

# JUDICIAL REFORM IN CHINA: LESSONS FROM SHANGHAI

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The rise of China has become an important factor in the global political, economic, and military balance of this century. While the international community welcomes a more prosperous China, it is deeply concerned about the potential threat of the communist country's rise.<sup>1</sup> To

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<sup>1</sup> The United States is a good example. The George W. Bush administration laid out its position on China in the September 2002 White House report on the *National Security Strategy of the United States*: "We welcome the emergence of a strong, peaceful, and prosperous China." During her first tour to China as the United States Secretary of State in March 2005, Condoleezza Rice adopted a similar phrase to welcome "the rise of a confident, peaceful and prosperous China." See President

ease such concern and to respond to criticisms against the Chinese Communist Party's ("CCP") governance, Beijing has vowed to establish a "harmonious society of socialism"<sup>2</sup> that features, along with other attributes, the rule of law, fairness, and justice.<sup>3</sup>

Unfortunately, courts in China have yet to exemplify the rule of law, fairness, and justice.<sup>4</sup> Understanding that a dysfunctional justice system severely impairs governance, Beijing has taken a series of actions to reform China's judiciary.<sup>5</sup> In 1999, immediately after the CCP decided at the Fifteenth Party Congress to "promote judicial reform" (推进司法改革, *tuijin sifa gaige*), the Supreme People's Court ("SPC") announced a five-year reform plan to build a "fair, open, highly effective, honest, and well-functioning" judicial system. "Judicial fairness" (司法公正, *sifa gongzheng*) was highlighted as the "essence" of judicial reform.<sup>6</sup> Since then, *gongzheng* (公正, fairness) has always been the central theme, although Chinese leaders have coined various expressions to describe their judicial reform initiatives, including "fairness and efficiency" (公正

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of the United States of America, *National Security Strategy of the United States 27* (The White House Sept. 17, 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>; Secretary of State Condoleezza Rice, Remarks at Sophia University in Tokyo, Japan (Mar. 19, 2005) (transcript available at Dept. of State, Off. of Press Relations 2005/T4-16), quoted in Glenn Kessler, *Rice Puts Japan at Center of New U.S. Vision of Asia; China Challenged in Major Speech*, WASH. POST, Mar. 19, 2005, at A16.

<sup>2</sup> See [CCP] *Pledges to Build Up Harmonious Society of Socialism*, XINHUA GENERAL NEWS SERVICE, Sept. 26, 2004 (according to the 中共中央关于加强党的执政能力建设的决定 [Decision of the CCP Central Committee on Enhancing the Party's Ability to Govern], adopted by the Fourth Plenary Session of the Sixteenth CCP Central Committee, building a socialist harmonious society is one of the CCP's principal tasks to strengthen its governing capacity).

<sup>3</sup> See *A Basic Task of Building Socialism with Chinese Characteristics – Penetratingly Understanding the Momentous Significance of Building a Socialist Harmonious Society*, 求是 [SEEKING TRUTH], Mar. 1, 2005, reprinted in *Chinese Party Journal Urges Building Harmonious Socialist Society*, BBC MONITORING INT'L REP., Mar. 4, 2005 (describing how a socialist harmonious society should demonstrate "democracy, rule of law, fairness, justice, honesty, friendliness, stability, orderliness, and filled with vigour and vitality, in which humans and nature get along in harmony").

<sup>4</sup> See, e.g., Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77 (2004); see also Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005); Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319 (2004); M. Ulric Killion, *Post-WTO China and Independent Judicial Review*, 26 HOUS. J. INT'L L. 507 (2004); M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUD. L. REV. 43 (2005).

<sup>5</sup> In this article, any reference to China's judiciary means only the country's court system unless stated otherwise. In China, "judiciary" or "judicial organs" (司法机关, *sifa jiguan*) consist(s) of courts, procuratorates, public security organs, and judicial administrative organs. For an explanation of this nomenclature, see 当代司法体制研究 [RESEARCH ON CONTEMPORARY JUDICIAL SYSTEM] 12-14 (郭成伟 & 宋英辉编 [Guo Chengwei & Song Yinghui] eds., 2002).

<sup>6</sup> 最高人民法院, 人民法院五年改革纲要 [Supreme Peoples Court, *The People's Courts' Five-Year Reform Plan*] (Oct. 20, 1999).

与效率, *gongzheng yu xiaolu*), “administering justice for the people” (司法为民, *sifa weimin*), and “fair judicature, serving the people wholeheartedly” (公正司法, 一心为民, *gongzheng sifa, yixin weimin*).<sup>7</sup>

In 2003, SPC President Xiao Yang claimed that most of the tasks laid out in the Court’s reform plan had been completed. The SPC particularly commended Shanghai for its “judicial work, court reform, and contingent building [that has] been outstanding.”<sup>8</sup> Such achievement has helped this pioneering city acquire the title of “the most competitive city in mainland China.”<sup>9</sup> Looking beyond labels and formal recognition, however, to what extent has the objective of fairness *really* been achieved in Shanghai?

Judicial fairness in a highly opaque legal system like China’s cannot be readily measured. But administrative cases—lawsuits brought by private parties against government agencies on the grounds that those agencies’ decisions have infringed on the parties’ legal rights or interests—shed useful light on the topic. Gu Nianzu, a former president of the Shanghai Higher Level People’s Court (“Shanghai High Court”), the highest court in the city, put it this way: “Whether or not the work of a

<sup>7</sup> See, e.g., 最高人民法院工作报告 [Supreme People’s Court Work Reports], 2003-05 [hereinafter Supreme People’s Court Report(s)], 2003 report available at [http://www.legaldaily.com.cn/gb/misc/2003-03/23/content\\_20224.htm](http://www.legaldaily.com.cn/gb/misc/2003-03/23/content_20224.htm); 2004 report available at <http://news.sina.com.cn/c/2004-03-19/16262091780s.shtml>; 2005 report available at [http://www.legaldaily.com.cn/bm/2005-03/18/content\\_197161.htm](http://www.legaldaily.com.cn/bm/2005-03/18/content_197161.htm); see also 孙晓光 & 阎永纬, 人民法院司法改革主要任务确定 [Sun Xiaoguang & Yan Yongwei, *The Main Tasks to Reform People’s Courts Determined*], 法制日报 [LEGAL DAILY], July 19, 2005, available at [http://www.legaldaily.com.cn/bm/2005-07/19/content\\_169453.htm](http://www.legaldaily.com.cn/bm/2005-07/19/content_169453.htm).

<sup>8</sup> *China’s Supreme Court Head Calls for Further Judicial Reform*, BBC MONITORING INT’L REP., Mar. 10, 2003; see also *People’s Courts Completed Most Reform Tasks – China’s Chief Justice*, BBC MONITORING INT’L REP., Mar. 12, 2003 (explaining that “contingent building” refers to the effort to build a team of professionally proficient judges).

<sup>9</sup> See 黄抗生, 我国城市综合竞争力排名 香港上海深圳位居前三 [Huang Kangsheng, *The Ranking of Our Country’s City Comprehensive Competitiveness, Hong Kong, Shanghai, Shenzhen Are the Top 3*], 中国法院网 [CHINESE CTS. NET], Apr. 16, 2003, available at <http://www.chinacourt.org>. According to this comparative study of the competitiveness of Chinese cities conducted in 2003 by China’s leading research centers led by the Chinese Academy of Social Sciences, Shanghai was ranked, overall, the most competitive city in mainland China. A city’s competitiveness was based on twelve indexes including the “government administration” competitive index (which covered the government’s planning, financial, and law enforcement abilities) and “system” competitive index (which examined, among other systems, the city’s legal system). Shanghai was ranked fourth in the “system” competitive index and the first in the “government administration” competitive index. New reports were issued in late 2003 and early 2005. Shanghai remains the most competitive city in mainland China. See 李东波 & 卢燕娥, 香港仍是中国最具竞争力的城市 [Li Dongbo & Lu Yane, *Hong Kong Remains China’s Most Competitive City*], 中国法院网 [CHINESE CTS. NET], Dec. 31, 2003, available at <http://www.chinacourt.org>; see also 中国城市综合竞争力排定 50 个城市分项指标排名 [Overall Competitiveness of Chinese Cities, Fifty Chinese Cities Ranked on Different Indicators], 中国法院网 [CHINESE CTS. NET], May 10, 2004, available at <http://www.chinacourt.org>.

court is fair hinges on administrative litigation.”<sup>10</sup> Similarly, Yu Zhengsheng, a member of the CCP’s Central Politburo and Secretary of the Hubei Provincial Party Committee, pointed out that administrative litigation is a yardstick for assessing the condition of the legal environment.<sup>11</sup>

China enacted the Administrative Litigation Law of 1989 to formally introduce administrative litigation into its legal system.<sup>12</sup> Despite some improvements, this type of litigation is still hampered by interference from CCP and government officials, inter-court and intra-court influence, and judicial corruption.<sup>13</sup> This article seeks to analyze whether fairness has genuinely been achieved in Shanghai and what this means to China as a whole. This analysis is based not only on extensive literary research but also on a survey of Shanghai residents and interviews conducted in the United States and China, predominantly in Shanghai.<sup>14</sup> This study seeks to answer three questions: Is the magnitude of interference, intra-court and inter-court influence, and judicial corruption lower in Shanghai than in other parts of China? If so, what measures has Shanghai taken to accomplish this? What lessons about judicial reform in China can be garnered from Shanghai’s experiences?

