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Source: *The China Quarterly*, No. 149 (Mar., 1997), pp. 1-28

Published by: Cambridge University Press on behalf of the School of Oriental and African Studies

Stable URL: <http://www.jstor.org/stable/655043>

Accessed: 30-07-2016 17:32 UTC

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The Fate of Judicial Independence in Republican China, 1912–37

Xu Xiaoqun

Although scholarship on Chinese law and legal history has been growing, so far no substantive study has been done (in the English language at least) on the judicial reform during the Republican period.¹ Without an adequate accounting for this historical experience it is not possible to understand fully the political democratization on Taiwan in recent decades, nor the Communist judicial practices during the Maoist era and the possible direction of the post-Mao reform in the judicial field. As part of a larger study that aims to contribute to this important subject, this article focuses on how the governments of Republican China treated the principle of judicial independence (*sifa dili*) and examines how judicial independence fared in practice.

Judicial independence is a historically contested concept. Even in today's world, and even in the West where the concept originated, debates have continued on what it should entail and how it can be achieved.² Furthermore, since judicial independence can only take place in an environment that includes other political and social institutions and a political-legal culture, it has to be measured in relative terms in any country.³ Starting with these premises, this article explores what judicial independence meant for the Chinese in the Republican era and measures its success or failure against the standards set by the Chinese governments themselves.

The Legacy of the Late Qing Reform

The ideas of the rule of law and judicial independence as well as

1. Among English language works on Chinese law and judiciary in traditional and Republican China are Jean Escarra (trans. Gertrude R. Browne), *Chinese Law* (Seattle: University of Washington Press, 1936); S. Van Der Sprenkel, *Legal Institutions in Manchu China* (London: Athlone Press, 1962); Derk Bodde and Clarence Morris, *Law in Imperial China* (Philadelphia: University Of Pennsylvania Press, 1973); Marinus J. Meijer, *The Introduction of Modern Criminal Law in China* (Arlington, VA: University Publications of America, 1976); Joseph D. Lowe, *The Traditional Chinese Legal Thought* (Berkeley: University of California Press, 1984); Leon Vandermeersch, "An enquiry into the Chinese conception of the law," in S. R. Schram (ed.), *The Scope of State Power in China* (London: School of Oriental and African Studies, 1985); Geoffrey MacCormack, *Traditional Chinese Penal Law* (Edinburgh: Edinburgh University Press, 1990); Michael R. Dutton, *Policing and Punishment in China* (Cambridge: Cambridge University Press, 1992); Kathryn Bernhardt and Philip Huang (eds.), *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994); Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens: University of Georgia Press, 1996); Philip Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996).

2. See Shimon Shetreet and Jules Dechenes (eds.), *Judicial Independence: The Contemporary Debate* (Boston: Kluwer Academic Publishers, 1985), especially the chapter by Shimon Shetreet, "Judicial independence: new conceptual dimensions and contemporary challenges," pp. 590–681.

3. Jerome A. Cohen, "The Chinese Communist Party and 'judicial independence': 1949–1959," *Harvard Law Review*, Vol. 82, No. 5 (March 1969), pp. 972–75.

modern legal theories in general came to China from the West, often via Japan. They included theories on constitutional government, judicial systems, litigation procedures, administrative procedures, criminal codes and civil codes. Quite a few late Qing reformers proposed legal reform as a way to strengthen the nation. After the Qing court began the New Policy reform in the first decade of this century, legal and judicial reform was proposed unambiguously within the context of constitutionalism.⁴ A related and equally powerful motive was the desire to end extraterritoriality. In the commercial treaties of 1902 and 1903, Great Britain, the United States and Japan promised that given the Chinese government's desire to reform the judicial system "to bring it in accord with that of Western Nations," they would relinquish extraterritoriality "when the state of the Chinese laws, the arrangement for their administration, and other considerations" warranted such actions.⁵ A modernized Chinese judiciary based on the Western model would deprive foreign powers of their justification for maintaining extraterritoriality. This objective was constantly on the minds of legal reformers at that time.⁶

Shen Jiaben was one of those who contributed greatly to the development of a modern Chinese judiciary. A native of Guian, Zhejiang, and a *jinshi* degree holder, Shen became deputy chairman of the Board of Punishment (*Xingbu zuoshilang*) in 1901 and the supreme court judge (*dalisi zhengqing*). When the Qing court set up the Law Compilation Commission (*Falü bianzuan guan*) in 1902 (renamed the Law Codification Commission (*Xiuding falü guan*) in 1907) as part of the New Policy reform, Shen was appointed the Commissioner of Law Codification (*Xiuding falü dachen*).⁷ It was Shen who first advocated judicial independence in unequivocal terms. He maintained that in order for a constitutional government to function, the judiciary, the administration and the legislature should be separate, and the judiciary should be independent, since all constitutional governments were based upon ju-

4. Meijer, *The Introduction*, pp. 38–43; Meribeth E. Cameron, *The Reform Movement in China, 1898–1912* (Stanford: Stanford University Press, 1930), pp. 100–135.

5. John V. A. MacMurray (ed.), *Treaties and Agreements with and concerning China, 1894–1919* (New York: Howard Fertig, 1973), pp. 351, 414, 431.

6. Meijer, *The Introduction*, pp. 13, 64–65; Cameron, *The Reform Movement*, pp. 171, 173; Douglas R. Reynolds, *China, 1898–1912: The Xinzheng Revolution and Japan* (Cambridge, MA: Harvard University Press, 1993), p. 181; Benjamin H. Williams, "Extraterritoriality in China," *China Weekly Review (CWR)*, Vol. 21, No. 12 (19 August 1922), p. 450.

7. In 1908–11 he presided over the revision of the Great Qing Legal Cases (*Daqing luli*), which was enacted in 1910 under the title of Current Law of Punishment of Great Qing (*Daqing xianxing xinglü*), and the drafting of the New Criminal Code of Great Qing (*Daqing xin xinglü*), the Criminal Litigation Law (*Xingshi susong lü*) and the Civil Litigation Law (*Minshi susong lü*), among a dozen legal codes. *Minguo renwu dacidian (Who's Who of the Republic of China)* (Hebei: Renmin chubanshe, 1991). For Shen's role in late Qing reform, see Wang Chung-hui, "Law Reform in China," *The Chinese Social and Political Science Review*, Vol. 2, No. 2 (June 1917), pp. 13–21; Leonard S. Hsu, "The Chinese legal system," *CWR*, Vol. 24, No. 1 (3 March 1923), pp. 12–16. C.Y.W. Meng, "Modern judicial reform in China," *CWR*, Vol. 55, No. 6 (10 January 1931), pp. 236–37, Vol. 55, No. 7 (17 January, 1931), p. 256; Meijer, *The Introduction*; Cameron, *The Reform Movement*, pp. 171–75.

dicial independence. By this Shen meant the abolition of the traditional practice in which administrative officials exercised judicial powers. In his view, the essence of judicial independence was non-interference from other authorities, even from a president or monarch. Furthermore, it required separation between judicial administration (*sifa xingzheng*) and adjudication (*sifa shenpan*). He also proposed to adopt jury trial and legal representation by lawyers.⁸

Shen and other legal reformers' efforts at judicial reform were fiercely attacked by conservatives such as Zhang Zhidong and Lao Naixuan. Significantly, however, even the conservatives did not challenge the principle of judicial independence. Their attack was directed at Shen's notion of separating judicial process from the role of traditional moral code (*lijiao*) and the disregard of the Confucian five relationships in the proposed New Criminal Code.⁹

With judicial independence accepted as the goal, the Qing court started setting up a modern judiciary independent of administrative bureaucracy. In November 1906 the court issued a decree: the Board of Punishment was changed into the Ministry of Law (*Fabu*) and no longer had a trial function but was only in charge of judicial administration; the *Dalisi* became *Daliyuan* to serve as the supreme court; and a General Procuratorate (*Zong jiancha ting*) was set up under the Ministry of Law, but would function independently. In 1906 and 1907 trial courts and procuratorates at different administrative levels began to be established. In 1910 the Organic Law of Judicial Courts (*Fayuan bianzhi fa*) was enacted, and the following year saw the enactment of the General Principles of the Organizing Trial Courts and Procuratorates at Provincial Capitals and Cities (*Ge shengcheng shangbu geji shenjian ting bianzhi dagang*).¹⁰ When the Qing dynasty came to an end in 1912 a total of 345 courts had been established nation-wide, including the supreme court in the capital, high courts (*gaodeng shenpan ting*) at the provincial level, district courts (*difang shenpan ting*) in major cities, and courts of first instance (*chujishi shenpan ting*) in smaller cities, each with their corresponding procuratorates.¹¹ The new court system and set of new legal codes were modelled after those in the West and Japan and laid a foundation for the judicial reform that continued along the same line during the Republican period.

Judicial Independence and Political Expediency: The Beiyang Period

The revolutionaries who overthrew the Qing dynasty upheld the idea of

8. Pan Nianzhi *et al.*, *Zhongguo jindai falü sixiang shi* (*A History of Legal Thought in Modern China*) (Shanghai: Shanghai shehui kexueyuan chubanshe, 1992), pp. 199–201.

9. For the attacks on the New Criminal Code, see Meijer, *The Introduction*, pp. 43–44, 79–93; Yang Hongli, *Zhongguo falü fada shi* (*A History of the Development of Chinese Laws*) (Shanghai yinshuguan, 1930; Shanghai shudian, 1990), p. 894; Meng, "Modern judicial reform," p. 256.

10. Meijer, *The Introduction*, pp. 40–41; Yang Hongli, *Zhongguo falü*, p. 919.

11. *The China Yearbook*, 1913, pp. 396–97; Chang Yao-tseng, "The present conditions of the Chinese judiciary and its future," *The Chinese Social and Political Science Review*, Vol. 10, No. 1 (January 1926), p. 172.

judicial independence. The Provisional Constitution of the Republic of China (*Zhonghua minguo linshi yuefa*) provided separation of the judiciary, the administration and the legislature, and stipulated that judicial power was to be exercised by judicial courts. Judges were to adjudicate independently, without interference from superior administrative organs. They should not be transferred, nor their salary be lowered, during their tenure.¹²

Wu Tingfang played an important role in transmitting the principle of judicial independence from the late Qing reform to the Republican state-building. Having been trained in law in England and having practised law in Hong Kong, Wu briefly served in the late Qing as Commissioner of Legal Codification as well as in the Ministries of Commerce, Law, and Foreign Affairs. After the 1911 Revolution, he served as the Minister of Justice of the Nanjing Provisional Government from January to April 1912.¹³ Like Shen Jiaben, Wu believed that judicial independence was the most vital element to a republican government established on the basis of separation of powers, and for him judicial independence meant the inviolability of a judge's independent adjudication. To ensure the judge's independence and foster his integrity, his salary had to be higher than administrative officials'.¹⁴ Wu was apparently involved in the drafting of the Provisional Constitution. The short life-span of Sun Yat-sen's government, however, did not allow much to happen in the area of judicial reform. The task was left to the Yuan Shikai government and the regimes that followed.

