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To understand the basic features of a legal order, one only has to study the relationship between the judges and legal rules. In the civil law countries, the traditional approach has been to cage the judges within statutes. In the common law countries, the judges are restricted by precedents, and the statutes only serve to modify the result of the usual practice. In China, the tradition has been "the two-track model of rituals and law (*li-fa-shuang-xing*)". As a result, the judges (magistrates) always have to pay attention to the human feelings and reason as well as statutes and judicial examples. Therefore, the judges have much discretion in adjudicating.

Actually, everywhere the administration of justice is unfolded on the tensions of legal rules and judges' will to varying degrees [1]. The problem here is just how to put the wills in a correct relationship to the rules. In correspondence to different types of the relationship between judges' will and law, the forms of legal communication in the

[1] This position turns out contrary to the ideal of objective judicature that expressed by J. Marshall in *Osborne v. Bank of the United States* as: to "has no will in any case …… Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law". However, Benjamin Cardozo criticized this judicial objective idealism. He says, "[I]t has a lofty sound; it is well and finely said; but it can never be more than partly true". See B. N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921) p.169. From his viewpoint, "the rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an Experiment" (at p.23). Therefore, in the judicial process, the uncertainty is inevitable, in its highest reaches the administration of justice is not discovery, but creation (Cf. p.166).

courts as well as the freedom for making choices and judgments through interpretation, reasoning, discussion and negotiation may be not in the least alike. By this paper, I will show that the Chinese judicial process has gone beyond the dichotomy of inquisitorial model and adversary model. In China, a judgment must be predicated on the agreement of the party who lost the lawsuit and the comprehension of public opinion, and the judges who lack the concept of *res judicata* and do not conduct judging in the main had been relativized as the medium of a symbolical interaction among the parties and local community [2]. The legal decisions made there were finally a joint venture of magistrates and the interested parties in the "forum of public opinion" (L. L. Fuller's words) of local society, and a "bargaining in the shadow of the law" (R. H. Mnookin's words).

## I. Four Quadrants of Social Discourse and Two Ways for Legal Interpretation

In the traditional legal system of China, the techniques and theories concerning the legal interpretation remained neglected and undeveloped. From the documents such as "Questions and Answers on Law" (*fa-lü-wen-da*) contained in the bamboo slips of Ch'in Law (221-207 B.C.) discovered in Hubei Province in 1975 (*yun-meng-qin-jian*), the "Private Hermeneutics of Law According to Confucian Classics" (*si-jia-zhang-ju, yin-jing-zhu-lü*) came out in Western Han Dynasty (206 B.C.-A.D. 24), "Collection of Legal Dogmas" (*ji-jie*) of the Western Jin Dynasty (265-316), "Official Commentary to the T'ang Code" (*tang-lü-shu-yi*), "Judicial Records and Judgments" (*shu-pan*) of Song Dynasty (960-1279), "Explanatory Notes" of the laws of Ming Dynasty (1368-1644) and "Collection of Laws and Regulations with Annotations" (*lü-li-ji-zhu*) in the Qing Dynasty (1644-1911), etc., we can tell that the fundamental principle for legal interpretation in China is "Substance over Forms" (*shen-ming-fen, ren-xiao-li*) [3].

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[2] Cf. Sybille van der Sprenkel, *Legal Institutions in Manchu China; A Sociological Analysis* (London: The Athlone Press, 1962), Shuzo Shiga, *Law and Justice in Qing China* (Tokyo: Sobunsha Press, 1984), Hiroaki Terada, "The Location of 'Law' in Studies About Qing's Judicial System", *Thought* No.792 (1990, Tokyo) pp.179-196, Philip C. C. Huang, *Civil Justice in China; Representation and Practice in the Qing* (Stanford, CA: Stanford University Press, 1996).

[3] Du Yu, renowned scholar of Wetern Jin Dynasty, well elaborated this principle in his memorial to the throne entitled "The Explanations of the Laws": "Laws are major

Obviously, the approach of "Substance over Forms" is policy motivated, fundamentally different from what put forward by R. Dworkin in his rights-based theory, to carry on the argumentation external to laws and precedents when necessary, and the argumentation must surround not the policy issues but the principles. The "Substance over Forms" approach, when adopted in the trial proceedings, is reflected in judges' discretion in "[w]eighing and reasoning the seriousness of the matter"(*liang-shi-zhi-da-xiao, tui-qing-zhi-qing-zhong*). Therefore, we can conclude that when China was under various Empires, the main stream of jurisprudence based the interpretation of law on the premise of subjectivism rather than the determinism. To be more precise, the practice of dispute management was to combine the mechanical application of law in the important and serious cases (*zhong-an*) with the flexible responsive approach in the comparatively trivial cases (*qing-an*). As the subjective approach is recognized as a major premise for the judicial system, it has been difficult to develop the techniques of strict interpretation. Besides, the causation against the possibility of "interpreting law by both ways and open-ended argumentation" (*cao-liang-ke-zhi-shuo, she-wu-qiong-zhi-ci*) [4], in turn, led to the bias against any interpretation or construction of laws.

Why traditionally in China were people so concerned about possible the open-end argumentation at the very mention of the interpretation of the laws? Why were parties, in solving their disputes, required to "respect the officials as the masters of jurisprudence" (*yi-li-wei-shi*) and to "allow the magistrate in charge of the case preaching law at a universal audience" (*yi-fa-wei-jiao*) [5] ? Why did the adjudication have to follow the principle of "Substance over Forms"? Why was the parties'

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demarcation lines rather than books exhausting various nuances in reasoning. Therefore, laws are concise and precise, and the hearings are brief. The regulations are clear and transparent, serving as deterrence against potential violator, and people will try not to violate the laws, and thus the punishment is seldom rendered as few people break the law. The criminal law must be concise and precise. Accordingly, the substance is more important than form. … … The explanatory notes herein all dial with the purposes and intents of the law in an effort to identify them with an view to enabling the law enforcers to follow the principles of the law without bothering about the details". Cited from "Authorized Biography" in *The Book of Jin* (*jin-shu · ben-zhuan*) .

[4] Cited from Liu Xin's preface to *Teng-his-tzu*.

[5] Cited from "Five Poisonous Inspects" in *Han-fei-tzu.*

understanding and recognition of the disposal sought as one of the purposes? In addition to the ideological causes, were there any institutional and social factors responsible for such phenomena? Apparently, the answers to the above questions would be beneficial to understanding the China's legal reality today as well as decoding its legal history. Before any specific discussion, I find it necessary to set forth, from four perspectives or quadrants, the basic modes and characters of the legal communications in the courts of justice.

Traditionally, the first quadrant of communication mode is “only to be sensed, not explained” (*bu-ke-yan-chuan*). It is well known that the Chinese society is relationship-oriented, and the informal “situation ethics” had an exceptional role in regulating the human conduct. This informal order based on personal relationships characterized approach, when reflected through formal system, was consolidated in ritual practice. Therefore, the reform of “ritualizing the law” carried out in the Western Han Dynasty [6] was, in essence, the efforts to form the order based on relationship into the legal order. From there on, in the general application of law, social relationships were consciously taken into account, and such an approach had already assumed the significance of a systematic practice. From the I-centered theory (solipsism) of Ludwig Wittgenstein's philosophy, in the relational networks, some of the facts involving relationships are articulated verbally, while other facts could only be felt instead of being uttered in words. As for the unspeakable facts, it would be very difficult to find external standards in an absolute sense to measure the justice there of. Besides, recognition of the unspeakable nature of some of the facts naturally lead to the conclusion that in conducting trials, it is impossible for the judges to know the whole story or all the information. Consequently, we have to admit that a judicial judgment is some what restrained, and importance is accorded to the subjective feelings, understanding, recognition and psychological satisfaction unique to the party particularly situated.

Many facts unique to an internal relationship are beyond words in description. However, where the law is introduced into such a structure of relationships, and the parties strive to find a favorable “explanation” while exerting a defense based on reasons and facts, the stand could be converted to another quadrant of communication mode, i.e., “the open-ended argumentation” (*wu-qiong-zhi-ci*). In China, the society is

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[6] Qu Tong-zu, *The Chinese Law and Chinese Society* (Beijing: Zhonghua Publishing House, 1981), pp.303ff. See its English version, Ch’ü T’ung-tsu, *Law and Society in Traditional China* (Paris and The Hague: Mouton and Co., 1961) Chap. 6 Sec. 3.

one based on personal relationships, and the laws are one based on situation thinking on human feelings and reasons. Placed with such a cultural context, an individual, although "on his knees before a court of justice", were still natural subject or personal entity of outside the state's structure. Although the state could declare its power to regulate and dictate, the personal entity, if emboldened by the ideal atmosphere of "law combined with compassionate reasoning", the personal entity would naturally ask the follow-up question: "Why do I have to do this?"——The legalist principle "anything that is law should be observed unconditionally" is hard to adopt in China. As a result, the state has to increase its efforts to persuade. And the reasoning with respect to regulating is much like the dialogue between Chuang-tzu and Hui-tzu on the pleasure of a swimming about fish [7], or the dialogue between Achilleus and a tortoise in Lewis Carroll's fable, easily becoming an open-ended extension of deduction, premises and logical rules. Given the above, the rulers are naturally worrisome about the "endless decrees and open-ended argumentation in response" which might be created by professional judicial persons using technical interpretations. In order to avoid such "open-ended argumentation", the Confucian philosophy of "harmony above everything" or the philosophy of "following the law obediently" and "respecting the officials as masters of jurisprudence" at the other extreme had been emphasized.

To end the endless play of language games between the parties with respect to the justification of the regulatory regime and legal order, a resolute third party has to be introduced. This is what referred to as "the official being respected as master of jurisprudence" (*yi-li-wei-shi*), the third quadrant of communication mode, i.e., the functions of an official being used to ensure the uniformity and implementation of the law, and to achieve a meaningful integration of dictatorship with moral and cultural order. In fact, "Respecting the officials as masters" has become a way of thinking, and even the legal situation in China at the present time is not free from the influence. For instance, when lawyers deal with business problems, they would often first consult the authorities for their policy guidance and judgment. Compared with precedents and legal theories, the administrative are often given more weight. Here the

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[7] "Autumn Water" in *Chuang-tzu* contains the following dialogue: "Chuang-tsu says: 'The fish enjoys while swimming'. Hui-tzu says: 'you are not fish. How could you know how fish knows'? Chuang-tzu says: 'You are not me, and how could you know that I don't know how the fish knows'." Along this line of the play of language games, we may ask the next question on behalf of Hui-tzu: "You are not me. So how could you know I don't know that the fish feels". The question could be replayed endlessly.

interpretation of law actually amount to instructions or detailed rules issued by the government agencies or competent departments specific issues.

Given the above and the judicial subjectivism being recognized, a question to be answered with respect to the system is: how to prevent the unchecked determination of the third party and how to legitimize the determination rendered with the administrative powers and functions. The institutional design of China is to aim at a unanimous problem-resolving through repeated intersubjective checks so as to ensure that court judgments and other legal decisions are appropriate. Such approach of reaching the consensus based on intersubjectivity share some similarities with Jürgen Habermas' theory of truth consensus based on communicative rationality. We categorize this communication aiming at unanimous problem-resolving and legal consensus as the fourth quadrant of communication mode, i.e. "no objection dispute resolution" (*bin-wu-yi-shuo*). In judicial reality, however, it is questionable as to whether the goal of "no objection dispute resolution" can be realized. On the other hand, where consensus or even unanimity is sought to the end as an ideal goal, it would inevitably lead to a certain kind of adversary approach or moot-style, i.e., the obstinate, unyielding party would, to large extent, determine the ways to solve a case. However, the approach of "no objection" is taken in an inflexible way, we would be likely to see the pressure of value assimilation of inquisitorial approach and collectivism.