## I. REDUCING INTERFERENCE IN SHANGHAI COURTS

Interference with the judiciary by the CCP and administrative agencies poses a major obstacle for China’s administrative litigation. This issue is reflected in Chinese courts’ small administrative caseload. On average, administrative cases account for only 1.4% of all first-

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<sup>10</sup> 柳福华, 上海话题 [Liu Fuhua, *Topics About Shanghai*], 人民司法 [PEOPLE’S JUST.] No.10 (1995), reprinted in 中国法院网 [CHINESE CTS. NET], Oct. 22, 2002, available at <http://www.chinacourt.org>.

<sup>11</sup> See 肖黎明, 湖北省委承诺不干预司法机关独立办案 [Xiao Liming, *Hubei Provincial Party Committee Pledged Not to Interfere with the Independent Adjudication of Judicial Organs*], 法制日报 [LEGAL DAILY], Apr. 15, 2003, available at [http://www.legaldaily.com.cn/gb/misc/2003-04/15/content\\_23755.htm](http://www.legaldaily.com.cn/gb/misc/2003-04/15/content_23755.htm).

<sup>12</sup> 中华人民共和国行政诉讼法 [Administrative Litigation Law] (promulgated by the Nat’l People’s Cong., Apr. 4, 1989, effective Oct. 1, 1990) (P.R.C.), available at <http://www.molss.gov.cn/correlate/xzssF.htm>.

<sup>13</sup> See generally Hung, *supra* note 4 (discussing these problems in detail).

<sup>14</sup> Interviews with fifty three Chinese officials, judges, professors, lawyers, and law students in Beijing, P.R.C., Shanghai, P.R.C., Boston, Mass., and Washington, D.C. (Mar. 14-Dec. 12, 2003, Nov. 1-10, 2004, and July 4-6, 2005) (list of interviewees on file with author, includes specific interviews cited throughout article; where name of interviewee is not provided, interview was conducted on the condition of anonymity); see also Survey of approximately 800 Randomly Selected Shanghai Residents (2004) [hereinafter Survey] (conducted by Horizon Research Consultancy Group with advice from the Carnegie Endowment for International Peace, on file with Carnegie) (examining these residents’ legal knowledge and legal experiences).

instance cases accepted by courts in China.<sup>15</sup> Many government officials and Party members, especially those at lower ranks, pressure judges to reject administrative cases filed by aggrieved parties.

In comparison with China as a whole, Shanghai has consistently had a smaller administrative caseload. On average, administrative cases accepted by courts in Shanghai account for only 0.9% of all of the city's first-instance cases.<sup>16</sup> Does this suggest that interference is more serious in Shanghai?

This question cannot be answered without analyzing the severity of the “three nots” (三不, *san bu*) problem in Shanghai. “Three nots” is an expression widely used in China to describe the phenomenon that many aggrieved parties do not take legal action for at least one of three reasons: (1) they dare not sue (不敢告, *bu gangao*) because of their fear of retaliation from the government, (2) they are not willing to sue (不愿告, *bu yuangao*) because of their concerns over, among other things, the cost of litigation, or (3) they do not know how to sue (不懂告, *bu donggao*) because of their inadequate legal knowledge and weak initiative to seek professional legal advice. In China, the “three nots” problem is serious—it is the second most significant cause (after interference) of China's small administrative caseload.<sup>17</sup> Is Shanghai's smaller administrative caseload simply a result of the city's more serious “three nots” problem, or is it a result of more interference?

Research shows that the “three nots” problem probably has less impact on Shanghainese<sup>18</sup> than on individuals in the rest of China because Shanghainese are likely to fear the government less, be more willing and able to bear the costs of litigation, and be either more knowledgeable about legal procedure or more ready to seek legal advice.

#### A. *Less Fear*<sup>19</sup>

Individuals in Shanghai likely have less fear of suing government officials because officials of highly mobile and populous societies such as Shanghai have difficulty retaliating against particular individuals. If

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<sup>15</sup> See generally 中国法律年鉴 [CHINA LAW YEARBOOKS] 1991-2004 [hereinafter CHINA LAW YEARBOOK(S)]. This calculation is an average based on data found in the following volumes: 1991, at 933; 1992, at 854; 1993, at 935; 1994, at 1027; 1995, at 1063; 1996, at 957; 1997, at 1055; 1998, at 1238; 1999, at 1021; 2000, at 1209; 2001, at 1256; 2002, at 1238; 2003, at 1319; 2004, at 1054.

<sup>16</sup> See 上海市高级人民法院工作报告 [Shanghai Higher Level People's Court Work Reports] 1999-2001, 2003-2005 [hereinafter Shanghai High Court Report(s)].

<sup>17</sup> See Hung, *supra* note 4, at 85-90.

<sup>18</sup> In this article, this term is used loosely to refer to residents of Shanghai.

<sup>19</sup> See generally Hung, *supra* note 4, at 85-87.

individuals such as peasants living in a small community offend local officials, the individuals cannot simply give up their land to escape from local officials' control.<sup>20</sup>

For example, when asked what they would do if the police illegally imposed a fine of ¥500 (US\$62.50) on them for violating traffic regulations, 145 of 362 (40%) Shanghai residents said that they would sue the police. The second most chosen means to settle the dispute (19.11%) was mediation.<sup>21</sup> Individuals in China as a whole generally exhibit intense fear of the police; consequently, these numbers would be unlikely in other parts of China.<sup>22</sup>

The above distinction between individuals in Shanghai and those in remaining parts of China is not apparent if they are owners of private enterprises. These owners show similar reluctance to bringing lawsuits against administrative agencies. The operation of private enterprises, regardless of their locations, is subject to close control of business-related agencies such as local administrations of industry and commerce ("AIC"). Possessing enormous discretionary power, these agencies could easily retaliate, for example, by rejecting targeted enterprises' applications for administrative approvals.<sup>23</sup> Entrepreneurs' fear of suing government agencies is reflected in both national and Shanghai statistics. AIC administrative cases, for example, account for only approximately 2% to 3% of all first-instance administrative cases in Shanghai and in China as a whole.<sup>24</sup> Such a low percentage is not consistent with the growing importance of AIC departments in China, especially in Shanghai.

Survey results are also illustrative. Residents in Shanghai were asked what they would do if they owned profitable restaurants and government agencies unreasonably rejected their applications for a

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<sup>20</sup> Interviews with fifty Chinese officials, judges, professors, and lawyers in Beijing, P.R.C., Shanghai, P.R.C., Boston, Mass., and Washington D.C. (Mar. 14-Dec. 12, 2003 and Nov. 1-10, 2004) [hereinafter Fifty Interviews] (list of interviewees on file with author, includes specific interviews cited throughout article).

<sup>21</sup> See Survey, *supra* note 14.

<sup>22</sup> Interview with Jiang Ming'an, Professor, Peking University, in Beijing, P.R.C. (Mar. 18, 2003 and Nov. 3, 2004); Interview with Qu Xuewu, Professor, China Academy of Social Sciences, in Beijing, P.R.C. (Nov. 2, 2004) (stating how the Chinese government has been discussing possible reforms of the "Re-education Through Labor" system, but that the Ministry of Public Security has been resistant to fundamental changes); see also Veron Mei-Ying Hung, *Improving Human Rights in China: Should Re-education Through Labor Be Abolished?*, 41 COLUM. J. TRANSNAT'L L. 303, 319-21 (2003) (discussing in detail individuals' fear of suing public security organs and the implications for China's system of re-education through labor).

<sup>23</sup> Fifty Interviews, *supra* note 20.