Continuation of judicial reform. On 11 March 1912, upon taking his post as provisional president, Yuan Shikai issued an order that before laws of the Republic were promulgated, the New Criminal Code of the Great Qing and other laws previously enacted should continue to be applied, except for those articles contradictory to the form of state (*guoti*) of the Republic. On 30 April, the revised New Criminal Code was issued under the name of the Provisional New Criminal Code (*Zanxing xin-xinglü*).¹⁵

Yuan's government also preserved the Qing Law Codification Commission.¹⁶ From 1912 to 1927, under Wang Chonghui, a Doctor of Jurisprudence from Yale University, and Dong Kang, a late Qing *jinshi* trained in law in Japan, the commission compiled a few dozen laws and

12. Yang Youjiong, "Zhongguo sifa zhidu zhi zongde guancha" ("Chinese judicial system in retrospect") *Zhongguo faxue zazhi* (*Journal of Chinese Legal Studies*), new edition, Vol. 1, Nos. 5–6 (February 1937), p. 28; Pan Nianzhi, *Zhongguo jindai*, p. 305.

13. *Minguo renwu dacidian*, p. 212.

14. Pan Nianzhi, *Zhongguo jindai*, pp. 340–42.

15. Yang Hongli, *Zhongguo falü*, pp. 1032–35.

16. The institution was first called the Commission for Compiling and Examining Laws (*Falü biancha hui*). In 1918 it was changed back to the late Qing name of Law Codification Commission (*Xiuding falü guan*). See Yang Hongli, *Zhongguo falü*, p. 1032.

ordinances, among which were amended criminal codes, litigation procedure laws, the civil dispute arbitration law, the corporation law, the bankruptcy law, the security and police law, and the press law.¹⁷ The important role of this commission in judicial reform was widely recognized. Commenting on the commission of “now defunct [Beijing] government” in 1928, Liang Yunli, secretary to the Minister of Justice in Nanjing, acknowledged that “China owes a debt to the Commission for most of the judicial reforms introduced since the Republic.”¹⁸

Not insignificantly, two important features of the draft criminal code compiled under Shen Jiaben in the late Qing – legal representation by lawyers and jury trial – were included. In September 1912 the Yuan Shikai government enacted the Provisional Regulations on Lawyers (*Lüshi zanxing zhangcheng*) which formally established the legal profession in China.¹⁹ The district court in Shanghai experimented with trial by jury in the spring of 1912, but found it unsatisfactory and abandoned it.²⁰

Prohibition of party affiliation for judges. From the beginning the Yuan Shikai government made clear its intention to keep the judiciary out of politics. The Organic Law of Judicial Courts that the Republic inherited from the late Qing had a provision barring judges from joining political parties and organizations as well as Parliament and local assemblies. In December 1912 the Ministry of Justice issued an order which invoked this provision and required that judges who were political party members renounce their party affiliation.²¹ In March 1913, responding to a report that judges in Guangxi province all belonged to political parties, the Ministry of Justice ordered the Guangxi High Court to ensure that they left their political parties.²² In the meantime the Ministry published a list of all judges who served at the Supreme Court, the High Court and the district court in the capital to show that they all had either never belonged to any political party or had left their party.²³ In March 1914 Yuan Shikai issued an order to prohibit judges from joining political parties. It said that the judicial system was established to ensure the people’s rights and that judges should rise above personal and selfish opinions and uphold “the spirit of judicial independence.”²⁴ In January 1915 the prohibition of party affiliation was extended to cover county magistrates who exercised judicial powers.²⁵

17. Yang Hongli, *Zhongguo falü*, pp. 1039–94.

18. Liang Yueng-li (Liang Yunli), “Judicial reform under the Nationalist Government,” *New China Edition of the China Weekly Review*, (10 October 1928), p. 105.

19. *Zhengfu gongbao* (Government Bulletin), No. 142 (19 September 1912), pp. 108–113.

20. *North China Herald (NCH)* 11 January 1913, p. 75; Williams, “Extraterritoriality,” p. 451. For detail of what transpired during that trial by jury, see *NCH*, 9 August 1919, pp. 326, 369–370.

21. *Zhengfu gongbao fenlei huibian* (*Government Bulletin Compiled in Categories*), No. 36, pp. 9–10.

22. *Zhengfu gongbao fenlei huibian*, No. 36, p. 11.

23. *Zhengfu gongbao*, No. 301 (9 March 1913), p. 136–141.

24. *Zhengfu gongbao fenlei huibian*, No. 36, p. 4.

25. *Zhengfu gongbao*, No. 961 (11 January 1915).

Ironically, the government's action in keeping the judiciary out of party politics itself was not without political motive. The above-mentioned list shows that the parties which the judges renounced were the Kuomintang and the Republican Party (*Gonghe dang*). For the same reason, the Yuan Shikai government also barred military personnel and the police from joining political organizations and parties.²⁶ Nevertheless, from a historical perspective, the prohibition in the long term served the purpose of making the judicial system relatively free of party politics and thus was a step in the direction of judicial independence.

Rule of avoidance. As part of the efforts to make the judiciary independent and honest, the Beijing government established an important "rule of avoidance." In 1915 the Ministry of Justice decreed that lawyers who had served as judges, procurators, or secretaries of courts and procuratorates could not, within three years after leaving office, practise in the same area over which their former office had jurisdiction. In 1916 the Ministry revoked the prohibition without explanation,²⁷ but then in September 1918 reinstated it.²⁸ At the inquiry of the Shanghai Bar Association, the Ministry clarified that the prohibition applied to district courts only and did not cover high courts.²⁹ This rule of avoidance remained in force until early 1927 when the Ministry repealed it in response to a request put forward by over 200 judicial officials.³⁰

The concept of the rule of avoidance was not new. In traditional China, county magistrates, and provincial and sub-provincial officials were forbidden to serve at their native counties or provinces. Insofar as administrative officials exercised judicial powers in traditional China, it may be argued that even the application of the rule to judicial officials was not totally new. On the other hand, in the Republican period only judicial officials and legal professionals were subject to the rule of avoidance, while administrative officials were not. This may properly be regarded as a measure specifically to help ensure the fairness and independence of the judicial process.

26. In July 1913 Yuan Shikai signed an order to prohibit military personnel from joining political parties. In September the Ministry of the Navy issued an order to the same effect. Meanwhile the Ministry of the Interior ordered police officers not to get involved in political parties. In December 1913 Yuan Shikai signed another order barring both the military and the police from joining political parties. See *Zhengfu gongbao fenlei huibian*, No. 36, pp. 3–4, 12–13.

27. *Zhengfu gongbao*, No. 281 (16 October 1916).

28. It pointed out that during recent years some such lawyers had used their connections to get inside information and advertised such connections to attract clients. *Zhengfu gongbao*, No. 942 (8 September 1918), pp. 121–22; *Shi bao* (*Eastern Times*), 16 September 1918, p. 5.

29. *Shi bao*, 28 October 1918, p. 5.

30. These judicial workers argued that the rule did not make sense, since it only covered three years and since Ministers and Deputy Ministers of Justice as well as teaching staff of the Judicial Training Institute (*Sifa jiangxi suo*) were not subject to the rule, while they had much closer connections with judges. See *Falü pinglun* (*Law Review*), No. 185 (16 January 1927, p. 18).

Rhetoric and reality. In the public discourse of the time the idea of judicial independence was closely associated with, and regarded as the prerequisite of, the rule of law (*fazhi*). The Beiyang government repeatedly exalted a spirit of public service and asked judges and judicial personnel at different levels to administer an efficient and honest judicial system. From 1913 to 1915 Yuan repeatedly issued directives emphasizing the importance of judicial independence and judges' public-mindedness.³¹ In March 1913 Xu Shiyong, the Minister of Justice, issued directives to all high courts, district courts and procuratorates, urging chief justices and chief procurators to be diligent and calling for close supervision over all judges and procurators in their performance of duties. He said that in the Republic the rule of law was the most important thing to be upheld and judicial officials should neither abandon their duty nor abuse their office. Within four months he issued another directive with the same message.³² These high-sounding words were rhetoric, certainly, but the government's intention to deliver an efficient and honest judicial system cannot be viewed as false, even though its capability of achieving this result is very much in question. Writing in 1923 Liang Qichao and Jiang Yong, both one-time Ministers of Justice, observed that while all measures and policies of the state since the founding of the Republic had been unsatisfactory, the judicial system was the single most successful field by comparison.³³

The rhetoric as well as the measures of the Beiyang government with regard to judicial reform (aiming at a modern court system) and judicial independence (meaning no outside interference in the judicial process) can be explained by historical factors. First, like the late Qing government, the Beiyang government was motivated by two related goals: to modernize China and to end extraterritoriality. Wang Chonghui, who was in charge of the Law Codification Commission, stated in 1918 that one of the objects of codifying laws was "to secure eventual cancellation of extraterritoriality." He expected that the revision of laws would be completed in five years and then efforts would be made to abolish extraterritorial rights enjoyed by foreigners.³⁴ This nationalistic agenda was so powerful and so closely related to judicial reform that Zhang Zongxiang, the Minister of Justice during 1914–16, observed in 1923 that "due to the existence of extraterritoriality, which all people know harms our national prestige (*youshang guowei*) and all try very hard to get rid of, the society watches the judicial reform closely and nobody dare to criticize the principle of judicial independence."³⁵

Secondly, throughout the period 1912–27, all but two of the successive Ministers of Justice in Beijing received legal training in Japan or the

31. *Zhengfu gongbao*, No. 595 (29 December 1913); No. 1069 (30 April 1915).

32. *Zhengfu gongbao*, No. 302 (10 March 1913); No. 446 (31 July 1913).

