law on the Procuracy of the Russian Federation). In addition, investigators are subject to the requirements imposed by the 2004 Federal Law "On the State Civil Service of the Russian Federation", which ordinarily requires that appointments be made on the basis of an open competition.

For example, on 6 May 2010 the Investigative Committee attached to the Procuracy of the Russian Federation announced a competition to fill two vacant positions and form a personnel reserve. In this instance the positions available were for a Chief Specialist in the Section for Material-Technical Provision and for a Senior Specialist, First Category, in the First Section for the Investigation of Especially Important Cases. Russian citizens aged 18 or above could participate if, for the position of Chief Specialist, they had a higher vocational education and for the position of Senior Specialist a secondary vocational education. In addition, the Chief Specialist was required to have experience in organizing motor vehicle transport work, work with insurance companies, experience in drawing up accident reports, and so on. The Senior Specialist needed computer skills and the ability to work with documentation and prepare letters. The announcement included a list of documents which an applicant must submit, among them information on incomes, property, and financial obligations for himself, spouse, and minor children. Such competitions routinely are announced on the website of the Investigative Committee and in the monthly gazette, called the Вестник Следственного комитета при прокуратуре Российской Федерации [Herald of the Investigative Committee attached to the Procuracy of the Russian Federation] (2008-).

The Investigative Committee attached to the Procuracy of the Russian Federation operates a boarding school in the Moscow Region which recruits a "cadet class" of young men who have completed nine years of general education and wish to consider a career as investigators. Preference is given to children of procuracy and investigative personnel in admissions. The first year of operation is from 1 September 2010.

The contracts with investigators are concluded in accordance with the Labour Code of the Russian Federation either for a fixed-term or, most commonly, for an indefinite period. Retirement is compulsory at the age of 65, which is a general requirement of the Russian civil service.

For each rank of Procuracy officials there is a corresponding rank of investigators within the system of the Investigative Committee attached to the Procuracy of the Russian Federation. The equivalent ranks are set out in the Table of Conformity of Posts of Procuracy Workers of Investigative Agencies of the Investigative Committee attached to the Procuracy of the Russian Federation to the Posts of Procuracy Workers of Procuracy Agencies of the Russian Federation, confirmed by Edict of the President of the Russian Federation of 1 August 2007, No. 1004. There is a similar Table for military procurators and personnel of military investigative agencies confirmed by the same Edict. The procedure for the conferment of class ranks up to the rank of senior counselor of justice inclusive upon investigators within the system of the Investigative Committee attached to the Procuracy of the Russian Federation is regulated by an Order of the Investigative Committee of 20 November 2009, No. 45; however, the precise procedure is classified and not available through the legal data bases.

As from 1 January 2011 budget authorizations have been fixed for 21,156 positions within the system of the Investigative Committee attached to the Procuracy of the Russian Federation,

excluding military investigators, pursuant to the Edict of the President of the Russian Federation of 4 January 2009, as amended 27 July 2009.

The annual salary of the Chairman of the Investigative Committee attached to the Procuracy of the Russian Federation is fixed by an Edict of the President of the Russian Federation, No. 1005, of 1 August 2007, as amended 1 November 2008. The basic salary is 166,207 rubles per month, which consists of a post salary of 75,207 rubles, a supplemental payment for class rank of 22,562 rubles per month, and a supplemental payment for years of service of 68,438 rubles per month. As from 1 July 2008 this basic salary was increased by 1.085 times. The sum is indexed to inflation and cost of living; increases are made in the amounts and within the periods provided for increasing the salaries ofjudges.

In general Russian media reports indicate that the investigators employed by the Investigative Committee earn from two to three times more per year than do investigators with the Ministry of Internal Affairs and those with the Federal Service for Narcotics Control. The salary differentials have been the source of comment in the Russian media and apparently some tension. On average investigators at the Ministry of Internal Affairs were being paid from US$400 to $500 per month in 2009.

Conclusion

The present system of criminal investigation represents nearly a decade of reform initiatives undertaken soon after the dissolution of the former Soviet Union. Considerable efforts were made to introduce elements of the Anglo-American adversarial system into the investigation; many of these innovations were eliminated in massive amendments to the Code of Criminal Procedure during mid-2002. Other changes reflect criticisms made by the European Court for Human Rights during the course of considering appeals from the Russian legal system to Strasbourg.

In general the system of criminal investigation introduces defence counsel into the process at an earlier stage and more frequently than was true in the past. To this extent the insertion of adversariality has been a positive move. Other criticisms, however, continue to be heard with respect, for example, to the duration of many investigations and the detention of individuals during these extended periods.

The introduction of reforms within the Procuracy to separate the investigative functions to a greater degree from other Procuracy functions has led to the formation of the investigative departments within the Procuracy under a separate deputy procurator. It is still too early to evaluate the success of these changes, but they have already caused comments in the media with respect to conflicts of interest within the Procuracy that have not been heard previously. Similar changes have not been introduced in other agencies performing preliminary investigation activities.

Moreover, despite the greater separation of investigative and procuracy functions, the Procurator General of the Russian Federation remains at the apex of the system. In consequence the ultimate separation of investigative and prosecution functions has not been introduced in Russia. The investigation service remains subordinate and accountable to the Procurator General – although only at the top of the system. Moreover, certain aspects of a preliminary investigation may require the sanction of the procurator or of the court; although these requirements do not involve the procuracy or the judiciary in the investigation as such, they are intended to operate as a form of supervisory agency for certain purposes.

Unlike the system in some Asian socialist legal systems, in the Russian Federation investigators are responsible for and in charge of the preliminary investigation unless non-investigator officials

or agencies are empowered to perform investigative actions (e.g., the master of a ship).

There are no established criteria for assessing the quality of inquiry and investigation activities in Russia. Some experienced foreign law enforcement personnel who have had contact with their Russian counterparts are not impressed by the general quality of work or the quality of equipment and technologies available to Russian personnel. In the field of narcotics, for example, one British law enforcement officer commented that his Russian colleagues handled samples of seized materials without using special gloves to avoid contamination of the evidence or special containers which are standard equipment in British practice. Such criteria as conviction rates, dismissal of cases at the investigative stage, closure of proceedings, and the like are so loosely applied as to be meaningless for evaluative purposes.

3. Procuracy

The Procuracy is a Russian invention, probably under Swedish influence, having been established by Tsar Peter the Great in 1711, when the institution was called a "fiskal"; the present Procuracy of the Russian Federation dates its institutional origins to 1722, when Peter the Great transformed the "fiskal" into the Procuracy.

Peter the Great saw the Procuracy as the "eye of the Tsar" overseeing legality, particularly financial affairs, at all levels of the State downwards. A key feature of the Petrine model of the Procuracy, revived by V. I. Lenin in 1922, was the highly centralized nature of its organization and separation from all other levels of State power and administration. This model was largely preserved throughout the Soviet period. There has been some modification in the post-Soviet era, mostly to separate the investigation functions from the prosecutorial role (see Chapter 2 above) and to reduce the presence of procuracy supervisory powers in the private sector.

3.1 Organisation

The Procuracy of the Russian Federation is a unified centralized system in which inferior procurators are subordinate to superior procurators and to the Procurator General of the Russian Federation. The Procurator General is appointed to and relieved from office by the upper chamber of the Federal Assembly (Soviet of the Federation) upon the recommendation of the President of the Russian Federation. (Article 129, Constitution). Each subject of the Russian Federation (of which there are 83) has its own procurator who is appointed by the Procurator General by agreement with the subjects of the Federation. Other procurators are appointed by the Procurator General. Thus, the Procuracy remains, in the Petrine model, a highly centralized organization independent of government as such.

The basic principles of the organization and activity of the Procuracy are set out in the Federal Law on the Procuracy of the Russian Federation of 17 January 1992, as amended.[214] Reflecting its centralized and unified character, the Procuracy exercises its powers independently of federal agencies of State power, agencies of state power of subjects of the Russian Federation, agencies of local self-government, and social associations and in strict conformity with laws in force on Russian territory. Procuracy agencies are required to operate openly insofar as this is not contrary to the requirements of Russian legislation concerning the protection of the rights and freedoms of citizens and of Russian legislation concerning State and other secrecy protected by law. The Procuracy is to inform federal and regional agencies of State power and of local self-government and the general population about the state of legality.

As from 1 January 2011 the personnel establishment for the Procuracy of the Russian Federation (excluding investigators) is budgeted for 43,875 persons. The number is quite stable in comparison with 2009 and 2010; personnel increases have benefited the investigative committee rather than the General Procuracy itself.

Leaving aside the Investigative Committee attached to the Procuracy of the Russian Federation (discussed in detail in Chapter 2 above), the General Procuracy consists of the central apparatus in Moscow, the Chief Military Procuracy, the procuracies of the 83 subjects of the Russian Federation, and the specialized procuracies. The General Procuracy is comprised of the following units:

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214 Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 773-812.

Chief Organizational-Inspector Administration

- Organizational Administration
- Apparatus of the General Procuracy of the Russian Federation
- Inspector Administration
- Informational-Analytical Administration

Personnel Administration

Chief Administration for Supervision over Execution of Federal Legislation

- Administration for Supervision over Execution of Legislation in Economy
- Administration for Supervision over Compliance with Rights and Freedoms of Citizens
- Organizational-Methods Section

Administration for Supervision over Execution of Laws on Transport and Customs

Chief Administration for Supervision Over Investigation

- Administration for Supervision over Investigation in Procuracy Agencies
- Administration for Supervision over Investigation in Ministry of Internal Affairs of Russia and Federal Service for Control Over Narcotics
- Organizational-Methods Section
- Section of Documentary Provision

Administration for Supervision over Performance of Inquiry and Operational-Search Activity

Administration for Supervision over Investigation of Especially-Important Cases

Administration for Supervision over Execution of Laws on Federal Security, Inter-Nationality Relations, and Counteracting Extremism

Administration for Supervision over Execution of Legislation on Counteracting Corruption

Chief Administration for Ensuring Participation of Procurators in Consideration of Criminal Cases by Courts

- Administration for Ensuring Participation of Procurators in Cassational Proceeding of Supreme Court of Russian Federation
- Administration for Ensuring Participation of Procurators in Supervisory Stage of Criminal Proceeding
- Section for Support of State Accusation Organizational-Analytical Section Section for Documentary Provision

Administration for Ensuring Participation of Procurators in Civil and Arbitrazh Proceeding

Administration for Supervision over Legality of Execution of Criminal Punishments

Legal Administration

Chief Administration for International Legal Cooperation

- Extradition Administration
- Legal Assistance Administration

- Administration of International Law

Administration for Interaction with Mass Media First Section (with Rights of Administration)

Chief Administration for Ensuring Activity of Procuracy Agencies and Institutions

- Administrative Office
- Administration for Documentation and Methods Provision
- Administration for Consideration of Recourses and Reception of Citizens
- Section for Reception of Citizens Section for Consideration of Recourses Informational-Reference Section
- Section for Administrative-Economic and Contract Work
- Section for Control-Internal Audit Work (with Rights of Administration)

Administrations for the eight federal districts (Southern, North Caucasus, Central, Northwestern, Volga, Urals, Siberian, and Far Eastern) Academy of the General Procuracy of the Russian Federation

Thereafter the procuracies follow the administrative-territorial division of the Russian Federation into 83 subjects of the Russian Federation. There are procuracies for each subject, and within each subject for the principal cities or subdivisions of very large cities. A full listing with addresses and contact details is given on the website of the General Procuracy of the Russian Federation.

The principle of administrative-territorial organization of the procuracy also extends to the specialized procuracies. Within the Procuracy of the Russian Federation there are two types of specialized procuracies which act with the rights of regional or district procurators. The first type comprises military and transport procuracies or procuracies of military units. The second type consists of nature protection procuracies and procuracies for the supervision of the execution of laws in correctional institutions. Neither of the two types is intended to replace the activities of territorially-based procuracies as the principal element of the procuracy system.

One of the deputies of the Procurator General of the Russian Federation is the Chief Military Procurator, who in turn has one first deputy, several deputies, and senior aides and aides. There are various administrations, sections, and services (not named in the published literature), and beneath them are military procuracies for military districts and for garrison levels. The various levels of the Military Procuracy are equated to procuracies of subjects of the Russian Federation, cities, and districts.

Within the General Procuracy of the Russian Federation is an Academy which incorporates several institutions of a research or instructional nature that previously enjoyed an autonomous existence while attached to the General Procuracy. These include the Scientific-Research Institute for Problems of Strengthening Legality and Legal Order, dealing with problems or organizing the struggle against crime by exploring the causes of crime. Advanced training for procurators is conducted principally by the Institute for Raising the Qualifications of Executive Personnel of the General Procuracy of the Russian Federation (Moscow), which has counterparts in St. Petersburg and Irkutsk.

It is prohibited to create procuracies which are not within the unified system of the General Procuracy of the Russian Federation.

3.2 Model

The organisational model of the system of Procuracy agencies consists of the following levels or functional divisions: the General Procuracy of the Russian Federation, procuracies of each of the

83 subjects of the Russian Federation, military and other specialised procuracies equated thereto, scientific and educational institutions within the Procuracy, editorial boards of printed publications of the Procuracy, which are juridical persons, together with the procuracies of cities, district, and other territorial, military, and specialized procuracies. All of the foregoing hold property by right of operative management under Russian civil law (that is to say, they do not own, or have title to, such property).

Pursuant to its centralized character, the formation, reorganization, and liquidation of Procuracy agencies and institutions and the determination of their status and competence is determined by the Procurator General of the Russian Federation.

Also part of the Procuracy is the Investigative Committee attached to the Procuracy of the Russian Federation and investigative administrations at all levels of the Procuracy (see Chapter 2 above).

The creation of procuracy agencies which are not part of the unified system of the Procuracy is prohibited.

The Procurator General of the Russian Federation is the head of the General Procuracy. He has a first deputy and deputies appointed to and relieved from office by the Soviet of the Federation upon his own recommendation. The Procurator General is assisted in the performance of his duties by a collegium which he heads and forms; the collegium includes all of his deputies *ex officio* and other Procuracy workers whom he wishes to include.

The structure of the General Procuracy is made up of chief administrations, administrations, and sections (with the rights of administrations within administrations). The heads of these respective subdivisions have the status of senior aides, and their deputies, the status of aides of the Procurator General of the Russian Federation. Within the respective chief administrations, administrations, and sections the posts of senior procurators, procurators, senior procurator-criminalists, procurator-criminalists, and senior investigators or investigators for specially important cases and their aides are established as necessary.

The Procurator General has advisors, senior aides, and senior aides for special commissions whose status is equivalent to the status of heads of administrations; aides and aides for special commissions whose status is equivalent to the status of deputy heads of administrations. The first deputy and deputies of the Procurator General have aides for special commissions whose status equals that of the deputy heads of administrations.

The Chief Military Procuracy is headed by a deputy Procurator General of the Russian Federation and bears the title "Chief Military Procurator". The Chief Military Procuracy operates within the General Procuracy with the rights of a structural subdivision.

Within the General Procuracy is a Scientific-Advisory Council which considers questions connected with the organization and activity of procuracy agencies and operates on the basis of a Statute confirmed by the Procurator General of the Russian Federation. Outside legal scholars and practitioners may be appointed to membership of the Scientific-Advisory Council. Recently, for example, the Scientific Advisory Council included representatives from the Social Chamber of the Russian Federation, the Union of Journalists, deputies of the State Duma, representatives of the judicial system, as well as leading scholars.

The procuracies of subjects of the Russian Federation, cities, districts, and procuracies equated thereto have an internal organizational structure analogous to that of the General Procuracy.

3.3 Tasks and Functions

The Federal Law on the Procuracy of the Russian Federation enumerates nine principal functions and tasks of the Procuracy, all of which are performed at each level of the Procuracy. These include:

1. supervision over the execution of laws by federal ministries, State committees, services, and other federal agencies of executive power, representative (or legislative) and executive agencies of subjects of the Russian Federation, agencies of local self-government, agencies of military administration, control agencies, the officials thereof, management organs and executives of commercial and non-commercial organizations, and also over the conformity of legal acts issued by them to laws of Russia;
2. supervision over compliance with the rights and freedoms of man and citizen by federal ministries, State committees, services, and other federal agencies of executive power, representative (or legislative) and executive agencies of subjects of the Russian Federation, agencies of local self-government, agencies of military administration, control agencies, the officials thereof, management organs and executives of commercial and non-commercial organizations;
3. supervision over the execution of laws by agencies engaged in operational-search activity, inquiry, and preliminary investigation;
4. supervision over the execution of laws by court bailiffs;
5. supervision over the execution of laws by the administrations of agencies and institutions which implement penal policies and apply measures of a compulsory character assigned by courts or by the administrations at places where detained persons are confined;
6. criminal prosecution in accordance with the Code of Criminal Procedure of the Russian Federation;
7. coordination of the activities of law enforcement agencies against criminality;
8. participate in the consideration of cases by courts and arbitrazh courts and protest decisions, judgments, rulings, and decrees of courts which are contrary to law;
9. take part in the drafting or commenting on draft legislation.

The branches of Procuracy supervision are several and collectively comprise the Procuracy's claim to uniqueness among bodies with analogous objectives in other families of legal systems. The Law on the Procuracy divides the supervision functions into four principal orientations. The first and most important is the Procuracy's power of "general supervision" over the execution of laws by federal ministries, State committees, services, and other federal agencies of executive power, representative (or legislative) and executive agencies of subjects of the Russian Federation, agencies of local self-government, military administration agencies, control agencies, officials thereof, and also over the conformity to laws of legal acts issued by the aforesaid agencies and officials. The acts adopted or issued by these agencies must correspond to the constitutions and other enactments of superior legislative and State agencies and be precisely and uniformly executed by officials and citizens.

This formulation makes it clear that the Procuracy is not the supreme guardian of the law; it has no supervisory authority over acts of the Government of the Russian Federation, or the Federal Assembly, or the President of the Russian Federation. However, its supervisory authority does extend to the parliamentary and governmental agencies of the subjects of the Russian Federation.

Its concern is to ensure that the Russian bureaucracy and citizenry adhere to law and not that the highest agencies of Federation power and administration do so.

The powers of the Procuracy to implement general supervision are several. They may personally visit the premises of the objects of supervision to inspect the state of affairs, they have access to materials and documents, and may require the directors and other officials to submit necessary documents, materials, statistical information, and the like, verify materials and appeals submitted to the Procuracy, and conduct an internal audit of the activity or organizations within the control or jurisdiction of the agencies being investigated. If necessary, officials and citizens may be summoned to the Procuracy to offer explanations regarding the violation of laws.

Once a violation of law is established, a procurator may react by submitting a recommendation to eliminate the violation, bring a protest against a legal act which is contrary to a law, or apply to a court or arbitrazh court to demand that a legal act be deemed to be invalid. If material harm was caused by a violation nof law, the procurator may initiate civil proceedings for the recovery of compensation. A criminal prosecution may be instituted if a crime has been committed, or an administrative proceeding if there was an administrative offence. A person illegally subjected to administrative detention on the basis of the decision of a non-judicial agency may be released upon the decree of a procurator.