<sup>24</sup> See CHINA LAW YEARBOOKS 1994-2004, *supra* note 15. This figure is a calculation of the average based on data from the following volumes: 1994, at 1029; 1995, at 1065; 1996, at 959; 1997, at 1057; 1998, at 1240; 1999, 1023; 2000, at 1211; 2001, at 1258; 2002, at 1240; 2003, at 1321; 2004, at 1055. Interview with Official 3, Legal Affairs Office, Shanghai Municipal Industry and Commerce Bureau, in Shanghai, P.R.C. (Apr. 10, 2003).

license to run another restaurant. About 46% of 488 respondents opted for the choice of “petition to the local government” for help. Only 185 (27%) said that they would sue to confront those agencies directly.<sup>25</sup>

A caveat to the analysis in the preceding paragraphs is that both individuals and private business owners in Shanghai are, like their counterparts in the rest of China, quite ready to sue administrative agencies if they feel they are immune to retaliation by these agencies because of, for example, their good *guanxi* (关系, connections) with government agencies that rank above the defendant agency in China’s political hierarchy. They are also ready to bring lawsuits if their interests at stake—physical interests such as health or economic interests such as real property—outweigh their fears. Private parties do not hesitate to sue government agencies for allowing facilities that emit life-threatening pollutants to be built near them. Similarly, individuals or entrepreneurs who are unfairly evicted from their homes or places of business have little fear of petitioning to local or central governments for help or of suing the agency responsible for the eviction.<sup>26</sup>

Chinese authorities have openly acknowledged the growing importance of eviction-related administrative cases.<sup>27</sup> Eviction disputes seem to be even more common in Shanghai, which is undergoing rapid urbanization and needs to build numerous facilities to host the World Expo in 2010.<sup>28</sup> Official sources reported that half of the households involved in the city’s 2000 eviction disputes in the past decade sued the government; the rest mostly resorted to lodging complaints with local leaders.<sup>29</sup> These officially acknowledged 1000 eviction-related administrative cases account for almost 13% of the 8000-odd administrative cases accepted by courts in Shanghai during this period.<sup>30</sup>

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<sup>25</sup> See Survey, *supra* note 14.

<sup>26</sup> See Hung, *supra* note 4, at 86-87; 王剑兵等, 行政诉讼面临的问题及对策 [Wang Jianbing et al., *Problems and Solutions of Administrative Litigation*], 中国法院网 [CHINESE CTS. NET], Nov. 26, 2004, available at <http://www.chinacourt.org>; 余东明, 温州 282 名农民状告浙江发改委 [Yu Dongming, *282 Peasants in Wenzhou Sue Zhejiang’s Commission on Development and Reform*], 法制日报 [LEGAL DAILY], June 13, 2005, available at [http://www.legaldaily.com.cn/bm/2005-06/13/content\\_153980.htm](http://www.legaldaily.com.cn/bm/2005-06/13/content_153980.htm).

<sup>27</sup> See, e.g., Supreme People’s Court Reports, 2004-2005, *supra* note 7. Interview with Ying Songnian, Professor, State College on Administration, Beijing, P.R.C., in Beijing, P.R.C. (Nov. 1, 2004).

<sup>28</sup> See 张明, 沪世博会土地动迁启动 市长令妥善安置动迁民众 [Zhang Ming, *Shanghai’s Relocations for Sparing Space to Organize the World Expo Start, Mayor Orders to Settle Relocated Residents Properly*], 中国法院网 [CHINESE CTS. NET], Apr. 29, 2004, available at <http://www.chinacourt.org>.

<sup>29</sup> See *Shanghai Government Says Zhou Zhengyi “Still Under Investigation,”* AFX-ASIA, Aug. 8, 2003.

<sup>30</sup> See CHINA LAW YEARBOOKS 1994-2001, *supra* note 15. This calculation is an average based on data found in the following volumes: 1994, at 1029; 1995, at 1065; 1996, at 959; 1997, at 1057;

Such cases account for only 6% of all first-instance administrative cases handled by courts in China in 2004.<sup>31</sup>

Experts interviewed confirmed the significance of administrative eviction cases in Shanghai.<sup>32</sup> Some of these experts suggested that the 20% to 30% annual increase in the number of administrative cases in Shanghai in recent years is primarily due to the rapid growth of eviction cases.<sup>33</sup>

### B. *Less Unwillingness to Bring Lawsuits*<sup>34</sup>

Citizens in China are often unwilling to bring lawsuits, including administrative lawsuits, because of their concern over, among other things, litigation costs. Residents in Shanghai are probably less burdened by such concerns.

At first glance, one may attribute this to Shanghai's better legal aid service. The city's legal aid service has received blessings from both national and municipal governments. In 2001, of the ¥47 million (about US\$6 million) appropriated by the national government to the country's legal aid system, half was spent on coastal regions such as Shanghai and Guangdong province.<sup>35</sup> In addition, Shanghai's municipal government appropriated ¥10 million (US\$1.25 million) to twenty legal aid centers in the city for improving their offices.<sup>36</sup> This stands in stark contrast with

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1998, at 1240; 1999, at 1023; 2000, at 1211; 2001, at 1258; 2002, at 1240; 2003, at 1321; 2004, at 1055). See also Shanghai High Court Reports 1999-2001, 2003, *supra* note 16.

<sup>31</sup> See Supreme People's Court Report, 2005, *supra* note 7.

<sup>32</sup> Interviews with thirty Chinese officials, judges, professors, and lawyers in Shanghai, P.R.C. (Mar. 28-Apr. 11, 2003, Nov. 8-10, 2004) [hereinafter Thirty Interviews] (list of interviewees on file with author, includes specific interviews cited throughout article).

<sup>33</sup> Interview with Shen Guoming, Vice President, Shanghai Academy of Social Sciences, and Director, Legal Affairs Commission of the Shanghai Municipal People's Congress Standing Committee, in Shanghai, P.R.C. (Apr. 10, 2003); Interview with You Wei, Professor, East China University of Politics and Law, Member, Shanghai Municipal Political and Consultative Conference, and Former Vice-President, Hongkou Basic Court, in Shanghai, P.R.C. (Apr. 9, 2003); Interview with Official 6, Legal Affairs Office, Shanghai Municipal Government, in Shanghai, P.R.C. (Apr. 11, 2003); Interview with Judge 5, Administrative Division, Shanghai No. 1 Intermediate Court, in Shanghai, P.R.C. (Apr. 10, 2003); Interview with Judge 6, Research Office, Shanghai High Court, in Shanghai, P.R.C. (Apr. 10, 2003); Interview with Judge 7, Administrative Division, Shanghai No. 2 Intermediate Court, in Shanghai, P.R.C. (Apr. 10, 2003); Interview with Judge 8, Research Office, Shanghai No. 2 Intermediate Court, in Shanghai, P.R.C. (Apr. 10, 2003).

<sup>34</sup> See generally Hung, *supra* note 4, at 87-88.

<sup>35</sup> See 李勇 & 万学忠, 让更多的困难群众享受“法律援助” [Li Yong & Wan Xuezhong, *Let More Underprivileged Groups Enjoy “Legal Aid”*], 法制日报 [LEGAL DAILY], Mar. 14, 2003, available at [http://www.legaldaily.com.cn/gb/hy/2003-03/14/content\\_18574.htm](http://www.legaldaily.com.cn/gb/hy/2003-03/14/content_18574.htm).

<sup>36</sup> Interview with Shen Wei, Director, Shanghai Municipal Legal Aid Center, in Shanghai, P.R.C. (Apr. 3, 2003).



China as a whole, where 23% of county-level localities are still short of funds for building legal aid centers.<sup>37</sup>

However, a deeper investigation indicates that the willingness of the Shanghainese to bring administrative lawsuits is probably unrelated to the city's better legal aid service. In Shanghai, legal aid in administrative litigation is limited. Of the 2645 legal aid cases handled in Shanghai in 2001, only ten (0.37%) were administrative cases. In 2002, of the 2903 legal aid cases, only nine (0.31%) were administrative.<sup>38</sup> Such a low percentage is not simply a reflection of the low percentage of administrative cases in the pool of all first-instance accepted cases in Shanghai because the latter percentage—about 1% in both 2001 and 2002—is actually higher.<sup>39</sup>

The director of the Shanghai Municipal Legal Aid Center said he noticed this trend and planned to study this issue.<sup>40</sup> A well-known lawyer in Shanghai who specializes in administrative litigation offered this insight: "It's about citizens suing officials; why does the government help its citizens sue itself?"<sup>41</sup> A poor woman who sued a local government in Shanghai for unlawful eviction was not granted legal aid because, she was told, her case was "too sensitive."<sup>42</sup>

The greater willingness of the Shanghainese to bring administrative lawsuits is likely linked to their relative affluence. The average annual income in Shanghai—¥49,180 (about US\$6150)—is the highest in the country.<sup>43</sup> For an administrative case that does not involve property, the court fee is only ¥100 (US\$12.50). This expense, together with lawyers' fees that typically range from ¥3000 to ¥5000 (US\$375 –

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<sup>37</sup> See 郑发, 法律援助 – 确保社会实现公平与正义 [Zheng Fa, *Legal Aid – To Ensure Society to Realize Fairness and Justice*], 法制日报 [LEGAL DAILY], Aug. 12, 2003, available at [http://www.legalinfo.gov.cn/fzxw/2003-08/12/content\\_42494.htm](http://www.legalinfo.gov.cn/fzxw/2003-08/12/content_42494.htm).