"Being unspeakable in words", "open-ended argumentation", "officials being respected as masters", and "no objection resolution", these four quadrants of legal communication or discourse mentioned above form a complete framework in an inter-acting, complementing and contradicting way. Such a structure with a long history dictates two Chinese ways for law interpretations. On the one hand, a judge answers all the questions regardless of their importance, and does so in a standardized way, leaving no room for other explanations or interpretations. A typical example could be found in the Lord Shang's Reform carried out during Ch'in Dynasty. With this Reform the law-making process was centralized, and full-time officials were designated to interpreting laws. The way to explain laws within such a framework is reflected in the "Questions and Answers on Law" that contained in the bamboo-slips-book of Ch'in law known as *Yun Meng Qin Jian* today. The "Questions and Answers on Law" shed light on how some of the sentences, concepts or articles were defined and interpreted, and what standards were employed to provide solutions

where definitions and provisions were incomplete or defective [8]. Even today, traces of this "Questions and Answers on Law" could be found in way the People's Supreme Court issues judicial opinions in exercising its judicial power to construe laws.

Another way to do it is that while announcing the legal text and trial method, a judge remains silent on certain things, leaving room to the parties to find a better way, both inside and outside the legal framework, for their case as an alternative to regulate conduct. Cases tried using this method are recorded in details in the *Collection of Famous Judicial Records and Judgments* (*ming-gong-shu-pan-qing-ming-ji*). One case decided by Liu Kezhuang on "the family of an engaged daughter breaches their promise" contains the following dialogue:

"[the first hearing]……pursuant to the law: in case anyone who has breached his promise to marry his daughter according to the engagement instrument or any agreement reached otherwise, he shall be flogged sixty times, and anyone who has engaged his daughter twice shall be one hundred times. Anyone who has married his daughter twice shall be sentenced to one year in prison, and the daughter shall be returned to her first husband. Although engagement card is not the same as an engagement instrument, doesn't it still amount to a binding promise? According to law, even in the absence of engagement instrument, acceptance of betrothal gifts also amounts to engagement. One footnote: the amount of the betrothal gifts is irrelevant; even a roll of cloth shall be deemed adequate for betrothal gifts. Besides, the engagement card lists the valuables within the gift box, and expressly states that Mr. Xie's daughter will be married to the son of Prof. Liu. Such a note is different from those informal notes. In this case, the authorities concerned do not hope to invoke specific laws for a judgment. Mr. Xie and his son are to figure out a solution and make an advisable long-term plan according to law. A judicial interference might turn out to be a regrettable thing for them. The two parties are asked to work out a solution in private and present their case to the court tomorrow."
"Second hearing: ……since the promise is breached upon the return of the engagement card, it is up to the law, not the county magistrate to determine whether a marriage

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[8] Cf. The Working Group for the Bamboo Slips from the Ch'in Grave of Shui-hu-di (ed.) *Bamboo Slips From the Ch'in Grave of Shui-hu-di* (Beijing, Antiques Publishing House, 1978), esp. p.159 (example of irrational reasoning), p.167 (explanation about additional penalty and sentencing for criminal offenses), p. 214 (explanation about provisions), etc.

shall be protected, and any decision should be made for the long-term interest. Mrs. Liu and her son are advised that since the two parties have been engaged in a lawsuit, a marriage, even if carried off, would be embarrassing for the both sides. Thus, it may well be advisable to have the case solved in private. It would be too late to render a judgment tonight."

"Further hearing: aren't there any relatives and village neighbors to step in for mediation? ……"

"Further hearing: both the engagement card and the applicable provisions of the law are clear. Why did the parties fail to make a sensible decision for their long-term interest while dishonoring the engagement card? Don't they want to be imprisoned before they came to their senses? They are given more night to solve their disputes."

"Further hearing: The case filed at court, both the reason and law must be followed, it is not a matter for some powerful connections to interfere……"

"Further hearing: ……to have a true understanding of laws, the two parties are asked to sort it out in private……"

"Further hearing: to wind up the case according to the agreement of two parties, and to give them the reasons for resolution" [9].

The repeated communicative actions and language games above show that the judge does not make it clear as to how a specific case should be decided. The parties are left to seek and speculate the solution among themselves. The judge bears resemblance to the Sphinx in Greek mythology that keeps asking the passers by to answer his riddles: if the party fails to provide a good answer, he will be punished severely. However, if the party gives a satisfactory answer, the judge will forego the work of judging, and switch his role to a mediator from an inquisitor who has the power to decide. Accordingly, the law will become flexible for the sake of expediency rather than fixed system. These demonstrate to us a moment of options regarding the law, or the space of choice, as communications are being made.

The fact that two methods are mentioned here as example does not exclude other traditional Chinese ways to interpret laws or to engage in discourse of laws. In fact,

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[9] Cited from The Research Organization of the History of Song Dynasty, Liao Dynasty, Jing Dynasty and Yuan Dynasty, Institute of History Research, China Academy of Social Sciences (ed. & annot.) *Collection of Famous Judicial Records and Judgments* (*ming-gong-shu-pan-qing-ming-ji* (two volumes, Beijing, Zhonghua Publishing House, 1987), pp. 346-348.

comparison, analogizing, case analyzing and mangy other methods and skills in making explanations in judicial practice to various degrees [10]. In this article, I just aim to describe the prototype of the fundamental way of thinking and methods in dealing with the judicial subjectivity problem in China. I attempt to analyze the fundamental structure and unique features of the Chinese ways of application and interpretation of law in the judicial process, and specific techniques and stipulations will not be deal with in this article.

To categorize the two models with catchy phrases, the first approach may be referred to as inquisitive one, and the second one as the adversary one with some qualifications. The inquisitive approach as interpreted by the judicial magistrates differs from the one as explained by modern legal profession. The Chinese style inquisitive approach, as interpreted by the officials, has failed to have developed into a structure of deduction for legal reasoning or a formula for calculation of legal conceptions. Rather, the inquisitive approach thus qualified is in effect a process whereby the statutes are fine-turned in package or retailed. On the other hand, explanations made through adversary approach means regulating by laws and individual wills may be somewhat re-combined through verbal communications. It may also be described as a common enterprise jointly carried out by the authorities, the parties, and the related parties for operation and modification of the law. The wonder of traditional Chinese interpretation is to combine the opposing methods so as the enable the determinism and the theory of probability to be at play at the same time.

## II. Selection and Rhetoric in Legal Communication

With a detailed analysis of the above judicial record made by Liu Kezhuang, we summarize the following essential elements characterizing the verbal communications in the courts:

(1) Judges may exercise their power to direct the trials, but do not act in a totalitarian way employing the dichotomy of “all or nothing” and “yes or no” while

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[10] Cf. He Min, “A Private Interpretation of Laws and the Methods thereof of Qing Dynasty” *Studies in Law* 1992 no.2 pp. 63ff., Wu Jian-pan, “The Jurisprudence in the Qing Dynasty and the End”, in *Collection of Papers Presented at the International Symposium on Chinese Legal History* (Xi-an: Shanxi People's Publishing House, 1990) pp.375ff.

making decisions. Instead, the judges use texts of legal provisions and the judgments available for reference frame in furthering the interaction and negotiation among the parties. In some sense, even the judge(s) may be regarded as mediator or a party participating in the interacting and negotiation. Therefore, where civil cases of minor disputes in everyday life and criminal cases of minor offenses, what employed in China is a certain kind of "three-party approach" [11] rather than inquisitive approach in the strict sense of the term or adversary one . Nevertheless, in terms of its respect for tradition and precedents, its accepting different entities in dealing with the cases and the efforts for consensus, the traditional Chinese trial methods are more like the moot (people's trial meeting) existing from Anglo-Saxon period to the Middle Ages. I believe that "moot approach" might be an appropriate phrase to describe the essence of this kind of trial. However, limited by the length and purposes of this article, the moot approach of Chinese judicial process can only be mentioned in passing and left for more thorough discussion in the future [12].

(2) In adjudicating cases, a judge must "follow both the law and the human feelings and reason"; a judge, while following the legal provisions, should take the parties' consideration into full consideration. This dual role is likely to create psychological conflicts. For example, the subjective approach is juxtaposed with objective approach (e.g., "the lawsuit not meant to be dealt with mechanically along with the legal lines" vis-a-vis "depending on the law rather than the county magistrate" in Liu Kezhuang's judicial record). And the conflicting approaches are further reflected in negotiation, mediation and persuasion (e.g., "the county magistrate is not the one to mediate such a case", "more specific laws are needed and long-term interests should be duly considered", "the matter is best dealt with by the parties in private" and "the relatives and village neighbors are supposed to mediate for reconciliation and settlement" cited from Liu Kezhuang's judicial record). These conflicting approaches, of course, are connected with the special features characterizing the Chinese legal thinking; while much attention is attached to pragmatic approach and practical

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[11] The "three-party structure" characterizing the Chinese adjudication system was first put forward by Prof. Yoshiyuki Noda, a well known Japanese scholar in the field of comparative law. Cf. his article "A Thought on the Source of Private Law Mentality", in the collection in memory of Dr. Jur. Sakae Wagatsuma *The New Developments of Private Law Studies* (Tokyo: Yuhikaku Press, 1975).

[12] Cf. Weidong Ji, *A Hypermodern Law; the Structure of Chinese Legal Order in the Depths* (Kyoto: Minerva Press, 1999), Chap. IV.

reasoning, there has been an inadequacy in legal reasoning and systematic operation of rules.

(3) Both the legal texts (statutes) or legal norm (predictable judgments) only serve as a starting point or reference point instead of the inevitable destination from negotiation. For the Chinese judges, the most important thing is coordinate and identify the specific actual relationship within the framework of the existing system rather than the skill of matching the specific factual pattern within the legal relationship. Possible areas for new legal development are found on a trial and error basis permissible within the legal framework. It could be said that personal relationship networks and relationalism at the abstract level play a medium role in judicial process, between general law and particular individual wills. When the relationalist discourse affect the area of law and adjudication, the fixed regulations and independent wills give away to the case-by-case agreements among parties for resolving the disputes.

(4) The legal communication in the court of justice centers on the debates and bargaining made by the parties. Such communication also includes the legal education and persuasion provided by the didactic judges, and is open to the parties concerned in the local community. Apparently, the public opinion of the local society affects the communications within the court. In argumentation and deliberation, while priority is no doubt given to solving the dispute, the importance is also accorded to long-term interest. The so-called “finding a solution for the long-term interest approach” aims at seeking a more appropriate solution, taking into account the fact that the litigation is already underway and its effect on the structure of the long-term relationship. As far as legal communication in China is concerned, in addition to the statutes, the facts and interests premised on various relationships, the human feelings and reason also serves as an important basis.

(5) The legal communication is a involved process whereby a consensus along the line of the law and the human feelings and reason is reached through argumentation and bargaining. To ensure the consensus on the judicial decision, a case which has already been decided may still be dealt with and reconsidered and the decision already rendered may always be corrected, as long as new evidence is discovered or a better solution is available. With respect to the verbal communications involving debates, negotiation, modification and correction surrounding changeable explanations and judgment, we can see the moment of change and the space for choice available momentarily.