In the domain of general supervision a procurator may bring a protest against a legal act which is contrary to a law. The protest is sent to the agency or official which issued the act and is subject to obligatory consideration within ten days from the moment of receipt; if the protest is against the decision of a representative or legislative agency of a subject of the Federation or agency of local self-government, the protest is to be considered at the next session thereof. Under exceptional circumstances requiring the immediate elimination of the violation of a law, the procurator may fix a shorter period for consideration of the protest. The filing of a protest does not mean that the agency which issued the act must necessarily agree with the protest. Its obligation is to consider the protest and the reasons for it; if the agency disagrees with the protest, the protest may be rejected, in which event the procurator may pursue the matter by carrying his protest to the next level of the Procuracy. Whether the protest is accepted or not, the results of the protest must be communicated to the procurator at once in written form. If the protest is considered by a collegial agency, the procurator who brought the protest must be informed about the date of the session and has the right to be present. A protest may be recalled by the person who brought it before consideration of the protest commences.

Although the Procuracy may not protest decrees of the Government or laws of the Federal Assembly which are contrary to the Russian Constitution, the Procurator General does have the right to bring such inconsistencies to the attention of the President of the Russian Federation. If a violation of law justifies the instituting of a criminal or administrative proceeding, the procurator's decree must be considered by the relevant agency or official within the period established by legislation and the results of the consideration communicated in written form.

New to the powers and competence of the Procuracy is the category of supervision over compliance with the rights and freedoms of man and citizen. In exercising this function the procurator considers and verifies applications, appeals, and other communications concerning a violation of such rights, explains to victims the procedure for defending those rights and freedoms, takes measures to prevent or suppress such violations, initiates proceedings against persons who have violated the law in this connection, and seeks compensation for damage caused. If a criminal act has been committed, the Procuracy may institute a criminal proceeding and, if an administrative offence,

either institute an administrative proceeding or bring the materials of the verification to the agency or official empowered to consider an administrative proceeding.

The procurator has standing to bring a civil suit in a court of general jurisdiction or an arbitrazh court if a violation of human rights requires defence in such a proceeding and the victim by reason of health, age, or other factors cannot personally defend those rights in court, or if the rights and freedoms of a significant number of citizens have been violated, or for other reasons such violation acquires great social importance. A procurator or his deputy may bring a protest against an act violating human rights to the agency or official which issued it. A recommendation to eliminate violations of rights and freedoms may be submitted by the procurator or his deputy to the agency or official empowered to eliminate the violation. However, if a State agency were, for example, to bring a case against a natural or juridical person for a reason related to its own activities or jurisdiction, the legal staff of the agency concerned are likely to be involved (jurisconsults)rather than a procurator.

The third branch of Procuracy supervision concerns the execution of laws by agencies engaged in operational-search activities, inquiries, or, to a lesser extent given the reforms introduced in 2007, preliminary investigations. With regard to operational-search activities a procurator may demand to see documents relating to such operations and may give instructions to operational-search agencies about taking measures relating to cases under investigative proceedings. A procurator may require the termination of illegal or unsubstantiated operational-search measures or repeal related decrees which in his opinion are not consistent with legislation. A number of Procuracy powers available under general supervision may be used in connection with operational-search measures: protest, recommendations, initiating administrative and criminal proceedings, and others.

The fourth branch of Procuracy supervision concerns institutions where individuals may be detained or confined, ranging from preliminary confinement up to imprisonment or compulsory medical treatment. The procurator is to ensure that legislation regarding the treatment of confined persons is complied with by visiting places of confinement systematically and, at any time, familiarize himself with relevant documentation, release immediately persons illegally confined, question detained or confined persons, and verify whether orders, regulations, and decrees issued by the administrations of place of confinement are consistent with law.

The Procuracy acts on behalf of the State to prosecute criminal cases in Russian courts. The term "criminal prosecution" was introduced by the 2001

Code of Criminal Procedure of the Russian Federation. The procurator appears, as a rule, only in the most serious cases, enumerated in the Code of Criminal Procedure, at the trial stage in the role of State accuser. As noted above, the procurator may appear in civil cases, but these are uncommon and confined to special circumstances.

3.4 Relations

The unified and highly centralized structure of the Russian Procuracy is a key feature of this institution. Accordingly, the Federal Law on the Procuracy provides that Procuracy agencies exercise their powers independently of federal agencies of State power, agencies of State power of subjects of the Russian Federation, agencies of local self-government, and social associations. The intention is to keep the Procuracy separate and independent from all intermediate levels of State power and administration and thereby preserve the autonomy of the Procuracy as an instrument of the central authorities only.

The Procuracy accordingly does not, and should not, coordinate its law enforcement actions with other branches of the State nor inform them of their activities except to routinely account for the activities in the usual way.

When, therefore, the Procuracy investigates or exercises supervisory powers with respect to other branches of State power and administration, it acts independently. Its supervisory powers extend to security agencies, judicial decisions, and especially to State agencies in the legislative and executive branches below the federal level and, at the federal level, to the executive branches below the Government itself. The Military Procuracy operates according to the same principles within the Armed Forces of the Russian Federation.

The segregation of the Procuracy from other agencies extends to requirements that procurators and investigators may not be members of elective and other agencies formed by agencies of State power and agencies of local self-government, may not join social associations pursuing political purposes or take part in their activity, and may not engage in other paid or unpaid activities except for teaching, scholarly, and creative activities.

When not acting in the performance of its investigative and supervisory duties, the Procuracy interfaces with other State agencies by way of coordination and intercommunication in the usual way.

The Procuracy is empowered to enter into direct links with respective agencies of other States and with international organisations, to cooperate with them, to conclude agreements relating to legal assistance and combating crime, and to take part in drafting international treaties.

The Procurator General of the Russian Federation participates in sessions of the Plenum of the Supreme Court of the Russian Federation and therefore has a voice if the drafting of Guiding Explanations and other documents issued by the Plenum of the Court. In addition, as noted above, the Procuracy may protest individual court decisions by way of supervision if these decisions are considered to be contrary to law. The power to protest is not seen, however, as a form of administrative supervision by the Procuracy over the courts nor as a vehicle of Party influence, but merely another source of verification over the quality of judicial decisions. It nonetheless remains a unique feature of the socialist legal tradition.

3.5 Mechanisms

Procuratorial Oversight

The Procurator General of the Russian Federation directs the activities of Procuracy agencies and supervises their work. He issues four distinct types of subordinate normative acts which are binding throughout the Procuracy system: the order [приказ], through which the strategic line for exercising powers of supervision over the execution of laws and other activities of Procuracy agencies is determined; the instructive directive [указание], which elaborates orders of the Procurator General; the regulation [распоряжение], intended to ensure the fulfilment of particular actions by a procurator or investigator; and the instruction [инструкция], which contains directions for the performance of procedural or operational actions, such as statistical reports or the registration of crimes committed.

The procurators of subjects of the Federation and procurators equated thereto direct the activities of city and district procuracies and other procuracies equated to them and operate on the basis of laws of the Russian Federation and normative acts of the Procurator General. Within their budgets and personnel establishments fixed by the Procurator General, they may make changes in their staffing.

Administrative Management

The Procuracy of the Russian Federation is financed entirely from the federal budget, except that financial provision for the activities of military procuracy agencies is made by the Ministry of Defence of the Russian Federation, Frontier Service of the Federal Security Service, and command of other forces and military formations in accordance with the budget of the Russian Federation. The same applies to material-technical provision and the allocation of official premises, transport, and means of communication. Military units are responsible for the protection of military procuracy agencies.

Human resources, subject to budgetary provisions for manning levels, are established by the Government of the Russian Federation within budgetary allocations. On the basis of budgetary and personnel establishment limits, the Procurator General of the Russian Federation determines the personnel requirements and structure of the General Procuracy and of the procuracies and Procuracy institutions subordinate to him. He appoints and dismisses all personnel of the General Procuracy and all procurators throughout the entire system (subject to the duty to secure agreement to the appointments of procurators of subjects of the Russian Federation).

Oversight and Inspection Mechanisms

It is the inherent nature of the structure of the Procuracy that its activities are not subject to oversight and inspection by other agencies. During the Soviet era, the Procuracy was subject to supervision by the Communist Party, but with the abolition of the special status of the Communist Party and the requirement that the Procuracy and individual procurators have no political affiliation, that dimension of supervision disappeared.

For the most part, therefore, the Procuracy is a self-policing agency which relies upon the internal command and appeal system for the purposes of oversight.

3.6 Career and Transparency Issues

Individuals who are citizens of Russia, not citizens of a foreign state, have a higher legal education at a State accredited institution, and by reason of professional and moral qualities and state of health are able to perform the duties of this office may be appointed as procurators. Law students who have completed their third year of study may become aides of procurators in the lower echelons of the procuracy system. There are age requirements for certain levels of appointment within the Procuracy: for example, 25 years of age for persons appointed to the office of procurator of a city, district, or procurators equated thereto, plus at least three years of work experience as a procurator or investigator in procuracy agencies; the age of 30 operates for persons appointed to the office of a procurator of a subject of the Russian Federation or procurators equated thereto. Depending upon background and experience, individuals first appointed to the procuracy may be required to complete a probation period for up to six months.

Procuracy personnel may not be transferred to another locality without their consent, and if a locality with unfavourable climatic conditions is involved, also on the basis of a medical opinion. Russian legislation establishes a number of incentives and rewards for exemplary service in the Procuracy, ranging from an announcement of gratitude to promotion in rank.

The failure to perform or the improper performance of duties by procuracy personnel may engage disciplinary responsibility. The following sanctions may be imposed: comment; reprimand; strict reprimand; reduction in class rank; deprivation of label pin; warning of failure to conform to the job, and dismissal from procuracy agencies. The Procurator General may himself impose any of these sanctions, and other procurators of lower ranks may impose some or all of these sanctions

in accordance with legislation and internal regulations. If procuracy personnel have committed an administrative violation or a crime, they are subject to investigation and prosecution by procuracy agencies.

Procuracy personnel are civil servants and subject to general Russian legislation on State service unless provided otherwise by the legislation on the Procuracy. In addition to the grounds for termination of employment in the Russian labour legislation, procuracy personnel are dismissed from service upon retirement or when they reach the maximum age for being in Procuracy service, or if they lose citizenship of Russia, or violate the Oath of procurator or commit offences disgracing the honour of a Procuracy worker, or fail to comply with limitations connected with service, or if they divulge information comprising a State or other secret.

The maximum age of procuracy personnel is 60 years of age, subject to extension for up to one year in individual instances and the possibility of working under a fixed-term contract up to the age of 65.

Salaries within the Procuracy are expressed in percentages of other base salaries. For example, the salary of the Procurator General is fixed at 98% of the post salary of the Chairman of the Supreme Court of the Russian Federation. The specific salary of the Procurator General is 117,130 rubles per month, consisting of a post salary of 53,000 rubles, a supplemental payment for class rank of 15,900 rubles, and a supplemental payment for years of service of 48,230 rubles. These figures were increased for the years 2006, 2007, and 2008, in the last year by 1.085 times. The salary is indexed for inflation and cost of living in the amounts and within the periods established for judges.[215]

The post salaries of lower procurators are a fixed percentage of the salary of the Procurator General; these percentages are established by the Government of the Russian Federation and not by the Procuracy itself. In addition, a variety of supplementary payments are available. If awarded for the complexity, tension, or exceptional achievement, they are established by the executive of the Procuracy agency concerned. Class rank and years of service are recognized by adding a percentage correlation to the base post salary. If the procurator has a postgraduate degree of Ph.D., an increment of 5% is received annually in post salary, and if an LL.D. or the rank of profession, 10% increment. In addition, bonuses may be paid for quarterly and yearly results of work. The general salary regime for procuracy personnel is analogous to, and slightly higher than, that for investigator personnel within the Procuracy (see Chapter 2 above).

Class ranks for procuracy personnel follow the post to which they are appointed within the General Procuracy. There are eleven class ranks:

- Junior jurist Jurist, third class Jurist, second class Jurist, first class
- Junior Counsellor of Justice
- Counsellor of Justice
- Senior Counsellor of Justice
- State Counsellor of Justice, third class State Counsellor of Justice, second class State Counsellor of Justice, first class Privy State Counsellor of Justice

Class ranks are conferred by taking into account the post to which a procurator is appointed, the period for which he has held a class rank, the results of attestation, education, and other conditions

[215] See the Edict of the President of the Russian Federation, No. 877, 26 July 2005, as amended by Edicts 831, 495, and 1317, respectively adopted 3 August 2006, 16 April 2007, and 6 September 2008.

laid down in the Statute on Class Ranks of Procuracy Workers of the Russian Federation confirmed by Edict of the President of the Russian Federation on 30 June 1997, as amended 1 August 2007. Graduates of law faculties appointed immediately upon completion of their studies are appointed at the level of Jurist third class. Lateral appointments from other law enforcement agencies or positions are given posts commensurate with their experience, but only after having completed six months of work.

Promotion from one class rank to another depends upon having held a class rank for a specified duration of time. A Junior Jurist, for example, will serve at that level for one year or until he receives his diploma in law. A Jurist, third class, or a Jurist, second class, will serve two years in each post before promotion, a Jurist, first class, for three years; a junior counsellor of justice, for three years, and a counsellor of justice, four years. There are no terms of years for service in higher posts before elevation to a more senior class rank. Thus, a junior jurist starting at the beginning and working his way up through the class ranks would serve for fifteen years before reaching the top of the counsellor of justice class rank.

Candidates for the conferment of class ranks may be promoted ahead of time or without compliance with the sequence of succession in the event they are nominated for a higher post or for exemplary performance of their employment duties or special distinction in work. However, one may not jump more than two ranks by way of promotion.

Once conferred, class ranks are held by a procurator for life. A procurator may be deprived of class rank only by judgment of a court for a crime committed.

The highest class rank, Privy State Counsellor of Justice, is conferred by the President of the Russian Federation. The class ranks of State Counsellor of Justice, first, second, and third classes, are conferred by the President of the Russian Federation upon the recommendation of the Procurator General of the Russian Federation upon procuracy workers who have a higher legal education. The Procurator General determines the procedure for conferring class ranks upon individuals up to senior counsellor of justice inclusive.

Procuracy personnel are subject to attestation in order to determine whether they have the knowledge and qualifications to hold the post which they occupy. The Procurator General has established the procedure and periods for carrying out attestation. Failure to meet the requirements of attestation will mean loss of job in the Procuracy.

With respect to pensions, procuracy personnel qualify in accordance with legislation regulating service by members of internal affairs agencies and their families. There are special provisions in legislation which give procuracy personnel free or reduced-cost travel on city, suburban, and local transport (except taxis), additional housing space, telephone service in priority, and medical services.

Procurators are accorded special protection for personal security purposes. They have the right to wear a combat sidearm (pistol, revolver, etc.) at all times; those killed or injured in the course of or in connection with duties are given funeral and burial costs at State expense. They also carry State personal insurance equal to 180 times the amount of their average monthly monetary maintenance.

Members of the Military Procuracy are governed by subject to slightly varying provisions, although they remain part of the General Procuracy of the Russian Federation.

Conclusion

During the Soviet era the Procuracy was regarded as an elite legal institution which routinely attracted the best graduates from the Soviet law faculties. It was also the legal institution mostly closely tied to the Communist Party of the Soviet Union. All procurators were Party members, or nearly so, and the Procuracy was known to be strongly guided by Party resolutions in determining the priorities for exercising its prosecutorial and supervisory functions.

With the transition to a market-oriented economy, in the early years after the dissolution of the Soviet Union the private sector was more attractive to many Procuracy personnel; many resigned, a trend initially reinforced by low levels of remuneration and serious problems with personal security (a number of procurators were the victims of organized crime or contract killers).

There is been a concentrated and targeted State response to these difficulties with the Procuracy. The salaries were raised substantially for all Procuracy personnel. The base salary was augmented by supplementary payments for class rank, years of service, special adverse service conditions (for example, service in climatically-adverse regions), increments reflecting the complexity and tension of particular assignments or posts, additional salary for receiving a postgraduate academic degree or title, or for the conferment of State honours. These measures collectively have done much to restore the Procuracy to its previous levels of prestige and considerably facilitated the recruitment and retention of personnel.

The plurality of roles which the Procuracy performs can raise conflicts of interest, especially when the procurator must act as accuser on behalf of the State yet initiate objections to procedural or substantive violations by the court. To some extent conflicts are avoided or reduced by depersonalizing the conflict. Different committees, administrations, or sections of the Procuracy are concerned with different types of supervision, or investigation, or other activities. The essence of the Procuracy function is to persuade agencies and officials to correct their own errors; except in certain aspects of inquiries and preliminary investigations, the Procuracy itself has no administrative power to set affairs in order by itself.

Perhaps the major criticism made of the Procuracy was the combining into a single agency the functions of investigation and prosecution. This was widely regarded as an inherent conflict of interest. Inevitably, the decision to prosecute must contain an evaluation of the quality and comprehensiveness of the investigation. If these decisions are taken within the same agency, it is felt that objectivity may be compromised. Criticism of these policies goes back many years; adjustments were made finally under the impact of decisions of the European Court for Human Rights, which also pointed to the anomalies that might arise from the traditional Russian structure. In response to this criticism the post of "Chief Investigator" was created within the Procuracy, the occupant of this post having the rank of Deputy Procurator General (see Chapter 2 above). It would be premature to assess the impact of this change.

The organization and structure of the Procuracy seem to have shielded that institution on the whole from extraneous local influences and from influences originating within political parties, which at this stage of Russian history are not powerful cohesive forces. This seems to be an institution which has proved itself satisfactorily and does not face serious calls for its abolition or substantial reorganization.

4. Court System

The Russian judicial system is regulated by the 1993 Russian Constitution (especially Chapter 7), the Federal Constitutional Law on the Judicial System of the Russian Federation of 31 December 1996, which entered into force on 1 January 1997, as amended;[216] the 1981 RSFSR Law on Court Organization,[217] and the 2002 Federal Law on Judges' Community Agencies of the Russian Federation, as amended.[218] These enactments require that judicial power be exercised only by courts, that the courts be independent of legislative and executive power, and that extraordinary courts and courts not provided for by the Constitution or by the 1996 Law on the judicial system are not permitted.

4.1 Role and Position

Three kinds of federal courts are provided for by the 1993 Russian Constitution: (1) the Constitutional Court of the Russian Federation; (2) the federal courts of general jurisdiction headed by the Supreme Court of the Russian Federation; and (3) the federal arbitrazh courts headed by the Supreme Arbitrazh Court of the Russian Federation.[219]

The courts of general jurisdiction within the system of the Russian Supreme Court exist at all administrative-territorial levels of the Russian Federation. This means within the 83 subjects of the Russian Federation, each of which has a highest court (the name varies, from supreme court of each of the republics within the Russian Federation, to the territory or regional court within each territory or region, and so on), to the Moscow and St. Petersburg City Courts, down to district courts within the districts of each subject of the Federation.

Military courts fall within the system of federal courts of general jurisdiction, as do the justices of the peace, who are judges of general jurisdiction of subjects of the Russian Federation.

The courts of subjects of the Russian Federation are the constitutional or charter courts established by each of them and the justices of the peace of their respective territory.

All Russian courts are conceived of as being part of a unified judicial system whose unity is ensured by the shared origin of Russian courts in the 1993 Constitution and the 1996 Law on the judicial system, the concept of "judges' community agencies", compliance by all courts with the rules of procedure established by federal laws, the application by all courts of the Russian Constitution, federal laws, generally-recognized principles and norms of international law and international treaties of the Russian Federation, recognition that judicial decrees which have entered into legal force are binding throughout the Russian Federation, the unity of the status of judges, and the financing of federal courts and justices of the peace from the federal budget.