<sup>38</sup> Interview with Shen Wei, *supra* note 36.

<sup>39</sup> See Shanghai High Court Reports 2001 & 2003, *supra* note 16.

<sup>40</sup> Interview with Shen Wei, *supra* note 36.

<sup>41</sup> Interview with Zou Jialai, Lawyer and Director, Administrative Litigation Committee, Shanghai Lawyers' Association, in Shanghai, P.R.C. (Apr. 2, 2003).

<sup>42</sup> See 郭国汀 & 佟文忠, 马亚莲诉上海市劳动教养委员会不服劳动教养决定行政争议案代理词 [Guo Guoding & Tong Wenzhong, Statement of Claim Prepared By Attorneys of Ms. Ma Yalian Who Sued the Shanghai Municipal Re-education Through Labor Committee], Aug. 31, 2004, available at <http://www.peacehall.com/news/gb/china/2004/09/200409101310.shtml>.

<sup>43</sup> See 上海年薪首超深圳居第一人均近五万元 [Shanghai's Annual Income Exceeds Shenzhen's for the First Time, Average Annual Income is Close to 50,000 Yuan], 中国法院网 [CHINESE CTS. NET], Mar. 20, 2003 [hereinafter *Shanghai's Annual Income*], available at <http://www.chinacourt.org>; 许凯等, 上海人薪水有多高 不同阶层“收入歧视”明显 [Xu Kai et al., *How High are Shanghainese Salaries, Different Classes' "Income Discrimination" is Obvious*], 外滩画报 [WAI TAN MAG.], Aug. 18, 2004, available at <http://finance.sina.com.cn/careerlife/20040818/0809956653.shtml>.

US\$625) per case, is an amount that a Shanghainese with an average income can afford.<sup>44</sup>

### C. *More Knowledge of the Judicial Process*<sup>45</sup>

Many citizens in China still do not know how to bring an administrative lawsuit. Shanghainese, in general, do not seem to have this problem, as illustrated by the fact that the city handles many new types of administrative cases.<sup>46</sup> Although prior to the turn of the millennium most Chinese citizens were largely unaware of their legal right to sue agencies for “failing to act”—that is, failing to carry out the agencies’ legal obligations (不履行法定职责, *bu lüxing fadìng zhìze*)—this type of case increased dramatically in Shanghai, from twenty three cases in 1998 to 163 cases in 2000.<sup>47</sup>

Interviewees attributed Shanghai residents’ greater knowledge of bringing lawsuits to the city’s efforts to promote legal education among the general public<sup>48</sup> and the residents’ stronger initiative to seek legal advice.<sup>49</sup> In 2001, for example, approximately 65% of all administrative cases resolved by courts in Shanghai were cases in which the aggrieved parties were represented by lawyers.<sup>50</sup> For all of China, the percentage was only 35%.<sup>51</sup>

The statistics presented in the preceding paragraph also seem to suggest that while Shanghai lawyers, like lawyers elsewhere in the country, may be reluctant to handle administrative cases,<sup>52</sup> they have less

<sup>44</sup> Interview with Zou Jialai, *supra* note 41; Interview with Zhu Mang, Professor, East China University of Politics and Law, in Shanghai, P.R.C. (Apr. 8, 2003).

<sup>45</sup> See generally Hung, *supra* note 4, at 88-90.

<sup>46</sup> See 用好法律武器“民告官”不再是难题 [Use of Legal Weapons Well, “Citizens Suing Officials” Is No Longer a Problem], 东方网 [E. NET], Apr. 3, 2001 [hereinafter *Use of Legal Weapons Well*].

<sup>47</sup> See *id.* Interviews with Judges 5-8, *supra* note 33.

<sup>48</sup> Interview with Fu Hao, Researcher, Research Center of the Shanghai Stock Exchange, in Boston, Mass. (Mar. 14, 2003); Interview with Zou Jialai, *supra* note 41; Interview with Official 3, *supra* note 24; Interview with Official 6, *supra* note 33.

<sup>49</sup> Interview with Professor 2, Department of Law, Shanghai University, in Shanghai, P.R.C. (Apr. 2, 2003); Interview with Professor 3, Department of Law, Shanghai University, in Shanghai, P.R.C. (Apr. 2, 2003); Interview with Judge 2, Research Office, Shandong High Court, in Beijing, P.R.C. (Mar. 19, 2003); Interview with Judge 3, Administrative Division, Shandong High Court, in Beijing, P.R.C. (Mar. 19, 2003).

<sup>50</sup> See 陈忠仪 & 倪慧群, 拓展行政审判领域 [Chen Zhongyi & Ni Huiqun, *Expand the Scope of Administrative Litigation*], 中国法院网 [CHINESE CTS. NET], Apr. 19, 2002, available at <http://www.chinacourt.org>; see also 2002 上海年鉴 [Shanghai Almanac 2002], at 416.

<sup>51</sup> See CHINA LAW YEARBOOK 2002, *supra* note 15, at 1238, 1240, and 1253. This figure is based on data recorded on these pages.

<sup>52</sup> Especially those cases that the government considers sensitive, as lawyers are generally apprehensive about standing up to the government. Interview with Zhu Mang, *supra* note 44; Interview with Zou Jialai, *supra* note 41

fear of doing so.<sup>53</sup> This does not mean, however, that lawyers in Shanghai have no fear at all of handling administrative cases.

The plights of Zheng Enchong and Zhu Jiuhu may have sent a warning to these lawyers. Zheng, a prominent lawyer in Shanghai who had handled many eviction cases, was sentenced to three years' imprisonment for disclosing state secrets. Zheng is believed to have offended powerful local Party officials when, in the course of representing 2000 residents in a suit against Shanghai's land administration authorities, he alleged that local Party officials had colluded with a wealthy property developer to evict those residents. The developer's subsequent conviction on fraud and stock manipulation has not changed Zheng's fate.<sup>54</sup> Zhu, a prominent lawyer in Beijing, was recently detained by the police in Shanxi province on the grounds that he "gathered the mass to disrupt social order" and participated in an "unlawful assembly" in the course of handling an administrative case. Zhu's case has aroused concern among lawyers in the nation.<sup>55</sup>

#### D. Main Cause

The above analysis shows that the "three nots" problem is probably less serious in Shanghai than in other parts of China. Hence, the "three nots" issue does not explain the city's unusually small administrative caseload.

One might then conclude that Shanghai courts are indeed suffering from more interference, but this conclusion is not supported by a comparison of the withdrawal rates of administrative cases in Shanghai and China as a whole. In China, a significant portion of accepted administrative cases are subsequently withdrawn from courts because of interference. Many government officials and Party members, especially

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<sup>53</sup> Interview with Chen Ruihua, Professor, Peking University, in Beijing, P.R.C. (Mar. 23, 2003); Interview with Zhu Mang, *supra* note 44; Interview with Professor 1, Department of Law, Fudan University, in Shanghai, P.R.C. (Mar. 28, 2003); Interview with Lawyer 1 in Beijing, P.R.C. (Mar. 21, 2003); see Hung, *supra* note 4, at 88-89; see also 朱宏俊, 南京一律师开通我国第一家民告官网站 [Zhu Hongjun, *A Lawyer in Nanjing Launched Our Country's First "Citizens Suing Officials" Website*], 法制日报 [LEGAL DAILY], Jan. 12, 2005, available at [http://www.legaldaily.com.cn/bm/2005-01/12/content\\_177248.htm](http://www.legaldaily.com.cn/bm/2005-01/12/content_177248.htm).

<sup>54</sup> See 刘建, 为境外非法提供国家秘密郑恩宠被判三年徒刑 [Liu Jian, *Zheng Enchong is Sentenced to Three Years' Imprisonment for Illegally Providing State Secrets to Overseas Institutions*], 法制日报 [LEGAL DAILY], Dec. 19, 2003, available at [http://www.legaldaily.com.cn/bm/2003-12/19/content\\_65874.htm](http://www.legaldaily.com.cn/bm/2003-12/19/content_65874.htm); Raymond Wang, *Court Orders Auction of Shanghai Land Assets*, 2005 WLNR 4331053, THE STANDARD, Mar. 21, 2005.