To describe such fleeting options in visual terms, I need to first explain the

Chinese traditional ways of legal thinking and then convert them into a sketch consisting of signs. For example, in the above Liu Kezhuang's judicial record, "consultation by the two parties" refers to the negotiation and decision to be carried out by the parties. The simplest option is "appropriate to marry or not". In case the two persons can only opt for either "yes" or "no", there are only two possibilities and the right and wrong are clear-cut. On the other hand, however, if "the two faced with the choice of the right or wrong" can compromise, the options multiply with re-arrangement into four possibilities: (i) right, right; (ii) right, wrong, (iii) wrong, right; and (iv) wrong, wrong. We all know that the Chinese dislike zero-sum game and prefer a win-win result with the "more" or "less" thinking and some compromise. Therefore, the options for individuals can further multiply, fine-tuned by the communications between the parties. As a result, modules for the parties to choose total sixteen ($4^2=16$). We further know that adjudication in China is characterized with the "three-party structure". To study the collective options for the three-party trial using the same formula, there possible decisions total sixty-four ($4^3=64$). Now let us use ○ and ● to represent "right" and "wrong" respectfully, the options in a Chinese trial or "the space of choice" can be shown with the chart below (Figure 1).

A knowing person would find this chart is another version of the "Fu Hsi Sketch of Sixty-four Hexagrams" as well as its ground state "Eight Frigrams" (Cf. Figure 2, Figure 3) of *I-Ching* (Book of Changes), the most famous pre-Confucius classical work. Here we can a kind of "complexification" or a mechanism of fractal that is astonishingly similar to the dynamic abstract structure of Cantor set as well as the Mandelbrot set. Some scholars did call the dynamic system of *I-Ching* "the ancient Chinese fractals" [13]. Indeed, I consider the philosophy of *I-Ching* a key to understanding the essence of the traditional Chinese ways of legal thinking. The law-makers in the ancient China dreamed of an ideal social order where "the cycle replays continuously and perpetually

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[13] See Arnold Keyserling and R. C. L., "The I Ching and Five Stages of Creative Time", http://www.chance and choice.com/Chance and Choice/chapter5.html. Cf. also R. C. L., "Fractals, Evolution and the I Ching", http://www.ichingwisdom.com/IchingWisdom/intro.html, and his "The Chinese Laws of Creativity",http://www.lawsofwisdom.com/LawsofWisdom/chapter8.html, Katya Wlter, *Tao of Chaos: DNA & the I Ching Unlocking the Code of the Universe* (New York: Kairos Center, 1994).

Figure 1 The Space of Choice in the Judicial Process in China

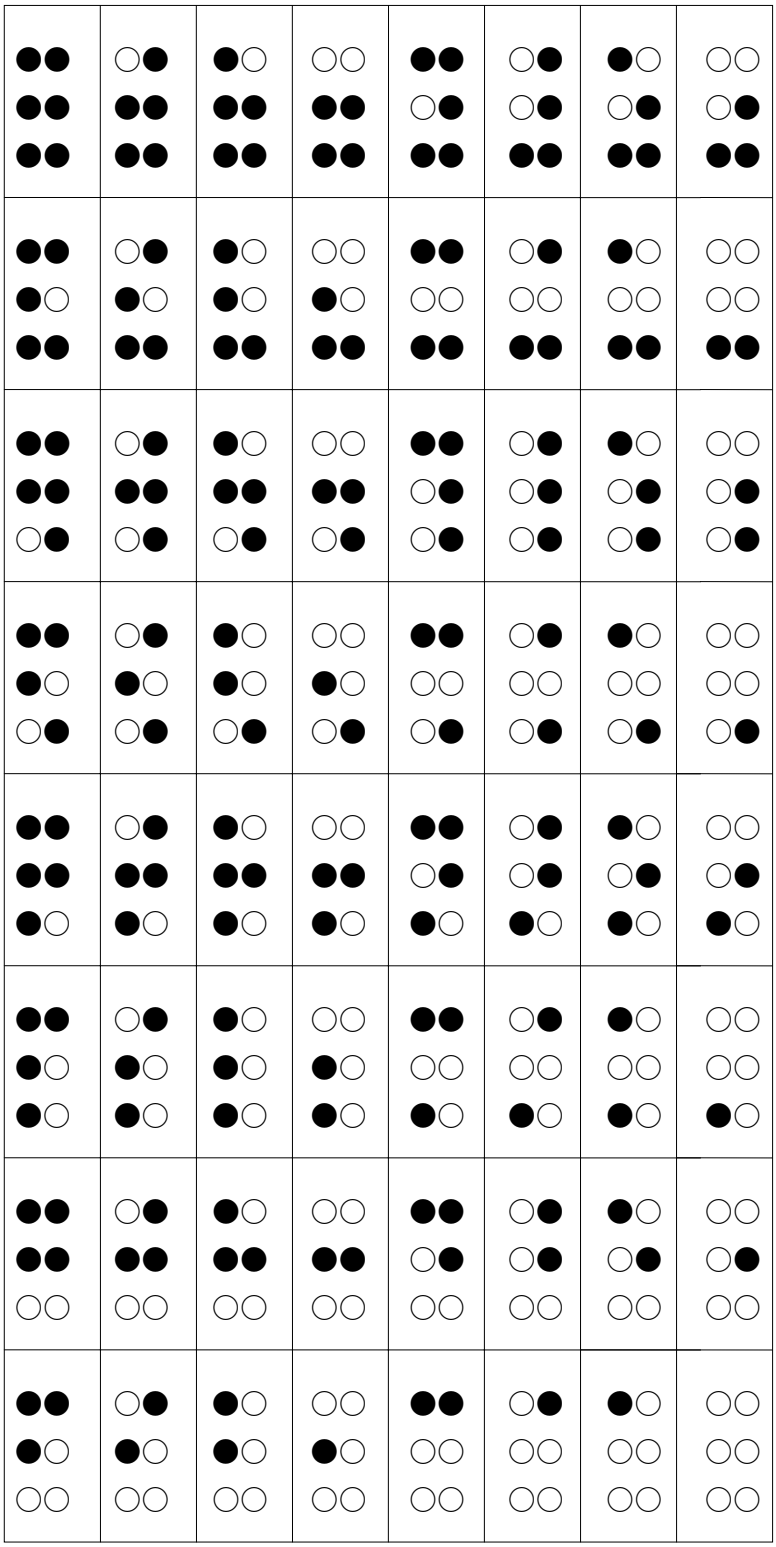

**Figure 2 Dynamic Resultant of Eight Frigrams Expressed in Binary Digit**

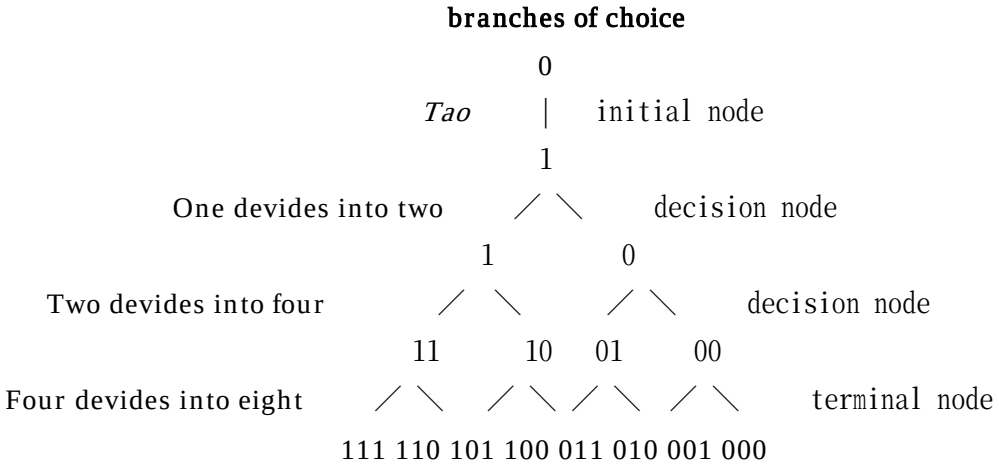


**Figure 3 A Variety of Sixty Four Hexagrams Expressed in Binary Digit**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 111111 | 111110 | 111101 | 111100 | 111011 | 111010 | 111001 | 111000 |
| 110111 | 110110 | 110101 | 110100 | 110011 | 110010 | 110001 | 110000 |
| 101111 | 101110 | 101101 | 101100 | 101011 | 101010 | 101001 | 101000 |
| 100111 | 100110 | 100101 | 100100 | 100011 | 100010 | 100001 | 100000 |
| 011111 | 011110 | 011101 | 011100 | 011011 | 011010 | 011001 | 011000 |
| 010111 | 010110 | 010101 | 010100 | 010011 | 010010 | 010001 | 010000 |
| 001111 | 001110 | 001101 | 001100 | 001011 | 001010 | 001001 | 001000 |
| 000111 | 000110 | 000101 | 000100 | 000011 | 000010 | 000001 | 000000 |

in a flexible framework, and the law is observed in universal but changing way" [14]. This "flexible framework" reflects the spirit of *I-Ching*. If interpretation of law can be regarded as chameleon, the ever changing mechanism in China represents "the interchangeable relationship between circle and square" in structural transformations of the space of choice —— much like a magic cube at play, playing a game of *weiqi*

[14] Zhang Pei, "Memorial on Annotating the Code", in *The Book of Jin—Annals of Criminal Law* (*jin-shu · xing-fa-zhi*).

with black and white pieces on the board of 361 crosses, or looking at a kaleidoscope. Although the components are very limited in number, the structure is not too complicated and the rules of the game are simple, the mechanism, when adjusted and re-grouped, can produce endless signs in endless forms.

This kind of endlessly replayed language games and negotiations are bound to cause fluctuations and chaos in the application of law. If a certain temporary parity could be attained, then a legal decision could be made under the complement of stochastic and deterministic factors. Of course, this kind of legal order is completely different from that of Kelsen's pyramid of rules system based on reductionism.

It is also worth noting that the institutional design of Chinese law has been characterized as learning by imitation of circumstances. In other words, it is a dynamic process of mimicry, "to model after the nature (*fa ziran*)", "to simulate the folkways". Max Weber also discovered that there had been innumerable "microcosms" and complicated relations between the "macrocosm" and a "microcosm"[15]. Thus legal norms in China have been reflective and have attached importance to "autoplastic" adaptation. To a great extent, the institutional design of China is to aim at unanimous problem-resolving through trial implementation of power and repeated inter-subjective checks so as to ensure that legal decisions are appropriate. Here both the legal text (statutes) and examples (judicial precedents) only serve as a starting point or reference framework instead of the inevitable destination.

To think along the line of the structural transformation, we will find that grammar and rhetoric skills of Chinese legal reasoning all have their unique features subject to certain things. For example, conflicting phenomenon and concepts, when grouped together with the words of uniformity, are found everywhere in the Chinese legal discourse in rhetorical symmetry. They are referred to as pairs of universal "canon" and expedient "power", "ruling of worthy" and "the rule by law", "moral leadership supported by criminal law", "light and severe sanctions", "lax and heavy governance", "close and distant relationships", "education and sanction", "prevention and control", "punishment and deterrence", "addressing the substance versus addressing forms", and so on and so forth. This generalization of rhetoric methods can be summarized into a suspicious attitude toward things. Attention should be

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[15] Cf. Max Weber, *The Religion of China: Confucianism and Taoism* (Trans. by H. Gerth, New York: The Free Press, 1951) chap.8.

given to inner relationship reflecting values between rhetoric features and ideas, when we think beyond the linguistic and grammatical causes of the Chinese language for the expressions. The suspicious attitude toward the conclusions in the language structure reflects that absent transcendental doctrines and the concept of individual right as an absolute basis, law is often a matter of compromise, with legal relationships in constant change. On the other hand, since the subjective or intersubjective approach in the judicial is inevitable, it is very much important for the institution designers to prevent arbitrary decisions of judges. From this perspective, the wording based on suspicious attitude furthers reflection about the laws and helps the adjustment of various interests. As a result, pressure of objectification will be created from a clash between different subjective claims. However, there is a danger inherent in the symmetrical or antithetical structure of the words and phrases, i.e., while lending some sense of fairness and calm to those participating in the legal communication, such structure may prevent judgments from being made, and the law, to put it in another way, will be self-destructive in repeated playing of language games with relativity.