Courts of the Russian Federation are financed only at the expense of the federal budget in accordance with the 1999 Federal Law on Financing Courts of the Russian Federation. Individual budget lines are provided for in the annual federal budget for the Constitutional Court, Supreme Court and other courts of general jurisdiction, the Judicial Department attached to the Supreme Court, and for the Supreme Arbitrazh Court and other arbitrazh courts. The legislation contains a number of safeguards intended to protect the judicial system against legislative interference. First, respective expense items

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216 Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 392-420.

217 Only a few articles remain in force.

218 Translated in Butler, *Russian Public Law* (2d ed.; 2009), pp. 421-446.

219 The "arbitrazh courts" are widely and absolutely erroneously often translated into English as "arbitration" courts. Even the English-language website of the Supreme Arbitrazh Court makes this mistake. *The Moscow Times* routinely does so.

must be financed in full. Second, a reduction of more than 5% in the total budget for the courts may be adopted only with the consent of the All-Russian Congress of Judges. The arbitrazh courts, justices of the peace, and Judicial Department attached to the Supreme Court each receive their funds monthly in equal proportions of their annual appropriation, and provision is made for the failure to transfer the said amounts or incomplete transfer thereof. Within the annual amounts appropriated, the three respective court systems autonomously determine how to allocate their respective budgets.

4.2 Organisation

Constitutional Court of the Russian Federation

The Court consists of nineteen judges appointed to office by the upper chamber of the Federal Assembly of the Russian Federation (Soviet of the Federation) upon the recommendation of the President of the Russian Federation.

The members of the Constitutional Court elect from among their number the Chairman, deputy chairman, and judge-secretary of the Court in a closed plenary session convoked not less than two months from the day when the respective office becomes vacant. A system of "rating voting" is conducted, under which all judges on the Court are entered on the ballot and each judge circles the number of judges who should stand for the respective office. The three judges who receive the largest number of rating ballots become candidates for the position. Complicated procedures exist to deal with tie votes and anomalies.

The respective duties and functions of the Chairman, deputy chairman, and judge-secretary are enumerated in the Law on the Constitutional Court and in the Reglament of the Constitutional Court.

Courts of ordinary jurisdiction

The courts of ordinary jurisdiction are headed by the Supreme Court of the Russian Federation, which is the highest judicial agency for civil, criminal, administrative, and other cases relegated by law to these courts. It is the directly superior instance to the supreme courts of the republics within the Federation, territory or regional courts, courts of cities of federal significance (Moscow and St. Petersburg), courts of the autonomous region and autonomous national areas, and designated military courts. The lowest tier of this system is the district court, which acts as a court of first instance and, with respect to justices of the peace, as the court of second instance. A federal constitutional law is supposed to be adopted with respect to the courts of ordinary jurisdiction. This has not happened, and until it does these courts continue to be governed by the 1981 RSFSR Law on Court Organization, as amended.

The Supreme Court of the Russian Federation consists of 111 judges appointed by the Soviet of the Federation upon the recommendation of the President of the Russian Federation, which in turn is based upon a recommendation of the Chairman of the Supreme Court and the opinion of the qualifications collegiums of the Court.

Justices of the peace operate within judicial precincts. The total number of justices and the number of judicial precincts is determined with a subject of the Russian Federation by a federal law and agreed with the Russian Supreme Court. As of 1 January 2008, there were 7,367 justices of the peace in Russia.

Arbitrazh courts

Under the 1993 Russian Constitution (Article 127) the arbitrazh courts are confirmed to be a branch of the federal judicial system and to operate in accordance with the Federal Constitutional

Law on Arbitrazh Courts in the Russian Federation, of 28 April 1995, as amended, and in force from 1 July

1995. The arbitrazh courts operate in accordance with the Code of Arbitrazh Procedure, currently in its third variation adopted 24 July 2002 and in force as from 1 September 2002, as amended. The system of arbitrazh courts comprises the Supreme Arbitrazh Court of the Russian Federation, the federal arbitrazh courts of precincts (of which there are ten), and the arbitrazh courts of subjects of the Federation. All arbitrazh courts are federal courts, even those organized at the level of subjects of the Federation.

4.3 Model

The organizational model is based on the concept of the unified judicial system composed of the three branches thereof (constitutional, ordinary jurisdiction, arbitrazh courts), each branch having its own jurisdiction, and so structured to cover the territorial extent of the entire country. The 83 subjects of the Russian Federation have their own constitutional or charter courts which address constitutional issues in each respectively.

The Constitutional Court of the Russian Federation, Supreme Court of the Russian Federation, and Supreme Arbitrazh Court of the Russian Federation, having been created in accordance with the 1993 Russian Constitution, may be abolished only by means of amendment to the 1993 Russian Constitution. Other federal courts are created and abolished by a federal law. The offices of justice of the peace and the constitutional or charter courts of subjects of the Russian Federation are created and abolished by laws of subjects of the Russian Federation.

No court may be abolished if questions of the administration of justice relegated to its jurisdiction have not simultaneously been transferred to the jurisdiction of another court.

4.4 Tasks and Functions

Constitutional Court of Russian Federation

The Constitutional Court was established on the basis of the 1993 Russian Constitution and the Federal Constitutional Law on the Constitutional Court of the Russian Federation of 21 July 1994, as amended.[220] The Court is presently located in St. Petersburg, Russia.

The functions of the Constitutional Court reflected in the jurisdiction of that Court are complex and may not be changed other than by making changes in the Federal Constitutional Law which established the Court. The Court exercises jurisdiction with respect to three major areas:

1. The first concerns the conformity to the 1993 Russian Constitution of: (a) federal laws, normative acts of the President of the Russian Federation, the Soviet of the Federation, the State Duma, and the Government of the Russian Federation; (b) the constitutions or charters, laws, and other normative acts of the subjects of the Russian Federation issued with regard to questions relegated to the jurisdiction of agencies of State power of the Russian Federation and to the joint jurisdiction of agencies of State power of the Russian Federation and agencies of State power of subjects of the Russian Federation; (c) treaties between agencies of State power of the Russian Federation and agencies of State power of subjects of the Russian Federation, and treaties between agencies of State power of subjects of the Russian Federation; and (d) international treaties of the Russian Federation which have not entered into force;

[220] Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 518-555.

2. The second concerns disputes concerning competence between: (a) federal agencies of State power; (b) agencies of State power of the Russian Federation and agencies of State power of subjects of the Russian Federation; (c) the highest State agencies of subjects of the Russian Federation;
3. The third concerns appeals against a violation of the constitutional rights and freedoms of citizens and inquiries from courts to verify the constitutionality of a law being applied or subject to application in a particular case; interpretations of the Constitution; in the event of an attempt to impeach the President of the Russian Federation, offer an opinion as to whether the procedure for putting forward an application against the President has been complied with; and the exercise of other powers granted to the Court by the 1993 Russian Constitution, the Treaty of the Russian Federation, federal constitutional laws, and treaties delimiting powers among subjects of the Russian Federation.

The Court has the right of legislative initiative with regard to matters of its jurisdiction.

The **organization** of the Court is as follows: the Court acts in plenary session and is divided into two chambers containing respectively ten and nine judges of the Court. Which judge serves in which chamber is determined by lot. The chairman and deputy chairman of the Court may not be within the same chamber, and the individual composition of the chambers must be changed at least every three years. In plenary session the Court exclusively settled cases concerning the constitutionality of the constitutions and charters of subjects of the Federation, interprets the 1993 Russian Constitution, gives an opinion regarding impeachment proceedings against the President, decides whether to exercise legislative initiative, and adopts messages to be issued by the Court, elects the chairman, deputy chairman, and secretary of the Court, determines whether to suspend or terminate the powers of a judge of the Court or term of office of the chairman, deputy chairman, or secretary of the Court. Matters not within the exclusive jurisdiction of the plenary session of the Court may be considered in sessions of the chambers of the Court.

Courts of ordinary jurisdiction. The courts of ordinary jurisdiction are headed by the Supreme Court of the Russian Federation, which is the highest judicial agency for civil, criminal, administrative, and other cases within the jurisdiction of these courts.[221] The Supreme Court exercises judicial supervision in the procedural forms provided by federal legislation over the activity of courts of general jurisdiction, including military and specialised federal courts. The Supreme Court may, as legislation stipulates, act as a court of first or second instance and is the directly superior instance to the supreme courts of the republics, territories or regions, cities of federal significance, autonomous region, and autonomous national area courts and military courts of stipulated levels.

The structure of the Supreme Court includes the Plenum of the Supreme Court, the Presidium of the Supreme Court, the Cassational Division, Judicial Division for Civil Cases, Judicial Division for Criminal Cases, Military Division, and various structural subdivisions comprising collectively the Apparatus of the Supreme Court. The Supreme Court is directed in its activities by the Chairman, First Deputy Chairman, and deputy chairmen of the Supreme Court. The powers and responsibilities of each of the foregoing organs and officials of the Supreme Court are set out in the

[221] There can be an overlap of jurisdiction between the courts of ordinary jurisdiction and the arbitrazh courts to the extent that both may be concerned with civil-law matters. In practice this gives litigants a choice as to which system to use. Although on the whole the arbitrazh courts have an excellent reputation among the foreign investment community, for example, some legal advisors believe that the courts of ordinary jurisdiction have a better record insofar as the enforcement of foreign judicial decisions and arbitral awards is concerned.

Reglament of The Supreme Court confirmed by the Plenum of the Supreme Court on 22 December 2009, No. 29, and in force as from 1 January 2010.[222]

The Chairman of the Supreme Court organizes the activities of the Court and the system of the courts of ordinary jurisdiction; distributes duties between the deputy chairmen and the judges of the Court, convenes the Plenum and presides at its meetings, organizes work to summarize and analyse judicial practice, organizes the current and long-term planning of the work of the Court, organizes work to raise the qualifications of the judges of the Court, submits recommendations to the President of Russia for appointment to the office of judge of a court of general jurisdiction, excluding members of the Supreme Court itself, offers his own view as to candidates for appointment as judge of the Supreme Court, is responsible for directing the Apparatus of the Court, including the hiring and dismissal of workers of the Apparatus and the distribution of their duties, establishes the rules for internal order of the Supreme Court, with the consent of the Council of Judges of the Russian Federation appoints to and relieves from office the Director General of the Judicial Department attached to the Supreme Court and performs a number of other duties with respect to the said Judicial Department, and concludes contracts and issues orders and regulations, among other functions.

All members of the Supreme Court, including the chairman and deputy chairmen, are on the Plenum of the Court. The Plenum analyses summaries of judicial practice and forensic statistics and issues explanations in the form of decrees to courts of general jurisdiction concerning the application of legislation. Legislative initiative is exercised by the Court through the Plenum and inquiries to the Constitutional Court submitted by it. The Plenum confirms the membership of the High Qualifications Division of Judges of the Russian Federation, chooses the secretary of the Plenum from among its members, confirms the Reglament of the Court, at a joint session with the Plenum of the Supreme Arbitrazh Court confirms the Reglament of the Judicial Disciplinary Office and elects the members thereof, confirms the Statute on the Scientific-Advisory Council attached to the Court, and hears reports from the respective chairmen about the activities of the various judicial divisions of the Court.

The Plenum meets at least quarterly to discuss an agenda determined by the Chairman of the Court. A quorum is at least two thirds of the members; minutes are kept and signed. Much of the time of the Plenum is devoted to discussing draft decrees on judicial practice; editorial commissions may be formed to assist.

The Secretary of the Plenum supervises the Secretariat of the Plenum, helps draft work plans and prepare draft decrees submitted for consideration, sits on editorial commissions to rework drafts, and ultimately signs the final texts of adopted decrees for transfer to the Chairman of the Plenum for his own signature.

The Secretariat of the Plenum undertakes all preparatory work for Plenum sessions and ultimately circulates the texts of Plenum decrees to all courts of ordinary jurisdiction and agencies of State power. All decrees are published on the internet, appear in the monthly bulletin of the Supreme Court, and in the official newspaper "Rossiiskaia gazeta".

The Scientific-Advisory Council assists by advising on matters of principle in judicial practice and consists of judges, scholars, leading practitioners, and representatives from other law enforcement agencies. The activities of the Council are governed by its Statute and the Council is managed by a Learned Secretary confirmed by the Plenum of the Court.

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222 The document is unpublished but available on the commercial legal database Consultant Plus.

The Presidium of the Supreme Court consists of 13 judges whose appointment is confirmed by the Soviet of the Federation (the upper chamber of the Russian parliament) upon the recommendation of the President of the Russian Federation, in turn based upon the recommendation of the Chairman of the Supreme Court. The 13 judges are made up of the Chairman and deputy chairmen of the Court ex officio and judges of the Supreme Court selected for this purpose. The Presidium is quorate when a majority of members are present. Minutes are kept of Presidium sessions, and with the permission of the chairman, photographs and recordings are permitted. The Presidium has its own Secretariat.

The Presidium considers cases by way of supervision and for new or newly discovered circumstances, considers materials summarizing judicial practice and forensic statistics, takes decisions with regard to organizing the work of divisions and the apparatus of the Court. Issues are put to the Presidium in the form of Memoranda with substantiation of positions recommended to be taken. Surveys of legislation and judicial practice confirmed by the Presidium are circulated to the judges of all courts of ordinary jurisdiction and workers of the apparatus of the Court, and also published in the monthly bulletin of the Court.

There are four divisions within the Supreme Court: the Judicial Division for Civil Cases, the Judicial Division for Criminal Cases, the Military Division – these three all known as judicial divisions, and the Cassational Division. The three judicial divisions are composed of judges from the Court who are confirmed in assignment by the Plenum of the Court. Each division considers cases as a court of first instance, by way of cassation, by way of supervision, and in view of new or newly discovered circumstances. The Cassational Division is composed of 13 judges whose appointment is confirmed by the Soviet of the Federation upon the recommendation of the President of Russia based on a recommendation of the Chairman of the Court and a positive opinion from the High Qualifications Division of Judges of the Russian Federation. The Cassational Division considers as a court of second instance civil and criminal cases upon appeal and submissions against decisions, judgments, rulings, and decrees rendered by judicial divisions of the Supreme Court as a court of first instance and within its own powers in judicial cases for newly discovered circumstances.

The heads of the judicial and cassational divisions report to the Plenum of the Court about the activities of their divisions, organize work to raise the qualifications of judges in their respective divisions, and exercise control over the consideration of supervisory appeals, submissions, and protests.

The rapporteurs of the Presidium and judicial divisions of the Supreme Court form judicial benches which coordinate and manage the judicial work of each bench and the workers of the Apparatus of the Supreme Court assigned to the judicial bench.

The courts of general jurisdiction below the Supreme Court of the Russian Federation correspond to the administrative-territorial subdivisions of the Federation. All have equal powers and are commonly called, for the sake of convenience, "territory (or regional) courts and courts equated thereto". All hear cases at first instance, and all act at second instance with respect to the courts below them. At second instance, therefore, the exercise judicial powers by way of cassation and supervision. Collectively, they comprise the middle link between the Supreme Court and the principal court of the Russian Federation: the district court. Each court contains a presidium and is divided into judicial divisions for civil and criminal cases, each division chaired by a deputy chairman of the court. Although part of the middle link, the republic supreme courts also are the highest judicial instance in the respective republic, exercise judicial supervision over district courts, and have the right of legislative initiative in their republic.

Previously the court which acted exclusively at first instance was the district court, known at one time as "people's courts" but renamed under the 1996 Federal Law on the Judicial System. When justices of the peace were installed, the relevant district became an appeal court with respect to their decisions. The entire middle and lowest tiers of the courts of ordinary jurisdiction are managed by the Judicial Department attached to the Supreme Court of the Russian Federation.

Military courts

Known as military tribunals until 1992, when they were renamed military courts, these institutions have survived in peacetime on the premise that military life has special features which require adjudication in courts composed of military personnel. They operate on the basis of the Federal Constitutional Law on Military Courts of 23 June 1999, as amended.[223] The number of military courts and military judges is determined by the Supreme Court of the Russian Federation. Protests against decisions, judgments, rulings, and decrees of the Military Division of the Supreme Court and military courts which have entered into force are heard by the Presidium of the supreme Court. Cassational appeals and protests are decided by the Cassational Division of the Supreme Court. The judicial activities of military courts are taken into account just as those of other courts when summaries of judicial practice are prepared.

Justices of the peace

Originally introduced into Russia in 1864, the institution of justice of the peace was abolished in November 1917 and reintroduced in the Russian Federation by the Federal Law on Justices of the Peace of 17 December 1998, as amended.[224] Their actual introduction has been gradual because of financial considerations. By 2010, however, they exist in all subjects of the Russian Federation; their existence has significantly decreased the caseload of the district courts.

Justices of the peace are judges of general jurisdiction and part of the unified judicial system of the Russian Federation. They issue decrees when deciding cases and these, together with other documents issued by them, are binding throughout Russia upon all to whom they are addressed. Their competence at first instance extends to criminal cases concerning crimes for whose commission the maximum punishment that may be assigned does not exceed deprivation of freedom for three years; cases concerning the issuance of a judicial order; cases concerning dissolution of marriage if there is no dispute concerning children between the spouses; cases concerning the division of jointly-acquired property between spouses; other cases arising from family law relations, except those relating to paternity or motherhood; deprivation of parental rights; adoption; property disputes under a established value; labour cases, except reinstatement in work; cases concerning determination of the procedure for the use of land plots, structures, and other immoveables; certain administrative violations; among others.

Role of Judicial Department

In the past organizational provision for the courts of ordinary jurisdiction was made by the Ministry of Justice of the Russian Federation, a proximity to and dependence upon Government that in the eyes of many specialists compromised the independence of the courts. The 1996 Law on the Judicial System made provision for the Judicial Department attached to the Supreme Court of the Russian Federation, regulated by the Federal Law of 8 January 1998, as amended.[225] Although attached to the Supreme Court, the Judicial Department is a federal State agency whose responsibility is to organize the activity of the entire system of courts (except the Supreme Court itself, which has

[223] Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 632-650.
[224] Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 587-590.
[225] Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 578-586.

its own apparatus) of ordinary jurisdiction, including specialized courts, and the financing of the justices of the peace. For these purposes "organize" means personnel, finance, material- technical, and other measures which enable the courts to function independently and efficiently. The Judicial Department therefore constitutes a system having agencies and institutions at every level of State administration where there are courts. It is headed by a General Director who is appointed to and removed from office by the Chairman of the Supreme Court with the consent of the Council of Judges of the Russian Federation.

So far as the public record discloses, the existence of the Judicial Department has facilitated the independence of the courts by acting as a "buffer" between the Government (and its inclination to introduce budget cuts, for example, everywhere in a financial crisis) and the financing of the judiciary. During the 1990s, the Government actually did attempt to reduce appropriations for the judiciary that was judged to be illegal.

Arbitrazh courts

The internal structure of the arbitrazh courts is similar in key respects to that of the courts of ordinary jurisdiction. The organization of their work is regulated by the Reglament of Arbitrazh Courts of the Russian Federation, confirmed by Decree No. 7 of the Plenum of the Supreme Arbitrazh Court of the Russian Federation on 5 June 1996, as amended to 17 December 2009.[226]

The Supreme Arbitrazh Court consists of the Plenum, the Presidium, and two judicial divisions, one for disputes arising from civil and other legal relations and the second for disputes arising from administrative legal relations. The Plenum consists of the Chairman, deputy chairmen, and all judges of the Supreme Arbitrazh Court. The Plenum is concerned principally with organizational matters, legislative initiative, referral of questions to the Constitutional Court, choosing members of the judicial divisions, confirming the Reglament on arbitrazh courts, the permanent sites of federal arbitrazh courts, and the like.