<sup>55</sup> See 邢晖, 会见朱久虎律师竟然如此难 [Xing Hui, *Meeting Lawyer Zhu Jiuhu Is Unexpectedly Difficult*], 法制日报 [LEGAL DAILY], July 14, 2005, available at [http://www.legaldaily.com.cn/bm/2005-07/14/content\\_167423.htm](http://www.legaldaily.com.cn/bm/2005-07/14/content_167423.htm).

those at lower ranks, pressure aggrieved parties, either directly or indirectly through judges, to withdraw their cases.<sup>56</sup> If there is more interference in Shanghai, one would expect to see a higher withdrawal rate. But Shanghai's average withdrawal rate, 34%, is lower than that of the national average of 42%.<sup>57</sup>

Shanghai's low withdrawal rate is mainly due to a comparatively smaller amount of interference in the Shanghai judiciary. That is, Party members and administrative officials in Shanghai are less likely to pressure aggrieved parties to withdraw an accepted administrative case from the courts.<sup>58</sup>

The city's low withdrawal rate is also linked to fewer errors made by aggrieved parties and administrative agencies. Residents in Shanghai, who generally have better legal knowledge, are less likely to bring a groundless suit and subsequently have to withdraw it upon discovering their error. Likewise, administrative agencies in Shanghai, which generally have better knowledge of legal principles, are less likely to take a groundless government action and then find it necessary, upon discovering their mistake, to amend their actions in order to make the aggrieved party feel satisfied and withdraw the case.<sup>59</sup>

The above analysis suggests that the main cause of Shanghai's low administrative caseload is neither a situation of greater interference nor the severity of the "three nots" problem in the city. The main cause is that citizens simply lodge fewer complaints against government agencies in the first place. In fact, approximately 52% of 691 surveyed Shanghainese agreed or strongly agreed that, compared with other places in China, judges in Shanghai suffer the least interference. Only 13% disagreed with this view.<sup>60</sup> This favorable situation in Shanghai, in turn, is due largely to Shanghai officials' greater respect for law.<sup>61</sup>

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<sup>56</sup> See Hung, *supra* note 4, at 90.

<sup>57</sup> See CHINA LAW YEARBOOKS 1991-2004, *supra* note 15. This figure is a calculation of the average based on data from the following volumes: 1991, at 935; 1992, at 856; 1993, at 937; 1994, at 1029; 1995, at 1065; 1996, at 959; 1997, at 1057; 1998, at 1240; 1999, at 1023; 2000, at 1211; 2001, at 1258; 2002, at 1240; 2003, at 1321; and 2004, at 1055. See also Shanghai High Court Reports 1999-2001, 2003-2005, *supra* note 16.

<sup>58</sup> Fifty Interviews, *supra* note 20.

<sup>59</sup> Interview with Jiang Ming'an, *supra* note 22; Interview with Ma Huaide, Professor, China University of Politics and Law, in Beijing, P.R.C. (Mar. 19, 2003); Interview with Professor 1, *supra* note 53; Interview with Professor 2, *supra* note 49; Interview with Professor 3, *supra* note 49; Interview with Professor 4, Department of Law, East China Normal University, in Shanghai, P.R.C. (Apr. 4, 2003); Interview with Judge 2, *supra* note 49; Interview with Judge 3, *supra* note 49.

<sup>60</sup> See Survey, *supra* note 14.

<sup>61</sup> Fifty Interviews, *supra* note 20; see also 郑文, 上海: 领导干部学法用法取得明显成效 [Zheng Wen, Shanghai: Leading Cadres' Legal Education and Application of Law Have Yielded Obvious Results], 法制日报 [LEGAL DAILY], Dec. 7, 2004, available at [http://www.legaldaily.com.cn/bm/2004-12/07/content\\_165025.htm](http://www.legaldaily.com.cn/bm/2004-12/07/content_165025.htm).

## 1. Reasons for Reduced Interference

Shanghai's judiciary has experienced less interference mainly because Shanghai's Party members and government officials have better respect for law and because *guanxi* and *difang baohuzhuyi* (地方保护主义, local protectionism) are less prevalent in the city.

### a. Party Members' and Government Officials' Greater Respect for Law

The “losing rate” of defendant agencies in administrative litigation is often used to show the extent to which law is respected by officials—and by extension, Party members, since most officials, especially decision-makers, are members of the CCP.<sup>62</sup> The term “losing rate” is not legally defined but usually refers to the rate at which (1) plaintiffs withdraw their administrative cases from courts after defendant agencies agree to alter the challenged administrative acts, (2) courts decide to revoke or alter the challenged administrative acts, and (3) courts order defendant agencies to act—that is, to implement their legal obligations.<sup>63</sup>

The average annual losing rate of defendant agencies in Shanghai was approximately 20%, compared with approximately 35% in China as a whole.<sup>64</sup> Interviewed experts attributed Shanghai agencies' lower losing rate to Shanghai officials' and Party members' greater respect for law.<sup>65</sup>

In particular, surveys conducted by the central government show that citizens in China consider Shanghai's police, who account for the majority of administrative officials in the city,<sup>66</sup> to be the best when

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<sup>62</sup> See, e.g., *Chinese Chief Justice Notes “Remarkable Progress” in Human Rights*, BBC MONITORING INT'L REP., Feb. 22, 2005; 张国强, 辽宁“民告官”案件数居全国前列 [Zhang Guoqiang, *The Number of “Citizens Suing Officials” Cases in Liaoning Is One of the Greatest in the Country*], 法制日报 [LEGAL DAILY], Apr. 3, 2004, available at [http://www.legaldaily.com.cn/bm/2004-04/03/content\\_88562.htm](http://www.legaldaily.com.cn/bm/2004-04/03/content_88562.htm); Wang et al., *supra* note 26.

<sup>63</sup> See *Use of Legal Weapons Well*, *supra* note 46. Because the term “losing rate” is not legally defined, officials may manipulate data to present a more favorable outlook of their performance in administrative litigation than is actually the case.

<sup>64</sup> See *id.*; see also CHINA LAW YEARBOOKS 1994-2004, *supra* note 15. This figure is a calculation of the average based on data from the following volumes: 1994, at 1029; 1995, at 1065; 1996, at 959; 1997, at 1057; 1998, at 1240; and 1999, at 1023; 2000, at 1211; 2001, at 1258; 2002, at 1240; 2003, at 1321; 2004, at 1055.

<sup>65</sup> Fifty Interviews, *supra* note 20.

<sup>66</sup> See 杨光, 上海公务员淘汰涉及厅局级 [Yang Guang, *Dismissal of Shanghai's Civil Servants Encompasses Division and Bureau-Level Personnel*], 法制日报 [LEGAL DAILY], June 28, 2004, available at [http://www.legaldaily.com.cn/bm/2004-06/28/content\\_111197.htm](http://www.legaldaily.com.cn/bm/2004-06/28/content_111197.htm).

compared with the police in nine other cities of the country.<sup>67</sup> Shanghainese themselves also rated their police highly. Approximately 48% of 789 surveyed Shanghainese agreed or strongly agreed that their police force is the best in China. Only 21% of them disagreed with this view.<sup>68</sup> The police are the most powerful administrative agency in China, and their abuse of power and dereliction of duty have aroused grave concern.<sup>69</sup>

Shanghai officials' and Party members' better respect for law is a result of the city's relative success in recruiting more qualified personnel as well as providing them with training and law enforcement advice. Following the CCP policy of recruiting better educated and professionally qualified people,<sup>70</sup> political and legal institutions in the country have required applicants for most positions, especially top-level positions, to pass a law examination.<sup>71</sup> Such recruitment methods, together with Shanghai's ability to offer attractive salaries, have turned the city into a magnet for the best labor in China, a country that is in desperate need of quality labor.<sup>72</sup>

Recent recruitment statistics for the Shanghai police best illustrate the city's ability to recruit more highly qualified candidates. The annual salary of a Shanghai police officer ranges from ¥50,000 to ¥80,000 (US\$6250 – US\$10,000).<sup>73</sup> Such an attractive employment package

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<sup>67</sup> See 杨金志 & 王雷鸣, 上海构筑现代警务机制 [Yang Jinzhi & Wang Leiming, *Shanghai Is Establishing a Modern Police System*], 中国法院网 [CHINESE CTS. NET], Nov. 13, 2002, available at <http://www.chinacourt.org>; 国家统计局调查显示: 上海群众安全感居全国之首 [Survey by the State Bureau of Statistics Reveals: Shanghai Mass's Sense of Security is Highest in the Country], 新华网 [XINHUA NET], May 8, 2004, available at <http://news.rednet.com.cn/Articles/2004/05/558549.htm>.