33. *Falü pinglun*, No. 1 (1 July 1923), pp. 1, 5.

34. Hollington K. Tong, "China's progress toward legal reform," *Millard's Review*, Vol. 6, No. 2 (14 September 1918), p. 53.

35. *Falü pinglun*, No. 1 (1 July 1923), p. 3.

West.³⁶ To what extent their foreign exposure shaped their behaviour as judicial officials can only be speculated upon, but compared with other groups in Republican China, they were apparently more aware of the gap between traditional Chinese judicial practice and its Western counterparts, and were probably more committed to building a Chinese judiciary along Western lines. Their role in pushing for reform in the judicial system should be duly recognized, since many measures of judicial reform were initiated by the Ministry of Justice. Furthermore, as foreign observers pointed out, the staff below ministers in the government bureaucracy were even more important. “It has been the secretaries and the assistants, chiefly Chinese young men who have been educated in mission or government schools or abroad, who have kept the train running in spite of the hordes of bandit soldiers and bandit generals who rode ‘dead head’ and disrupted traffic.”³⁷ Since these people below the level of deputy-minister were not replaced as frequently as were ministers and deputy-ministers,³⁸ there was a certain degree of continuity in the operation of the state apparatus, especially in the judicial system, throughout the Beiyang period. It is in the light of these circumstances that the judicial reform of 1912–27 is to be understood.

After the principle of judicial independence was established in rhetoric and in policies, those who did not accept it had to live with it. In 1915, for example, Yuan Shikai asked the Ministry of Justice to prosecute a provincial Civil Governor for misappropriation of public funds, but the Supreme Court found no evidence after a preliminary hearing and dismissed the case. Frustrated, Yuan tried to have the administrative court find the judge guilty of misconduct, but again failed. Yuan was reported to have complained that the judge was “too subservient to the law” – a testimony to the independence of the courts involved.³⁹ As for the provincial level, Zhang Yaozeng, a one-time Minister of Justice and later a lawyer practising in Shanghai, claimed in 1922 that despite provincial warlords’ interference in education and finance and their contention with

36. Wang Chonghui, the first Minister of Justice in Beijing (March–July 1912) was a J. D. from Yale University and admitted into English bar. Xu Shiying, who succeeded Wang (July 1912–September 1913), was not trained in foreign schools but was the deputy head of the mission sent to Europe and America by the Qing court to study Western laws in 1910. Liang Qichao (September 1913–February 1914) had a similar background and inclination. Zhang Zongxiang (February 1914–June 1916) was a graduate from Meiji University in Japan. Zhang Yaozeng (June 1916–June 1917), Zhu Shen (March 1918–May 1921) and Cheng Ke (January 1923–January 1924) graduated from Imperial University of Tokyo. Lin Changmin (July–November 1917), Jiang Yong (December 1917–March 1918) and Yao Zheng (June 1927–February 1928) were graduates from Waseda University in Japan. Dong Kang (May–December 1921) also studied law in Japan in 1912–14. Zhang Shizhao (November 1924–July 1925) studied law at Edinburgh University in 1908–11. Ma Junwu (December 1925–March 1926) was a Ph. D. in engineering from Industrial University in Berlin. Luo Wengan (July 1926–June 1927) held a Master’s degree in law from Oxford University. See Geng Wentian, *Zhongguo zhi sifa (China’s Judiciary)* (Shanghai: Minzhi shuju, 1933), pp. 27–29; Qian Shifu, *Beiyang zhengfu zhiguan nianbiao (A Chronology of the Beiyang Government Officialdom)* (Shanghai: Huadong shifan daxue chubanshe, 1991); *Mingguo renwu dacidian*.

37. *Millard’s Review*, Vol. 6, No. 8 (26 October 1918), p. 300.

38. Andrew J. Nathan, *Peking Politics, 1918–1923* (Berkeley: University of California Press, 1976), pp. 72–74.

39. F. T. Cheng, “The Supreme Court in China,” *Millard’s Review*, Vol. 16, No. 13 (28 May 1921), p. 673.

the central government for positions, “there has not been a single instance in which a man disqualified through ignorance of law has been placed in a position where he had [*sic*] to exercise the functions of a judge,” nor “has there been any case in which a militarist however influential has openly defied the supreme authority of a judge in rendering decisions in court.”⁴⁰ Although Zhang’s observation may contain some exaggeration, it is largely true that during the Beiyang period the idea of judicial independence entered public discourse and came to be accepted as an ideal.

Judicial Independence and Party Dominance: The Nanjing Decade

Unlike the Beiyang regimes which were struggling between traditional patterns of behaviour and the impulse to modernize, the KMT had a distinctive party doctrine or ideology (*dangyi*) to guide its revolutionary actions and state-building. This included the Three Principles of the People (*Sanmin zhuyi*) and the theory of a three-staged revolution. While one of the Three Principles was democracy, meaning a democratic constitutional government, it was qualified by the latter theory: the Nationalist revolution had to move from military government (*junzheng*), through tutelage government (*xunzheng*), finally to reach constitutional government (*xianzheng*). The establishment of the National Government under Chiang Kai-shek in mid-1927 was proclaimed as the transition from the military to the tutelage government. During this stage the KMT would exercise state power on behalf of the people and rule the country through the party (*yidang zhiguo*). This theory, when applied to judicial system, was apparently at odds with the principle of judicial independence. How did the KMT government deal with the inherent contradiction of these two ideas?

“Partyizing” the judiciary. Xu Qian was the first KMT official who advocated “partyizing” the judiciary (*danghua sifa*).⁴¹ After the founding of the Republic, he held several judicial posts in different regimes, including serving as the Minister of Justice in San Yat-sen’s Military Government in Guangzhou in 1920 and the Minister of Justice under Duan Qirui in 1922. Having affiliated with the KMT as early as its founding in August 1912, Xu joined the National Government in Guangzhou in 1925. From August to December 1926 he was the Minister of Justice and the Chairman of the Judicial Commission in the Guangzhou government.⁴²

In September 1926, with the success of the Northern Expedition expected, Xu put forward a plan for carrying out judicial reform nationwide. In the section on “Renewal of Judicial Apparatus,” Xu said that the prohibition by the Beiyang government against judges’ party affiliation in

40. Francis Zia, “A Chinese jurist’s views on extraterritoriality,” *CWR*, Vol. 23, No. 5 (30 December 1922), p. 169.

41. A native of Hexian, Anhui, Xu obtained a *jinshi* degree in 1903 and then studied law and government in the Translation and Study Institute (*Yixue guan*) in 1904–07. He joined the Law Codification Commission for a short period and was then appointed the chief justice in the district court in Beijing in 1908 and chief procurator of the high court in Beijing a year later.

42. *Minguo renwu dacidian*, p. 703; *Millard’s Review*, Vol. 10, No. 12 (22 November 1919), pp. 506–07; George T. Yu, *Party Politics in Republican China: The Kuomintang, 1912–1924* (Berkeley: University of California Press, 1966), p. 97.

the name of judicial independence was contrary to the party ideology of the KMT. "If the political [apparatus] promotes revolution and the judiciary opposes [it], then the judiciary will move in an opposite direction from the political system (*zhengxian*). For this reason the judicial apparatus must be controlled by the political [one]." In the section on "Renewal of Judicial Personnel," Xu argued that in the past judges only studied theories of law and government (*fazheng xue*) and paid no attention to revolution. To protect their status, some judges took bribes and conspired with lawyers. Moreover, less than one per cent of judges had the strength of character to participate in the Nationalist revolution. Xu proposed to set up institutes to train judges in politics and party doctrine, to produce new and revolutionary judges, and to dismiss old-fashioned ones. He further advised the abolition of the qualifications previously set for judges and the adoption of a special system to ensure the employment of revolutionary persons.⁴³ Xu's proposal was adopted by the Political Commission of the National Government.

In November 1926 the Judicial Reform Committee (*Gaizao sifa weiyuanhui*) of the Guangzhou government passed a resolution on judicial reform. It provided, among other things, that the prohibition of judges from joining political parties be abolished and that no persons could be judicial officers other than those KMT party members who had a good reputation and three years of legal experience.⁴⁴ The emphasis on party membership, good reputation and legal experience at the same time indicates that the KMT did not totally disregard judges' legal competence in favour of their political reliability. Furthermore, it also suggests that KMT officials were not necessarily of one mind and that the resolutions of the Judicial Reform Committee might well have been a compromise. Ideally, judicial personnel under the KMT were supposed to be both politically reliable and technically competent, but in reality political loyalty, or at least conformity, to the KMT always came first.

These ideas are very similar to the later policies and practices of the Chinese Communist Party.⁴⁵ Indeed, Xu Qian, who played a prominent role on the KMT left in the National Government in Guangzhou and then

43. *Falü pinglun*, No. 168 (19 September 1926), p. 7.

44. *Falü pinglun*, No. 185 (16 January 1927), p. 17.

45. The judicial practices under the CCP evolved from the Soviet Republic era through the Maoist era to the present. The principle of party dominance over the judiciary has hardly changed, though its forms varied with political climate from period to period. See Trygve Lotverit, *Chinese Communism 1931–1934: Experience in Civil Government* (Lund: Studentlitterature, 1973), pp. 106–144; W. E. Butler (ed.), *The Legal System of the Chinese Soviet Republic, 1931–1934* (Dobbs Ferry, NY: Transnational Publishers, 1983); Franz Michael, "The role of law in traditional, Nationalist and Communist China," *The China Quarterly*, No. 9 (March 1962); pp. 124–148; Shao-chuan Leng, *Justice in Communist China* (Dobbs Ferry, NY: Oceana Publications, Inc., 1967); Jerome Alan Cohen, *The Criminal Process in the People's Republic of China, 1949–1963* (Cambridge, MA: Harvard University Press, 1968), pp. 483–506; "The Chinese Communist Party and 'judicial independence': 1949–1959," *Harvard Law Review*, Vol. 82, No. 5 (March 1969) pp. 967–1006; Liao Kuangsheng, "'Independent administration of justice' and the PRC legal system," *Chinese Law and Government*, Vol. 16, Nos. 2–3 (Summer–Fall 1983) pp. 123–152; Shao-chuan Leng and Hung-dah Chiu, *Criminal Justice in Post-Mao China* (Albany: SUNY Press, 1985); Laszlo Ladany, *Law and Legality in China* (London: Hurst & Co., 1992), pp. 52–70.