The Presidium of the Supreme Arbitrazh Court consists of the Chairman, deputy chairman, and chairmen of judicial divisions, together with individual judges who may be elected by the Plenum. It is the Presidium which considers cases by way of supervision upon protests against judicial acts of arbitrazh courts which have entered into legal force. The judicial divisions consider cases at first instance, study and generalize judicial practice, make proposals to improve legislation, and analyse forensic statistics, among other functions. Within each division so-called benches of judges are organized to hear cases. A Council of the Chairmen of Arbitrazh Courts, consisting of the chairmen of all arbitrazh courts in the Russian Federation, acts as a consultative organ to advise on organizational, personnel, and financial matters.

There also is a Scientific-Consultative Council composed of leading scholars and practitioners attached to the Supreme Arbitrazh Court.

The ten federal arbitrazh courts of precincts have no plenums but do have a presidium and the same judicial divisions as the Supreme Arbitrazh Court. They act purely as a cassational instance and sit collegially with an uneven number of judges. The remaining arbitrazh courts are organized internally along analogous lines, having regard to the number of judges in each. The Reglament adopted by the Supreme Arbitrazh Court governs internal organizational matters of the entire court system and relationships among the courts.

In 2007 the arbitrazh courts received 953,045 petitions to sue, a decrease of 11.8% in comparison with the year 2006. The decrease is attributed to the continuing impact of amendments made in

[226] There is no English translation known of this document.

2005 to improve administrative measures for the settlement of disputes. The rate of reduction, however, has slowed, as would be expected, in comparison with the preceding year. Within these statistics the number of petitions to sue to declare debtors to be bankrupt dropped in 2007 to 44,255 (less than half the number in 2006, 91,431). The number of applications to establish facts having legal significance was 5.2% lower in 2007, comprising 4,869 applications. There were 188 applications to recognize and enforce the decisions of foreign courts and foreign arbitral tribunals. The caseload varied significantly from one jurisdiction to another. On average it was 41 cases per month for each arbitrazh judge, but in some jurisdictions was as high as 86 (Nizhnii Novgorod Region).

Of the total number of 905,211 cases settled by arbitrazh courts in 2007, 1,338 involved the participation of foreign persons and of these, 501 foreign persons were from countries of the Commonwealth of Independent States. 288 judicial commissions of foreign courts were performed, more than double the figure for 2005 and quadruple the figure for 2004 (60). Arbitrazh courts considered 162 applications of foreign persons to take security measures with respect to suits.

4.5 Relations

Among the principles of a Constitutional Court proceeding is the independence of judges, which requires that judges of the Court be guided exclusively by the law, not represent any State or social agencies, political parties, or movements, State, social, or other enterprises, institutions, or organizations, officials, State and territorial formations, or social groups. Decisions must be adopted under circumstances that preclude any outside influence or interference.

Constitutional Court of Russian Federation

The Court is expressly authorized to interact with constitutional control agencies of the 83 subjects of the Federation for the purpose of exchanging experience and information and rendering mutual methods assistance. The Court is further authorized to enter into agreements on cooperation, exchange of decisions, visits by apparatus personnel, and the organization of joint scientific measures with constitutional control agencies of foreign countries.

By invitation of the Chairman of the Supreme Court, judges of the Constitutional Court of the Russian Federation may take part in sessions of the Plenum of the Supreme Court.

Courts of ordinary jurisdiction

Joint sessions may be held, and sometimes are, between the Plenums of the Supreme Court and the Supreme Arbitrazh Court of the Russian Federation. Judges of the Supreme Arbitrazh Court may be invited to take part in sessions of the Plenum of the Supreme Court.

The Plenum of the Supreme Court may submit an inquiry to the Constitutional Court of the Russian Federation concerning the conformity to the Constitution of laws and other normative acts and may petition for explanations of judicial decisions adopted by the Constitutional Court.

The Supreme Court maintains partnership relations with the highest courts of foreign States and international organizations working in the sphere of the administration of justice, interacts with judicial agencies of CIS countries on the basis of arrangements and agreements with them, cooperates with the United Nations, Council of Europe, Organization for Security and Cooperation in Europe, Parliamentary Assembly of the Council of Europe, and the European Court of Justice, and collaborates in joint programs with the Council of Europe to promote judicial reform in Russia and enhance the effectiveness and openness of the administration of justice in Russia.

Arbitrazh courts

Deputies from the Federal Assembly, the chairmen of the Constitutional Court and Supreme Court, the Procurator General, the Minister of Justice, judges of arbitrazh courts, legal scholars, and others may be invited to take part in sessions of the Plenum of the Supreme Arbitrazh Court.

International links of the Supreme Arbitrazh Court and other federal arbitrazh courts are pursued in accordance with legislation and plans and programs for international legal cooperation prepared by the International Legal Section of the Supreme Arbitrazh Court and confirmed by the Chairman of the Supreme Arbitrazh Court.

Investigation Agencies

It would be possible for members of investigative agencies to be present, if invited, at sessions of the Plenum of the Supreme Court or Supreme Arbitrazh Court of the Russian Federation.

Security Agencies

It would be possible for members of security agencies to be present, if invited, at sessions of the Plenum of the Supreme Court or Supreme Arbitrazh Court of the Russian Federation.

Procuracy Agencies

The Procurator General of the Russian Federation takes part ex officio in sessions of the Plenum of the Supreme Court of the Russian Federation.

Other State Agencies

The Minister of Justice of the Russian Federation takes part ex officio in sessions of the Plenum of the Supreme Court of the Russian Federation.

The Minister of Justice also may take part in sessions of the Plenum of the Supreme Arbitrazh Court. The Reglament on Arbitrazh Courts authorizes "interaction" by the Supreme Arbitrazh Court with the Ministry of Justice in resolving issues connected with ensuring the established procedure for the activity of arbitrazh courts and questions relegated to the competence of the Court Marshall Service. When necessary, the chairmen of arbitrazh courts may interact with agencies of court marshalls on the territory of subjects of the Russian Federation.[227]

Legislative Branches

The Plenum of the Supreme Court has the right by way of legislative initiative to submit and retract draft laws to the State Duma to the Russian Federation. The Supreme Court also submits official comments on draft federal laws in accordance with the Reglament of the State Duma of the Federal Assembly of the Russian Federation.

Executive Branches

It would be possible for members of executive agencies attached to the President or to the Government of the Russian Federation to be present, if invited, at sessions of the Plenum of the Supreme Court or Supreme Arbitrazh Court of the Russian Federation.

4.6 Judicial Education and Training

The training of future judges and continuing legal education for sitting judges is among the responsibilities of the Russian Academy of Justice, founded by the Supreme Court and the Supreme

[227] The Reglament is translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 280-391.

Arbitrazh Court of the Russian Federation on the basis of the Edict of the President of the Russian Federation of 11 May 1998, as amended.[228] The Academy operates under the jurisdiction of its founders and undertakes fundamental and applied research on the organization and activities of the courts.

Constitutional Court of Russian Federation.

A person who is a citizen of the Russian Federation and attained by the day of appointment the age of not less than forty years, has a higher legal education, an irreproachable reputation, and work experience in a legal profession of not less than fifteen years and who possesses in the domain of law recognized high qualifications may be appointed a judge of the Russian Federation. No additional training is required by law for appointment to the Constitutional Court of the Russian Federation. In practice individuals are appointed who have at least the degree of candidate of legal sciences and commonly the doctor of legal sciences.

Courts of ordinary jurisdiction

A citizen of the Russian Federation who has a higher legal education, who does not have or has not had a record of conviction or criminal prosecution, who is not a citizen of a foreign State or permanently resident in a foreign State, has not been deemed to lack or to be limited in dispositive legal capacity, is not recorded in a narcological or psychoneurological dispensary in connection with treatment for alcoholism, narcotics addiction, toxicomania, or chronic and prolonged mental distress, and is not afflicted with other illnesses obstructing the exercise of the powers of a judge, and who is at least 35 years of age with 10 years of work experience in a legal speciality may serve on the Supreme Court of the Russian Federation. Such a person who is 30 years of age with 7 years of work experience in a legal speciality may serve as a judge of any of the intermediate courts of ordinary jurisdiction down to but not including a district court. Such a person who is 25 years of age with at least 5 years of relevant work experience may be a district court judge.

Military courts

A military judge must be at least 25 years of age and a Russian citizen, have a higher legal education and work experience of at least five years as a lawyer, have committed no offences, have passed a qualification examination and been recommended by the qualifications division of military court judges, be a military officer, and have concluded a contract to perform military service.

Justice of the Peace

A justice of the peace must be a Russian citizen aged 25 or more having a higher legal education and work experience as a lawyer for not less than five years, have committed no offences, and have passed the qualifications examination and been recommended by the college of judges in the respective subject of the Russian Federation. Federal court judges with more than five years' experience as a federal judge are exempt from the examination. They are appointed or elected to office by the legislative agency of State power of the subject of the Russian Federation or elected directly by the population in the judicial precinct as established by a law of the subject of the Russian Federation. The term of office may not exceed five years and is determined by local legislation. Subsequent elections or appointments are possible for up to five-year terms, provided that retirement is compulsory at age 70.

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228 СЗ РФ (1998), no. 19, item 2110.

Arbitrazh courts

The same criteria set out above for courts of ordinary jurisdiction apply respectively to the Supreme Arbitrazh Court, federal arbitrazh court of a district or appellate arbitrazh court, or arbitrazh court of a subject of the Russian Federation.

Courts of subject of Russian Federation

Judges of a constitutional or charter court of a subject of the Russian Federation must meet the same criteria as judges of a district court of ordinary jurisdiction.

All candidates for appointment to judicial office must undergo a medical examination and a security clearance. The introduction of a security clearance is of recent origin; previously there was no such requirement.

4.7 Career Issues

Constitutional Court of Russian Federation.

Election to this Court is effectively a lifetime appointment to the age of 70. Most individuals appointed to this Court have not risen through the judicial hierarchy of the courts of ordinary jurisdiction or the arbitrazh courts. Prior judicial experience has not been considered to be a significant requirement for appointment.

Courts of ordinary jurisdiction

Judges of courts of ordinary jurisdiction are elected or appointed to office until the age of 70, whereupon retirement is compulsory. A different age of retirement may be selected by courts of subjects of the Russian Federation.

Justices of the peace are elected or appointed for term not exceeding five years as determined by legislation of the subject of the Russian Federation where their judicial precinct is situated. Retirement is compulsory at the age of 70. The financing of salaries and expenses is from the federal budget; salaries are fixed at 60% of the salary of the Chairman of the Supreme Court of the Russian Federation, except in Moscow and St. Petersburg, where the coefficient is 64%.

Arbitrazh courts

All judicial appointments to arbitrazh courts are regulated by federal laws and not by legislation of subjects of the Russian Federation. The Chairman of the Supreme Arbitrazh Court is appointed to office by the Soviet of the Federation upon the recommendation of the President of the Russian Federation. The same procedure applies to the deputy chairmen and other judges of the Supreme Arbitrazh Court, except that in this instance the Chairman of the Supreme Arbitrazh Court makes recommendations for appointment to the President of Russia. The other arbitrazh court judges are appointed in accordance with the 1996 Federal Law on the Judicial System.

All federal judges except those serving on the Constitutional Court, Supreme Court, or Supreme Arbitrazh Court of the Russian Federation, are appointed for a term of three years, upon the expiry of which this person may be appointed to the same office for an indefinite term until the maximum age before retirement is reached.

4.8 Guarantee of Tenure

All Russian judges are irremovable. A judge may not be appointed to or elected to another office or to another court without his consent.

Constitutional Court of Russian Federation

Members of the Constitutional Court are appointed for an indeterminate term subject to the compulsory age of retirement at 70. A judge of the Constitutional Court takes up office from the moment he takes the Oath of Office; his powers terminate on the last day of the month in which he celebrates seventy years of age. However, having reached the age of seventy, a judge continues in office until the adoption of the final decision with regard to a case commenced with his participation or until the appointment of a new judge to office.

A judge is irremovable from office, and his powers of a judge may be terminated or suspended only in the procedure and on the grounds established by the Federal Law on the Constitutional Court. The powers of a judge may be suspended if a criminal case has been instituted with respect to him or he is prosecuted as an accused in another criminal case or if the judge by reason of health is temporarily incapable of performing his duties.

The powers of a judge of the Constitutional Court may be terminated for twelve different reasons enumerated in the Law on the Constitutional Court (Article 18). These range from a violation of the procedure for appointment to office, reaching the age of 70, retirement at the wish of the judge concerned, loss of citizenship of the Russian Federation, being convicted for a crime, engaging in actions not compatible with the office of judge, the failure to take part in proceedings or to vote more than twice in succession without justifiable reasons, to the death of the judge.

Justices of the Peace

Justices of the peace enjoy the same protections and guarantees as other judges.

By the Federal Constitutional Law on the Judicial Disciplinary Department of 9 November 2009[229] judges are guaranteed the right to appeal against decisions of the High Qualifications Division of Judges of the Russian Federation or qualifications divisions of judges of subjects of the Russian Federation to either terminate the powers of a judge or refusal to so terminate. This Department is composed of six judges, three each from the Supreme Court and Supreme Arbitrazh Court; effectively, discipline of judges is left to the judiciary itself. There is no appeal against the decision of the Judicial Disciplinary Department.

4.9 Judicial Interpretation

Constitutional Court

The form and style of a decision of the Constitutional Court is regulated by the Law on the Constitutional Court (Article 75). Special opinions (either concurring or dissenting) are possible. The decision of the court is proclaimed in open court immediately after being signed by all judges who participated in the voting. Within a two-week period after signature decrees and opinions are circulated according to a list set out in the Law on the Constitutional Court and are subject to official publication in the gazettes for the publication of legislation and in a bi-monthly journal of the Constitutional Court itself. In addition, court decisions have been collected in individual volumes edited by judges of the Court, sometimes with commentary.

A decision of the Constitutional Court is final and not subject to appeal; it enters into force immediately after promulgation. Although publication of the decision is required by legislation, the legal force of the decision does not depend upon and is not connected with publication. No confirmation by other agencies or officials is required in respect of a Court decision; it has immediate direct effect and is subject to immediate execution.

[229] СЗ РФ (2009), no. 45, item 5261.

An example of the role and authority of judges in shaping the development of the law through interpretation is the Decision of the Constitutional Court of the Russian Federation of 21 January 2010[230] which effectively introduces and establishes precedent as an element of Russian law.

Courts of ordinary jurisdiction

The Russian courts have inherited from the Soviet era a practice more or less unique to the family of socialist legal systems: the issuance of "Guiding Explanations" issued by the Plenum of the Supreme Court and/or Supreme Arbitrazh Court of the Russian Federation – the name varying slightly from one period and one court system to another. Guiding Explanations take the form of a Decree of the Plenum and are binding upon all inferior courts within the particular system of the supreme court. They are based upon the generalization and analysis of lower court practice, usually upon a particular provision or area of the law. Typically they criticize lower courts, or some lower courts, for approaches to or understandings of the relevant provisions and indicate what the correct position should be. Soviet and post-Soviet legal doctrine have disagreed as to whether Guiding Explanations in general or the provisions of particular Guiding Explanations constitute a source of law or not.

Arbitration courts

The Plenum of the Supreme Arbitrazh Court by a Decree of 14 February 2008, which amended an early Plenum decree of 12 March 2007, was considered to have officially recognized judicial precedent. The Plenum in essence determined that the review of judicial acts when the possibility of review by way of supervision had been lost by reason of the expiry of the period of limitations was henceforth impossible. One reason for introducing this position was to reduce the opportunities for destabilization of the positions of the parties when a significant lapse of time has occurred. It was this position of the Supreme Arbitrazh Court that was appealed to the Constitutional Court, which in its Decision of 21 January 2010 upheld the Supreme Arbitrazh Court.

The role of the Russian judiciary in shaping the law has thus become more substantial than it was in the past.

4.10 Adjudication

Even though the Russian Federation has introduced the possibility of trial by jury in a limited number of criminal cases, the procedural model in criminal, civil, administrative, and other cases is overwhelmingly the so- called inquisitorial model with, perhaps, greater elements of adversariality introduced at certain points (e.g., rights of access of defence counsel, greater freedom for defence counsel to insist upon their views and to pursue appeals, and so on). Oddly enough, perhaps the elements of adversariality have been strengthened not by readjusting the role of the parties, but by strengthening the role and independence of the judge.

The investigation or the inquiry continue to be primarily the responsibility of the State in criminal proceedings even though access to counsel is ensured at an earlier stage, there is greater emphasis upon the rights of the suspect or accused and the importance of the presumption of innocence, and defenders or advokats may have a greater role in collecting relevant evidence. On the whole, however, since 2002 the Russian legislator has retracted many of the adversarial elements originally introduced into the 2001 Code of Criminal Procedure. In civil and arbitrazh procedure the inquisitorial model also dominates.

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230 СЗ РФ (2009), no. 45, item 5261.

Constitutional Court

The rules of procedure of the Constitutional Court are contained in the Law on the Constitutional Court and in the Reglament of the Court, adopted on 1 March 1995 – which is unpublished but available on a commercial legal data base in Russia called Consultant Plus. [231]
Recourse to the Court takes the form of an inquiry, petition, or appeal. The Court is required to reply in writing to every recourse, giving grounds for acceptance or rejection, directing the person having recourse to other competent agencies or officials if the matter is not within the jurisdiction of the Constitutional Court. During the calendar year 2007 there were 16,612 recourses to the Constitutional Court.

The Constitutional Court adopts four types of document, depending upon the nature of the matter under consideration. A determination adopted in a plenary session or the session of a chamber of the Court is called a decision [решение] of the Constitutional Court of the Russian Federation. With regard to most matters within its jurisdiction (Article 3(1)-(4), Law on the Constitutional Court), the final determination of the Court is called a decree [постановление]; if the matter deals with impeachment of the President, it is called an opinion [заключение]; all other determinations of the Court concerning a Constitutional Court proceeding are called a ruling [определение]. A decision is reached by open voting; each judge is polled by name and the person presiding votes last. A majority of judges who participate in the voting is sufficient to adopt a decision unless expressly provided otherwise by the Law on the Constitutional Court. A tie vote in a case concerning the constitutionality of a normative act or a treaty is considered to be in favour of the constitutionality of the act under consideration. Disputes concerning competence must be decided by a majority vote. A decision concerning an interpretation of the Constitution requires a two-thirds majority of the total number of judges (13 of 19). There is no right of abstention.

Since the adoption of the 1993 Russian Constitution, the Constitutional Court has issued nearly 300 decrees and 300 rulings.

Courts of ordinary jurisdiction

Civil and criminal cases are considered at first instance by the courts of ordinary jurisdiction in accordance with the 2003 Code of Civil Procedure[232] and 2001 Code of Criminal Procedure respectively. All judicial clerical work connected with first instance proceedings is organized in accordance with the Instruction on Clerical Work in the Supreme Court. Within the secretariat of a judicial bench clerical work is conducted in accordance with a post reglament confirmed by a deputy chairman of the Supreme Court.