One other Chinese feature stands out with respect legal communication: languages typical of dialogues in everyday life and story-telling (narratives) are much in use. This tendency is further reinforced with habitual "explanation of laws according to Confucian classics" and "deciding a case by using historical lessons" and official selection examination, through which the judges are selected, with emphasis on articles of humanitarian subjects. A large amount of historical data has shown that with respect to legal communication, especially where rules have to be created by explanations, common knowledge, comparison, analogizing and legal fiction often have a large role to play. Different from the modern legal reasoning characterized with consistence of formal logic, the Chinese legal communication through story-telling and in the language for everyday use is based on the practical reason and intuitive feelings. Entities of various subjective minds communicate with one another by the means of meaning exchange such as an association of ideas and a flow of feelings. Story-telling as a rhetorical method in legal communication may have the following role: the uniformity of law is strengthened with comprehension and spiritual response, enabling more people to accept certain legal premises while reserving their different understandings about the scope of application and handling of specific cases; each person is permitted to tell his story to carry out certain rational dialogues.

In the ancient China, the practice of "explanation of laws according to Confucian classics" is apparently meant to stress the governing principles and to curb judgments based on policy considerations. The book entitled *Yin-wen-tzu* champions "everything

in its right name" as the essence of law so as to draw a clear line between the right and wrong. The book, however, also advocates flexibility: "Where Way (*Tao*) ——the cosmic order of Heaven—— is inadequate for governing, law is to be applied; where law is inadequate for governing, devices are to us deployed; where devices are inadequate for governing, power is to be used; and where power is inadequate for governing, influence is to be used. Conversely, influence leads back to power, power leads back to devices, devices back to law and law leads back to Way. And if the Way works, one can govern well by doing nothing that goes against nature". Thus, a mental status is created by integrating different components that are interacting with each other in a smooth way and attaining a dynamic parity. The two documents, "Questions and Answers on Law" and *Numerous Dewdrops of Spring and Autumn* (*chun-qiu-fan-lu*) remind the integrity of legal decisions as the "chain novel", a metaphor made by Ronald Dworkin. Someone even points out that Confucianism share many things in common with Dworkin's coherence theory of law [16]. Notwithstanding the similarities between the two legal frameworks, however, the traditional Chinese jurisprudence and legal interpretations are fundamentally different from the thinking of Dworking. For example, the requirements posed by "the theme of rights", an essential component to Dworkin's coherence theory, finds no counterpart whatsoever in the jurisprudence native to China. Apparently, absent a set of grammar correspondent to the "theme of rights", law is easily transgressed to momentary compromise from a perpetual system. Absent a criterion for integrity, consistency and sense, interpretation of law will vacillate between "open-ended argumentation" and "respecting the officials as masters". The pattern is ever-shifting even if decisions are imposed with the inquisitorial approach.

## III. The Characteristics of the Contemporary Interpretation of Law

With the introduction of the regulatory regime and the jurisprudence thereof from the Western Europe, the legal communication in China has apparently undergone a fundamental change. Any book on jurisprudence of practical use is somewhat influenced by the systematic method for interpretation of law (*usus modernus Pandectarum* and Pandektenwissenschaft), the "legal mind" (especially the skill for subsumption) and "The Golden Rule". Yet, at the same time, the traces of the

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[16] See R. P. Peerenboom, "Confucian Justice: Achieving a Humane Society", *International Philosophical Quarterly* Vol.30 No.1 (1990) pp.17-32.

tradition could be found everywhere. The two basic ways of legal communication of interpretation described above are still very important in judicial practice.

As I have pointed, the People's Supreme Court interprets laws by issuing "judicial interpretations" (in the form of official opinions, explanations, official answers, letters in reply, notices and conference summaries, etc.), a measure amounting to the creation of detailed rules and new rules. As the judicial interpretations correspond to their respective articles and provisions of various statutes, judicial work and legislator efforts converge on the basis of inquisitorial approach. This practice is apparently part of a legacy of the "Questions and Answers on Law". Similar cases could be found in the division of the power regarding interpretation of laws and the advantages of the administrative interpretation. For example, pursuant to Article 53 Section 1 of the Administrative Procedure Law of the People's Republic of China taking effect on October 1, 1990, the people's courts, while following laws, administrative regulations and the laws and regulations issued by the local government, must refer to the regulations issued by the ministries and commissions under the State Council, the capitals of the provinces and relatively large cities. Article 53 Section 2 specifies: "Where the people's courts find the regulations adopted by the local governments inconsistent with those issued by the ministries and commissions under the State Council, the People's Supreme Court will refer the case to the State Council for explanations and decisions". This stipulation means that when the regulations are inconsistent with each other, the courts have no power to reconcile them with judicial interpretations. In other words, the highest administrative authority is empowered to make any interpretation with respect to the regulatory regime, and judicial review is non-existent. Legal professionals must "respect the officials as masters". It also means that the administrative interpretations rendered by the State Council prevail over judicial interpretations. Within such a system, administrative interpretations could only by supervised and corrected by legislative interpretations. In reality, however, legislative interpretation is a rare thing, and it is not distinctive from the supplementary legislation.

Besides, the Sphinx-like way of legal communication and interpretation makes it possible for the "two-track model" or "dual approach", a system designed for civil cases, to continue to exist. We know that the contemporary laws of the Western Europe are premised on the dichotomy of "all or nothing", and all the wills and conducts are programmed as "legal" or "illegal". The Chinese legal tradition, on the other hand, has the categories of "serious case"(*zhong-an*) versus "trivial cases"(*qing-an*) between the "legal" conducts and "illegal" conducts. As the serious cases are dealt with in a

more heavy handed way and trivial cases are treated more leniently, the line between "the legal" and " the illegal" has blurred to a greater or lesser extent. In China today, the different treatment of "serious cases" and "trivial cases" is reflected in Mao Zedong's theory on classifying social conflicts into two categories of different natures——the conflicts between the enemy and Weness, the conflicts among the people——and the interchangeability of the two as well as the division of labor between the people's mediation commission and the people's courts in dealing with disputes. The different treatment is further demonstrated by the existence of adjudication committees which are designed to handle cases of complexity and importance [17] as well as the different first-instant trial jurisdictions of the courts according to the significance of a case [18]. In the judicial efforts to distinguish the "serious cases" from the "trivial cases", the "two-track model" or "dual approach" is available in applying the law either strictly or flexibly. Where the law is applied in a strict way, the adjudicator almost has no discretion, and the interpretations of law tend to be objective in an absolute sense. By contrast, where laws are applied flexibly, the feel and creation on the part of judges as well as the intents of the parties are respected and emphasized. Judicial judgments and decisions take shape in the interacting relationships and is characterized with probability. Such "two-track model" or "dual approach" can be illustrated with the

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[17] I believe that the adjudication commission may, to a large extent, be deemed as fulfilling the function of traditional "Obligatory Review System". For more information on the concepts and history of the judicial review system , Cf. Shuzo Shiga, *Law and Justice in Qing China* (Tokyo, Sobunsha Press, 1984) pp.23ff.

[18] For example, Article 19 of the Civil Procedure Law specifies: "The people's intermediate courts have the jurisdiction over the following cases: (1) cases of significance involving foreign parties; (2) cases of major importance in the areas of their respective jurisdictions; and the (3) the cases placed by the People's Supreme Court under the jurisdictions of the people's intermediate courts". By the same token, Article 20 therein specifies: "The high courts have first-instance trial jurisdiction over the cases of major significance in the areas of their respective jurisdictions", and Article 21 therein specifies: "the People's Supreme Court has the first instance trial jurisdiction over the following cases: (1) the cases of major importance in the country; (2) cases deemed by the Court appropriate for its adjudication". Here let us leave alone the problem that the there are no clear procedure and basis to identify the cases of major importance. The interesting thing, however, is the model whereby the cases are handled in judicial practice according to their respective degrees of seriousness.

following chart (Figure 4):

**Figure 4 The Two-Track Design of Legal System for Dispute Resolution**

| | *formal procedure* | *informal procedure* |
|---|---|---|
| *formal cognizance* | **I** judge's judgment | **II** judge's mediation |
| *informal cognizance* | **IV** didactic conciliation | **III** people's mediation |

It should be pointed out that although the phenomenon under III ——the people's mediation——is being formalized, the mediators with cognizance and the procedures of dispute resolving remain informal compared with other ways and means. Judges' mediation under II include mediation simultaneous to hearings prior to judgment (Article 128 of the Civil Procedure Law) and the mediation at the second instance trial (Article 155 of the Civil Procedure Law). Such mediations are, to a certain degree, integrated into the formal trial proceedings. For the purpose of this article, mediation also includes those more informal mediations such as "mediation before opening a court session", "mediation between court sessions", "face to face mediation", "back to back mediation" [19] and education which could be given at any time. However even those mediation which have been integrated into the trial proceeding retain the characters of its informal proceeding. As for the didactic conciliation and persuasion by the relatives and friend in the court under IV, it is treated as part of formal proceeding with the participation of informal principals pursuant to Article 15 of the Civil Procedure Law (in support of litigation clause), Article 87 (invitation for the persons concerned clause) and Article 121 (cases to be handled on the spot clause). The factual basis is that persuasion carried out by individuals and entities are deemed part of the formal trial proceeding, bearing no independence feature characterizing the people's mediation or the mediation conducted by judges.

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[19] For more information on the different methods of mediation, please refer to investigation reports and the summaries delivered at the conference held in mid-April, 1997 on the experiments of the reform of trial methods in civil cases and economic cases in the courts in China.

In the judicial structure for civil cases involving "two-track model" or "dual approach", there are judges' efforts and non-judges' efforts, judgment plus persuasion and mediation conducted by different entities, judges' decisions and mediations, didactic conciliation and persuasion conducted by the relatives and friends in an unsystematic way and institutionalzed people's mediation. In short, regardless of from which perspective the observation is made, implementation of law involves two ways to deal with it, formal and informal as well as two defense lines, and law interpretation is not confined the professional lawyers' reasoning. Especially for Item II and Item IV in the above chart, there is more room for communications to carry out free argumentation, and more active interacting arrangements of the application of laws and individuals' wills. As a result, it is more like that case will be determined by probability. Generally speaking, for the litigation cases that come before the courts after having been filtered by the people's mediations under Item III, they will be allocated to Item I, Item II and Item IV according to the principle of treating serious cases and trivial cases differently. Most of the ordinary cases move back and forth between Item II and Item IV, and are gradually solved or digested in the process. Only those cases left after the process will be submitted to the "final trial" under item I. As shown by the statistics on the judicial work for the period between 1986 and 1998 (the statistics sketches in the volumes of *Law Yearbook of China* (*zhong-guo-fa-lü-nian-jian*) covering the period between 1987 and 1999), the cases taken by the courts for the first instance trial continued to increase, but average two-thirds of these cases were solved through mediations, and only third-fourths of the remaining one-third cases are disposed with court decisions (less than one-forth of the total number of the cases).