in Wuhan during the politically volatile months of late 1926 and early 1927,⁴⁶ was later wanted by Chiang Kai-shek's government as a Communist suspect and his proposal for revolutionary judicial reform was attacked as Communist and Marxist.⁴⁷ Yet Xu's ideas were not unique. The Nationalist Revolutionary Army on the Northern Expedition under Chiang Kai-shek and the Nanjing government established in mid-1927 practised exactly what he had proposed about reforming the judiciary along revolutionary (political) lines. After the Nationalist Revolutionary Army arrived in Shanghai in March 1927, the KMT Jiangsu-Shanghai headquarters joint meeting made a decision on taking over the judiciary in Shanghai: the former district chief procurator Sun Shaokang would remain and Zheng Yuxiu would become the new chief justice (*tingzhang*) of the Shanghai district court.⁴⁸ Zheng was the first woman judge ever appointed in China. Her credentials included membership in the Chinese delegation to the Paris Peace Conference in 1919, and a law practice in Shanghai. Politically she belonged to the KMT right.⁴⁹

In May 1927 Lu Xingyuan, who had served in various judicial capacities in the Sun Yat-sen government in Guangzhou, was appointed the Chief Justice of the Provisional Court (the former Mixed Court) in Shanghai's International Settlement.⁵⁰ At his inaugural ceremony, Chen Dezheng, the head of the Propaganda Department of the KMT Municipal Party Headquarters (*shidangbu*), delivered a speech. Chen praised Lu as a faithful follower and devoted disciple of Sun Yat-sen and went on to say: "Now that the Government has appointed him to this important post, we have no doubt whatever in our minds but that he will do his utmost to uphold the doctrine and the traditions of the Kuomintang in the administration of justice according to the law."⁵¹ Quoting Chen's speech, the editor of the *North China Daily News* observed: "We failed to see

46. During the transition period when the National Government moved from Guangzhou to Wuhan (13 December 1926–21 February 1927), with the approval of Borodin, the Comintern adviser, a "Temporary Joint Council of the KMT Central Committee and the National Government Commissioners" was organized to function as the supreme authority. Xu Qian was the chairman of this KMT-left-dominated joint council. When the KMT Second Central Committee Third Plenum was convened in Wuhan in March, Xu was one of the nine elected members of the Central Committee Standing Committee. The Plenum also produced a new National Government, of which Xu was one of the five standing commissioners. See Xu Mao, *Zhonghua minguo zhengzhi zhidu shi (A History of the Political Institutions of the Republic of China)* (Shanghai: Shanghai renmin chubanshe 1992), pp. 187–191.

47. *Falü pinglun*, No. 206 (13 June 1927), pp. 7–9; *NCH*, 9 July 1927, p. 48; *Minguo renwu dacidian*, p. 703.

48. *Falü pinglun*, No. 198 (17 April 1927), p. 8.

49. After the Communist-led workers' uprising drove away the warlord forces from Shanghai, the Nationalist Revolutionary Army entered the city on 22 March. The Provisional Municipal Government of Shanghai was elected by a meeting of over 4,000 people representing over 1,000 organizations. Zheng was one of the 19 municipal government commissioners, the majority of whom were Communists and labour union representatives. When Chiang Kai-shek decided to get rid of this provisional government, Zheng, along with other commissioners of KMT ties, withdrew from the government. See Tang Zhengchang, *Shanghai shi (A History of Shanghai)* (Shanghai: Shanghai renmin chubanshe, 1989), pp. 623–26; *NCH*, 2 April 1927, p. 16.

50. *CWR*, Vol. 18, No. 10 (5 November 1921), p. 448; *NCH*, 21 May 1927, p. 330; *Minguo renwu dacidian*, p. 1520.

51. *North China Daily News*, 17 May 1927, p. 12; *NCH*, 21 May 1927, p. 330.

how Mr Loo [Lu] can honestly use a law court to forward the interests of a party and at the same time administer what we call justice. We have no doubt that the Chinese see nothing incompatible in these two lines of endeavour.”⁵² This comment captured the essence of the judicial reform under the KMT.

What happened to Lu subsequently was ironic but equally revealing. Just five months later, he was dismissed from his post precisely because he failed to follow the order of the Shanghai-Wusong Garrison Headquarters to hand over Communist suspects arrested in the Settlement to the Chinese authorities.⁵³ He Shizhen, an American-educated law expert and KMT member, on succeeding Lu, pledged that he would abide by the decisions of the party and do his best to carry out party principles.⁵⁴ Yet He resigned after only one year, in August 1929, probably finding that he had too difficult a role to play.⁵⁵

The practice of appointing KMT members to judicial posts became the rule. After Chiang Kai-shek secured Nanjing in April 1927, he appointed Zhang Jundu, the chief of the court martial office (*Junfachu zhuren*) in the Nationalist Revolutionary Army, as the chief justice of the Jiangsu High Court (*Jiangsu gaodeng shenpan ting*). After his appointment, Zhang was reported as saying that he was prepared to reform the judiciary in Jiangsu province to conform to party rule (*shihe dangzhi*).⁵⁶

Meanwhile, Chen Hexian, a former law professor and an adviser at the Nationalist Revolutionary Army headquarters, was appointed the head of the Jiangsu Provincial Department of Justice (*Jiangsu sheng sifa ting*). He was given a mandate that before the highest judicial administration was formed, his department was to make plans for judicial administration in various provinces secured by the Revolutionary Army and put proposals to the Central Commission of Legal Codification (*Zhongyang fazhi weiyuanhui*).⁵⁷ In an interview with reporters, Chen outlined his views on judicial reform. Along a similar line to that of Xu Qian, he emphasized

52. *North China Daily News*, 19 May 1927, p. 6.

53. The dismissal of Lu turned out to be a mini-saga. After the Jiangsu Provincial Government ordered his dismissal, Lu refused to step down and appealed to the National Government arguing that the order of the Provincial Government was in violation of the Provisional Constitution which guaranteed the tenure of judges and of the Law Governing Discipline of Judicial Officers which provided procedures for dismissing judges. He issued a statement to refute the accusation that he was not active in suppressing Communists. Lu successfully petitioned the Military Commission in Nanjing to restrain local military authorities from demanding for extradition of persons prosecuted at the Provisional Court, but only to see the commission's decision in his favour overturned after the counter-petition of the garrison headquarters. Finally, when the National Government created the Committee of Disciplinary Punishment for Judicial Officers in mid-1928, the Jiangsu Provincial Government laid five charges against Lu before the committee. Lu was found guilty and removed from the post in August 1928. *CWR*, Vol. 42, No. 8 (22 October 1927), p. 216; *NCH*, 22 October 1927, p. 144; 5 November 1927, p. 231; 19 November 1927, p. 317; 26 November 1927, p. 360; 7 July 1928, pp. 12–13; 14 July 1928, p. 60; 21 July 1928, p. 103; 4 August 1928, p. 198.

54. *NCH*, 11 August 1928, p. 234; Thomas B. Stephens, *Order and Discipline in China: The Shanghai Mixed Court, 1911–1927* (Seattle: University of Washington Press, 1992), pp. 117–18.

55. *NCH*, 10 August 1929, p. 218.

56. *Falü pinglun*, No. 199 (24 April 1927), p. 13.

57. *Falü pinglun*, No. 206 (13 June 1927), p. 7; No. 207 (20 June 1927), pp. 14–16.

the necessity of establishing institutes to train judicial personnel, meaning not legal but political training. "Such training institutes will not be just for teaching lessons like in schools; the purpose is to provide training in this party's ideology (*zhuyi*) and thus lay a foundation for gradual judicial reform in the future." He criticized in the same breath the idea of judicial independence and the judicial system that served the privileged. "The biggest evil [in the past] is [for judicial personnel] to hold fiefs and cultivate private factions in the name of judicial independence."⁵⁸ What Chen was referring to is unclear, but to categorize judicial independence as an evil practice in such a casual manner was indicative of the mentality of these KMT judicial experts.

The Jiangsu Provincial Department of Justice under Chen Hexian proceeded to abolish the prohibition of judges from joining political parties, establish a training institute for teaching judicial personnel the KMT party doctrines, and encourage KMT party members to become judges.⁵⁹ After the Ministry of Justice was established in Nanjing, it finally created a Training Institute for Judges (*Faguan yangcheng suo*). The Ministry announced that the 200 positions were open only to KMT party members with a proper educational background (those who had studied law and government for more than three years and graduated).⁶⁰ Those who had the same background but were not KMT members could also apply if they joined the party.⁶¹

In 1935, in an effort to ease the shortage of judicial personnel, the KMT government decided to train members of KMT party provincial and municipal headquarters to staff judicial organs. Party headquarters could recommend their members and members could also volunteer. They would take an examination (the examination committee would be selected by the KMT Central Executive Committee) and enter the Training Institute for Judges. After training, they would be given preference for employment.⁶² Thus the development of the judicial system became almost a KMT party affair and was politicized as completely as possible.⁶³

The propensity to exert party dominance over the judicial process was also reflected in the KMT regulation of the legal profession. In December 1928 the Ministry of Justice ordered all district courts to enforce the provision in the Regulations on Lawyers which barred lawyers from

58. *Falü pinglun*, No. 207 (20 June 1927), p. 14. It was Chen Hexian who initiated and finally succeeded in dismissing Lu Xingyuan.

59. *Falü pinglun*, No. 214 (7 August 1927), p. 6.

60. *Shi bao*, 22 February 1929, p. 4.

61. *Sifa gongbao* (*Judicial Bulletin*), No. 9 (9 March 1929), back cover; No. 12 (30 March 1929), p. 1.

62. *Sifa gongbao*, No. 29 (25 March 1935), pp. 1–3.