In the Supreme Court the greater portion of work is performed within its judicial divisions. The judicial divisions for civil and criminal cases are each divided into benches composed of six to eight judges, one of whom acts as chairman to preside at judicial sessions and to ensure the preparation of cases for consideration by way of cassation or supervision. Each bench is allocated lower administrative-territorial subdivisions from whose courts cases flow to it. It is felt that such allocation enables the judges to come to know the lower courts in detail, the kinds of errors they are likely to make, and the professional qualities of individual judges. As a court of first instance the Supreme Court can take jurisdiction over virtually any civil or criminal case, as well as trying those relegated specifically to its jurisdiction. In practice the Supreme Court tries criminal cases where important State interests are involved, or in which the crimes committed involve several administrative-territorial divisions, entail grave consequences, or are of unusual complexity.

231 For an English translation, see W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 556-577.

232 There is no English translation of the Code of Civil Procedure.

During election periods the Supreme Court hears appeals against the decisions of the Central Electoral Commission of the Russian Federation refusing to register candidates for elective office.

Arbitrazh courts.

An arbitrazh court considers cases within its jurisdiction in which Russian citizens or organizations are parties, and also foreign organizations, organizations with foreign investments, international organizations, foreign citizens, or stateless persons who are engaged in entrepreneurial activity. Although commonly and inaccurately called "commercial" or "economic" courts because a considerable measure of their activity arises out of entrepreneurial relations, the arbitrazh courts have jurisdiction over matters which go far beyond the ordinary understanding of "commercial". The jurisdiction of the courts extends under the Code of Arbitrazh Procedure to "economic disputes". Examples of such are: disagreements relating to a contract which according to a law must be concluded or with regard to which the parties have agreed to submit to an arbitrazh court; the change of the conditions or dissolution of a contract; failure to perform or improper performance of obligations, recognition of the right of ownership; vindication suits; compensation of losses; defence of honour, dignity and business reputation; deeming "non-normative" acts of State agencies, local self-government, and other agencies to be invalid if they are contrary to laws and other normative legal acts and violate the rights and legal interests of citizens; appeals against a refusal of State registration or evasion thereof; appeals against fines; and numerous others.

4.11 Jurors and Assessors

Restoration of jury trial was a central provision of the Conception for Judicial Reform in the Russian Federation of 24 October 1991. On 16 July 1993 the 1960 RSFSR Code of Criminal Procedure was amended to add a new Section X devoted to a court of jurors. Trial by jury was introduced on an experimental basis in 1993-93 in nine territories and regions of Russia with exceptional care and attention and monitored thoroughly.

Role

The role of the jury in those criminal proceedings in which it is eligible to be chosen and actually is chosen is to determine whether a crime has been committed, whether it is proved that the accused committed the crime, and whether the person on trial is guilty of committing a crime. If the jury concluded that the person on trial is guilty, they have the right to say whether the accused deserves leniency, special leniency, or none whatsoever.

By the Federal Law on Arbitrazh Assessors of Arbitrazh Courts of Subjects of the Russian Federation of 30 May 2001, as amended,[233] the Russian Federation introduced a lay element into arbitrazh proceedings in the form of "arbitrazh assessors". These are non-lawyers at least 25 years of age, Russian citizens, with a higher vocational education and work experience of not less than 5 years in the sphere of economic, financial, legal, management, or entrepreneurial activity. Upon taking office they are required to take an oath.

Appointment and Training

Citizens of the Russian Federation who have reached the age of 25 and who do not have an uncancelled or unremoved record of conviction, who do not lack dispositive legal capacity or are not limited in dispositive legal capacity, or who are not registered in a narcotics or psycho-neurological dispensary for treatment as an alcoholic, narcotics addict, toximania, or chronic and

[233] Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 628-631.

grave mental illness may be included on the lists of candidacies for jurors. Individuals suspected or accused of the commission of a crime, or who do not have a command of the language in which the trial is to be conducted, or who have physical or mental defects that obstruct fully-fledged participation in the consideration of a criminal case by the court also are excluded. The general and reserve lists of candidates to be selected as a juror are drawn up in accordance with the Federal Law on Jurors of Federal Courts of General Jurisdiction in the Russian Federation of 20 August 2004, as amended.

Candidacies for appointment as arbitrazh assessor are recommended by chambers of commerce and industry and by associations of entrepreneurs or other professional associations, the Lists being subject to confirmation by the Plenum of the Supreme Arbitrazh Court of the Russian Federation and the names published in the official gazette of that Court. There are to be not less than two arbitrazh assessors for each arbitrazh judge who considers cases at first instance. Arbitrazh assesors serve for two years and are subject to reappointment. Remuneration is based on a formula that takes into account the number of days worked and local levels of remuneration.

Relationship with Judges

A single professional judge presides in a trial by jury. Before the judge begins to form the jury, he must formally open the judicial session, announce what case is subject to examination, settle any challenges made, elicit who is present in the courtroom, establish the identity of the person on trial, explain to all participants their rights and duties, and settle any petitions submitted, Once these formalities have been completed, the judge instructs the secretary to invite into the courtroom those persons summoned to act as jurors.

The jurors chosen for possible selection are greeted with a brief speech from the judge explaining what case is being heard, the tasks of a juror, and the conditions under which they participate in the case, including under what circumstances their participation may be challenged. They are instructed that questions will be put to them requesting information about themselves and their relationships with other persons participating in the case. They are cautioned about their duty to perform the functions of juror in accordance with Russian law. A juror may disqualify himself if there are conflicts of interest, although his reasons for doing so are subject to discussion by the parties. When self-disqualifications have been completed, the parties may question the remaining candidates for juror individually to determine whether there are reasons to submit a reasoned challenge to selection of the juror. Challenges are submitted in writing to the judge and not disclosed to the jurors; the judge decides the petitions to challenge without leaving the courtroom. Possible grounds for disqualification include being a minor, having a record of conviction for a crime, not having dispositive legal capacity, already holding an opinion with regard to the case based on information previously received, being the relative of a person who suffered in an analogous crime, and so on. If after reasoned challenges there remain less than eighteen candidates for juror, the judge must take measures to increase the number of candidates up to eighteen from a reserve list. If there remain eighteen or more candidates, the procurator and the person on trial or his defender each have the right to make two unsubstantiated challenges by simply crossing the names off the list of candidate jurors. This leaves fourteen persons, two of whom will be reserve jurors.

The jurors are seated separately from the judge and elect their own foreman by majority vote. The foreman directs the course of the meeting of jurors, puts requests and questions to the judge on their behalf, reads out questions put by the court, writes down the answers to them, calculates the voting results within the jury, formalizes the verdict, and when asked by the judge, proclaims the verdict at the judicial session. The jury may communicate with the judge only through the foreman and may not communicate with the participants in the trial at all.

The jurors may not decide questions of a purely legal character. Being guided by their experience in life and by sound reason, they are to decide whether certain actions were committed, whether the accused committed them, and whether the accused is guilty of what the procurator or the victim accuse him of. The jurors are judges of fact. After electing the foreman, the jury is required to take an oath administered by the judge. The oral argument before the jury is confined to the questions which the jurors must decide. The parties may not mention matters subject to consideration after the verdict has been rendered. The judge formulates in written form the questions subject to being decided by the jury. He reads them out and passes them to the parties, who have the right to comment on them and propose new questions. The judge may not refuse to allow the person on trial or his defender to put questions as to the existence of factual circumstances excluding criminal responsibility or entailing criminal responsibility for a lesser crime. The jurors are not present during the formulation of the questions and discussion thereof. Taking into account the observations and proposals of the parties, the judge then retires to the conference room and formulates the questions in final written form for the jurors. These are entered on a questionnaire and signed by the judge. The questionnaire is read aloud in the presence of the jurors and handed to the foreman.

Before the jurors retire to the conference room, the judge offers a "parting word" to the jury, reminding them of the substance of the accusation and of the criminal law providing responsibility for the commission of the act of which the person on trial is accused. He recalls the evidence investigated in the courtroom which both incriminates and exonerates the person on trial without expressing his attitude towards such evidence and without drawing any conclusions. Then he sets out the positions of the procurator and the defence. The jurors have explained to them the basic rules for evaluating evidence in aggregate, the meaning of the presumption of evidence, the position concerning the construing of ineradicable doubts to the benefit of the person on trial, that their verdict must be based only on that evidence directly investigated during the judicial session, that no evidence has a priori force, that their conclusions may not be based on presuppositions nor on evidence deemed to be inadmissible. The judge draws the attention of the jurors to the fact that a refusal of the person on trial to give testimony or silence in court has no legal significance and may not be construed as evidence of the guilt of the person on trial. The procedures by which the jurors are to conduct their meeting is explained, including preparing replies to the questions put, voting, and rendering the verdict. The judge concludes by reminding the jurors of the oath which they swore at the outset of the proceedings.

In retiring to consider their verdict, the jurors may seek an explanation from the judge with regard to ambiguities in the questions but without touching upon the essence of possible answers to those questions.

The meeting of jurors is secret. The foreman presides, voting is open, no juror may abstain from voting, and the foreman votes last. The jury is required to reach a unanimous verdict if possible; after three hours, if unanimity is not possible, the decision is taken by voting. If a majority of jurors vote in favour of each of the three questions put to the jury, the person on trial is deemed to be guilty. If not less than six jurors voted in favour of a negative reply to any of the three questions put, the person on trial is acquitted.

If the person on trial is found to be guilty, the jurors have the right to say whether he deserves leniency, special leniency, or none at all. The judge must take their reply into account when assigning punishment.

The jury having answered the questions put to them, the foreman signs the questionnaire and the jury returns to the courtroom. All stand while the foreman reads out the verdict and the answers to

the questions put. The judge thanks the jurors and declares that their participation in the judicial examination has been completed. If they wish, the jurors may remain in the courtroom to view the further proceedings in places reserved for the general public.

Oversight

In the event of a guilty verdict with respect to an accused rendered by a jury, if the judge believed the verdict has been rendered with respect to an innocent person and there are sufficient grounds to decree a verdict of acquittal in view of the fact that the occurrence of a crime was not established, or the participation of the person on trial in committing the crime was not proved, the judge may by decree dissolve the jury and send the case for new consideration from the stage of preliminary hearing with a new bench. This last decree may not be appealed by way of cassation.

When jurors participate in a criminal case the secretariat personnel of the court keep a record of the time spent (number of work days) in court by each juror. The judge issues a decree for the payment of remuneration to the jurors, which together with cards containing information for each juror (full name, year of birth, passport data, etc.), is passed to the Planning- Financial Administration for payment. When the case is completed, each juror is issued a document confirming that he has performed the duties of juror for presentation to anyone who so requires.

4.12 Regional Delimitations

The Russian Federation is divided into 83 administrative-territorial units called "subjects of the Russian Federation". They are classified and enumerated in Article 65 of the 1993 Constitution. Each subject of the Federation has the right to establish constitutional or "charter" courts (depending upon whether they have a constitution or a charter establishing their State structures) and justices of the peace, who act as judges of general jurisdiction within each subject of the Federation.

The constitutional or charter courts are established and financed by the respective subject of the Russian Federation and have jurisdiction over constitutional legal issues that may arise within each subject of the Russian Federation. The constitutional or charter courts are not part of a hierarchy of courts within the federal system.

The federal arbitrazh courts below the Supreme Arbitrazh Court are organized into ten precincts. The term "precinct" in this instance refers to administrative-territorial combinations formed for the sole purposes of the arbitrazh courts; each "precinct" incorporates a number of geographical administrative-territorial divisions of the Russian Federation.

4.13 Judicial Independence

Constitutional Court of Russian Federation

The independence of judges of the Constitutional Court is deemed to be guaranteed by a combination of principles: irremovability, inviolability, and equality of the rights of judges; by the procedures required for the suspension or termination of the powers of a judge; by the right to resign; by the obligatory nature of the established procedure of a constitutional court proceeding; by the prohibition against any interference in judicial activity; and by providing to a judge the material and social security and the guarantees of personal safety consistent with the high status of a judge.

For these purposes the judges of the Constitutional Court are equated with the members of the Supreme Court and Supreme Arbitrazh Court of the Russian Federation.

The financial or material guarantees of the independence of a judge of the Constitutional Court connected with his remuneration, annual leave, social security, housing, socio-domestic servicing, State life, health, and property insurance are the same as for other judges of the supreme federal courts.

The inviolability of a judge as a guarantee of independence means that he may not be brought to criminal or administrative responsibility, including after the termination of his powers, for an opinion expressed by him when considering a case in the Constitutional Court unless he has been already convicted of a criminal abuse of his powers. For committing a disciplinary offense or a violation of the federal legislation regulating the Constitutional Court, law on the status of judges, or code of judges' ethics a disciplinary sanction may be imposed in the form of a warning or of termination of the powers of judge.

Equal rights of judges of the Constitutional Court are expressed in the form of the right to cast a vote on all questions considered at plenary sessions or chamber sessions.

Conflicts of interest are minimized by the requirements that a judge of the Constitutional Court may not be a member or deputy of the Soviet of the Federation, deputy of the State Duma or other representative agencies, occupy or retain for himself other State offices, have a private practice, engage in entrepreneurial or other activity except teaching, scholarly, and other creative activity provided that such activities to not interfere with the performance of judicial duties and do not lead to an absence from sessions of the Court. A judge of the Constitutional Court may not perform legal defense or representation in a court, belong to political parties, support such parties financially, take part in political actions, carry on political propaganda or agitation, participate in election campaigns, be present at congresses and conferences of political parties and movements, or engage in other political activity. If a judge appears in the press or mass media, or before any public audience, he may not publicly express his view regarding a matter which may become subject to consideration in the Constitutional Court. However, a judge does have the right to vote in elections and referendums.

4.14 Appeals

Constitutional Court of Russian Federation

There is no right of appeal against a decision of the Constitutional Court.

Courts of ordinary jurisdiction

There are two methods by which court decisions may be reviewed: by way of cassation and by way of supervision. Appeals and submissions against decisions of courts of first instance which have not entered into legal force are considered by way of cassation. Appeals and submissions and protests against judicial decisions or decrees which have entered into legal force are considered by way of supervision. In each situation the codes of civil and criminal procedure set out the procedure for filing and the periods for consideration of such materials by the cassational or supervisory instance.

All parties to a case have the right of appeal within a stipulated, usually brief, period after the court comes to a decision. Parties for these purposes means the prosecution or claimant, the defendant or respondant, the victim, or other trial participants. The same applies in arbitrazh proceedings (see below).

Although we take the Supreme Court as the example, the procedures by analogy would be similar if not identical in lower courts which exercise these functions. Cases and materials which have arrived for consideration are registered in the secretariat in accordance with the relevant Instruction on clerical work and referred to the judge who will deal with them. The persons participating

in the case are notified and summoned. The priority for considering cases or materials by way of cassation or supervision is determined by the chairman of the court or bench. The persons participating and other persons wishing to be present at open judicial sessions are admitted to the courtroom on the basis of applications signed by the relevant judge upon the presentation of identification documents. A secretariat worker registers the persons present in the room and informs the presiding judge of their presence. A protocol is kept of the session by a secretariat worker using automated equipment in the courtroom.

Appeals, submissions, and protests considered by way of supervision are dealt with in accordance with procedural legislation. After the decision is rendered, it is referred to the Section for the Verification of Judicial Decisions by Way of Supervision of the Supreme Court (or equivalent lower court), which sends the reply to the person who filed the appeal, submission, or protest.

Arbitrazh courts.

Judicial acts of arbitrazh are or may be reviewed to verify their legality and well-foundedness in order to protect the rights of juridical and natural persons. The Code of Arbitrazh Procedure provides for three autonomous stages of an arbitrazh proceeding in order to rectify errors committed or permitted by a court when considering a dispute and a fourth stage when judicial acts may be reviewed other than in connection with judicial error.

These four stages are: (1) proceedings in appellate instances with regard to appeals against decisions and rulings of an arbitrazh court of first instance which have not entered into legal force – such an appeal must be filed within a month after adoption of the decision by the arbitrazh court; (2) proceedings in cassational instances with regard to appeals against decisions, rulings, and decrees of arbitrazh courts of the first and appellate instances which have entered into legal force – the same one- month period applies for filing the appeal; (3) proceedings by way of supervision with regard to protests against decisions, rulings, and decrees of arbitrazh courts of the first, appellate, and cassational instances which have entered into legal force; and (4) review of decisions, rulings, and decrees of arbitrazh courts which have entered into force, on the basis of newly-discovered circumstances.

Although the caseload of arbitrazh courts at first instance was lower in 2007, the appellate caseload increased. Of the three means of obtaining a review of a judicial decision, increases were recorded in all categories: appeal (16.3%, up from 12.5% in 2006); cassation (11.9%, up from 9.1% in 2006). By way of appeal, the appellant was successful in 2.8% of the number of cases considered at first instance. By way of cassation, the appellant was successful in 2.2% of the total number of cases heard at first instance. Of those unsuccessful at the level of cassation, 15,932 cases were pursued by way of supervision, which was 17.1% of the total number of cassational decrees. Of these, 339 cases were referred to the Presidium of the Supreme Arbitrazh Court, which vacated or changed the decrees of lower courts in 293 of the referred cases. The major categories in which an increase in appellate work was observed were taxation and contesting the legality of non-normative legal acts issued by State agencies and officials.

330 cases were considered in 2007 with the participation of foreign persons in a cassational instance.

4.15 Positioning

Although the unified Russian judicial system consists of three components, as noted above, all Russian judges are part of a single community, called the “judges’ community”, regulated by the

2002 Federal Law on Judges' Community Agencies.[234] As of 1 January 2008 there were 23,172 federal judges in the Russian Federation. The caseload is such that there should have been 35,700 to deal adequately with the amount of work. It will take several years to train and appoint a sufficient number of people to eliminate the shortage of judges.

The "judges' community" comprises judges of federal courts of all types and levels together with judges of courts of subjects of the Russian Federation, In effect, judges from throughout the entire judicial system of Russia are part of the judges' community. A judge becomes a member of the community from the moment he or she takes his or her oath of office and remains a member until the decision terminating his or her powers as judge enters into legal force. The purpose of the judges' community is to express the interests of judges as the bearers of judicial power. The organs or agencies of the judges' community comprise: the All-Russian Congress of judges; the conference of judges of subjects of the Russian Federation, the Council of Judges of the Russian Federation, the councils of judges of subjects of the Russian Federation, the general meetings of judges of courts, the Supreme Qualifications College of Judges of the Russian Federation, and the qualifications colleges of judges of subjects of the Russian Federation.

The principal tasks of the judicial community of judges are to facilitate the improvement of the judicial system and court proceedings; defend the rights and legal interests of judges; participate in the organizational, personnel, and resource provision for judicial activity, and affirm the authority of judicial power.

4.16 Judicial Administration

Constitutional Court of Russian Federation

Judicial administration with respect to the Constitutional Court is the responsibility of the apparatus of the Court, which consists of the Secretariat and other subdivisions. The Secretariat has responsibility for the organizational, scientific-analytical, informational-reference and other needs of the Constitutional Court. The Secretariat arranges the reception of visitors, considers recourses addressed to the Constitutional Court in a preliminary way and deals with them when they do not affect matters that require study of judges of the Court. The Secretariat assists judges in preparing cases and other matters for consideration at sessions and meetings, studies and summarizes the activities of the Court with regard to ensuring that the decisions of the Court are executed.