It may be said that such fluid status and mechanism for options are set-up for probing better explanations of laws and better solutions to the problems. Judges do not expressly declare the trial norms, leaving the parties "to figure them out the hard way" (*wu-jiang-shang-xia-er-qiu-suo*). The selection here is not an individual right safeguarded by the rationalized institution, but just the outcome of interaction based on intersubjective contentment and humanity. For achieving contentment, the communicative action must repeat again and again. In this legal communication and proceedings in accordance with justice, the parties could expect to attain a better resolution by telling their stories and ideas, just like a Chinese silkworm constructing a "legal pupa" by spinning "silk of meaning". Where the parties solve the problem by themselves, the judges and the laws will only play the part of medium (instead of entities) in the agreement reached by the parties. However, if the parties fail to reach

a consensus, judgment and enforcement there of are necessary. Apparently, such legal communications are not fundamentally different from what recorded by Liu Kezhuang in the *Collection of Famous Judicial Records and Judgments*.

Now let us review how the power of judicial interpretation is exercised. Unlike the powers of legislative interpretation and administrative interpretation which are defined broadly, judicial interpretation in China is highly centralized as a system. Only the People's Supreme Court and the People's Supreme Procuratorate are authorized to make judicial interpretation. The Supreme Procuratorrate has the power to interpret laws with respect to the matters over which it has power to handle. A large number of judicial interpretations regarding criminal laws are issued by the People's Supreme Court together with the People's Supreme Procuratorate, a major feature characterizing the existing system of judicial interpretation in China. In this article, however, our discussion will be confined the judicial interpretations issued by the People's Supreme Court. It is worth noting that the judicial interpretations are not confined to written forms. In fact, a significant number of the judicial interpretations are made as oral reply. A judge familiar with the operation states: "All the written judicial interpretations must be deliberated and approved by the adjudication commission of the People's Supreme Court and issued as document, rule, opinion, notice or reply to the courts and departments concerned. The oral judicial interpretations, although also deliberated and approved by the adjudication commission of the People's Supreme Court, are only orally communicated to the high courts involved for implementation. Modified on the basis of their implementation, some of these oral interpretations are reaffirmed in writing and issued to the courts in the country for implementation" [20]. As shown by the above description, one feature about the oral reply is its flexibility for deliberation to solve the problem and to find the optimal option. With respect to the permission for the lower courts to find better interpretation through trial and error, the experimental oral reply is much similar to the Sphinx-like explanations.

Dworkin insists that laws should be interpreted according to the principle instead of policy [21]. Unlike the approach advocated by Dworkin, the judicial

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[20] Zhang Jun, "Review and Reflection on the Judicial Interpretations Rendered by the Highest Adjudication Body With Respect to the Criminal Matters (1980-1990)", *Studies in Law* 1991 No.3 p.46.

[21] R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), pp.81ff.

interpretation in China has been subject to the political system and social environment; in fact, judicial interpretation have long remained policy explanations [22]. Over the recent years, there have been quite a lot of judicial interpretations regarding the statutes accompanying the development of legislation. Nevertheless, policy still has very strong influence over judicial interpretation. Further, the judicial interpretations, which are supposed to create legal rules in adjudication, are close to policy-making. For example, the People's Supreme Court issued "Notice on Several Problems That Should Receive Attention in Adjudication of the Cases Involving Bankruptcy of the Enterprises by the People's Courts" (SC [1997] No. 2). This notice explains and modifies the Bankruptcy Law for the State-Owned Enterprises (experimental) pursuant to Document 59 of 1994, the State Council and Document 10 of 1997, the State Council and the relevant administrative regulations (for example, Notice [1996] No.492 jointly issued by the State Economic and Trade Commission and the People's Bank of China). Article 9 of the People's Supreme Court's Notice amounts to a recognition of the relative nature of the security right in that under the notice, the proceeds from the sale of the land-use rights shall first be paid to the employees of the bankrupt enterprise. Thus, a policy issue is in effect converted into a judicial rule. Given the reality in China at the present time, it is understandable that the mortgage right established on the land-use rights is subject to the settlement allowance for staff and workers as well as the labor credits for the sake of social justice and social stability. However, things become complicated when a court step in substituting judicial interpretation for policy judgment. Given the fact that 30% of the loans extended by the commercial banks are not mortgaged, subordinating the security right will create more bad loans, increase the risks of loans and disrupt the credit relationship. Therefore, compromising mortgage right may not be justified on the ground of the public interest. Further, the compromised mortgage right will undermine the interest of the creditors, rendering ineffective certain provisions of the Civil Law, Guaranty Law and Bankruptcy Law [23]. Article 9 of Notice [1997] No. 2,

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[22] Zhou Dao-luan, "Review and Reflections on the Judicial Interpretations in the New China and the Ways to Improve the Work", in *The Complete Collection of the Judicial Interpretations Issued by the People's Supreme Court of the People's Republic of China* (Beijing: the Publishing House of the People's Courts, 1994) p.4.

[23] See The Research Group of the Bank of Industry and Commerce of China on Enterprises' Bankruptcy, "Investigation Report on the Problems Associated with Bankruptcy of Enterprises", *Economic Research* 1997 No.4. The procedures and

the People's Supreme Court cited above is also meant to restrict the priority given to labor credits, emphasizing that the settlement allowance for the employees should be calculated strictly according to the applicable rules and may not be increased in the amount and scope. However, this is an adjustment based on policy. Apparently, here the integrity of law is not the focus of the judicial interpretation.

Since its interpretations are policy-orientated, the People's Supreme Court often issues judicial interpretations jointly with the administrative agencies not authorized to make judicial interpretations. As a result, the power to make judicial interpretations have been proliferated and the entities with such a power have multiplied. Further, more written judicial notices, letters in reply and instructions are issued to address specific issues rather than serving as interpretations with general application. Thus, the structure of judicial interpretations is complicated and fragmented, beset by internal conflicts and inconsistencies. The contradictions inherent in the judicial interpretations are heightened as the economy develops and internationalizes, leading to more property relationships and legal problems. A the present time, the People's Supreme Court tries to solve the problems chiefly in the following two ways: (1) the judicial interpretations which have been issued should be reviewed and those conflicting with each other should be revised, supplemented or annulled. On July 27, 1994, the People's Supreme Court published a list of 11 judicial interpretations which were issued by the end of 1993 and would be annulled [24]. On December 31,1996, the second set of 69 judicial interpretations to be annulled were published [25]. (2) Clauses addressing inconsistency and conflicts should be part of the new judicial interpretations, specifying that later judicial interpretations prevails over the previous ones where there is inconsistency among them. For example, according to article 31 of the "Rule on Several Problems Involving Guaranty In Adjudicating Disputes Arising from Economic Contracts" issued by the People's Supreme Court on April 15, 1996, "This rule prevails over the judicial interpretations which have been previously issued by this court are inconsistent with rule. However, the cases which

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rules governing the transfer of the land-use right were specified by the State Administration of the Land in February 1998. See "the Interim Regulations on the Administration of the Transfer of the Land-Use Right by the State Owned Enterprises in the Reform Period", *Gazette of the State Council, the People's Republic of China*, Issue No. 898, pp.276ff.

[24] *Law Yearbook of China*, Vol.1995, pp.720-721.

[25] *Law Yearbook of China*, Vol.1997, pp.567-575.

have already been disposed shall not be retried under this rule" [26]. It may be said that the techniques in legislative rule-making is applied to judicial interpretations in that judicial interpretation in China is a quasi-legislative process whereby to make more specific rules.

## IV. The Formula Designed for Legal Argumentation

Over the recent years, China once again is modeling its reform of trial methods on the modern law of the Western Europe. For example, the trend is to move from inquisitorial system (Untersuchungsmaxime) of bureaucratic way to adversary system centered on the parties, establishing and completing the rules on evidence admission and the burden of proof, introducing the concept of due process and upgrade the level of professionalism. Such measures are being taken for the purpose for standardizing adjudication process and prevent operation within a black box. Such a trend is naturally meant to promote debates using legal mind and legal languages so as to ensure the rationale and fairness of adjudication. As a result, the ambiance for dialogues and debates in the court will inevitably improve. It is interesting to note that the imprints of the traditional Chinese ways to conduct legal communication could be found in the measures taken in reforming the trial methods.

For example, the district people's court of Haidian, Beijing has adopted rather different rules for adjudicating civil cases of major importance and complexity and civil cases of ordinary import and small claims. These rules are made under the principles of "differentiating the complicated and the simple" within the framework of different approaches for the "serious cases" and "trivial cases". These rules contained in the collection of rules published in June 1998 by the district court that is a vanguard of the reform of trial methods. "The Rules of the Adjudication of Simple Civil Cases" (summary proceedings for small claims) specifies "effort be concentrated on understanding the focus of the disputes and the positions of the parties" (Chapter 1 Article3) and mediation. The Rules further states that "in mediation, the adjudicators must give full respect to the wills of the parties. Where the facts are determined and faults are found, the adjudication should be conducted according to the principle of solving and defusing the dispute" (Chapter 3 Article 9) [27]. However, according to "the

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[26] *Law Yearbook of China*, Vol.1995, p.717.

[27] Cited from *The Collection of the Rules of the Beijing Haidian District People's Court* (edited by the Research Organization of Haidian District People's Court, Beijing,

Rules of the Adjudication of the Cases of Importance and Complexity," "the law should be followed strictly" (preamble) and there are special requirements concerning the procedures for taking cases: "The case of importance and complexity are to be confirmed by the presiding judge of the division responsible for the case and the remarks column of the cases-accepting registry should be marked with a red asterisk upon taking the case" (Chapter 2 Article 1 Section 4); "efforts should be made to take notice of responses and reactions from various parties" (Chapter 2 Article 5 Section4) and etc. [28]

Now let us take a look at the rules concerning the procedures of open trial of the commercial (economic) cases which took effect in the same court on March 21, 1998. According to the rules, the presiding judge of the panel should sort out issues, conduct judicial investigation, determine the breach liability, explaining the laws serving as the bases the fore liability of the breaching party. The following dialogue shows the prelude to the phase of mediation:

> "Presiding Judge: based on the facts the court has found and according to the relevant provisions of the Civil Procedure Law of the People's Republic of China, the court hereby holds mediation governed by the principles of following the laws and respecting the wills of the parties. Each of the parties may present a proposal for settlement. The parties may either accept or refuse to accept a settlement proposal. The parties may work out settlement proposal on their own to the extent permissible by the law. If one of the parties does not consent mediation, the court will render a judgment instead of conducting a mediation. Now the court would like to know whether the parties want to have mediation.
>
> *Does the plaintiff agree to mediation? Does the plaintiff have settlement proposal?
>
> *Does the defendant agree to mediation? Does the defendant have settlement proposal?
>
> #(Both parties agree to mediation).
>
> *Now that both parties agree to a mediation conducted by the court, the court would like to know whether the parties have settle-

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published in June 1998), pp.281-282.

[28] *Ibid.*, pp.306-308.

ment proposal (the plaintiff, the defendant and the third party are inquired in turn)

…… ……" [29].

Comparing the above standard dialogue in the operating rules of commercial trial with the Liu Kezhuang's judicial record cited above, one will find the two are essentially the same in terms of their structures and ways of thinking. Laws and judgments rendered thereby do not represent a transcendent justice or absolute predictability. Instead, they form a framework limiting the parties' negotiations and options and deterring the parties from running out of control so as to further reconciliation. To the extent permissible by the law, judges allow and encourage the parties and the third party to seek a solution more appropriate to the dispute.