<sup>68</sup> See Survey, *supra* note 14.

<sup>69</sup> See Hung, *supra* note 4, at 85, 129; 谢庆 & 张亦嵘, 警察权力有多大法律说了算 [Xie Qing & Zhang Yirong, *Law Decides How Great the Police Power Is*], 法制日报 [LEGAL DAILY], July 20, 2005, available at [http://202.99.23.215:8080/search/detail.jsp?dataid=102932&tableclassid=4\\_0](http://202.99.23.215:8080/search/detail.jsp?dataid=102932&tableclassid=4_0).

<sup>70</sup> See *Chinese Provincial Government, Congress Elections – Agency Round-Up*, BBC MONITORING INT'L REP., Apr. 15, 2003 (describing criteria for recruitment, including the traits of being “younger” and “more revolutionary”).

<sup>71</sup> See, e.g., 侯文学, 干部“任前考法”减少“拍脑门”决策 [Hou Wenxue, *Cadres' “Pre-Appointment Law Examination” Reduces Careless Decision-making*], 法制日报 [LEGAL DAILY], Mar. 3, 2004, available at [http://www.legaldaily.com.cn/bm/2004-03/03/content\\_79795.htm](http://www.legaldaily.com.cn/bm/2004-03/03/content_79795.htm).

<sup>72</sup> In China, of the 189 million new labor force that emerged between 1990 and 1999, only 3.5% attained a *dazhuan* (大专, junior college diploma level, which is below bachelor's level) or above level education. The picture is likely to remain quite gloomy in the near future, as 20 million of the country's 85 million illiterates are currently fifteen to fifty years old and will remain the country's main labor source in the years to come. See 殷蕾, 人才强国呼唤法律的跟进 [Yin Lei, *Strengthen a Country by Fostering Talents, Calls for Progress in Laws*], 法制日报 [LEGAL DAILY], Dec. 22, 2003, available at [http://www.legaldaily.com.cn/bm/2003-12/22/content\\_66201.htm](http://www.legaldaily.com.cn/bm/2003-12/22/content_66201.htm).

<sup>73</sup> See 刘建, 警界的新兵 – 上海公安机关实施文职雇员制度侧记 [Liu Jian, *The New Soldiers of the Police Force – A Chronicle of the Shanghai Public Safety Organs' Implementation of the New*

allowed the city's police to stop recruiting individuals with only a high school education in April 2003. Instead, they recruited 700 people with *dazhuan* (大专, junior college diploma level, which is below bachelor's level) or above, as well as 300 university degree holders.<sup>74</sup>

China has increasingly placed emphasis on improving the training of administrative officials and Party members. This goal has not been fully attained, however, especially in poorer regions where administrative bodies do not have enough resources even for routine operations.<sup>75</sup> For example, as of November 2003, only approximately 65% (about 194,000 persons) of all police officers at the county level and leaders of police stations had received legal training.<sup>76</sup> Financial problems are the main reason for inadequate training.<sup>77</sup>

By contrast, Shanghai's prosperity allows the city to allocate funds for training its government personnel. To that end, it launched a five-year plan to train all civil servants in the city and to require them to have post-training assessment.<sup>78</sup> In 2000 and 2001, the city organized thirty eight programs to train more than 4000 law enforcement officers on municipal legislation.<sup>79</sup> Incumbent civil servants in Shanghai who are incompetent are also required to go through training and assessment.<sup>80</sup> Apart from organizing training programs in collaboration with local law

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*Employment-by-Contract System*], 法制日报 [LEGAL DAILY], Apr. 6, 2004, available at [http://www.legaldaily.com.cn/bm/2004-04/06/content\\_89206.htm](http://www.legaldaily.com.cn/bm/2004-04/06/content_89206.htm).

<sup>74</sup> See 杨金志, 上海警方借助社会教育资源培养专业人才 [Yang Jinzhi, *Shanghai Police Use Society's Education Resources to Foster Professional Talents*], 中国法院网 [CHINESE CTS. NET], Mar. 8, 2003, available at <http://www.chinacourt.org>.

<sup>75</sup> See, e.g., 广东将统一公务员岗位津贴 [Guangdong Province Will Standardize Benefits for Civil Servants], 法制日报 [LEGAL DAILY], Feb. 3, 2005, available at [http://www.legaldaily.com.cn/bm/2005-02/03/content\\_185569.htm](http://www.legaldaily.com.cn/bm/2005-02/03/content_185569.htm).

<sup>76</sup> See 孙春英, 再造警察新形象 [Sun Chunying, *Create a New Image for the Police*], 法制日报 [LEGAL DAILY], Nov. 18, 2003, available at [http://www.legaldaily.com.cn/bm/2003-11/18/content\\_59688.htm](http://www.legaldaily.com.cn/bm/2003-11/18/content_59688.htm).

<sup>77</sup> For detailed discussion of problems faced by the police, see *Chinese Academics Highlight Problems Facing Police*, BBC MONITORING INT'L REP., Aug. 14, 2003. See also 公安部将为中西部公安机关配发 2800 辆警车 [The Ministry of Public Security Will Allocate 2800 Police Cars to Public Security Organs in Mid-Western Part of China], 中国法院网 [CHINESE CTS. NET], Sept. 2, 2004, available at <http://www.chinacourt.org>; 于晓雨, “办案经费”能不能由案件受益人出 [Yu Xiaoyu, *Could "Case Handling Fees" Be Paid by Beneficiaries of Cases*], 法制日报 [LEGAL DAILY], Mar. 30, 2004, available at [http://www.legaldaily.com.cn/bm/2004-03/30/content\\_86881.htm](http://www.legaldaily.com.cn/bm/2004-03/30/content_86881.htm).

<sup>78</sup> See 上海加强公务员培训 [Shanghai Strengthens Training for Civil Servants], 中国法院网 [CHINESE CTS. NET], Feb. 8, 2003, available at <http://www.chinacourt.org>.

<sup>79</sup> See CHINA LAW YEARBOOK 2001, *supra* note 15, at 847; CHINA LAW YEARBOOK 2002, *supra* note 15, at 824.

<sup>80</sup> See Yang, *supra* note 66.

schools, the city also works closely with foreign institutions to provide training inside and outside of the city.<sup>81</sup>

Enhanced respect for the law on the part of Shanghai officials and Party members also stems from the provision of law enforcement advice by legal affairs offices of administrative agencies and from law professors and judges. Advice on routine operations is often handled by a legal affairs office within each administrative agency. Staff members of these offices usually have educational and professional backgrounds relating to law.<sup>82</sup>

Shanghai courts also give advice to administrative agencies in the form of judicial suggestions (司法建议, *sifa jianyi*), explaining to them why they lost a particular administrative case or what problems the judges discovered in administrative agencies' law enforcement. For example, in 2001, 328 judicial suggestions were given to different divisions of administrative agencies.<sup>83</sup> Officials seem to be quite receptive to such advice. A police officer said, "[A]fter [we] los[e] a lawsuit, we discover a problem. [We] fix the problem and, in [the] future, we will not lose similar lawsuits."<sup>84</sup> A professor at Fudan University who served as a consultant to administrative agencies said, "Most administrative agencies in Shanghai consider judges to be their 'monitors'."<sup>85</sup> In an official review of the performance of Chinese courts, Shanghai's judicial suggestions were specifically complimented as having effectively improved the law enforcement of the city's administrative agencies.<sup>86</sup>

#### b. Less *Guanxi* and Local Protectionism

Courts in Shanghai have also experienced less interference because the problems of *guanxi* and local protectionism are less serious in the city of Shanghai than elsewhere.

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<sup>81</sup> Interview with Professor 4, *supra*, note 59.

<sup>82</sup> Interview with Official 1, Ministry of Foreign Trade and Economic Cooperation, in Boston, Mass. (Mar. 14, 2003); Interview with Official 2, Legal Affairs Office, Shanghai Municipal Public Security Bureau, in Shanghai, P.R.C. (Apr. 10, 2003); Interview with Official 3, *supra* note 24; Interview with Official 4, Legal Regulations Office, Shanghai Municipal Tax Bureau, in Shanghai, P.R.C. (Apr. 10, 2003); Interview with Official 5, Legal Regulations Office, Shanghai Municipal Housing and Land Resources Administration Bureau, in Shanghai, P.R.C. (Apr. 10, 2003); Interview with Official 6, *supra* note 33; Interview with Official 7, Ministry of Justice, in Beijing, P.R.C. (Nov. 3, 2004).

<sup>83</sup> See CHINA LAW YEARBOOK 2002, *supra* note 15, at 826.

<sup>84</sup> See Liu, *supra* note 10.