63. The actual impact of the Training Institute for Judges appears to have been limited. From 1930 to 1935, it graduated 428 judges, 75 prison officers and 61 judicial secretaries. By comparison, the total number of judges in the country in 1936 was 2,382 and of procurators, 1,071. See *Sifa yuan faguan xunliansuo gailan* (*An Overview of the Judicial Council's Training Institute for Judges*) Nanjing, 1935), p. 66; *Faling zhoukan*, No. 335 (2 December 1936), *Legal News*, p. 2; The International Relations Committee, *Twenty-Five Years of the Chinese Republic* (Nanjing, 1937), p. 23.

assuming paid public offices while practising law.⁶⁴ To protect its party members and maintain the party's political control over the profession, however, the KMT government made an exception to its own regulation. In December 1931 the Ministry of Justice instructed that the prohibition of lawyers from taking paid public office did not apply to those who worked at KMT party headquarters and were paid "living allowances (*shenghuo jintie*)."⁶⁵

A similar tendency was displayed in the doing and undoing of the jury system. In December 1929 Nanjing issued the Provisional Law on Jury Trial in Counter-Revolutionary Cases (*Fangeming anjian peishen zanxing fa*). Under this law, jury trial was adopted in cases dealing with Communists and other political dissidents. The jury, however, had to be composed of KMT members selected by local party headquarters. Conviction was to be determined by a simple majority. This law was officially abolished in March 1931 when the Emergency Law on Crimes Against the Republic (*Weihei minguo jinji zhizui fa*) came into effect.⁶⁶ But in late 1932 KMT juries were still being selected for the trial of alleged Communists in the Third Branch of the Jiangsu High Court in Shanghai's French Concession.⁶⁷

Justification for party dominance. The KMT practice of establishing party dominance over the state apparatus including the judiciary needed to be justified. When the Jiangsu Provincial Department of Justice abolished the prohibition of judges from joining political parties in 1927, the justification was that judges were also citizens who had rights to participate in politics which should not be forfeited. Judicial independence was instead to be achieved by strict organization and fair operation of political institutions.⁶⁸ This argument was rather far-fetched and lacked theoretical force. Further justifications had to be worked out.

In 1929 Ge Guangyu, presumably a KMT official, wrote in the *Law Review (Falü pinglun)* urging that laws should be "partyized" (*falü yi danghua*).

The principles of legislation in most countries change with political trends. In the monarchical era, public and private laws served nothing but the power relations [of that time]. After Rousseau advocated the theory of social contract and after the French Revolution produced the Declaration of the Rights of Men [and Citizens], the political trends turned dramatically – all laws stressed liberty and equality. Recently, social theories came into fashion and therefore the laws in the world have become socialized (*shehuihua*). Briand put forward the theory of associated responsibility (*liandai zeren lun*), and legislation in France is almost completely based on this theory. In Russia Lenin established a peasant-worker government and its laws are

64. *Shi bao*, 17 December 1928, p. 6.

65. *Shanghai lüshi gonghui baogao shu (The Report of the Shanghai Bar Association)*, No. 30 (April 1932), p. 146.

66. *NCH*, 5 April 1930, p. 94; *Zhonghua faxue zazhi*, Vol. 5, No. 7 (July 1934), pp. 18–19; New edition, Vol. 1, Nos. 5–6 (February 1937), pp. 41–42.

67. *NCH*, 30 November 1932, p. 334.

68. *Falü pinglun*, No. 214 (7 August 1927), p. 6.

collectivistic. Others such as Guildism in England, Socialism in Germany, all influenced the principles of legislation in these countries. Our National Government rules the country through the party. All the political institutions are based on the Three People's Principles and therefore all laws and regulations should be partyized. This is the principle of legislation that must be established.⁶⁹

In an article published in 1930, Hu Hanmin, a veteran KMT leader, emphasized that the legislation based on the Three People's Principles was fundamentally different from modern legislation in Europe and America. The latter was based on individualism and took individuals as the object of law, which was even more backward than traditional Chinese law based on family. In contrast, the Three People's Principles legislation considered society as a whole to ensure social stability, economic development and a balance of various social interests.⁷⁰ Since the KMT claimed to rule the country on behalf of society and the people, logically the party was the body that should make law.

Liang Yunli, a secretary to the Minister of Justice, offered an explanation of the relationship between the KMT and the judicial system. Under the Law on the Procedure of Law Making adopted by the KMT on 11 March 1928, the Central Political Council of the KMT had exclusive powers to make laws which should then be handed to the National Government for promulgation and enforcement.

Many of the constitutional principles are definitely embodied in the party principles. These in effect possess the force of unwritten constitution in China. Any law or regulation that is in conflict with or repugnant to the party principles and programmes must fall to the ground. This is a necessary corollary of the principle that the Nationalist Government is founded on the bedrock of the Kuomintang Party.⁷¹

A further theory about "partyizing" the judiciary was provided in 1934 by Jü Zheng. Jü was a KMT veteran who participated in the 1911 Revolution and the Second Revolution in 1913. He studied law in Japan and served in several important offices in the KMT party and government. In 1932 he became the chairman of the Judicial Council and chief justice of the Supreme Court. In October 1934 he assumed the post of the Minister of Justice.⁷² In a long article, "The question of partyizing the judiciary" (*Sifa danghua wenti*), published in December 1934, Jü explained what the process ought to entail.⁷³ It did not mean that all high positions in the judicial system should be given to party members, nor that party members become judicial officers without regard for qualifications, nor that party-member judicial officers settle cases in disregard of all laws. Instead, it required that judges had to apply party doctrines to adjudication and that judges be selected from those who understood and would carry out party doctrines. "In a nutshell, partyizing the judiciary is not to make a judiciary of party members (*sifa dangrenhua*), but to make a judiciary of party doctrines (*sifa dangyihua*)."⁷⁴

69. *Falü pinglun*, Vol. 6, No. 29 (28 April 1929), pp. 19–22.

70. *Zhonghua faxue zazhi*, Vol. 1, No. 1 (September 1930), pp. 1–12.

71. Liang Yueng-li, "Judicial reform," p. 106.

72. *Minguo renwu dacidian*, pp. 543–44.

73. *Zhonghua faxue zazhi*, Vol. 5, Nos. 11–12 (November–December 1934), pp. 1–27.

74. *Ibid.* p. 3.

Interestingly, in a Marxist vein (one more example of the ideological confusion), Jü Zheng argued against the natural law of Western origins. He asserted that law was the superstructure of society and “had to correspond to the base structure of society, that is, the economic system.”⁷⁵ Every society, nation and era, therefore, had its particular world view, upon which a certain uniform sense of justice was formed, and such a sense in turn provided the central principle of a nation’s laws.⁷⁶ The KMT party doctrine represented the world view, the sense of justice and the central principle of law at that time in China. In exercising adjudication, a judge should apply the party doctrine in the following ways: to supplement what the law failed to address; to make concrete laws that were too abstract to solve practical problems; to revitalize aspects of the law that had become ossified; and to void aspects of the law that were obviously contradictory to the reality of social life.⁷⁷ This article was the most complete enunciation of party dominance over the judiciary that the KMT officials offered.

Judicial independence with party dominance. While the impulse to impose party rule remained strong throughout the Nanjing Decade, the rhetoric on the rule of law and judicial independence was never toned down. Like its Beiyang predecessor, the KMT embraced the goal of modernization, even if in a fascist-corporatist fashion, and wanted to abolish extraterritoriality, since both these objectives were related to the legitimacy of the government.

As early as June 1925, in the wake of the May 30th Incident, the KMT Central Executive Committee announced the party’s intention to abolish the unequal treaties.⁷⁸ Meanwhile, Hu Hanmin, as Minister of Foreign Affairs of the National Government in Guangzhou, issued a statement to the people of the world, in which he condemned the unequal treaties and extraterritoriality in strong language and called for support for China’s efforts to end these evils.⁷⁹ In April 1926 the Guangzhou government stated that it would not receive the visiting international commission investigating the judicial system in China. It declared that the National Government would follow the will of Sun Yat-sen to abolish the unequal treaties and revoke extraterritoriality as a matter of course – there was no need for foreigners to investigate such matters.⁸⁰ After the National Government was established in Nanjing, it continued the efforts to reclaim judicial rights and to end extraterritoriality. In spite of the statement of 1926, however, the KMT was not in a position to do this

75. *Ibid.* p. 7.

76. *Ibid.* pp. 7–9.

77. *Ibid.* p. 23.

78. Di’er lishi dang’an guan, *Zhonghua minguo shi dang’an ziliao huibian* (*A Compilation of Archival Materials on the History of the Republic of China*) (Nanjing: Jiangsu guji chubanshe, 1986), Vol. 4, pp. 1555–58.

79. *Ibid.* pp. 1558–62.

80. *Ibid.* p. 1562.

unilaterally.⁸¹ There had to be continued judicial reform along the line, or rather, accompanied by the rhetoric, of the rule of law and judicial independence.

On the occasion of Wang Chonghui assuming the office of Minister of Justice in Nanjing on 14 July 1927, Hu Hanmin delivered a speech. Since the National Government was established in Guangzhou, said Hu, the Nationalist revolution had been guided by KMT party doctrine. As the military government had become the tutelage government, it was now the party's responsibility to move the country from lawlessness to the rule of law. He commended Wang's commitment to abolishing unequal treaties and urged him to spread the KMT party's spirit of the rule of law (*fahui bendang fazhi jingsheng*).⁸² Such rhetoric about the spirit of the KMT party being the rule of law was, in effect, an attempt to invent a tradition. It was uttered partly out of Hu's own notion of the rule of law and partly as his political weapon in the intra-party struggle: to use the separation of five powers and the rule of law to restrict Chiang Kai-shek's power.⁸³

Just as KMT officials could mention in the same breath the rule of law and party dominance, they had no difficulty paying homage to judicial independence in public discourse. The manifesto of the National Judicial Conference of 1935 declared:

The foundation of establishing the Republic of China are the Three People's Principles and five-power constitution, and judicial independence is the basis for carrying out these Principles and implementing constitutional government. In enforcing law, balance has to be maintained, and in protecting human rights, appropriateness has to be sought. All matters, from maintaining public order and good social custom to securing individuals' rights and obligations, depend upon the working of judicial organs. Advanced countries in the world, no matter what form of government, have to take judicial independence as the unshakable golden rule if they want to maintain the spirit of the rule of law. Although state affairs are many, nothing is more closely related to the interests of the people than the judiciary, and nobody is more [important] than a judge in carrying out state laws and taking care of the people's sufferings. Although the judiciary is but one of five powers, as far as its effect is concerned, it not only helps the rule of law, but also holds the national spirit.⁸⁴

To make sense of statements such as this, it should be noted that, first, there were cross purposes and different impulses among KMT leaders and judicial officials. The manifesto and other public announcements about judicial independence might have resulted from compromise and a combination of those purposes and impulses. Furthermore, in KMT

81. For the KMT government's repeated and failed efforts to revise treaties and abolish extraterritoriality, see Wesley R. Fishel, *The End of Extraterritoriality in China* (Berkeley: University of California Press, 1952); Wu Dongzhi, *Zhongguo waijiao shi: Zhonghua minguo shiqi, 1911–1949* (*A Diplomatic History of China: The Period of the Republic of China, 1911–1949*) (Kaifeng: Henan renmin chubanshe, 1990), pp. 198–207.