The fairness doctrine set forth in Article 4 and Article 132 of the General Principles of the Civil Law plays a key role in combining the law regime (the principle of abiding by the law) with individual wills (the principle of respecting the parties' willingness) so as to find the best combination of the two for solving the dispute. The traditional legal terms of "appropriate, reasonable and legal" can be translated into the modern legal terms as "fairness doctrine" applicable to both mediation and adjudication. The fairness doctrine include both the frustration of purpose doctrine (*clausula rebus sic stantibus*) in the contract law and the fair liability doctrine with distinctive Chinese features in tort law. As far as the latter is concerned, under the PRC laws governing the civil cases, discretion is allowed in adjudication according to the social relationships and the actual circumstances so as to determine the damages and allocate the liabilities in a flexible way. For example, in order to prevent torts, the injured party may recover damage from both the wrong doer and the party who benefits from the tort (Article 109 of the General Principles of the Civil Law). The wronged party, on the other hand, has the obligation to limit the injury, and may not recover for the injury which it has failed to limit (Article 114 of the General Principles of the Civil Law) etc. For this kind of situation, legal communication and free options are subject to little restrictions.

## V. Where Is It Right and Where Is It Errs?

Now let us review the logic underlying the Chinese ways of legal thinking,

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[29] *Ibid.*, p.374.

judicial explanations, argumentation and communication in the court of justice.

As early as the age when the Spring and Autumn Period (770-476 B.C.) is changing into the Warring States (475-221 B.C.), China underwent to the change in value with the new polytheist theory of "there is no longer the God, and all gods are equal". The social order has been beset by the conflict between the single-center approach and multiple-center approach. The judicial system has been accompanied by the contradiction between mystery and rationale, with the general trend toward a legal system based on internal self criticism free from the external and transcendental force. For a principal with internal reasoning force, it is necessary to follow the moral rule in order to be free from outside force. In a certain sense, law is no more than a stepping-stone to properly understanding the world and life, and law becomes irrelevant once one figures out the secret therein the self-cultivation. In this sense, the traditional law in China which emphasize moral and self-cultivation is self-negating. In the end, however, the traditional law does not allow the elements making laws present as the law to exist.

Although in the Chinese history, there was some kind of objective approach that law has to be applied objectively, subjectivism and inter-subjectivism, in the main steam of legal thought has been taken as a premise for institution-designing. As a result, it had to become the most important task to restrict the arbitrariness caused probably by the subjectivity and inter-subjectivity inherent in the traditional legal system in order to ensure the justification of the system. The subjectivism has been restricted with the following two mechanisms: (1) premised on the assumption of self-criticism conducted by the principal to achieve self-government through the proceedings of "learning from practice and experience(*ge-wu*), being wholly absorbed in knowledge (*zhi-zhi*), treating people open-heartedly (*chen-yi*), correcting in behavior (*zheng-xing*), cultivating the moral character (*xiu-shen*), unifying the family (*qi-jia*), running the country well (*zhi-guo*) and giving the world peace and security (*ping-tian-xia*)" , an effort on the part of the enlightened to guarantee the appropriateness of applying law. This approach is not entirely different from the empirical science and policy science used for ensuring objective truth. Nevertheless, the Chinese approach is too optimistic and too romantic. (2) On the other hand, proper application of law is ensured with various inter-subjective approaches. The specific measures include: the procedure for consenting and admission, criticism and self-criticism, supervision of each other, negotiations afterwards, the absolute truth-seeking approach of "correcting each and every error found" (*you-cuo-bi-jiu*) and the special appeal (*shen-su*) against a legal decision after the final judgment

rendered. In the Chinese judicial practice, the checking mechanisms of realism are what really at play. The modern Chinese situation is even more so. The Chinese jurisprudence does contain something close to prophetic vision beyond the times in that inter-subjective approaches are introduced and consent or consensus are emphasized for the legitimacy of law, etc.

In the Chinese courts, there are following ways for communicative actions in the space of inter-subjectivity and choice: authoritative judgment and regulative announcement based on inquisitive approach, activities with educational dialogue and didactic conciliation, the process of persuading each other, and negotiation, understanding, concession and compromise made to achieve consensus. It has to be recognized that such communications are very defective from the perspective of Western style legal reasoning and legal argumentation.

It should be first pointed out that the problem is one set of legal procedure system of fairness and reason has not been established and completed. As a result, an ideal environment has not been formed for legal communications and the communications have more often than not been twisted by the power relationship and power games. Since 1993, the importance of procedure has been emphasized. The judicial reforms, however, has been handicapped by the reality and focused on the traditional approach contracting and sub-contracting responsibilities plus supervision [30]. On July 11,

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[30] This could be shown by the materials distributed at the national symposium on the experiments of the trial methods of civil cases and economic cases held in April 1997. For example, with the reform of "decentralizing" adjudication powers, the courts throughout China have been adopting the practice of judges in charge, presiding judge in charge, panel of judges in charge and presiding judge of the panel in charge. In addition, the practices of accountability for wrong judgments, supervision for reviewing cases and court president attending hearings have been introduced. Besides, "the People's Supreme Court's Rules On Several Problems With Respect to Reforms of Trial Methods For Civil Cases and Economic Cases" was issued on July 6, 1998 (judicial interpretations [1998] No. 14). Article 34 of the Rules specifies: "If major mistakes and serious consequences thereof are found with the judgments rendered by a panel, a single judge or adjudication committee at the suggestion of the court president, the responsible persons are subject to liabilities according to the relevant laws". This provision stands in sharp contrast with the principle concerning judges' immunities contained in article 44 of the minimum standards with respect to judicial independence adopted by the International Bar Association.

1998, the China Central Television Station first gave live coverage to a hearing as part of the effort to further the transparency of the courts' work under the spotlight of the public opinion in order to ensure judicial fairness [31]. Indeed, this is something new and encouraging. On the other hand, however, it is also important with court hearings open to the public, efforts should also be made to ensure that dialogues for reasoning be not carried out in an emotion-charged environment. Thus, it is imperative that as part of institution-designing, the people study about how judges could make their minds without being subject to the undue influence of opinions. Although, supervision is indeed important here, it is also indispensable that due process should be protected.

It is also worth noting that the Chinese judicial practice suffers from the lack of a set of real rules for reasoning and deductions, the concept of integrity and adequate juristical studies. For example, quite a significant number of judges understand the judicial reforms as less mediation and more adjudication or fifty-fifty of both [32]. People are still handicapped by the bureaucratic jurisprudence to deem a judicial judgment as mandatory order, to understand legal argumentation in the court of justice only from the perspective of didactic dialogues at hearing. Another example involves contract breach. To establish a contract breach, the reasoning involves the following elements: the conduct involving offer, the time when the offer becomes effective, the possibility of and the limitation on revoking the offer, whether the offer is clear, the duration of the promise, the conduct involving promise, the time when the promise takes effect, conditional promise, the time when a contract is formed, the definition of service for manifestation of intention and so on, the validity of the contract as distinguished from the validity of a clause of the contract, the factors for validating a contract, the factors for invalidating a contract and the factors for determining when the contract takes effect (of course, the explanations and reasoning could not be so comprehensive and so involved). However, the judicial explanations issued by the People's Supreme Court are only focused on essential elements of written contract and the substantive provisions on determining the validity of a contract. It is true that

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[31] See newspaper reporter Xulai, "Court Hearing Was Brought Into Thousands of Households", *Legal Daily* July 12, 1998, at the front page.

[32] See the speech by Tang Dehua, Vice President of the People's Supreme Court, entitled "Speech at the Symposium of the Reform Experiments of the Trial Methods Involving Civil Cases and Economic Cases in the Courts" (April 16, 1997) p.17.

this kind of approaches have a good quality of brief and to the point. However, the most valuable properties such as flexibility and definiteness inherent in the techniques of legal reasoning and interpretations may be lost.

In a word, if the above mentioned two problems can not be solved, if the two most important factors——the procedural due process and the argumentation concerned in legal reasoning ——can not be inlaid into the intermediate zone of judgment and mediation, coercion and consensus as well as the "judicial explanations" without clear boundary, if the art of law interpretation can not be improved conscientiously, it is very difficult for judicial reforms, legal system building and jurisprudence in China to make great advances in essence.

As many people have pointed out, the Western style modern legal system is based on the world outlook of Newton mechanics and Euclid geometry. In the sense of reductionism or determinism, it is designed as a simple system. That is just the reason why people can count on legal rules being predictable or look forward to modernization to maximize legal predictability. The simple system of law is necessary for Niklas Luhmann, because the world of complexity needs the "unmoving mover" as the first motive force or "expectation-certainty" of the people that can reduce social complexity [33]. If even law could be a complex system, then the world would become a world of runaway "complexification", and the situation of "double contingency" (Talcott Parsons) could not be gotten rid of.

It is clear that traditional Chinese law has not been playing the role of the "unmoving mover". As a result, the said runaway "complexification" took place in China. There has been too much chaos and too many exchanges, which has made the public choice very difficult. Especially in the case of replacing the traditional multi-functional measures with a new single-functional measure, blank spaces in the legal system emerge one after another, and received foreign laws become very different from what was expected or intended. So, it is hardly surprising that China is finally comfortable with a program of multi-dimensional legal change and so-called "piecemeal social technology" (Karl R. Popper) [34].

As mentioned above, there has been too much chaos and too many exchanges that have made the public choice very difficult in China. Therefore, the starting point of

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[33] Cf. Ysuo Baba, *Niklas Luhmann's Theory of Society* (Tokyo: Keisoshobo Press, 2001) chap.1.

[34] For details, see my new book *Legal Change in Modern China* (Tokyo: Japan Review Press, 2001).

legal reform in a relational society characterized by a fractal structure must be the de-randomization of contingency. It is not to negate negotiation or interaction in legal processes, but just to put bargaining amongst the parties in the shadow of the law, especially the procedural rules. In other words, switching the train of thought from the informal process to due process, and from law as an institution to law as a medium, to make Chinese people use law as their weapon for interaction and communication. Here the procedural rules are of great significance [35].

The fundamental principle in traditional Chinese law has been "substance over form" and "substantive rules over procedural rules". Thus many people hold that it is very difficult to make China receive the idea of procedural due process. However, in approaching this problem, we should see the whole as well as the parts. The possibility of substantive consensus can only increase after a procedural agreement is reached. Especially in a diversified network society and multi-cultural situation, only by receiving procedural justice can people find the generally recognized justice.

Does this mean a kind of reductionism? On the contrary, just because we hold that legal pluralism allows no reduction and because we recognize the changeable relations of subjective efforts among different players, it is necessary for us to find procedure as the stone base or anchorage for legal modernization. Procedure is precisely the "the unmoving mover" we are looking for in China. In fact, the forms of dynamic communication based on constant feedback such as "*Huandao* (Circular Route of Social Control) ", "the mass line" and other many cyclical organizations can also be rearranged according to the fundamental tenets of procedural justice.

I conclude that Chinese law must install the "unmoving mover" through reform to refrain from runaway "complexification" and the "double contingency". It is procedure as medium that can function as the software of the "unmoving mover". Thus the way forward in legal reform in China is to form a kind of reasonable mechanism of public choice by introducing modern procedural rules into the dynamics of constant interaction and feedback inherent in Chinese society. (END)

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[35] For details, see my book *Constructing Rule of Law* (Beijing: China University of Law and Political Sciences Press, 1999).

## Appendix

## The Discretionary Power of the Judge: Regional Report of China

Ji Weidong

### *I. The notion of judicial discretion*

#### 1. The notion of discretion in general

Free evaluation of evidence and free decision of dispute resolution through legal communication and balancing of interests according to rule of justice and rule of reason.