Other subdivisions of the apparatus are concerned with material-technical and socio-domestic provision for the Court. The Court also creates a Scientific-Advisory Council whose membership and functions are confirmed by the Court. The Court has its own Press Service.

The work regime of judges and the apparatus of the court is set out in a model schedule for the consideration of cases per quarter, The days of the week on which plenary and chamber sessions are to be held, the leave periods for judges, and the model plan for travel by judges on official business are all indicated thereon. The work regime of the apparatus of the Court is determined by the Statute on the Secretariat of the Court and by the Rules of Internal Labour Order.

Within the limits of its budgetary estimate the Court itself establishes the number, structure, and personnel establishment of the apparatus and confirms the Statute on the Secretariat of the Constitutional Court. The judges of the Court hold "working meetings" to consider and decide organizational, financial, personnel, and other matters of the internal activity of the Court except insofar as such matters must be decided in another procedure on the basis of the Law on the

[234] Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 421-446.

Constitutional Court. The working meetings are convened by the Chairman, deputy chairman, or judge- secretary at their initiative or at the request of any judge. Members of the Court apparatus may be invited to these meetings. Such meetings may adopt decisions when a majority (10) of the total number of judges of the Court is present (quorum), and decisions are taken by a majority vote of the judges present. Minutes may be kept, and decisions adopted are binding upon all judges of the Court and workers of the Court apparatus.

The Court may create temporary or permanent commissions from among judges of the Court and personnel of the apparatus of the Court to consider changes in the Reglament of the Court, personnel, budgetary, and informational questions, generalizations of Court practice, and the like.

The rights, duties, and responsibility of personnel of the apparatus of the Court and their conditions of service are determined by laws also are regulated by legislation governing Federal State service, on the legal status of court workers, and Russian labour legislation.

Courts of ordinary jurisdiction

The Apparatus of the Court operates as the institutional infrastructure for the Court's activities. Its structure and composition is confirmed by an Order of the Chairman of the Court. Administrations, sections, and other structural subdivisions of the Court are created in accordance with the Register of Posts of the Federal State Civil Service. Within the Apparatus there are: the Secretariat of the Chairman of the Court; Secretariat of the First Deputy Chairman; Administration for the Analysis and Generalization of Judicial Practice, Administration for Work with Legislation; Management Office, Personnel and State Service Administration, Planning and Financial Administration, Economic Administration, First Section, Section for the Mass Media, Special Control Section, Section for Verification of Judicial Decisions by way of Supervision, Legal Informatization Section, International Legal Section, and secretariats of the Plenum, Presidium judicial divisions, and cassational division of the court. The powers of structural subdivisions of the Apparatus are determined in statutes on them, the Instruction on Clerical Work in the Supreme Court, and orders and regulations of the Chairman and deputy chairmen of the Court. Apparatus workers perform their duties according to post reglaments confirmed by the Chairman of the Court.

The Reglament of the Supreme Court enumerates in detail the functions of the sections of the Apparatus. The Special Control Section, for example, is concerned with the registration and efficient consideration of queries and recourses of the Plenipotentiary of the Russian Federation attached to the European Court for Human Rights and queries of the Ministry of Foreign Affairs of the Russian Federation regarding appeals to the Human Rights Committee of the United Nations, registering decisions of the European Court for Human Rights and control over the execution of ECHR decisions with regard to criminal cases, registering and control over the execution of decisions of the Constitutional Court of Russia relating to criminal and civil cases and participation in studying the practice of the ECHR and Russian Constitutional Court by all other courts of ordinary jurisdiction.

Arbitrazh courts

The arbitrazh court system, which is a far smaller number of courts and easier to manage as a unit, is managed by the Supreme Arbitrazh Court and financed from appropriations specially earmarked in the State budget.

Judicial Disciplinary Department

The Judicial Disciplinary Department is financed from the federal budget through appropriations to the Judicial Department attached to the Supreme Court.

4.17 Oversight and Accountability

Access of the general public to information concerning the activities of courts in the Russian Federation is regarded as one form of oversight and accountability of the judiciary in a civil society. To this end public access is guaranteed and regulated by the Federal Law on Ensuring Access to Information on the Activity of Courts in the Russian Federation, of 22 December 2008 and in force as of 1 July 2010.[235] This Law affects all courts, the Judicial Department, agencies of the Judicial Department, and agencies of the Judges' Community. This Law does not override limitations on access established by legislation concerning State secrecy or other secrecy protected by law.

Underlying the aforesaid Federal Law is the Conception of Information Policy of the Judicial System and the Conception of Informatization of Courts of General Jurisdiction adopted at some point in the past but not published. An integral part of those Conceptions, however, is the requirement that every court of general jurisdiction have its own website on the Internet which would contain basic information about each court (official name, address, telephone and e-mail addresses; organizational structure with telephone and e-mail addresses of each subdivision; normative acts regulating the activity of the court, surveys of judicial practice and documents of the court, calendars of cases, sample documents used by the court, information on payment of State duty, rules for behaviour in court, and procedures for filing suit). For courts of general jurisdiction these matters are regulated by the Statute Regarding the Creation and Accompaniment of Official Internet Sites of Courts of General Jurisdiction of the Russian Federation, confirmed by Decree of the Presidium of the Supreme Court on 24 November 2004.[236]

The professional discipline of judges is handled initially within each of the three court systems and then by the Judicial Disciplinary Department created by Federal Constitutional Law of 9 November 2009, which entered into force on 10 March 2010. The Judicial Disciplinary Department is a judicial agency which considers cases of appeals against decisions of the High Qualifications Division of Judges of the Russian Federation and qualifications divisions of judges of subjects of the Russian Federation to terminate the powers of judges before time because they committed disciplinary offences and also recourses against decisions of the of the High Qualifications Division of Judges of the Russian Federation and qualifications divisions of judges of subjects of the Russian Federation refusing to terminate the powers of a judge for the alleged commission of a disciplinary offence.

The Judicial Disciplinary Department consists of six judges, three from the Supreme Court and three from the Supreme Arbitrazh Court (excluding the Chairman of each and their deputies, and also excluding any judges who are members of the High Qualifications Division of Judges or a member of the Council of Judges of the Russian Federation; these persons also may not nominate candidates to serve in the Judicial Disciplinary Department). The six judges eligible to serve must be at least 40 years of age and not more than age 65 and have worked as a judge on the Supreme Court or Supreme Arbitrazh Court for at least five years. Members of the Department may not be elected for more than two terms in succession; each term is three years.

The Judicial Disciplinary Department operates in accordance with the Reglament of the Judicial Disciplinary Department confirmed by the Decree of the Plenum of the Supreme Court of the Russian Federation, No. 4, and Decree of the Plenum of the Supreme Arbitrazh Court of the Russian Federation, No. 2, adopted jointly on 4 February 2010.[237]

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235 СЗ РФ (2008), no. 52(I), item 6217.

236 The document is unpublished but available unofficially on the database of Consultant Plus.

237 The document is unpublished but available unofficially on the database of Consultant Plus.

Neither the Federal Constitutional Law nor the Reglament apply to the Constitutional Court of the Russian Federation.

4.18 Other Court Staff

In effect an entire professional group of court administrators has been created by the 1998 Law on the Judicial Department. Its powers are substantial: organizing the activity of all courts below the Supreme Court, assisting with the drafting of federal laws and other normative acts relating to questions within its jurisdiction, working out proposals to finance the courts and justices of the peace, making proposals to improve the organization of the courts, submitting proposals to create or to abolish courts, monitoring personnel requirements of the courts, conducting work relating to the selection and training of candidate judges, interacting with educational institutions, training and raising the qualifications of judges and workers of the court apparatus, developing normative standards for the caseload of judges, helping to reassign judges to courts with vacancies, keeping forensic statistics and court archives, organizing the construction and repair of court buildings, and others.

Conclusion

The greatest challenge faced by the Russian court system and judiciary is the public perception of its integrity and quality of performance. The President of the Russian Federation has since taking office singled out the legal system in general and the judicial system in particular as requiring further improvement, notwithstanding all the measures taken during the past nearly two decades. It was the President who proposed, for example, the creation of the Judicial Disciplinary Department and the enactment of a Federal Constitutional Law to this end.

The move to introduce judicial precedent, on the other hand, has come from within the judiciary itself, although the chairmen of the Supreme Court and the Supreme Arbitrazh Court have on various occasions made it clear they favoured such an introduction.

Strong points in the eyes of the present writer are the relative efficiency in processing cases once filed in court. Comparative to Anglo-American and western European legal systems, the Russian legal system is, as a rule, more expeditious and less expensive. The weaknesses lie in the seemingly interminable possibilities for appeal and review – which can drag out for years. The Russian procedural model needs to contemplate and incorporate an ultimate and final outcome to litigation.

5. Civil and Criminal Judgement Enforcement

The enforcement of judgments has been acknowledged to be a key component of an effective justice system in the Russian Federation. Considerable resources have been devoted to enlarging and improving the system of court bailiffs during the past decade. The personnel establishment for the central apparatus of the Federal Service of Court Bailiffs was 483 persons as of 1 January 2009 excluding protection and servicing personnel. For court bailiffs linked with territorial agencies of the Federal Service of Court Bailiffs the budgeted limit as of 1 January 2011 is 84,352 persons, also excluding protection and servicing personnel.

5.1 Types of Enforcement

According to official statistics, the Federal Service of Court Bailiffs recovers monies owed under court judgments relating to civil suits, criminal proceedings to which a civil suit is joined or fines imposed in a criminal proceeding, indebtedness for tax arrears, administrative fines, alimony owed in family law matters, and the like. In 2009 the territorial agencies of the Federal Service of Court Bailiffs pursued about 44.3 million execution proceedings, an increase of 23% over the preceding calendar year. On average the caseload per bailiff increased from 1,439 to 1,706 per year. In all 29.3 million execution proceedings were completed or terminated, as compared with 27.3 million in 2008.

Civil

Recovery of alimony is a major concern of the court bailiffs. More than 1.9 million execution proceedings were instituted for alimony arrears, of which 931,300 were completed and terminated. More than 541,900 execution proceedings were connected with the withholding of periodic payments from earnings to be paid by organizations. A key instrument in the arsenal of court bailiffs is seeking a limitation on travel abroad by debtors. In 2009 177,300 such decrees were issued on limitation of travel, more than 42,800 being issued for arrears in alimony payments.

Criminal

In 2009 the trend increased of notifications about the commission of crimes coming to the Federal Service of Court Bailiffs. There were 112,152 such notices, with regard to which 50,592 criminal cases were instituted and investigated by inquiry officials of the Federal Service of Court Bailiffs. The number of criminal cases instituted for malicious evasion of payment of alimony for child support or support of parents not capable of working increased by 34%, to 45, 422 in 2009. The Federal Service of Court Bailiffs, in particular, uncovered crimes for swindling (83), appropriation or waste (177), abuse of official powers (179), exceeding official powers (41); receiving a bribe (47), giving a bribe (1), employment forgery (390), and neglect (22) in 2009.

Administrative

During the calendar year 2009 more than 77.8 billion rubles was collected for tax arrears (27.3% higher than in 2008) and in excess of 7 billion rubles in the form of fines imposed in an administrative proceeding (19.5% more than in 2008) was collected for the State budget. In addition, some 5.3 billion rubles came to the budget in the form of an execution fee.

Labour

Labour cases are not segregated in the reports on execution activities. However, the Statute on the Federal Service of Court Bailiffs authorizes the Service to take part in executing decisions of labour disputes commissions.

5.2 Organisation

The organization of the Federal Service of Court Bailiffs is determined by the Federal Law on Court Bailiffs of 21 July 1997, and the Statute on the Federal Service of Court Bailiffs confirmed by Edict of the President of the Russian Federation on 13 October 2004, as amended. The organization of activities of the court bailiff services in the Constitutional Court, Supreme Court, and Supreme Arbitrazh Court is determined by the 1997 Federal Law and by the federal constitutional laws on each of the said courts.

The Federal Service of Court Bailiffs is headed by the Chief Court Bailiff of the Russian Federation, who is appointed to and relieved from office by the President of the Russian Federation, who also determines the procedure for appointing and relieving other court bailiffs. The Chief Court Bailiff also is known as the "Director" of the Federal Service.

The Federal Service itself is assigned to keep order in courts, execute documents of execution and other enforcement measures in accordance with legislation and on the basis of the writ of execution; organize the custody and compulsory realization of arrested and seized property, search for debtor organizations and their property (including of citizens), participate in defending the interests of the Russian Federation as a creditor in bankruptcy cases and proceedings; participate in executing decisions of labour disputes commissions; direct and supervise the activities of territorial agencies of the Federal Service; set up and maintain data banks on the initiation of execution proceedings; and the like.

The Director of the Federal Service has deputies appointed to and relieved from office by the President of the Russian Federation, who also establishes the number of deputies. However, The Director distributes duties among the directors and establishes the powers of other officials of the Federal Service to decide operational, organizational, personnel, financial, and other issues. The Director organizes the work of the central apparatus of the Federal Service and submits to the Ministry of Justice for confirmation the draft Statute on the Federal Service, the draft statutes on territorial agencies, proposals concerning personnel numbers and overall fund for the payment of labour, proposals for the appointment to and relieving from office of the chief bailiffs of subjects of the Russian Federation, proposals to include international treaties of relevance, and a vast variety of other tasks enumerated in the Statute on the Federal Service of Court Bailiffs.

The Director also organizes proceedings for an inquiry into criminal and administrative cases and is responsible for coordinating an execution proceedings institute against the same debtor in different territorial agencies.

The Chief Court Bailiff of a Subject of the Russian Federation heads the territorial agency in the respective Subject (there are 83) and performs the same basic duties as does his Director but confined to the territorial limits of the Subject. Immediately subordinate to him is the Senior Court Bailiff of the subject of the Federation who is in charge of the subdivisions of the Court Bailiff Service in that territorial unit. He may himself perform actions of execution or assign these to his deputy.

As noted above, the bailiffs are subdivided into two subdivisions, one for performing protection and security functions in courts and the other to execute judicial and other acts. The Federal Law on Court Bailiffs provides that bailiffs assigned to protective functions, inter alia: ensure the safety of judges, jurors, and other participants in a judicial proceeding in the courtroom, when procedural actions are performed outside the court building, and on the premises of the court; ensure when a judge so requires the safe delivery to the court of the files of the case and material evidence; maintain public order in the court building and courtroom itself, perform the instructions of the judge or person presiding to ensure public order and protect the building and premises of the

court, including 24-hour protection if ordered; upon the instruction of a judge or inquiry official escort persons to court who have failed to appear; when performing employment duties prevent and suppress crimes and turn over offenders to internal affairs agencies; interact with internal affairs agencies and military units when persons are transported for trial under guard; and undergo special firearms and other training at period intervals so that if force is necessary to perform their duties, they are able to use it properly. When bringing a person to court who has failed to appear upon summons, court bailiffs are authorized to enter territories of premises and housing when they believe the person they seek is there, to verify identity documents, to search persons if there is reason to believe they are carrying weapons, narcotics, and other articles or substances of danger to others, to conduct cases concerning administrative violations which are within their jurisdiction, and to use physical force when so authorized by legislation.

An executing bailiff must take measures for the timely, full, and correct execution of the documents of execution, make it possible for the parties to the execution proceeding to familiarize themselves with the materials of the proceedings, make extracts or copies, submit petitions, and with regard to petitions adopt decrees and explain to the parties the possibility for appeal thereof, and recuse themselves if there is a conflict of interest that would cast doubt on their impartiality. In the course of performing duties a court bailiff has the right to receive necessary information and explanations, at an employer verify the documentation of debtor workers, give citizens and organizations participating in an execution proceeding specific assignments to perform actions; enter premises occupied by a debtor or belonging to him, perform inspections and seal them, and on the basis of a court order also enter the premises occupied by other persons or belonging to them; arrest, seize, take custody of, and realize arrested property, impose arrest on money and valuables of a debtor in accounts or deposits or kept in banks or other credit institutions; declare a search for a debtor or his property or for a child; among others.

5.3 Model

The Ministry of Justice of the Russian Federation is responsible for coordinating and supervising the activities of the Federal Service of Court Bailiffs and the functions with regard to the adoption of normative legal acts relating to the activities of that Federal Service.

Depending upon the duties they perform, court bailiffs are divided into two types: those ensuring good order in courts, and those engaged in the execution of court judgments. Lawful demands of a court bailiff are subject to being performed by all agencies, officials, organizations, and citizens on the territory of the Russian Federation.

5.4 Tasks and Functions

Under the Federal Law on Court Bailiffs of 21 July 1997, as amended, three separate basic tasks are placed upon court bailiffs: (1) ensuring good order in the Constitutional Court, Supreme Court, Supreme Arbitrazh Court, courts of general jurisdiction, and arbitrazh courts; (2) enforcing judicial acts and acts of other agencies and officials as provided for by the Federal Law on an Execution Proceeding of 2 October 2007; (3) executing legislation on criminal proceedings with regard to cases relegated by Russian criminal procedure legislation to the investigative jurisdiction of the Federal Service of Court Bailiffs.

Under the 1997 Federal Law, the Chief Court Bailiff directs the activity of the Federal Service, exercises supervision over the enforcement of judicial and other acts and over good order in the courts and the protection of court buildings and premises, supervises activity to search for a debtor, property, or a child; has the right to vacate or change a decision of a Federal Service official which is not consistent with Russian legislation; ensures interdepartmental coordination with agencies

and officials performing the requirements of judicial and other acts and may form advisory and consultative organs and request statistical and other necessary information; be involved in organizing resistance to terrorism when fulfilling tasks placed on court bailiffs; and other powers.

5.5 Relations

The 2004 Statute on the Federal Service of Court Bailiffs provides generally (point 5) that the Service shall effectuate its "... activity in interaction with other federal agencies of executive power, agencies of executive power of the subjects of the Russian Federation, agencies of local self-government, and social associations and organizations".

The Federal Service of Court Bailiffs has the right in order to exercise its powers to request and receive from federal agencies of State power, agencies of State power of subjects of the Russian Federation, and agencies of local self-government, and from organizations irrespective of their organizational-legal form, documents, reference, and other materials necessary in order to take decisions regarding questions within their sphere of activity. They may involve scientific and other organizations, scholars, and specialists, including on a contractual basis, to assist in working out decisions on matters within their jurisdiction. The Federal Service may perform the functions of State customer and organization the capital construction, conversion, and capital repair of objects belonging to the Federal Service and housing construction.

The Federal Service undertakes interdepartmental coordination of activities with organizations and agencies executing the requirements of judicial acts and acts of other agencies and officials in the instances provided by Russian legislation. When performing protective functions in court buildings the Federal Service may turn for assistance to personnel of internal affairs agencies, migration agencies, Federal Security Service agencies, emergency situation agencies, and others.

The Federal Service is authorized to interact with agencies of State power of foreign States and international organizations on matters within its jurisdiction.

5.6 Process

Under the 2007 Federal Law on an Execution Proceeding,[238] the principles of such a proceeding are: (1) legality; (2) timeliness of performance; (3) respect for the honour and dignity of citizens; (4) inviolability of the minimum property necessary for the existence of a citizen debtor and his family; (5) relationship between the amount of the demands and the enforcement measures used.