<sup>85</sup> Interview with Professor 1, *supra* note 53.

<sup>86</sup> See 周德伟, 浓墨重彩写辉煌 – 党的十五大以来人民法院审判工作综述 [Zhou Dewei, *Great Success – Comprehensive Review of People's Courts' Adjudication Work Since the Fifteenth Party Congress*], 中国法院网 [CHINESE CTS. NET], Oct. 30, 2002, available at <http://www.chinacourt.org>.



Officials and Party members in China may interfere with judges to inquire about a case that concerns a friend or a friend's friend. Cases that are influenced by such interference are dubbed *guanxi* or *renqing* (人情, personal favor) cases, and are not uncommon in China.<sup>87</sup> Such cases are, however, probably less common in Shanghai. Of more than 20,000 cases randomly examined in 1998 by the Party organization in Shanghai, only twenty six (0.14%) were reported to be *guanxi* or *renqing* cases.<sup>88</sup> This is corroborated by the general impression of interviewees.<sup>89</sup>

The lower incidence of *guanxi* cases is mainly due to the fact that Shanghainese place less emphasis on *guanxi* than do other Chinese. A scholar traced the roots of this culture to Westerners' governance in Shanghai before the establishment of Communist China. During that earlier time, residents in Shanghai were exposed to the Western culture of adhering to rules. In fact, because of the relative indifference of Shanghainese to *guanxi*, other mainland Chinese often see them as arrogant and lacking *yiqi* (义气), the sense of personal loyalty that bonds most Chinese.<sup>90</sup>

Local protectionism is also a problem in administrative litigation, meaning that local Party members or officials may request that judges make a ruling that would protect the locality's economic interests.<sup>91</sup> The magnitude of local protectionism is inversely proportional to the prosperity of a locality: the more prosperous a locality is, the less local protectionism it practices. When a locality is desperate to improve its economy, its government tries its utmost to prevent any loss of investment projects.

Shanghai's economy is doing well, as reflected by its top ranking in provincial per capita income.<sup>92</sup> Interviewed experts shared the view that local protectionism is not a serious influence in the city.<sup>93</sup> Many surveyed Shanghainese also had this impression. Approximately 44% of 743 surveyed residents in Shanghai agreed or strongly agreed that local protectionism is least serious in Shanghai in comparison with other places in China. Only 28% disagreed with this view.<sup>94</sup> Some interviewees

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<sup>87</sup> See Hung, *supra* note 4, at 94.

<sup>88</sup> See Shanghai High Court Report 1999, *supra* note 16.

<sup>89</sup> Interviews with twenty-four Chinese officials, judges, professors, and lawyers in Shanghai, P.R.C. (Mar. 28-Apr. 11, 2003) [hereinafter Twenty-Four Interviews] (list of interviewees on file with author, includes specific interviews cited throughout article).

<sup>90</sup> Dr. Gu Xin, a research fellow at the East Asia Institute in Singapore, made this observation. See also Chua Sok Peng, *Remaking the "Ugly" Shanghainese*, THE STRAITS TIMES, Feb. 3, 2003.

<sup>91</sup> See Hung, *supra* note 4, at 95.

<sup>92</sup> See *Shanghai's Annual Income*, *supra* note 43.

<sup>93</sup> Thirty Interviews, *supra* note 32.

<sup>94</sup> See Survey, *supra* note 14.

cautioned, however, that local protectionism still exists if an investment is so profitable that it would contribute significantly to the economic development of the city.<sup>95</sup>

## 2. Interference Still Exists

Notwithstanding the progress Shanghai has made, interference still exists and is most evident in “major and complex” cases such as eviction cases.<sup>96</sup> Interference in Shanghai takes forms similar to interference in the rest of China. The existence of interference in Shanghai shows two fundamental problems with the city’s court system: Judges are strongly requested, without clear guidance, to make their judgments realize both social and legal effects (实现社会与法律效果, *shixian shehui yu falu xiaoguo*), and the financial and personnel arrangements of local courts are still, regardless of certain improvements, highly controlled by local governments and Party organizations.

### a. “Major and Complex” Cases

Interference is most common at the basic court level, not only because approximately 80% of court cases are handled at this level, but also because their jurisdictions cover small communities governed by officials who generally have the least respect for law.<sup>97</sup>

At all levels of the court system, interference is particularly common in “major and complex” cases. Final decisions in these cases are made by each court’s adjudication committee, which consists of the president and vice presidents of the court as well as chief judges of the court’s various divisions—criminal, administrative, and civil divisions, for example. Adjudication committees usually make their decisions after consultation with the CCP’s political-legal committees at corresponding levels. These political-legal committees are led by senior Party members who also serve as leaders of administrative agencies, such as the police, at corresponding levels. This sort of decision-making mechanism opens a door for officials and Party members to interfere with the judicial process.<sup>98</sup>

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<sup>95</sup> Twenty-Four Interviews, *supra* note 89.

<sup>96</sup> Thirty Interviews, *supra* note 32.

<sup>97</sup> See Supreme People’s Court Report, 2005, *supra* note 7; 张镇, 基层法官难做 [Zhang Zhen, *It Is Difficult to Be a Basic Court Judge*], 法制日报 [LEGAL DAILY], Oct. 23, 2003, available at [http://www.legaldaily.com.cn/bm/2003-10/23/content\\_54958.htm](http://www.legaldaily.com.cn/bm/2003-10/23/content_54958.htm).

<sup>98</sup> See, e.g., Hung, *supra* note 4, at 99-105; 李庆芳 & 陈德刚, 合议庭制度的完善与审判方式改革 [Li Qingfang & Cheng Degang, *Improvement of the Collegial Panel System and Reform of*

The Chinese government often justifies the participation of the CCP's political-legal committees in the judicial process as an exemplification of the leadership of the CCP—a principle enshrined in the Chinese Constitution. Adhering closely to the CCP's leadership principle is praised and is considered particularly important in administrative litigation, as reflected in the following paragraph extracted from an article published on an official web site of Chinese courts:

During the implementation of administrative adjudication, courts at all levels realize that administrative litigation is a type of work that involves a lot of rule-of-law and policy issues. The handling of many cases involves the overall working situation of the Party and the state and involves social stability and economic development . . . therefore, [judges] must tightly rely on the Party committee's leadership . . . to ensure the orderly development of administrative litigation . . .<sup>99</sup>

The article specifically commends a few courts, including a court in Shanghai, for “taking the initiative to report” to Party committees to obtain support in handling administrative cases that had a relatively large impact on their localities. It concludes that experience showed that this method is effective.<sup>100</sup> As a result of the prevalence of this attitude, courts often boast in their annual reports about their efforts in “taking the initiative” to get support from the Party.<sup>101</sup>

Criticism has intensified concerning the apparent conflict between the CCP's leadership and another constitutional principle of allowing judges to independently adjudicate cases. The CCP has attempted to reconcile the conflict by reiterating that the political-legal committees do

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*Adjudication Methods*], 中国法院网 [CHINESE CTS. NET], Nov. 17, 2004, available at <http://www.chinacourt.org>.

<sup>99</sup> “民告官”案件越理越清 [“Citizens Suing Officials” Cases Are Handled More and More Clearly], 中国法院网 [CHINESE CTS. NET], Mar. 20, 2002 (emphasis added), available at <http://www.chinacourt.org>.

<sup>100</sup> *See id.*

<sup>101</sup> *See, e.g.*, Shanghai High Court Report 2000 (Part IV), *supra* note 16; 浦东新区人民法院工作报告 [Pudong People's Court Work Report] 2003 (Part III). Ironically, such consultation with the CCP – a type of interference – is often considered to be necessary to overcome interference from less powerful administrative agencies or individual officials to ensure that the latter complies with the law. In other words, the Party steps in to assist judges in fending off interference from agencies or officials. Fifty Interviews, *supra* note 20. Although this practice is understandable at a time when China is still a transitional legal system, it should not be overly encouraged. Authorities must aim to avoid the practice as long as the circumstances permit.

not decide any specific cases for judges. These committees, as alleged by the CCP, only provide “macroscopic supervision” over adjudication to ensure that judges correctly apply laws. Because laws were enacted to reflect Party policies, correct application of laws automatically means correct application of Party policies. The CCP’s leadership is thus indirectly exemplified in adjudication. In sum, judges should apply laws but *not* Party policies when they decide individual cases.<sup>102</sup> The CCP cannot lead the country by holding its policies above the law because, according to the Constitution, “all political parties . . . must abide by the Constitution and the law.”<sup>103</sup>

This explanation sounds persuasive, but what should judges do if a case covers an area where no law exists or existing law no longer reflects the most up-to-date Party policies? Li Yayun, professor of law at the Central Party School—the CCP’s leading institute for training Party cadres—explained that judges have two alternatives when they adjudicate such exceptional cases.<sup>104</sup> First, the Chinese national legislature, the National People’s Congress, should follow legislative procedures to enact, amend, or repeal relevant laws in time. The presiding judge(s) of the exceptional case can either suspend the court proceeding to wait for new legislation or report the exceptional case to the SPC to seek its instructions.