In China, the reality is somewhat paradoxical. On one hand, the people's courts must base themselves on facts and take the law as the criterion in conducting civil or criminal proceedings. The principle of free intention or free evaluation of evidence through inner conviction has been criticized and rejected by the Chinese law circles so far. At the institutional level, a system was set up to rigidly determine the grade of sanction for each type and degree of illegal act or offense. On the other hand, however, extensive analogy had been allowed, and equity had occupied a dominant position, especially in the "trivial cases" or the said"serious cases". The situational ethics of traditional Chinese society and many blank norms in contemporary legal system make for a strong tendency to pursue the application of law adapting to changing circumstances, and to lead to abuse of discretionary power after all.

#### 2. The specific notion of judicial discretion

*a) Judicial discretion in procedural matters*

* If for some objective reasons, a party and his agent for the lawsuit are unable to collect the evidence by themselves or if the people's court considers the evidence necessary for the trial of the case, the people's court shall investigate and collect it. And the court must examine and verify evidence comprehensively and objectively (CPL Article 64).

* Some restrictions are placed on Dispositionsmaxime. For example, if a plaintiff applies for withdrawal of the case before the judgment is pronounced, the people's court shall decide whether to approve or disapprove it. If withdrawal of the case is not allowed by an order of the court, and the plaintiff, having been served with a summons, refuses to appear in court without justified reasons, the people's court may make a judgment by default (CPL Article 131).

* The system of last word in decision-making of "serious cases" by the adjudication

committee in that is set up in every court.

* In the adjudication supervision process, the reopening of a case is allowed at any time based solely on the later discovery of "error", though there has been no change in the circumstances of the case and in the claims of the parties (CPL Article 177).

* In dealing with a case on appeal, a people's court of second instance may conduct mediation. After the mediation agreement has been served, the original judgment of the lower court shall be deemed as set aside (CPL Article 155).

*b) Judicial discretion concerning the substantive law*

* Law-making by the Supreme People's Court through its "judicial interpretations" has been institutionalized in China.

* Law-making by the people's courts through the system of trial implementation of law and applying policy has been institutionalized in China.

* The judicial practice of consulting administrative and local regulations in the trial of a case has been popular in China.

* In many cases, the people's courts are guided by a few general clauses, especial the basic principle of fairness. A prominent example is the courts' treatment of penalty clauses in civil and commercial contracts, here courts must make case-by-case determinations of what is reasonable penalty clauses and what unreasonable. Another prominent example is the fair liability principle provided by tort law. According to General Principles of the Civil Law of the People's Republic of China, if a person suffers damages from preventing or stopping encroachment on state or collective property, or the property or person of a third party, the tortfeasor shall bear responsibility for compensation, and the beneficiary may also give appropriate compensation(GPCL Article 109). If one party is suffering losses owing to the other party's breach of contract, it shall take prompt measures to prevent the losses from increasing; if it does not promptly do so, it shall not have the right to claim compensation for additional losses (GPCL Article 114). If none of the parties is at fault in causing damage, they may share civil liability according to the actual circumstances (GPCL Article 132). In these cases, individual courts have apparently much more discretionary powers in their decision-making.

*c) Judicial discretion concerning the facts of the case*

* There is a basic principle concerning judicial decision based on concrete conditions in China, that has been called "to hold trials on the spot" (CPL Article 121).

* During a court session, any request by the parties concerned for a new investigation, expert evaluation or inspection shall be subject to the approval of the people's court (CPL Article 125 sec.3).

* If an application made by a party meets the condition that there is sufficient new evidence to set aside the original judgment or written order, the people's court shall retry the case (CPL Article 179 no.1).

### *II. Party control of the proceedings and judicial discretion*

In China, the parties are free to deal with their own civil rights and litigation rights the way they prefer within the scope provided by the law (CPL Article 13). The parties are entitled to apply orally or in writing for a judicial officer's withdrawal, and the application may also be submitted before the closing of arguments in court if the reason for the withdrawal is known to him only after the proceedings begin (CPL Article 45 and Article
46). In addition, all witness must be present in court and cross-examined by the parties concerned (CPL Article 66).
If a party to an action considers that there is error in a legally effective judgment (except a legally effective judgment on dissolution of marriage) or written order, he may apply to the people's court which originally tried the case or to a people's court at the next higher level for a retrial, within two years after the judgment or written order becomes legally effective (CPL Article 178, Article 181 and Article 182). Even a legally effective mediation/conciliation statement may also be applied for a retrial, if evidence furnished by a party proves that the mediation/conciliation violates the principle of voluntariness or that the content of the agreement violates the law (CPL Article 180).

### *III. Procedural discretion of the judge*

#### 1. Concerning jurisdictional issues (forum non convenience, parallel proceedings)

According the principle of "making things convenient for the people as well as for the people's court", the court may go on circuit to hold trials on the spot whenever necessary (CPL Article 121). The court of second instance may try a case on appeal at its own site or in the place where the case originated or where the court which originally tried the case is located (CPL Article 152 sec.2).
With respect to the jurisdiction by forum level, Civil Procedure Law of the People's Republic of China stipulates that the basic courts at the county level have jurisdiction as courts of first instance over civil cases (Article 18). However, the intermediate courts have jurisdiction as courts of first instance over following civil cases: (1) major cases

involving foreign element; (2) cases that have major impact on the area under their jurisdiction; and (3) cases as determined by the Supreme People's Court to be under the jurisdiction of the intermediate court (Article 19). The high courts at the province level have jurisdiction as courts of first instance over civil cases that have major impact on the areas under their jurisdiction (Article 20). The Supreme Court has jurisdiction as the court of first instance over following civil cases: (a) cases that have major impact on the whole country; and (b) cases that the Supreme Court deems it should try (Article 21). Of course, determination of what constitutes "major cases " that was called "serious cases (*zhong-an*)" in traditional China or "major impact" on the local society is decided by individual courts based on their discretionary powers.

No matter jurisdiction by forum level or territorial jurisdiction, the people's court at higher levels have the power to try civil cases over which the courts at lower levels have jurisdiction as courts of first instance; they may also transfer civil cases over which they themselves have jurisdiction as courts of first instance to courts at lower levels for trial. If a court at a lower level that has jurisdiction over a civil case as court of first instance deems it necessary to have the case to be tried by a court at a higher level, it may submit it to and request the court at a higher level to try the case (CPL Article 39).

In the adjudication supervision process, if the Supreme Court finds definite error in a legally effective judgment or written order of a local court at any level, or if a court at a higher level finds some definite error in a legally effective judgment or written order of a court at a lower level, it respectively has the power to bring the case up for trial by itself or direct the court at a lower level to conduct a retrial (CPL Article 177 sec.2).

According to the Civil Procedure Law Chapter XXVIII "Arbitration" and the Arbitration Law, if the parties have had an arbitration clause in the contract concerned or have subsequently reached an arbitration agreement in other forms, they may not bring an action in a court, unless the arbitration agreement is invalid. If one party fails to comply with the arbitration award, the other party may apply for its enforcement to the court. If a court makes, in accordance with the law, a written order not to allow the enforcement of the arbitration award after examination and verification by a collegial panel, the parties may apply for arbitration again; they may also bring an action in a people's court.

### 2. Concerning the management of the proceedings

The reform of civil adjudicative procedures since 1993 have shown the developments as following: (1) Courts lay further stress on adhering to open trial policy and to

brighten the transparency of the judicial process. (2) The reform program aims at setting up the system of pretrial conference and imbuing authority to the functions of court hearing. Courts are asked to complete the preparatory work fully prior to the opening of the court and to hold the session on time and promptly. The courts validate evidence through an open session, ascertain the facts and allocate responsibilities among parties. The court may proceed with mediation at any time when necessary. (3) Changes in the aspect of the burden of proof by the parties are requiring parties to adduce evidence to prove the authenticity and legality of their allegations and with verification. The individual court will actively guide the parties on the issue of a burden of proof according to the law, and play the leading role in all proceedings. The judge will affirm evidences after investigation and hearing. (4) It is to allow the courts to properly apply summary procedures, for preventing and reducing the backlog of cases. (5) The responsibilities both of individual judges and collegial panels have been emphasized. However, most "serious cases" are still decided by the adjudication committees of people's courts.

### 3. Concerning the proofs

A new judicial practice of trying out “one-step to the court” judgment in civil and commercial cases has been popularized in China. The emphasis is on the overall realization of public trials in court sessions and on the burden of proof by the parties concerned.

Judges will try their best not to make investigations for evidence to avoid the problem of “first impressions are strongest”. Meanwhile, the traditional way of handling cases in modern China such as “litigants speak, judges do legwork to get evidence, and attorneys go over files” has changed to a certain extent.

However, according to the Civil Procedure Law, if for some objective reasons, a party and his agent for the lawsuit are unable to collect the evidence by themselves or if the people’s court considers the evidence necessary for the trial of the case, the court shall investigate and collect it. And the court must examine and verify evidence comprehensively and objectively (CPL Article 64). During a court session, any request by the parties concerned for a new investigation, expert evaluation or inspection shall be subject to the approval of the court (CPL Article 125 sec.3).

By the way, if an application made by a party meets the condition that there is sufficient new evidence to set aside the original judgment or written order, the court must retry the case (CPL Article 179 no.1).

### 4. Allocation of costs

China began to build up a new legal order following the mass line the 1950s, and the methods of reducing or remitting monetary cost of legal services for those who cannot afford it were provided by the Measures for Lawyers' Charge in 1956, 1981 and 1990. Although attorney fees were very low in a long period, in fact, except for a token filing fee and possible attorney fees, the expenses of litigation including the cost of investigation and testimony were borne by the state. Therefore, the personal monetary burden was not an obstacle to access to the courts in essence.

The Civil Procedure Law stipulates that "Organs, social organizations, enterprises and institutions may support the injured units or individuals to file a suit with thePeople's Court against acts that damaged the civil rights or interests of the state, collectives or individuals" (Article 15). This principle of public intervention in civil disputes means that the lawsuit expenses of the injured and weak party may be borne partly or totally by some state departments or social organizations.

However, the situation has been changing especially since 1993 when the principle of litigation costs allocation was revised from public burden to the lost party's burden. The Civil Procedure Law stipulates that any party filing a civil lawsuit shall pay court costs according to the rules. For property cases, the party shall pay other fees in addition to the court costs. But any party that has genuine difficulty in paying litigation costs may, according to the relevant rules, apply to the court for deferment or reduction of the payment or for its exemption (Article 107).

### 5. Sanctions against the parties, their attorneys and third persons

If an application for property preservation is wrongfully made, the applicant must compensate the person against whom the application is made for any loss incurred from property preservation (CPL Article 96).

If a defendant is required to appear in court, but, having been served twice with summons, still refuses to do so without justified reason, the court may constrain him to appear in court by a peremptory writ (CPL Article 100).

If a person violates the court rules, the court may reprimand him, or order him to leave the courtroom, or impose a fine on or detain him. A person who seriously disrupts court order by making an uproar in the court or rushing at it, or insulting, slandering, threatening, or assaulting the judicial officers, shall be investigated for criminal responsibility by the court according to the law; if the offense is a minor one, the offender may be detained or a fine imposed on him (CPL Article 101 sec.2 and sec.3, Article 102).

Where a unit which is under an obligation to assist in investigation and execution does not assist, the court may, apart from enjoining it to perform its obligation, also impose a fine. With respect to a unit that refuses to assist, the court may impose a fine on its principal heads or the persons who are held actually responsible for the act. The court may also put forward a judicial proposal to the supervisory organ or any relevant organ for the imposition of disciplinary sanctions (CPL Article 103).

### *IV. Judicial discretion in specific proceedings*

#### 1. Small claims

It is an important judicial policy at the present stage to allow the courts to properly apply summary procedures to the full, for preventing and reducing the backlog of cases. The court trying a case in which summary procedure is followed shall conclude the case within three months after placing the case on the docket (CPL Article 146).