82. *Faliu pinglun*, No. 214 (7 August 1927) p. 4.

83. Suisheng Zhao, *Power by Design* (Honolulu: University of Hawaii Press, 1996); Guo Xuyin, *Guomindang paixi douzheng shi* (*A History of the KMT Factional Strife*) (Shanghai: Shanghai renmin chubanshe, 1992), pp. 116–6.

84. *Quanguo sifa huiyi huibian* (*A Compilation of the National Judicial Conference Proceedings*) (Nanjing, 1935).

officials' collective perception, "partyizing" the judiciary and judicial independence did not appear to be contradictory but compatible. The key was to limit judicial independence to the establishment of a court system independent of administration (see below). As long as the operation of the court system was not taken into account, "partyizing" the system was not considered at odds with the idea of judicial independence. Indeed, in this vision, judicial independence was even complementary to party dominance, both serving the purpose of the party-state.

The Failure of Judicial Independence: The County Judicial Process

Following Shen Jiaben and Wu Tingfang, judicial officials and legal scholars of the Beiyang period and the Nanjing Decade agreed that judicial independence had two meanings: judicial organs were not subject to interference from legislative or administrative organs; and when a lower-level judicial organ exercised judicial powers, it was not subject to undue interference from superior judicial organs.⁸⁵ Based on this consensus, a primary goal in judicial reform was to establish a court system independent of administrative bureaucracy from the capital down to the county level throughout the country. Apart from the question of whether established courts functioned independently, it was the goal of establishing courts in all counties that the successive Republican governments failed to achieve.

Judicial process at the county level. After the founding of the Republic, the Yuan Shikai government started to set up a four-tier court system: the Supreme Court at the capital, provincial high courts at provincial capitals, district courts at major cities, and courts of first instance at county seats. Due to the lack of judicial personnel, graduates from modern schools were enlisted to serve as judges. This caused widespread criticism and, in response, the government reduced the number of courts and abolished courts of first instance in 1913.⁸⁶ Thereafter most rural counties did not have courts. In these places county magistrates performed judicial as well as administrative functions as their predecessors had done in traditional China. The practice was institutionalized by two ordinances, the Provisional Regulations on County Magistrates' Management of Judicial Affairs (*Xian zhishi jianli sifa shiwu zanxing tiaoli*) of 1914 and the Provisional Regulations on County Magistrates' Disposal of Lawsuits (*Xian zhishi shenli susong zanxing zhangcheng*) of 1923.⁸⁷ In

85. To cite a few, Tao Huizen, *Zhonghua sifa zhidu (China's Judicial System)* (Shanghai: Shanwu yinshuguan, 1926), p. 6; Wang Chengzhi, *Zhonghua sifa wenti (Issues Concerning China's Judiciary)* (Shanghai: Sanmin shudian, 1929), p. 5; Wan Deyi, *Zhonghua sifa zhidu yipie (A Glance at China's Judicial System)* (Hangzhou: Zhejiang faxue yanjiuhui, 1931), p. 8.

86. Chang, "Present conditions," p. 172–73; Yu Qizhang, "Minguo yilai xin sifa zhidu" ("The new judicial system since [the founding of] the Republic"), *Falü pinglun*, No. 244 (27 February 1928), pp. 1–2; Tao Huizeng, *Zhonghua sifa zhidu*, p. 10; Wang Zhengji, *Zhonghua sifa wenti*, pp. 9–10; C. Y. W. Meng, "Modern judicial reform in China," *CWR*, Vol. 55, No. 6 (10 January 1931), p. 214.

87. *Zhonghua minguo fajui daquan (A Complete Compilation of Laws and Regulations of the Republic of China)* (Shanghai: Shangwu yinshuguan, 1936), pp. 5555–57.

1916 a national judicial conference convened by the Ministry of Justice passed a resolution that in rural areas county judicial offices (*Xian sifa gongshu*) be established with one trial officer (*shenpan yuan*) each and with county magistrates acting as procurators. The following year an ordinance to this effect, the Organizational Regulations of County Judicial Offices (*Xian sifa gongshu zuzhi zhangcheng*), was enacted.⁸⁸ But necessary expenditure for the plan was never included in the government budget and it had not been implemented by 1926.⁸⁹

On the other hand, under the Regulations on Lawyers, lawyers could only practise in the area where a district court was located and therefore had no place in the trials held in county magistrates' offices. In February 1913 the Ministry of Justice issued a specific order to prohibit lawyers from practising in counties where no district courts were established. The rationale was that legal defence was one of the three components of the judicial system (the others being the procurator and the judge) which could function in a balanced way only in a formally established court.⁹⁰

The government seems to have feared that if lawyers were allowed to confront county magistrates (instead of judges with the necessary legal training), they would manipulate laws and outwit the magistrates to the advantage of their clients in return for higher fees. Here arose a fundamental issue of how the role of lawyers and the nature of law were perceived at that time. In the West it is the lawyer's job to interpret or "manipulate" law, which makes the autonomy of law and therefore judicial independence possible. The Beiyang government's concern reflected a deep-seated distrust of lawyers who were never out of the shadow of the opprobrium attached to pettifoggers. This distrust alone would have limited the degree of judicial independence even if all other favourable conditions had been present.

Abuses in the county judicial process. If the possibility of lawyers manipulating laws existed, the alternative – a system that gave county magistrates judicial powers, unchecked by the presence of lawyers – certainly invited abuses. The result was considerable corruption and miscarriage of justice at the county level. The government was aware of the problem. From 1913 to 1914 the Ministry of Justice issued a series of orders and directives addressing the abuses committed by county magistrates in various locations. The abuses named ranged from

88. Tao Huizeng, *Zhonghua sifa zhidu*, p. 11; Meng, "Modern judicial reform in China," p. 235; *Zhonghua minguo xianxing fagui daquan* (*A Complete Compilation of the Laws and Regulations in Effect of the Republic of China*) (Shanghai: Shangwu yinshuguan, 1934), pp. 1127–28.

89. Chang Yao-tseng, "Present conditions," pp. 172–73; Yang Youjiong, "Zhonghua sifa zhidu," pp. 30–31.

90. *Zhengfu gongbao*, No. 280 (16 February 1913), p. 114; *Zhengfu gongbao fenlei huibian*, No. 36, p. 14; *Faling daquan* (*A Complete Compilation of Laws*) (1914), p. 915.

overcharging litigants for legal complaint forms (*zhuangzhi*), to systematically using torture, illegally detaining defendants, and recklessly applying the death penalty and failing to report to the superior courts the reasons for such death sentences.⁹¹

Since the presence of lawyers was not considered an antidote to judicial abuses at the county level, the government resorted to administrative supervision to address the problem by ordering the sub-provincial administrators (*daoyin*) to act as appellate court judges for cases tried at the county magistrates' offices.⁹² In November 1914, for instance, the Office of the Greater Shanghai Administrator received an order from the Ministry of Justice, saying that local evil gentry controlled county level judicial powers and abused ordinary people, and that the office should supervise the county judicial process and allow the people to report any injustice they suffered.⁹³ The administrator was empowered with judicial responsibility to act as a court of appeal and to review cases tried in the 12 counties that belonged to Greater Shanghai.⁹⁴

At the same time, however, the Ministry warned all sub-provincial administrators that as their responsibility was to oversee the judicial process at the county level, they should remain within the boundaries of their jurisdiction and not take over the judicial power of county magistrates.⁹⁵ The Ministry apparently intended to balance the powers of the bureaucracy at different levels in order to prevent abuses of power by any parties. But the net result was the utter ineffectiveness of the supervision over the judicial process at the county level.

According to Deng Changyao, who served as a county magistrate in several counties in Hunan and Shaanxi during the 1910s and 1920s, the abuses at the county office were worse than during the Qing period. Clerks of county offices were often former yamen runners. Since they controlled all paper-work and collected fees, and since they knew everybody in the area and were insiders at the county office, they had various ways to squeeze money out of ordinary people who had to litigate or were prosecuted. County magistrate, assessor (*chengshen yuan*) and secretary (*shuji*) were all powerful persons in the county judicial process. They would decide when to hear a case or settle a suit, who should win and who should lose, all depending on which way they could squeeze the most money. Because these officials associated with the local corrupt gentry, litigants had to pay money to the latter before they could hope that

91. *Zhengfu gongbao fenlei huibian*, No. 16, pp. 4, 14–15, No. 17, pp. 86–87. These and other abuses were also testified to by foreign observers. For example, see “Dollar and tael in Shansi,” *NCH*, 24 July 1915, p. 219; “Tortures of prisoners,” *ibid.*, 30 June 1917, p. 753; “Yamen harpies of Kuechow,” *ibid.*, 3 November 1917, p. 267; “Scandal of Chinese ‘justice’,” *ibid.*, 10 August 1918, p. 331; “China’s judicial atrocities,” *ibid.*, 26 April 1924, p. 127.

92. Chang Yao-tseng, “Present conditions,” p. 172–73; *Dongfang zazhi* (*Eastern Miscellanies*), Vol. 12, No. 2 (the section of Chinese chronicles).

93. *Shi bao*, 5 November 1914, p. 5.

94. *Shi bao*, 24 December 1914, p. 5.

95. *Zhengfu gongbao fenlei huibian*, No. 17, p. 87.

their cases would be won or even be heard. When it was a bandit case (*fei'an*), money could buy one's safety; otherwise, all kinds of tortures were used no matter what the result of the trial. Judicial police and gaol guards were equally resourceful in manipulating, mistreating and extorting ordinary people.⁹⁶

The KMT approach. After the KMT took over state power, the Nanjing government inherited the judicial system and related rules. At the county level, it continued to have magistrates exercise judicial powers where no county judicial courts existed, and it continued to prohibit lawyers from practising there. It also reiterated the provision that lawyers sign and affix personal seals to any legal complaints they wrote for litigants.⁹⁷ Lawyers were not even allowed to work as legal consultants (*falü guwen*) at the county level.⁹⁸

In order to improve the competence of county magistrates and make them politically reliable, the KMT government established an examination system and issued a set of standards for them. First started by provincial governments in Zhejiang, Jiangsu and Anhui, this system was later institutionalized by the National Government. For example, the regulations in Zhejiang province provided that candidates for county magistrates should be male or female citizens of the Republic and over 25 years old. They should be graduates of colleges or specialized schools, or have over six months' work experience with high achievements in mass movement or KMT propaganda work, party affairs or administrative duties. The examination included KMT party ideology, the history of Chinese revolution, world political and economic trends, the relationship between party affairs and civil administration, the people's economy and local social problems, municipal administration and rural construction policy, civil and criminal codes, police administration, solutions to practical problems in local administration, and Zhejiang demographic geography.⁹⁹ It is notable that civil and criminal codes were among the examination subjects. The intention of the government to ensure technical competence as well as political loyalty is evident.