The principal documents of execution in the Russian Federation are: (1) writs of execution issued by courts of ordinary jurisdiction or arbitrazh courts on the basis of judicial acts which they have adopted; (2) judicial orders; (3) notarially certified agreements concerning the payment of alimony or notarially certified copies thereof; (4) certificates issued by commissions for labour disputes; (5) acts of agencies which exercise supervisory functions over the recovery of money with the attachment of documents containing notations of banks and other credit organizations; (6) judicial acts and acts of other agencies concerning administrative violations; (7) decrees of a court executing-bailiff; (8) acts of other agencies as provided for by a federal law; (9) endorsements of execution of a notary when there is an appropriate pledge or other agreement providing for extra-judicial levy of execution.

These documents of execution must contain the requisites set out in the 2007 Federal Law. Among these are the name and address of the court or other official issuing the document and the surname and initials of the official; the name of the case or materials on the basis of which the document of

[238] Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 451-517.

execution is issued; the date of adoption of the judicial act or act of other agency or official; (4) the date of entry into force of the said act; (5) information concerning the debtor and the creditor; and others.

The 2007 Federal Law contains detailed instructions regarding the time periods during which execution proceedings may be enforced.

The enforcement measures which a court bailiff may perform in the process of executing demands under documents of execution include: (1) summoning the parties to an execution proceeding; (2) requesting necessary information and obtaining necessary explanations, information, and references; (3) conducting a verification, including of financial documents, relating to the documents of execution; (4) giving assignments to natural and juridical persons with regard to the execution of demands; (5) entering premises to execute documents of execution; (6) place arrest on property, including money and securities, seize such property and take custody of it; (7) perform a valuation of property or enlist valuations specialists for this purpose; (8) perform a search for a debtor or a child; (9) establish temporary limitations on the right of a debtor to leave the Russian Federation; (10) verify the correctness of withholding and transfer of money pursuant to a judicial or other act.

5.7 Mechanisms

Administrative

Expenses for the maintenance of the central apparatus of the Federal Service of Court Bailiffs and the territorial agencies thereof, including personnel, are entirely at the expense of the federal budget. The Director of the Federal Service confirms the structure and personnel establishment of the central apparatus of the Federal Service and the territorial agencies within the numbers and amount of the fund for the payment of labour established by the President of the Russian Federation, together with the estimate of expenses for the maintenance of workers of the Federal Service within the appropriations fixed in the federal budget.

Oversight and Inspection

The Ministry of Justice exercises oversight of the court bailiff service and, with respect to bailiff protective services, the courts to which they are attached. Appeal lies to the courts against actions of court bailiffs in the instances established by legislation.

Conclusion

The Federal Service of Court Bailiffs assesses the quality of its activities primarily on the basis of statistical reports which record such matters as the total number of execution proceedings handled each calendar year, the number completed or terminated; the amounts of money recovered for creditors and the State budget, the number of firearms, ammunition, flammables, explosives, and other objects confiscated from visitors to courts and other premises under the protection of bailiffs, and the number of criminal proceedings instituted and investigated by bailiff personnel. These figures in recent years have increased substantially, which is seen as progress in the quality of bailiff service made available.

On the other hand, the Russian press reports instances of bailiff arbitrariness, including some celebrated examples of destroying homes allegedly built without authorization on protected lands.

Corruption is an issue. The Federal Service indicated that for 2009 workers of the Service reported to their superiors bribes offered in at least 27 cases where criminal proceedings were initiated against those offering the bribes. Some bribes offered were small in amount, whereas others reached 100,000 rubles and in especially remarkable instances, 187,000 rubles (Tatarstan), 200,000 rubles (Amur Region) and $9,000 plus 63,000 rubles (Sakhalin Region).

6. Lawyers and Other Legal Services

In the Russian language and legal system the term "jurist" is used to designate anyone who has a legal education or anyone employed in a legal specialization, whether as academician, professor, judge, procurator, arbitrator, notary, investigator, advocate, jurisconsult, registry of civil status personnel, law enforcement officer, paralegal, or others. In this section we examine two types of jurist who routinely provide legal services to the general public and most closely approximate the Anglo-American concept of the "lawyer". These are the advocate and the jurisconsult.

Under Article 72(k) of the 1993 Russian Constitution, the advokatura is the subject of joint jurisdiction of the Russian Federation and its subjects. Accordingly, the Federation may adopt federal laws on the advokatura, and so too may the subjects of the Federation in elaboration of and in compliance with such federal laws.

6.1 Organisation

Advocates

The organization and activity of advocates are regulated by the 2002 Federal Law on Advocate Activity and the Advokatura in the Russian Federation.[239] Under this Law, the Federal Chamber of Advocates of the Russian Federation has been formed as an all-Russian, non-State, non-commercial organization in which membership is compulsory for chambers of advocates formed in the 83 subjects of the Russian Federation. The Federal Chamber represents and protects the interests of advocates in agencies of State power and local self-government and helps to ensure a high standard of legal assistance to clients. It is empowered to represent the interests of advocates and chambers of advocates of subjects of the Federation in relations with federal agencies of State power when questions are being resolved affecting the interests of the community of advocates, including the appropriations from the federal budget to pay the fees of advocates who act in criminal proceedings as defence counsel by assignment of agencies of inquiry, preliminary investigation, or a court.

The Federal Chamber is a juridical person which is formed by the All- Russian Congress of Advocates, but is not subject to reorganization and may be liquidated only on the basis of a federal law. The existence of rival organizations is prohibited if they have functions and powers analogous to those of the Federal Chamber. The Charter of the Federal Chamber was adopted by the All-Russian Congress of Advocates; decisions of the Federal Chamber are binding upon all chambers of advocates and individual advocates.

The All-Russian Chamber of Advocates meets, as a rule, once every two years and acts as the highest organ of the advocate profession. In addition to adopting the Charter, it enacts the professional ethics code for advocates, forms of the Council of the Federal Chamber, determines the deductions from chambers of advocates for the common needs of the Federal Chamber, confirms the estimates of expenditures, elects the internal audit commission, confirms the Reglament of the Congress, personnel establishment, and performs other functions stipulated by the Charter. In intervals between congresses, the affairs of the Federal Chamber are conducted by its collegial executive organ, the Council, which elects the President of the Federal Chamber for a term of four years and, upon his recommendation, three vice presidents for a term of two years.

A chamber of advocates exists in each of the 83 subjects of the Russian Federation, also as a non-State, non-commercial organization. Membership is obligatory for advocates. These chambers operate on the basis of general statutes for organizations of this type. They are created to ensure

[239] Translated in W. E. Butler, *Russian Public Law* (2009), pp. 844-877.

that qualified legal assistance is rendered and accessible throughout the territory of the particular subject of the Federation in which they are formed, that such assistance is free of charge when required or necessary, to represent and protect the interests of advocates in agencies of State power and local self-government and other organizations, and to supervise the professional training of persons admitted to engage in advocate activity and compliance with the code of professional ethics. The chamber is formed by a constitutive meeting or conference of advocates. Each chamber is a juridical person and responsible for its own obligations with its property; advocates are not liable for obligations of their chamber. Each chamber is subject to State registration in the procedure established for the registration of juridical persons. There may be only one chamber in each subject of the Federation. No branches, representations, or subdivisions on the territory of other subjects of the Federation are permitted, and inter-regional or other inter-territorial formations are prohibited. A chamber may not engage in advocate activity in its own name, nor engage in entrepreneurial activity. Reorganization is not a possibility for a chamber of advocates; however, if a new subject of the Federation is formed in accordance with relevant federal legislation – which has occurred several times – the chamber of advocates affected may be liquidated.

As of 1 January 2010 there were 63,740 advocates in the Russian Federation organized into 83 chambers of advocates. On the same date there were 2,342 colleges of advocates, 344 bureaus, 15,978 cabinets, and 82 legal consultation offices of advocates.

Under the 2002 Law on Advocate Activity, advocates may conduct their activities within so-called "advocate formations", of which there are four types: the advocate cabinet, college of advocates, advocate office, and legal consultation office. It is for the individual advocate to determine the form and place of his preference and to notify the council of the chamber of advocates of that choice in the established procedure.

The advocate who prefers to operate as a sole practitioner forms the advocate cabinet, which is not a juridical person. As of 1 January 2010 there were 15,978 advocates (about 25% of the total number) who preferred this model. Agreements with clients are concluded between the advocate and the client and registered in the documentation of the cabinet. If the advocate wishes, he may work from home. For accounting purposes the advocate who chooses this model is equated to an individual entrepreneur.

Two or more advocates have the right to form a college of advocates, which is a non-commercial organization based on membership and operating on the basis of a charter confirmed by its founders and constitutive contract concluded by them. The great majority of advocates prefer this vehicle for the practice of law; as of 1 January 2010 44,483 advocates (about 70% of all advocates) were members of colleges of advocates. The founders and members of the college must be advocates, information concerning which is contained only in one regional register. In the constitutive contract the founders determine the conditions for transferring their property to the college of advocates, the procedure and conditions for admitting new members, the rights and duties of each, and the procedure and conditions for withdrawal. The charter must contain information established in federal legislation. The college of advocates is a juridical person and may create branches anywhere in the Russian Federation or abroad, but within Russia must also register in the regional register of the relevant subject of the Federation and, if a foreign branch is created, this must be registered in the regional register where they were founded and information provided about the advocates serving in this foreign branch. Property contributed by the founders of a college of advocates belongs to the said college by right of ownership. A college of advocates has limited liability: members of a college of advocates are not liable for its obligations, and the college of advocates is not liable for obligations of its members. However, agreements to render

legal assistance in a college of advocates are concluded between the advocate and the client and are registered in the documentation of the college of advocates.

Two or more advocates may choose to form an advocate office, which requires that a partnership contract be concluded in a simple written form. Only 2,798 advocates chose this vehicle as of 1 January 2010, comprising 4.4% of all advocates. Under the partnership contract the advocate-partners are obliged to combine their efforts to render legal services in the name of all the partners. The contract is considered to be a document which contains confidential information and is not provided for State registration of the office. The contract must make provision for its period of operation, the procedure for taking decision by the partners, the procedure for electing the managing partner and his competence, and any other material conditions. Under this structure, agreements are concluded with clients by any partner in the name of all the partners on the basis of powers of attorney issued by them. The power of attorney must set out all limitations on the competence of a partner who is concluding agreements with clients and third persons.

A legal consultation office is formed by the chamber of advocates in a subject of the Federation in which the total number of advocates in all advocate formations on the territory comprises less than two per federal judge. As of 1 January 2010, there were 82 such offices comprised of 481 advocates (0.8% of the total number of advocates). This happens upon the recommendation of the agency of executive power of the respective subject of the Federation. The legal consultation office is a non-commercial organization created in the form of an institution, and is regulated by the Civil Code and the Federal Law on Non-Commercial Organizations. The conditions for operating the legal consultation office are determined by legislation of the respective subject of the Federation.

Jurisconsults

There is no national or territorial regulation of jurisconsults. Any regulation at all is established within the institution where they are employed (see below).

6.2 State Regulation

As noted above, State regulation of the advokatura takes the form of constitutional regulation and federal legislation, pursuant to which the advocates create essentially self-governing entities in accordance with legislation. The State therefore maintains a relationship with advocates in various ways, but does not regard advocates as civil servants and goes a considerable distance towards preserving their autonomy and independence. The relationship differs from the Soviet era, but perhaps more as a matter of degree than of principle.

The jurisconsult is not regulated as such by the State. Individual ministries and State enterprises have introduced departmental enactments to regulate the existence, functions, duties, and rights of internal legal advisors or legal sections.

6.3 Lawyers

An advocate is a person who has received the "status of an advocate" in the established procedure and has the right to engage in advocate activity. He is an independent advisor on legal questions and does not have the right to engage in other paid activity except for scholarly, teaching, and other creative activities. Federal legislation authorized an advocate to: (1) give advice on and provide memoranda on legal questions in oral and written form; (2) draw up applications, appeals, petitions, and other documents of a legal character; (3) represent the interests of the client in constitutional court proceedings; (4) participate as a representative or defender of a client in a civil, criminal, or administrative proceeding; (5) participate as a representative of the client in

an arbitration court, international commercial arbitration, and other agencies for the settlement of disputes; (6) represent the interests of a client in agencies of State power, agencies of social associations, social associations, and other organizations, courts, agencies of State power, courts, and law enforcement agencies of foreign States, and non-State agencies of foreign States; (7) represent a client in execution proceedings and tax relations; and (8) render other legal assistance not prohibited by a federal law.

There are no political constraints on advocates. They are free to join any political party.

Role in Criminal Cases

The 2001 Code of Criminal Procedure provides (Article 15) that "the functions of accusation, defence, and settlement of a criminal case have been separated from one another and may not be placed on one and the same agency or official. The court is not an agency of criminal prosecution and does not lean to the side of the accusation or to the side of the defence. The courts created the necessary conditions for the parties to perform their procedural duties and effectuate the rights granted to them". The advokat is considered to be equal to the procurator in a court proceeding, and in post-Soviet Russia this is generally considered to be achieved in practice.

The Code of Criminal Procedure specifies the time from which an advokat (or defender) participates in a criminal case (Article 49): (1) from the moment a decree is rendered to involve a person as an accused except for instances as follows: (2) from the moment of instituting a criminal case with respect to a specific person; (3) when a suspect is detained or is confined under guard; (4) when notice is handed over to a person that he is suspected of the commission of a crime; (5) from the moment when a person suspected of the commission of a crime is assigned to undergo forensic psychiatric expert examination; and (6) from the moment when other measures of procedural coercion or other procedural actions are taken which affect the rights and freedoms of a person suspected of a crime.

The presence of a procurator and defence counsel is obligatory not only during the consideration of a criminal case, but the defence counsel must be present when the preliminary investigation is completed and the materials of the case are presented to the accused and during the preliminary hearing. If there are several accused, the Code of Criminal Procedure requires that each have their own defence counsel irrespective of the articles of the Criminal Code under which they are charged. If an accused refuses to have defence counsel, his position is no longer binding on the investigator, procurator, or court, and the failure to provide a defence counsel is a material violation of criminal procedure.

As a rule, it is the advocate himself who gathers evidence or other data for submission to an investigator or to a court in a criminal case or who retains a private detective to do so. An advocate has the right to represent the interests of the client in all State and social organizations: the courts, Procuracy, Ministry of Internal Affairs, Federal Security Service, and others. On 27 March 1996 the Constitutional Court of the Russian Federation held that the participation of an advocate in a criminal case could not depend upon whether the advocate had clearance for access to State secrets. Article 21 of the Law on State Secrecy, the Court ruled, did not extend to advocates participating as defenders in a criminal proceeding.

The right to defence counsel in a criminal proceeding is guaranteed under the 1993 Russian Constitution. If a person under investigation does not or cannot for financial reasons retain defence counsel, the investigator, inquiry official, or court will request an advocate to be appointed for this purpose; such a request is binding upon the advocate formation concerned. In calendar year 2009

some 38,569 advocates were appointed by agencies of inquiry or preliminary investigation or by a court to act as defenders in a criminal proceeding. From the standpoint of advocates it continues to be a major source of annoyance that payments by the State for such services and reimbursement of expenses are late, and that advocates have inadequate premises to meet with clients who have been accused of a crime; the Federal Chamber of Advocates spent considerable time in 2009 interacting with the Ministry of Justice to accelerate remuneration (on average in 2009 advocates received 5,093 rubles per month from the State budget for performing duties as assigned counsel).[240]

However, on an experimental basis the Russian Federation has introduced a State system for rendering legal assistance free of charge to indigent citizens. Where these exist, the staff lawyer is called a "jurisconsult" rather than an "advocate". If this scheme is regarded as successful, it should result in reducing the responsibilities of advocates for providing legal services free of charge. There is a draft federal law as of spring 2010 in whose preparation advocates have had a considerable part "On the System of Legal Assistance Free of Charge in the Russian Federation".

An advocate may not be summoned or interrogated as a witness concerning circumstances which became known to him in connection with the application of a client for legal assistance or the actual rendering of such assistance. An advocate's office or dwelling premises may be searched only on the basis of a court decision. In practice such court decisions have been rendered and both the professional and domestic space of individual advocates have been searched by law enforcement agencies and files removed. While there undoubtedly have been excesses in some instances, a close reading of the legislation also discloses that the extent of professional immunity here is rather limited.

Role in Civil Cases

Advocates do a considerable amount of civil law representation, but not necessarily in the majority of civil cases. Many civil litigants prefer to represent themselves or to have friends, neighbours, or others do so.

During the calendar year 2009, advocates gave legal assistance free of charge to 195,189 indigent persons, among them: plaintiffs for the recovery of alimony (26,792); plaintiffs for compensation of harm caused by the death of a breadwinner (4,042); plaintiffs sustained injuries at work (4,810); veterans of the Second World War (30,348); citizens who required advice when applying for pensions and benefits (13,432); citizens who suffered political repression and sought compensation (3,355); minors committed to institutional confinement (5,651); citizens in in-patient institutions (2,554); persons mentally disturbed (2,755); military servicemen with regard to call-up (2,293); defendants in a civil proceeding whose place of residence was unknown (22,919); and other citizens pursuant to legislation in subjects of the Russian Federation (66,238).[241]

Jurisconsults may appear in civil and administrative cases on behalf of their employers, and frequently do so.

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240 The situation became sufficiently awkward that the Federal Chamber of Advocates filed suit in the Constitutional Court of the Russian Federation, contending that the failure of advocates to receive expenses incurred by them when travelling to a site where procedural actions were undertaken was a violation of the constitutional rights and freedoms of advocates. By a decision handed down in 2009 the Constitutional Court concurred with this contention, and on 9 March 2009, in compliance with the Constitutional Court decision, the Government of Russia supported a federal law amending legislation concerning reimbursement of procedural expenses. Travel expenses for advocates were provided for in Article 131(2) of the Code of Criminal Procedure of the Russian Federation.

241 Statistical data is drawn from the website of the Federal Chamber of Advocates and is considered to be official.

6.4 Education and Training of Lawyers

The status of an advocate may be acquired by a natural person who has a higher legal education received in an accredited institution of higher professional education or a learned degree in a legal specialization. The individual must have either work experience of two years in a legal speciality or undergo a traineeship. Persons who lack dispositive legal capacity, or who have a record of a criminal conviction, may not be advocates. The decision to confer the status of advocate is taken by the qualifications commission attached to the chamber of advocates of the subject of the Russian Federation concerned after a qualifications examination is completed. Foreign citizens and stateless persons may become advocates. The status of advocate is conferred for an indefinite period and is not linked in any way with age.

Since there is no organization regulating the activity of jurisconsults, the requirements for employment in this capacity are fixed by the organization hiring the jurisconsult. As a rule, this will mean having a higher legal education. In many State institutions the role of the jurisconsult continues to be regulated de facto by the General Statute on the Legal Section (or Office), Chief (or Senior) Jurisconsult, and Jurisconsult of a Ministry, Department, Executive Committee of a Soviet of People's Deputies, Enterprise, Organization, or Institution, confirmed by Decree of the USSR Council of Ministers on 22 June 1972, as amended and construed by judicial decisions.[242] On the basis of this General Statute, ministries and departments confirmed their own internal statutes for their respective legal offices or legal personnel.