#### 2. Provisional and protective measures (i.e. injunctions)

In the cases where the execution of a judgment may become impossible or difficult because of the acts of either party or for other reasons, the court may , at the application of the other party, after enjoining the applicant to provide security, order the adoption of measures for property preservation. In the absence of such application, the court may of itself, when necessary, order the adoption of measures for property preservation.

If the case is urgent, the court must make an order within 48 hours (CPL Article 92).

The court may, upon application of the party concerned, order advance execution in respect of the following cases: (1) those involving claims for alimony, support for children and elders, pension for the disabled or the family of a decedent, or expenses for medical care; (2) those involving claims for remuneration for labor; and (3) those involving urgent circumstances that require advance execution (CPL Article 97).

In the course of execution, if the person subjected to execution provides a guaranty, the court may, with the consent of the person who has applied for execution, decide on the suspension of the execution and the time limit for such suspension. If the person subjected to execution still fails to perform his obligations after the time limit, the court has the power to execute the property he provided as security or the property of the guarantor (CPL Article 212).

If the person subjected to execution fails to fulfill according to the execution notice the obligations specified in the legal document, the court is empowered to make

inquires with banks or other organizations that deal with savings deposit into the deposit accounts of the person subjected to execution, to withhold or withdraw part of his income, to seal up, distrain, freeze, sell by public auction, or sell off part of his property for the fulfillment of his obligations. However, it shall leave out the necessaries of life for the person subjected to execution and his dependent family members (CPL Chapter XXII "Execution Measures").

### 3. Complex litigation

State policy has still had very strong influence over complex litigation and its concentrated expression is the "judicial interpretations" by the Supreme Court.
Most of complex litigation are finally decided by the adjudication committees of people's courts. It is not an individual judge or a collegial panel in charge of the lawsuit but the adjudication committee that hold the discretionary powers in handling major cases.
Courts may transfer complex litigation over which they have jurisdiction as courts of first instance to courts at higher levers for trial.
Many courts in China have adopted rather different rules for adjudicating civil cases of major importance and complexity and civil cases of ordinary import and small claims.
These rules are made under the principles of "differentiating the complicated and the simple" within the framework of different approaches for the "serious cases" and "trivial cases". For example, according to "the Rules of the Adjudication of the Cases of Importance and Complexity" made by the district court of Haidian, Beijing, "the law should be followed strictly" (preamble) and there are special requirements concerning the procedures for taking cases: "The case of importance and complexity are to be confirmed by the presiding judge of the division responsible for the case and the remarks column of the cases-accepting registry should be marked with a red asterisk upon taking the case" (Chapter 2 Article 1 sec. 4); "efforts should be made to take notice of responses and reactions from various parties" (Chapter 2 Article 5 sec.4) and so on.

### 4. Arbitration and ADR

Article 5 of the Arbitration Law implements Article 257 of the Civil Procedure Law which imposed an obligation on disputing parties not to bring an action in the people's courts if an arbitration agreement has been reached, by emphasizing the obligation of a court not to accept a case brought under the above mentioned condition. A disputing

party involved in an arbitration agreement may, only in two circumstances, bring a lawsuit in court. Firstly, where the validity of the arbitration agreement is at issue, Article 20 of the Arbitration Law permits a disputing party to challenge the agreement either in an arbitratal tribunal or in court. In the later case, the court is required to give a written order on whether the arbitration agreement is valid or invalid upon receiving such a request. Secondly, where the disputing parties have concluded an arbitration agreement and one party institutes an action in the court without declaring the existence of the agreement, if the other party fails to raise objection to the acceptance of the case by the court, he must be deemed to have renounced his rights under the arbitration agreement. This position has been confirmed by the "Opinion Concerning Questions of Implementing the Civil Procedure Law", issued by the Supreme Court as a judicial interpretation, where the Supreme Court explained in Article 148: "In the event that one party, when filing suit, fails to declare that there is an arbitration agreement, and after the court accepts the case, the other party enters a defense, the court shall be deemed to have jurisdiction over the case".
In addition to judging case by adjudication, courts can and indeed are encouraged to lead the parties to a mediated agreement. Until its 1991 revision, the Civil Procedure Law instructed courts to "stress mediation". Although the proportion of disputes resolved by mediation has been coming down relatively every year in the 1990's because of the increase of judging cases, many civil cases and minor criminal cases heard only upon complaint are still mediated by the court as well as the People's Mediation Committees. An important feature of court mediation in China is that the mediation agreement has the same effect as a court judgment or ruling once it is delivered to the parties. Because mediation may also be conducted by a court hearing an appeal against the judgment of first instance, and the mediation conducted by a court of first instance may not be appealed, people can even say that the mediation agreement has a stronger effect than judgment.

### 5. Non-contentious litigation

The Civil Procedure Law provides the rules on non-contentious litigation mainly in Chapter XVII "Procedure for Hastening Debt Recovery" which is for a creditor requesting payment of a pecuniary debt or recovery of negotiable instruments from a debtor through the people's court. After accepting the application and upon examination of the facts and evidence provided by the creditor, the court must issue an order of payment to the debtor within 15 days after accepting the application, if the rights and obligations relationship between the creditor and the debtor is clear and

legitimate.
But if the application is unfounded, the court will make an order to reject it (CPL Article 191). The court should, on receiving the dissent in writing submitted by the debtor, make an order to terminate the procedure for hastening debt recovery and the order of payment shall of itself be invalidated. The creditor may bring a lawsuit in the court.

### 6. Execution

In the course of execution, if an outsider raises an objection with respect to the object subjected to execution, the execution officer must examine the objection in accordance with the procedure prescribed by the law. If the reasons for the objection are untenable, the objection shall be rejected; if otherwise, execution shall be suspended with the approval of the president of the court (CPL Article 208).
If a person or property subjected to execution is in another locality, the court in that court may be entrusted with carrying out of the execution. The entrusted court shall begin the execution within 15 days after receiving a letter of entrustment and shall not refuse to do so (CPL Article 210). However, there are many problems concerning with the entrusted execution in reality at present stage.
If the person subjected to execution provides a guaranty, the court may, with the consent of the person who has applied for execution, decide on the suspension of the execution and the time limit for such suspension. If the person subjected to execution still fails to perform his obligations after the time limit, the court has the power to execute the property he provided as security or the property of the guarantor (CPL Article 212).
If the person subjected to execution fails to fulfill according to the execution notice the obligations specified in the legal document, the court is empowered to make inquires with banks or other organizations that deal with savings deposit into the deposit accounts of the person subjected to execution, to withhold or withdraw part of his income, to seal up, distrain, freeze, sell by public auction, or sell off part of his property for the fulfillment of his obligations. However, it shall leave out the necessaries of life for the person subjected to execution and his dependent family members (CPL Chapter XXII “Execution Measures”).

## *V. Limits of judicial discretion and remedies*

### 1. The constitutional right to be heard

According to Article 37 of the Constitution, no citizen may be arrested except with the approval or by decision of a people's procuratorate or by decision of a people's court, and arrests must be conducted by a public security organ. Unlawful detention or deprivation or restriction of citizens freedom of the person by other means is prohibited, and unlawful search of the person of citizens is prohibited. The Constitution also stipulates that the state organ concerned must deal with complaints, charges or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures or retaliate against the citizens making them (Article 41 sec.2).

Professor A. Nathan and R. Edwards have emphasized several characteristics in Chinese modern tradition of the constitutional rights: the rights are not inherent in humanhood as under natural rights doctrine but are create by the State; rights provisions will generally be worded in the positive, as an express grant; greater emphasis is placed on welfare rights while political rights are more restricted; rights are juxtaposed with duties, a sort of contingent notion of rights; instead of rights being a limit on the state, the State's interests are often a limit on rights; and rights are generally subject to restriction "according to law". This kind of relations among individual rights, social welfare and state will have made many local problems of the constitutional rights, include the right to be heard.

The growing participation of the People's Republic of China in the global community has made some improvements in its human rights, at least by comparison with the past.

For example, Chinese lawyers have changed their status from "state legal workers", whose obligation to protect socialism and the state took priority over duties to their individual clients, to legal profession supplying service to clients, since the mid-eighties.

According to the Lawyers' Law revised in 1996, lawyers shall serve on behalf of the clients, safeguard the lawful rights and interests of the clients and assume the re-sponsibility of the legal aid. The courts have been conducting the reforms of judicial proceedings, especially civil trial proceedings, for many years, the adversary system is ratified by Supreme Court for trial implementation in some local courts.

The 1996 amended Criminal Procedure Law makes an improvement guaranteeing human rights, and the distinguishing features may be manifested as following: (1) It stipulates that the power of convicting is fully exercised in accordance with the law by the courts, and it leaves out the provision of "exemption from prosecution". It means that only after the court has tried a case within the due process of law, can it convict a

citizen of guilt. Therefore, whether a citizen is guilty or innocent should be decided by the courts within the due process of law. (2) It improves coercive measures and does away with provisional custody for investigation. (3) It stipulates that an attorney can undertake a case before the trial starts. This strengthens the right to defense of suspects and defendants. (4) A further guarantee of the rights of criminal suspects and the accused provided by the new Criminal Procedure Law lies in the principle of "presumption of innocence" taken from Western countries. (5) The amended Criminal Procedure Law further protects the right to litigation of a victim, and improves his status during litigation. The original Criminal Procedure Law regarded the victim in a case as a general participant in the proceeding; under the new Amendment he is considered to be one of the parties to the litigation; he and his legal agents are entitled to challenge the accused. During the trial in the first instance, after the prosecutor reads the indictment, the victim can present his case just as the accused does; with the approval of the presiding judge, he can question the accused, the witnesses and the expert. If he is not satisfied with the trial court's decision, he has the right to ask the People's Procuratorate for an appeal. During the trial in the second instance, even if the case is not tried, the collegial panel shall listen to the opinions of all parties, including the victim, before entering a verdict. It is especially important to point out that the new amendment expands the scope of private action by the victim.

### 2. The fair trial principle

There is no subject who is possessed of absolute human rights in Chinese mental world. The interested parties must find a satisfactory and successful solution by trial and error. They may reach an agreement with some blemishes because of despair.
They may conciliate after the grievances were aired. The state may manage the dispute resolution effectively and properly after exploratory dialogues. Anyway, in the process of repeating communicative interaction, the judge may be relativized as a function of language games and choosing actions. Ideology, situation factors, power relations and grammar or rhetoric of discussions and so on in the intersubjective practice will be the squares for choices and their interpretation. Thus law will be internalized in varying degrees. Legal decision-making satisfy the needs of the people just because of having choice, conversely, it looks by choice just because of the psychological satisfaction based on reciprocity.
Because the choice in Chinese judicial procedure is predicated on the social exchange and takes reciprocity as the criterion, a kind of contractual relationships become the basis of law court as well as social order finally. When Chinese talk about justice, they

mean a kind of relational or mutually beneficial fairness based on cognition of reality and intersubjective sensations. It is the principle of contentment that decides the reciprocal justice institutionalizing as a moot-style procedure for obtaining the consent of those concerned. If the consent of all the people could be obtained, then the degree of contentment is highest. In this sense, the ideal goal of Chinese judicial system is to reach unanimity. However, it is usually very difficult to reach unanimity in real life, especially in dispute resolution. And it becomes more and more difficult along with the increase of social complexity.

### 3. Remedies against abuses of judicial discretion

* taking the consent of the party concerned and even unanimity as the ideal goal for judicial process
* to set up the adjudication committee in each court as the highest decision-making body within the court
* the adjudication supervision system
* law-making by the Supreme Court through the judicial interpretations