The examinations were not held consistently, however. In 1928–29 three were held by the Ministry of the Interior in Zhejiang and Hunan; two in Jiangsu; one each in Anhui, Fujian, Guangdong, Guangxi, Hubei, Yunnan, Hebei, Shandong, Shanxi, Chahar and Suiyuan; and one for Henan, Shaanxi and Gansu together. Of 2,223 county magistrates in

96. Deng Changyao, *Xianshu zhi baibi (One Hundred Abuses at the County Office)* (Guihuacheng qinglongzai, 1925). This general picture of the judicial process at the county level at that time makes a revealing comparison with the Qing period. A recent study on the role of yamen runners in the county judicial process during the Qing is Bradley W. Reed, "Money and justice: clerks, runners, and the magistrate's court in late Imperial Sichuan," *Modern China*, Vol. 21, No. 3 (July 1995), pp. 345–382.

97. *Faling zhoukan*, No. 148 (3 May 1933), p. 3; Liu Zhen, *Lüshi daode lun (On Lawyer's Ethics)* (Shanghai: Shangwu yinshuguan, 1934), p. 34.

98. *Shanghai lushi gonghui huiyuan yingxing zhuyi shixiang*, p. 17; *Faling zhoukan*, No. 87–90 (23 March 1932), p. 1; *Sifa gongbao*, No. 18 (29 January 1935), pp. 17–18; *Sifa xingzheng gongbao (Bulletin of Judicial Administration)*, No. 2 (15 February 1932), p. 53.

99. *Falü pinglun*, No. 238, (22 January 1928), pp. 24–26.

1932, only 97 had been chosen through examinations. After the Examination Council was founded in January 1930 and took over, no examinations were held until 1936.¹⁰⁰ On the other hand, county magistrates were mostly educated at post-secondary education level.¹⁰¹

As for the judicial responsibilities of county magistrates, the KMT government put forward specific demands. According to a government-issued pamphlet entitled “What County Magistrates Ought to Know,” they were supposed to do the following in exercising judicial powers:

1. Supervise and work together with assessor to clear up backlogged cases.
2. Dispose of new cases as speedily as possible.
3. Upon receiving report of murder and robbery, go to the crime scene immediately and investigate and examine evidence personally.
4. Publicize the trial procedures to the ordinary people.
5. Try cases openly, except for special cases.
6. Pay attention to the first deposition.
7. Proceed immediately after accepting lawsuits.
8. Pay attention to the time of receiving and registering complaints.
9. Pay attention to filling out and cancelling subpoenae.
10. When anyone other than the magistrate sends out police, he must send them by turn according to the police roll to avoid abuses.
11. Expenses for business trips should be set, and demanding from [the people] prohibited.
12. Check the arrival of litigants and the date reported by the police concerned to see if they match.
13. Be calm and patient in trial, without prejudgment and without losing temper easily.
14. Do not use torture in trial.
15. Do not detain defendants at will and do allow bail according to situations.
16. Judicial fines should be announced along with the case; do not impose fines at will and for private use.¹⁰²

That such a detailed prescription of behaviour for county magistrates was necessary, however, only indicates the prevalence of the opposite in reality, and there is no evidence that the prescription was closely followed. In fact the abuse of power and miscarriage of justice continued to plague the judicial process at the county level during the Nanjing Decade just as they did during the Beiyang period, and the government knew it. As directives issued by the Judicial Council and the Ministry of Justice in the 1930s revealed, county magistrates holding judicial powers often failed to follow judicial procedures required by the law.¹⁰³ There were also outright abuses and injustice. One kind of abuse was familiar: in order to squeeze money to cover administrative costs, county magistrates would add a variety of fees (such as police assistance fee, industry fee,

100. Hung-mao Tien, *Government and Politics in Kuomintang China, 1927–1937* (Stanford: Stanford University Press, 1972), pp. 130–31.

101. According to the statistics of 1932, 25.1% of them were graduates of colleges; 23% were from schools of law and government; 16.1% from military and police academies; and 35.8% had lower level of education. *Ibid.* pp. 137–38. Appointed by provincial governments, magistrates were to be approved by the Ministry of the Interior and later the Examination Council, but because provincial governments rarely submitted lists of magistrates in office and candidates for the position to Nanjing, the central government actually had little role in selecting and evaluating county magistrates. *Ibid.* 135.

102. Guomin zhengfu neizhengbu, *Xianzhang xuzhi (What County Magistrates Ought to Know)* (Nanjing, 1928), pp. 75–77.

103. *Sifa gongbao*, No. 74 (5 November 1935), p. 8.

education fee, green crop fee, winter shelter fee) to the normal charge for criminal and civil complaint forms (*xingmin zhuangzhi*).¹⁰⁴

Significantly, however, contemporaries, from judicial officials to legal scholars, all discussed the problem in the county judicial process as an issue of judicial independence – separation of judiciary from administration. Wang Chonghui, the first Minister of Justice of the Nanjing government, repeatedly pointed out that the system of the county magistrate exercising judicial powers “impaired the integrity and independence of the judiciary and must be abolished.”¹⁰⁵ The work report of the Ministry of Justice in 1929 continued to emphasize the importance of establishing more and more courts at the county level, “to uphold the spirit of judicial independence and in accordance with the system of [separation of] five powers.”¹⁰⁶ The same was repeated in the report of the 1934.¹⁰⁷

Similarly, legal scholars believed that the problems in the county judicial process were inherent in the system of the county magistrate holding judicial powers. “As the administrative official (county magistrate) is checked by superiors from above and surrounded by local toughs and evil gentry from below, it is really impossible to expect him to rely on the spirit of independence and adjudicate in a fair and just way like [normal] judicial officers bound by the law.”¹⁰⁸ On the one hand, observed another commentator, since the county assessor and other judicial personnel were appointed by the magistrate, they had no way of conducting the judicial process independently. On the other hand, since the county magistrate had to associate with and rely on local gentry to carry out his administrative duties, he had no way of preventing the latter from intervening in the county judicial process. “When judicial power is in the hands of an administrative official and depends on administrative power, it has no independence to speak of.”¹⁰⁹

104. *Sifa gongbao*, No. 83 (20 December 1935), pp. 46–47. *Falü pinglun*, Vol. 6, No. 43 (4 August 1929), pp. 16–17 contains a report of the investigation in the court at Zhongshan County, Guangdong province, where abuses were rampant. After litigants submitted lawsuits, they would have to wait one week in criminal cases and five weeks in civil cases to get a first hearing, then it would be at least seven to eight weeks before the next hearing was held. A case could run several years, but its speed depended on how much money the litigant spent and how many connections he or she had. Once accused, criminal defendants were automatically detained and some defendants were gaoled for years without being convicted. Judicial police would give false information without having done any investigation, and the judge would not check the report for accuracy. Judicial police were responsible for checking the creditability of property owners who put up bail for defendants, and this gave them opportunities to extort money. Secretaries, record keepers and judicial police would advertise their connections to take bribes and bend rules. Gaol guards would mistreat inmates and allow old inmates to abuse new ones. The report was published, said the editor, because the same problems must have existed to a greater extent in those counties where there were no courts. It also shows that even the presence of a county court would not necessarily end all the injustice in the county judicial process.

105. *Falü pinglun*, No. 215 (14 August 1927), p. 8; *NCH*, 8 December 1928, p. 385.

106. *Falü pinglun*, Vol. 6, No. 31 (20 May 1929), pp. 36–37.

107. *Zhonghua falü zazhi*, Vol. 5, Nos. 8–9 (September 1934), pp. 73–74.

108. Wang Chengzhi, *Zhonghua sifa wenti*, p. 50.

109. Peng Shi, “Lun xian sifa gaige zhi yaodian” (“On the key points of county judicial reform”), *Falü pinglun*, Vol. 6, No. 34 (2 June 1929), pp. 3–8.

The shortage of judicial funds. Why did the Beiyang regimes and the KMT government allow county magistrates to exercise judicial powers while professing their desire for the rule of law and judicial independence? The answer given by government officials was that the shortage of judicial funds and personnel prevented courts from being established in all counties. These two problems, especially the financial difficulties, apparently plagued successive Republican governments. Wang Chonghui admitted in 1927 that because of financial difficulties it was impossible to establish county judicial courts throughout the country at once, and he hoped the situation could be changed as soon as possible.¹¹⁰ That would be no easy task, however.

During the Beiyang period, the expenditure of the judiciary was borne by the central government just as it was in the final years of the Qing. From 1919 to 1925 the budget for the judiciary increased from 10,239,976 *yuan* to 13,500,903 *yuan*, and the money was mostly used for the construction and maintenance of modern prisons in the capital.¹¹¹ After the KMT government was established, all public finance, including judicial finance, was divided between the central government and provincial governments.¹¹² Nanjing was responsible only for the operation of the Ministry of Justice, the Supreme Court and related establishments in the capital. Judicial expenditures that occurred at provincial and county levels were to be paid by provincial treasuries. From 1928 to 1937, the judicial expenditure of the central government increased from 913,844 *yuan* to 4,315,894 *yuan*.¹¹³ In 1934 it was 0.28 per cent (2,963,910 *yuan*) of total government expenditure (1,069,354,000 *yuan*), whereas military spending constituted 34.4 per cent (367,819,000 *yuan*).¹¹⁴

However, whatever the amount of money spent on the judiciary by the Nanjing government, this did not affect county level judicial finance, since it was provincial governments that were responsible for the counties under their jurisdictions. The statistics for 1936 show that the total judicial expenditure of all provinces was 23,456,938 *yuan*, accounting for a mere 6.78 per cent of their total expenditure (345,775,078 *yuan*). A critical fact is that at the county level there was no money allocated for the judiciary.¹¹⁵ That is to say, judicial expenditure at the county level, including the cost of establishing and operating a county court, had to come from the judicial funds of the provincial governments.