In the Russian market economy the jurisconsult remains a salaried employee in the establishment where he works. Jurisconsults are by far the largest component of the Russian legal profession. On 8 May 2001 the President of the Russian Federation adopted an Edict on Certain Measures to Strengthen the Legal Services of State Agencies which introduced substantial increased in salaries and benefits for jurisconsults and instructed that there be confirmed a "Model Statute on the Legal Service of a Federal Agency of Executive Power".[243] The Model Statute was confirmed by Decree of the Government of Russia on 2 April 2002.[244] In the private sector jurisconsults act as legal advisors to juridical persons. The lawyers of foreign law firms in Russia are regarded as jurisconsults.

6.5 Disciplining Lawyers

The 2002 Law on Advocate Activity assigns to the Federal Chamber of Advocates the adoption of a code of professional ethics (Article 7). That Law, however, contains certain requirements of an ethical nature which have been incorporated in the Code of Professional Ethics of an Advocate, adopted 31 January 2003, by the I All-Russian Congress of Advocates and in force as amended.[245] An advocate does not have the right to render legal assistance to a person as a client if the advocate has an autonomous interest with regard to the subject-matter of the agreement with the client which differs from that of the client, or if the advocate participated as a judge, arbitrator, mediator, procurator, investigatory, inquiry official, expert, specialist, or interpreter in a case or is a witness or victim, or if he was an official within whose competence it was to take a decision with regard to the interests of the client, or if the advocate is a relative or in kinship relations with an official who took part or who is taking part in investigating or considering the case with regard to the client, or if his interests are contrary to those of his client. Moreover, an advocate may not take a position contrary to the will of his client except in special situations, nor divulge information

242 Transl. in W. E. Butler, *Soviet Legal System: Legislation an d Documentation* (1978), pp. 311-318.
243 Transl. in W. E. Butler, *Russian Public Law* (2d ed.; 2009), p. 896.
244 Transl. in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 897-898.
245 Transl. in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 878-890.

communicated to him by the client or in connection with legal assistance rendered unless the client so consents, nor resign from a defence undertaken. Advocates are prohibited from rendering non-transparent cooperation to agencies engaged in operational search activity.

The duties of an advocate are reflective of certain ethical principles. The advocate must honourably, reasonably, and in good faith insist upon the rights and legal interests of his client using all means not prohibited by Russian legislation. Any he must comply with the Code of Professional Ethics of an Advocate and execute decisions of organs of the chamber of advocates and the Federal Chamber of Advocates. The 2003 Code of Professional Ethics expressly "augments the rules established by legislation" on advocate activity (Article 1). When legislation and the Code of Ethics do not regulate a particular ethical issue, the advocate is obliged to "comply with the customs and traditions which have formed in the advokatura corresponding to the general principles of morality in society" (Article 4).

The status of an advocate may be terminated upon the entry into force of a court decision deeming an advocate to lack dispositive legal capacity or to be of limited dispositive legal capacity, or of a court decision convicting an advocate of an intentional crime, or for the failure to perform or improper performance by an advocate of professional duties to his client, or a violation of the Code of Professional Ethics, and a number of special circumstances specified in legislation on the Advokatura.

In the calendar year 2009 the status of 2,031 advocates was terminated, of which 1,281 (63%) resigned from this status at their request; 293 (14%) died during the year; 28 (1.3%) were convicted by a court of an intentional crime and their status of advocate was accordingly terminated; 81 (4%) were excluded from the Advokatura for failure to perform or improper performance of their professional duties towards their client; 78 (3.8%) were expelled for a violation of professional ethics; and 233 (11.5%) were exclused for the failure to perform or for improper performance of decisions of a chamber of advocates.

The jurisconsults are not bound by any codes of professional ethics or disciplinary procedures.

6.6 Dispute Resolution

Advocates and jurisconsults are at liberty to engage in alternative forms of dispute resolution, including in the forms of arbitration, conciliation, mediation, negotiation, and others. There are more than 500 arbitration courts in the Russian Federation which routinely hear cases in which advocates and/or jurisconsults appear on behalf of the parties.

The arbitrazh courts have within the system of arbitrazh courts a system of arbitration courts to which parties may turn if they wish. These are regulated by the Federal Law on Arbitration Courts in the Russian Federation of 24 July 2002.[246]

Conclusion

The organisation and structure of the Russian Advokatura and its relationship with the State bear many resemblances with arrangements introduced in Russia from 1864 to 1917. This also extends to the interface between the Advokatura and other components of the legal profession. Russia has never been willing to grant to advocates or their equivalent a monopoly right to practice law or an exclusive right of audience in Russian courts. Always there has been a lay element in representation before the Russian courts and administrative agencies. Here there seems to be a deeply ingrained cultural pattern that reaches back to the early days of Muscovy.

[246] Translated in W. E. Butler, *Russian Public Law* (2d ed.; 2009), pp. 665-681.

The Russian advocate, perhaps paradoxically, is to some extent in the same position as the Russian judiciary: neither the advocates themselves nor the general public have full confidence in their integrity or in their abilities. On the whole the profession appears to have succeeded in striking a far more independent relationship vis-a-vis the State than existed during the Soviet era. Protections of client confidentiality are not, however, as strong as they might be and indeed are in other legal systems.

Intervention by State agencies in the activities of the Advokatura or individual offices or formations thereof continue to be a concern. In 2009 the advokaturas of several subjects of the Russian Federation complained about "verifications" of advocates instituted by territorial justice agencies, or about terminations of leases or refusals to extend leases of advocate formations in State or municipal premises (under Russian legislation advocate formations have the right to lease State and municipal-owned premises on favourable terms). It is clear that in more remote regions of Russia the local authorities do not necessarily share the same understanding of the Advokatura's autonomous status under Russian legislation in comparison with the Soviet era.

The jurisconsult – comprising the great majority of Russian legal practitioners – remains professionally unorganized and unrepresented. This can hardly be in anyone's interest.

As will be evident from the materials above, it would be highly misleading to attempt a per capita measure of legal services in Russia, for several reasons. First, the advokats are heavily concentrated in the major population centres and far from evenly distributed throughout the subjects of the Russian Federation. Second, the numbers of jurisconsults are unknowable but must be taken into consideration when measuring the total resource base of legal services in Russia. Third, many legal services continue to be provided, as a matter of law, pro bono in Russia from various sources.

7. Justice Sector Reform

Although there is no monopoly in any branch of the Russian State with regard to initiating a discussion about judicial reform, in practice the Government of the Russian Federation has taken the primary initiative in the form of, for example, the "Federal Special-Purpose Programme 'Development of the Judicial System of Russia' for 2002-2006", confirmed by

Decree of the Government of the Russian Federation on 20 November 2001, No. 805, and its successor, the "Conception of the Federal Special-Purpose Programme 'Development of the Judicial System of Russia' for 2007-2011", confirmed by Regulation of the Government of the Russian Federation on 4 August 2006, No. 1082-p.

The vision, aims, and objectives of justice sector reform as set out in the 2001 Programme and the 2006 Conception were summarized in Part 1.3 above.

7.1 Initiation

Justice sector reform as contemplated in the 2001 Programme and 2006 Conception constitutes a legal and financial commitment by the Russian Federation to introducing agreed changes in the justice sector. It is important to observe that the Ministry of Justice is not the key player in this process. The formal actor is the Ministry of Economic Development of the Russian Federation, which acts for budgetary and oversight purposes as the Coordinator and State Customer for measures to be implemented under the

2006 Conception and its co-customers are the Constitutional Court, Supreme Court, Supreme Arbitrazh Court, Judicial Department attached to the Supreme Court, Ministry of Justice, Federal Service for Communications, and the Ministry of Economic Development.

The power of legislative initiative is not to be overlooked in this connection, though. The Supreme Arbitrazh Court, for example, through its Plenum submitted to the State Duma a draft federal law on making changes in and additions to the Code of Arbitrazh Procedure of the Russian Federation. Although cast in the form of amendments, the proposal was in effect a new version of the Code which ultimately became the basis of the present 2002 Code of Arbitrazh Procedure.

7.2 Responsibility

Under the 2006 Conception responsibility for justice sector reform is placed very concretely upon the Ministry of Economic Development and the courts themselves. Responsibility here means legal responsibility for ensuring that the budget appropriations for the five-year duration of the operation of the Conception are properly spent for contracted purposes.

7.3 Design

In Russian conceptual terms the "design" of judicial sector reform is embodied in the "Conception" formally approved by the Government together with the attendant financial commitments. The specific objectives of the Conception are, for example, linked to sets of performance indicators by which successful (or not) execution of the Programme will be measured.

For example, the principal tasks of the 2006 Programme are to: (1) ensure the openness and transparency of the administration of justice; (2) enhance trust in the administration of justice, including by increasing the efficiency and quality of the consideration of cases; (3) create necessary conditions for the administration of justice and ensuring the accessibility thereof; (4) ensue the independence of judges; and (5) enhance the level of execution of judicial acts.

The extent to which these objectives are achieved would be measured in part, for example, by the reduction in the number of court cases considered with violations of procedural periods. Year by year it is expected that the percentage reduction of such cases would fall from 12.8% in 2006 to 5% in 2011.

7.4 Review

All of the agencies mentioned, including all of the courts, consider at the levels of internal staff and respective Plenums the proposals for judicial sector reform and agree the draft(s) for submission to the Government.

7.5 Implementation

The Programme and the Conception are implemented initially by being confirmed at the level of Government of the Russian Federation in the form of a decree or regulation. Once approved, the specific tasks are budgeted and translated into contracts for performance by those who need to supply the goods, products, or services provided for.

7.6 Evaluation

The Reform will be evaluated by the extent to which the specific tasks and performance indicators have been met under the Programme and Conception. These will then form the foundation for the next five-year justice sector reform documentation.

7.7 Remedies

No specific information is available as what the consequences of failure to meet justice sector reform targets may be. Presumably there may be political consequences (dismissal of ministers or other staff who fail to perform) or legal (suits for breach of contracts concluded in pursuance of the Reform).

7.8 Oversight

Under the Programme and Conception set out above, the Government of the Russian Federation has ultimate responsibility for overseeing justice sector reform and, secondarily, the Ministry for Economic Development in its capacity as the coordinator and State customer.

The Parliament

The Federal Assembly of the Russian Federation would comment, if it chose to, on the justice sector reform described above at the budgetary stage. The annual State budget of the Russian Federation must undergo four readings in the State Duma. Justice sector reform has, however, received virtually no special comment in the budgetary debates.

Parliamentary Committees

Although the relevant committees could comment upon the budgetary dimension of justice sector reform or even hold hearings on particular matters, judging from the media judicial reform has not received special attention from parliamentary committees.

The Ombudsman

The Russian versions of the ombudsman have not been involved in justice sector reform as such, although some of their activities have implications for the quality of justice sector performance.

Local Government

Units of local government might be consulted at the early stages of justice sector reform discussions, especially insofar as these will have involved discussions of premises and land allocations for courts and other justice sector premises.

Subjects of Russian Federation

The 83 subjects of the Russian Federation also may be consulted at the early stages of justice sector reform discussions insofar as these may affect justice institutions of the said subjects or physical premises on their territories.

Central Government

As noted above, this is the prime concern of the Government of the Russian Federation.

Conclusion

Justice sector reform is a routine item on the Government agenda and is addressed routinely in Five-Year Programmes and/or Conceptions which undertake to achieve agreed objectives. The financing of these measures has on the whole been achieved.

8. Conclusions

Russia has during the past two decades made more deliberate efforts to establish the foundations of an impartial and objective Judicial Sector than at any time in its prior history. Constitutional reforms reflect the institutional structures of this development, reinforced by individual legislative enactments devoted to particular institutions, including the judiciary. During the past decade the development of the Judicial Sector, especially the judicial system, has been the subject to conceptual medium- term planning with federal appropriations in support of the intended reforms. Although much remains to be done, by all the indicia of measurement Russia has made considerable progress in the directions of improvement that it intends to introduce.

During the Soviet era the Procuracy was regarded as an elite legal institution which routinely attracted the best graduates from the Soviet law faculties. It was also the legal institution mostly closely tied to the Communist Party of the Soviet Union. All procurators were Party members, or nearly so, and the Procuracy was known to be strongly guided by Party resolutions in determining the priorities for exercising its prosecutorial and supervisory functions.

With the transition to a market-oriented economy, in the early years after the dissolution of the Soviet Union the private sector was more attractive to many Procuracy personnel; many resigned, a trend initially reinforced by low levels of remuneration and serious problems with personal security (a number of procurators were the victims of organized crime or contract killers).

There is been a concentrated and targeted State response to these difficulties with the Procuracy. The salaries were raised substantially for all Procuracy personnel. The base salary was augmented by supplementary payments for class rank, years of service, special adverse service conditions (for example, service in climatically-adverse regions), increments reflecting the complexity and tension of particular assignments or posts, additional salary for receiving a postgraduate academic degree or title, or for the conferment of State honours. These measures collectively have done much to restore the Procuracy to its previous levels of prestige and considerably facilitated the recruitment and retention of personnel.

The organization and structure of the Procuracy seem to have shielded that institution on the whole from extraneous local influences and from influences originating within political parties, which at this stage of Russian history are not powerful cohesive forces. This seems to be an institution which has proved itself satisfactorily and does not face serious calls for its abolition or substantial reorganization.

8.1 Strengths and Weaknesses

The plurality of roles which the Procuracy performs can raise conflicts of interest, especially when the procurator must act as accuser on behalf of the State yet initiate objections to procedural or substantive violations by the court. To some extent conflicts are avoided or reduced by depersonalizing the conflict. Different committees, administrations, or sections of the Procuracy are concerned with different types of supervision, or investigation, or other activities. The essence of the Procuracy function is to persuade agencies and officials to correct their own errors; except in certain aspects of inquiries and preliminary investigations, the Procuracy itself has no administrative power to set affairs in order by itself.

Strong points of the judicial system in the eyes of a foreign observer are the relative efficiency in processing cases once filed in court. Comparative to Anglo-American and western European legal systems, the Russian legal system is, as a rule, more expeditious and less expensive. The weaknesses lie in the seemingly interminable possibilities for appeal and review – which can drag

out for years. The Russian procedural model needs to contemplate and incorporate an ultimate and final outcome to litigation.

The Federal Service of Court Bailiffs assesses the quality of its activities primarily on the basis of statistical reports which record such matters as the total number of execution proceedings handled each calendar year, the number completed or terminated; the amounts of money recovered for creditors and the State budget, the number of firearms, ammunition, flammables, explosives, and other objects confiscated from visitors to courts and other premises under the protection of bailiffs, and the number of criminal proceedings instituted and investigated by bailiff personnel. These figures in recent years have increased substantially, which is seen as progress in the quality of bailiff service made available.

On the other hand, the Russian press reports instances of bailiff arbitrariness, including some celebrated examples of destroying homes allegedly built without authorization on protected lands.

The Russian advocate, perhaps paradoxically, is to some extent in the same position as the Russian judiciary: neither the advocates themselves nor the general public have full confidence in their integrity or in their abilities. On the whole the profession appears to have succeeded in striking a far more independent relationship vis-a-vis the State than existed during the Soviet era. Protections of client confidentiality are not, however, as strong as they might be and indeed are in other legal systems.

The jurisconsult – comprising the great majority of Russian legal practitioners – remains professionally unorganized and unrepresented. This can hardly be in anyone's interest.

8.2 Challenges and Controversies

In general the system of criminal investigation introduces defence counsel into the process at an earlier stage and more frequently than was true in the past. To this extent the insertion of adversariality has been a positive move. Other criticisms, however, continue to be heard with respect, for example, to the duration of many investigations and the detention of individuals during these extended periods.

Perhaps the major criticism made of the Procuracy was the combining into a single agency the functions of investigation and prosecution. Criticism of these policies goes back many years; adjustments were made finally under the impact of decisions of the European Court for Human Rights, which also pointed to the anomalies that might arise from the traditional Russian structure. In response to this criticism the post of "Chief Investigator" was created within the Procuracy, the occupant of this post having the rank of Deputy Procurator General (see Chapter 2 above). It would be premature to assess the impact of this change.

The greatest challenge faced by the Russian court system and judiciary is the public perception of its integrity and quality of performance. This too is a longtime cultural phenomenon which dates back centuries into Russian history. The President of the Russian Federation has since taking office singled out the legal system in general and the judicial system in particular as requiring further improvement, notwithstanding all the measures taken during the past nearly two decades. It was the President who proposed, for example, the creation of the Judicial Disciplinary Department and the enactment of a Federal Constitutional Law to this end.

The move to introduce judicial precedent, on the other hand, has come from within the judiciary itself, although the chairmen of the Supreme Court and the Supreme Arbitrazh Court have on various occasions made it clear they favoured such an introduction.

Corruption is an issue in the court bailiff service. The Federal Service reported that for 2009 workers of the Service reports to their executives bribes offered in at least 27 cases where criminal proceedings were initiated against those offering the bribes. Some bribes offered were small in amount, whereas others reached 100,000 rubles and in especially remarkable instances, 187,000 rubles (Tatarstan), 200,000 rubles (Amur Region) and $9,000 plus 63,000 rubles (Sakhalin Region).

8.3 Current Reforms

The present system of criminal investigation represents nearly a decade of reform initiatives undertaken soon after the dissolution of the former Soviet Union. Considerable efforts were made to introduce elements of the Anglo-American adversarial system into the investigation; many of these innovations were eliminated in massive amendments to the Code of Criminal Procedure during mid-2002. Other changes reflect criticisms made by the European Court for Human Rights during the course of considering appeals from the Russian legal system to Strasbourg.

The introduction of reforms within the Procuracy to separate the investigative functions to a greater degree from other Procuracy functions has led to the formation of the investigative departments within the Procuracy under a separate deputy procurator. It is still too early to evaluate the success of these changes, but they have already caused comments in the media with respect to conflicts of interest within the Procuracy that have not been heard previously. Similar changes have not been introduced in other agencies performing preliminary investigation activities.

8.4 Issues for Future Reform

Justice sector reform is a routine item on the Government agenda and is addressed routinely in Five-Year Programmes and/or Conceptions which undertake to achieve agreed objectives. The financing of these measures has on the whole been achieved.

All sectors of justice reform discussed above and others not discussed (e.g., notariat) will continue in Russia to be the subject-matter of re- evaluation and change. The President of the Russian Federation has made justice reform one of the highest items on his agenda. He has himself, as a specialist in civil law, encouraged the preparation of a draft Conception of civil-law reform.

Areas likely to receive close scrutiny for reform purposes include the need to hold in custody individuals being investigated for tax and other financial offences, ways to reduce or eliminate corruption in all components of law enforcement, the extradition to Russia of Russian citizens abroad who are sought in connection with criminal investigations or prosecutions (said to number more than 66,000 in 2010), and the reduction of arbitrariness in law enforcement operations and activities.

In Russia the impetus for law reform was the introduction of perestroika and the unexpected dissolution of the former Soviet Union. Perestroika generated a certain measure of law reform simply by virtue of the intention to “restructure”, *inter alia*, the legal system. The dissolution of the USSR was an unanticipated political outcome which did not lend itself to advance preparations. To the extent that it is possible to anticipate and plan for law reform, including the involvement of foreign assistance, the lessons from Russia are to address the issue of language and translation from the outset and seek advice from institutions and individuals who have a considerable understanding of the legal fabric into which reforms are to be inserted.

Law is a profoundly cultural phenomenon. Undisciplined tampering with it can lead to the most unexpected and undesirable consequences.

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