110. *Falü pinglun*, No. 215 (14 August 1927), p. 8.

111. Jia Dehuai, *Minguo caizheng shi* (*A History of the Finance of the Republic*) (Shanghai: Shangwu yinshuguan, 1941), p. 234.

112. Hung-mao Tien, *Government and Politics in Kuomintang China*, pp. 73–78, 151–53.

113. Jia Dehuai, *Minguo caizheng shi*, p. 235.

114. *Ibid.* pp. 229, 239; another source indicates that the military spending for 1934 was 373,000,000 *yuan* or 48.5% of total government expenditure. See “Minister Kung in report says military expenditures are crux of China’s financial problem,” *CWR*, Vol. 72, No. 12 (18 May 1935), pp. 386–88.

115. Jia Dehuai, *Minguo caizheng shi*, pp. 645–48. In Jiangsu province for example, the judicial outlay was 2,932,302 *yuan*, or 10.51% of the total outlay (27,889,938 *yuan*), which was slightly over the expenditure on administration (9.75%) but lower than the expenditures on education and cultural affairs (20.59%), public security (13.22%), construction (19.87%), and debt payments (14.38%).

The difficulty of establishing courts at the county level is therefore not surprising. Of 75 counties in Zhejiang province in 1927, only eleven had courts or their branches. The Zhejiang Provincial Department of Justice made an ambitious plan for establishing district courts or their branches in all the counties in four instalments to be completed by July 1928. For the fiscal year of 1927 alone, the plan would cost 67,750 *yuan* for opening the new courts and 374,795 *yuan* for their operating expenses, adding to 175,389 *yuan* needed for the operation of existing county courts and county magistrates' judicial functions.¹¹⁶ The plan was not realized, however. By 1935 Zhejiang province still had 43 counties where no courts existed.¹¹⁷

In September 1935 a national judicial conference was convened under the auspices of the Judicial Council and was attended by 241 people, among whom were judicial officials, legal experts from law schools and representatives from bar associations. One of the most discussed issues at the conference was the county judicial process. As many as 20 proposals relating to this issue were put forward, mostly by judges, chief justices and chief procurators at provincial high courts. These proposals again listed all kinds of abuses and injustice in places where county magistrates exercised judicial powers and called for an end to the system.¹¹⁸ In connection with establishing more courts at the county level, the issue of independent judicial expenditure was raised in 25 proposals. The conference resolved that before the national treasury took over judicial expenditure, provinces should still be responsible for it, and that the national treasury should use income tax, inheritance tax and other specified taxes for judicial expenditures, the details of which should be decided by the Judicial Council and the central financial authorities.¹¹⁹

These resolutions, however, did not result in immediate government action. Unified and independent judicial expenditure financed by the national treasury was not in place until 1941 when a dozen or so provinces were actually occupied by the Japanese.¹²⁰ As for the county judicial process, the government enacted in early 1936 an ordinance on the establishment of county judicial sections (*xian sifa chu*), a new version of the county judicial office which the Beiyang government had tried to establish.¹²¹ During the next five months Nanjing enacted two supplementary ordinances, by which lawyers were allowed for the first time to practise at county judicial sections.¹²² But the regulations provided

116. *Falü pinglun*, No. 216 (21 August 1927), pp. 8–9.

117. *Sifa yuan, Ershisan niandu sifa tongji (Judicial Statistics for the Year of Twenty-three)* (Nanjing, 1936), p. 41; *Zhonghua falü zazhi*, Vol. 6, No. 10 (1935), p. 73.

118. *Quanguo sifa huiyi huibian*.

119. *Ibid.*; Anna Ginsbourg, "First national judicial conference in China," *CWR*, Vol. 74, No. 11 (16 November 1935), pp. 388–89.

120. Wu Xueyi, *Sifa jianshe yu sifa rencai (Judicial Construction and Judicial Personnel)* (Chongqing: Guomin tushushe, 1941), pp. 3–4.

121. The document appeared in *Faling zhoukan*, No. 303 (22 April 1936), Law and Ordinance, pp. 1–2; *Xiandai sifa (Modern Judiciary)*, Vol. 1, No. 8 (1936), pp. 179–81.

122. *Faling zhoukan*, No. 314 (8 July 1936), Law and ordinance, pp. 7–9; No. 329 (21 October 1936), Law and ordinance, p. 3; *Shen bao (Shanghai News)*, 4 December 1936, p. 10; 25 February 1937, p. 16.

that when a county magistrate did not appear at a trial as prosecutor, lawyers “need not” appear either. As one writer of the *Weekly Review of Laws and Ordinances* (*Faling zhoukan*) commented, given the slothfulness to which county magistrates were prone, they would rarely appear at a trial and thus lawyers would have little chance to appear either.¹²³

All told, while the Nanjing Decade saw some progress in building a modern court system, such progress was a far cry from the goal that the KMT government set for itself. By the end of 1929, the country had one supreme court, 28 high courts, 32 branch high courts, 106 district courts, and 207 branch district courts or county courts. The Ministry of Justice planned to establish 1,367 county courts in two years to eliminate the practice of county magistrates exercising judicial powers.¹²⁴ Another plan called for 1,597 county courts to be established and then upgraded to district courts between 1930 and 1935.¹²⁵ By the mid-1930s, however, nation-wide there were as many as 1,046 counties where county magistrates were in complete control of the judicial process.¹²⁶ Another source counted 1,400 counties where no courts existed, though some had judicial sections.¹²⁷ Between July 1935 and February 1937 only 457 judicial sections were established.¹²⁸ The failure was obvious, though hardly surprising.

Conclusion

The assessment of the record of judicial reform in Republican China is mixed. On the one hand, the successive Republican governments made measurable progress in establishing a modern judicial system as opposed to the traditional system that had existed in China for many centuries. This system, when completed, would include a court system independent of administrative bureaucracy from the capital down to the county level; an army of properly trained and disciplined judicial officers; a regulated legal profession whose role was recognized in the judicial process; and a system of modern prisons. The guiding principles of the judicial reform were the rule of law and judicial independence, supported by a general desire to modernize China and a specific objective to abolish extraterritoriality.

On the other hand, the Republican governments failed to complete such a system, and especially failed to achieve the limited goal of establishing courts in all counties throughout the country, a necessary condition for achieving judicial independence. The Republican governments may not be faulted for confining themselves to this goal. However, the failure to reach it made a mockery of the rhetoric about judicial

123. *Faling zhoukan*, No. 331 (4 November 1936), Comments, p. 2.

124. *Faliu pinglun*, No. 326 (12 January 1930), pp. 30–31.

125. The Editor, “Judicial administration in China,” *The Chinese Social and Political Science Review*, Vol. 14, No. 4 (October 1930), pp. 432–33.

126. Sifa yuan, *Ershisan niandu*, pp. 41–71; *Twenty-Five Years of the Chinese Republic*, p. 22.

127. *Faling zhoukan*, No. 295 (26 February 1936), Legal News, p. 1.

128. *NCH*, 24 February 1937, p. 346.

independence and defeated the best intentions of those among judicial officials and legal professionals who might have really believed in the principle.

The progress of judicial reform was limited because the commitment to judicial independence was limited. The problem of judicial funds reflected the fact that judicial reform was never a priority for successive Republican governments, especially in the Nanjing Decade. Although there were external constraints and financial drains on the government, such as civil wars, foreign debts and natural disasters, the basic truth is that in carrying out judicial reform, both the Beiyang government and the KMT government were mainly motivated by the goal of abolishing extraterritoriality. This essentially political objective was no substitute for a fundamental understanding of and commitment to judicial independence in the framework of a democratic government.

The party dominance over the judiciary advocated and practised by the KMT revealed another dimension of the lack of commitment. The theory of “partyizing” the judiciary was virtually a denial of judicial independence. Yet the KMT government was able to claim to support both, precisely because it narrowed judicial independence down to setting up a court system, as if that alone were a sufficient condition, so that a contradiction did not exist for KMT officials.

Having said the above, the positive side of the public discourse on judicial independence needs to be noted. This mainly came from the unintended consequences of such a discourse. Even if only as rhetoric, the acceptance of the rule of law and judicial independence in principle was itself of no small significance. The long-term implications of what was actually done went beyond the government’s political motives and limited interpretations. Once the principle of judicial independence was established, it became a normative standard, against which the action of the government itself was held and examined by social groups such as bar associations in the country. And ironically, these social groups challenged the practices of the government on the same nationalist ground – to deprive foreigners of excuses for insisting on extraterritoriality, since nationalistic rhetoric could serve as legitimate protection against government suppression.¹²⁹ More importantly, the acceptance of judicial independence in principle opened possibilities that in time people may give a different interpretation to the principle and endow it with more meaningful content.

The legacy of the judicial reform in Republican China has been mixed as well. On the one hand, the democratization on Taiwan in recent decades was at least partly as a result of and accompanied by an increased judicial independence, although this topic has yet to be fully examined.¹³⁰

129. This part of the story is to be told elsewhere.

130. Recent studies on Taiwan’s political changes tend to neglect this issue. The following books, for example, have no discussion of it: Harvey J. Feldman (ed.), *Constitutional Reform and the Future of the Republic of China* (New York: M. E. Sharpe, 1991); Tun-jen Cheng et al. (eds.), *Political Change in Taiwan* (Boulder, CO: Lynne Rienner, 1992); Peter R. Moody, Jr., *Political Change on Taiwan* (New York: Praeger, 1992); Janshieh Joseph Wu, *Taiwan’s Democratization: Forces Behind the New Momentum* (Oxford: Oxford University Press, 1995).

On the other hand, PRC judicial practice in the Maoist era was a continuation to the extreme of the party dominance that both the KMT and the CCP advocated in the Republican era.¹³¹ Today, as post-Mao reform in the judicial field is still unfolding, the CCP faces the same question that the KMT once did: how to reconcile party dominance with judicial independence. So far the CCP's answer has not gone beyond what the KMT did over six decades ago.¹³² Whether and how judicial reform in the PRC will help ensure justice and protection of human rights may depend to a large extent on when and how judicial independence will be re-invented, re-interpreted and made a reality in China.

131. See n.45.

132. Shao-chuan Leng and Hung-dah Chiu, *Criminal Justice in Post-Mao China*, pp. 98–104.