Alternatively, CCP policies can be used to guide the adjudication of that exceptional case. Because (1) all Party policies must be conducive to developing a socialist society’s productivity, conducive to strengthening a socialist country’s comprehensive state power, and conducive to improving the people’s standard of living<sup>105</sup> (the “three conduces”) and (2) these “three conduces,” according to the CCP, comply with the constitutional principle that “the Chinese people of all

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<sup>102</sup> See Li Yayun, Professor of Law, Central Party School, Remarks at the Carnegie Endowment for International Peace on the Relationship between the Chinese Communist Party’s Leadership and Judicial Independence (Oct. 29, 2003), *summarized at* <http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=650>.

<sup>103</sup> 宪法 [CONST.] art. 5 (P.R.C.); see also Shi Jiangtao, *Party Must Not Be Above the Law*, *Says Chief Justice*, S. CHINA MORNING POST, Jan. 4, 2005 (quoting from an article published in 求是 [SEEKING TRUTH]). Xiao Yang, President of the Supreme People’s Court, wrote: “The rule of law means the Party and its representatives should enter different levels of the country’s political organs according to the Constitution and laws, and to fulfill its responsibilities to lead and support the people to be masters of the country.” Xiao also wrote, “The Party should assume overall responsibility but not all-encompassing control. The Party should work within the framework of the Constitution and law, instead of going beyond them, or even putting itself above them.”

<sup>104</sup> See Li, *supra* note 102.

<sup>105</sup> 第十六中国共产党全国代表大会, 中国共产党章程, 总纲 [Sixteenth National Congress of the Communist Party of China, Constitution of the Communist Party of China, General Program] (amended and adopted Nov. 14, 2002) (stating that each task undertaken by the Party must satisfy these three criteria), *translation available at* <http://www.china.org.cn/english/features/49109.htm>.

nationalities will . . . persist in reform and opening up, steadily improve socialist institutions, [and] develop a socialist market economy,”<sup>106</sup> the CCP claims that the application of Party policies to guide the adjudication of an exceptional case does not violate the Chinese Constitution.<sup>107</sup>

Those indeterminate expressions embodied in the “three conduives” and the above-mentioned constitutional principle could easily be misused to justify the application of virtually any Party policy to guide the adjudication of exceptional cases. The problem is exacerbated by the fact that these exceptional cases are not really so exceptional in China, whose laws and rules still do not cover a great number of legal vacuums; in addition, many laws and rules quickly lag behind Party policies. For these reasons, this alternative solution should not be used.

The problem of allowing political-legal committees to participate in the judicial process is aggravated by the vague definition of the term “major and complex.” Judges are guided by some rules to determine whether a case is major and complex. Yet, those rules often include a catchall phrase to let judges categorize a case as major and complex so long as they believe that the decision of the case is likely to have great impact on society. Therefore, new types of cases and cases jointly brought by a large number of plaintiffs, such as labor or eviction disputes, are often treated as major and complex and decided by adjudication committees and, ultimately, by the CCP’s political-legal committees.

When handling cases that are perceived by leaders in local courts or local governments as sensitive, judges in Shanghai are still overshadowed by adjudication committees and political-legal committees, even though the problem may not be as serious as elsewhere in China.<sup>108</sup> Eviction cases clearly illustrate this problem. Because of rapid urbanization, eviction lawsuits against government authorities have been common in China, especially in Shanghai, but government authorities have seldom lost. Members of adjudication committees and political-legal committees are reluctant to rule against the government, fearing that such opposition would hinder urbanization and economic development. The difficulty of winning eviction cases has led frustrated residents to organize demonstrations.<sup>109</sup>

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<sup>106</sup> 宪法 [CONST.] pmb1. (P.R.C.).

<sup>107</sup> See Li, *supra* note 102.

<sup>108</sup> Thirty Interviews, *supra* note 32; see Richard McGregor, *Legal Evolution with Strings Attached*, FIN. TIMES, May 2, 2001.

<sup>109</sup> See, e.g., *Homeowners Rally over Poor Payouts*, S. CHINA MORNING POST, Oct. 10, 2004; *Beijing Residents Mark Human Rights Day with Protests*, ASIAN POL. NEWS, Dec. 15, 2003; *Chinese Police Release Shanghai Property Protestors*, AGENCE FRANCE-PRESSE, Oct. 6, 2003; Bill Savadove, *Shanghai Residents Learn to Fight Back; Owners of Homes in the Way of Progress Have*

### b. Forms of Interference

Interference from administrative agencies and Party members in Shanghai takes on forms similar to those in the rest of China. Blatant disregard for the rule of law is rare.<sup>110</sup> Instead, interference can include rejecting a case filed by aggrieved parties or pressuring aggrieved parties to withdraw accepted cases from courts. Another common form of interference is for officials to influence judges to interpret legislation in a way that favors defendant agencies. As a result, some cases are either not accepted by courts or a ruling is issued in favor of defendant agencies.<sup>111</sup> Numerous pieces of ambiguous legislation in China provide much room for this second form of interference.<sup>112</sup>

To stop this type of interference, courts in Shanghai are reportedly cautious about improper contact between presiding judges and defendant agencies.<sup>113</sup> However, an interviewed representative of the Shanghai Municipal Industry and Commerce Bureau blurted out that in cases where her bureau's interpretation of laws was different from judges' interpretations, she and her colleagues would explain their views to judges, even in the absence of plaintiffs. When asked whether this type of *ex parte* communication is fair to plaintiffs, she replied, "I believe plaintiffs [talk to judges], too. Nowadays, judges seem to be quite ready to help plaintiffs, thinking that they are weak. We, therefore, need to seek every opportunity to show our stance!"<sup>114</sup>

### c. Two Fundamental Problems

The existence of interference in Shanghai reveals two fundamental problems in its court system. These problems have also hampered the entire Chinese court system.

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*Begun Joining Forces to Protect Their Rights and Get Better Compensation*, S. CHINA MORNING POST, July 4, 2003.

<sup>110</sup> See Hung, *supra* note 4, at 91-93. Interview with Li Zongxing, Professor, Shanghai Academy of Social Sciences, in Shanghai, P.R.C. (Apr. 1, 2003); Interview with Shi Jiansan, Lawyer, in Shanghai, P.R.C. (Apr. 4, 2003); Interview with You Wei, *supra* note 33; Interview with Judge 2, *supra* note 49; Interview with Judge 3, *supra* note 49; Telephone Interview with Judge 4, Shandong, Dongying Basic Court, in Beijing, P.R.C. (Mar. 20, 2003).

<sup>111</sup> See *Use of Legal Weapons Well*, *supra* note 46.

<sup>112</sup> See Hung, *supra* note 4, at 101-04, 115-20.

<sup>113</sup> See Liu, *supra* note 10.

<sup>114</sup> Interview with Official 3, *supra* note 24.

i. Uncertainty in Realization of Both Legal and Social Effects

Leaders in Shanghai, like others in China, emphasize that adjudication should realize both legal and social effects (实现法律效果与社会效果, *shixian falu xiaoguo yu shehui xiaoguo*).<sup>115</sup> Authorities, however, offer no clear explanation on how to achieve this goal. Uncertainty in this area opens a door for interference. Shedding some light on the topic, the SPC's official web site explains: "To realize legal effects, [adjudication] has to strictly follow laws; to realize social effects, [adjudication] has to satisfy emotional needs of society and the public."<sup>116</sup>

This dual-goal approach is quite appealing, but difficulties arise if the realization of one effect conflicts with the realization of the other. The same web site article also addresses this problem: "In most cases, these two effects are consistent. But sometimes, they are not. An inconsistency between legal effects and social effects may reflect *conflicts between law and policy*, conflicts between law and actual needs, conflicts between law and social customs, and conflicts between law and moral standards."<sup>117</sup> What should judges do under these circumstances? The web site article states:

How to find a point of convergence among these conflicts *requires our judges' thorough consideration and prudent judgment*. As courts and judges, of course, the first is to strictly enforce laws, strictly work in accordance with laws. There is no doubt about this. The effect of fair adjudication (公正司法, *gongzheng sifa*) is forever a goal that we pursue. We oppose blatant violation of explicit provisions of law and

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<sup>115</sup> See, e.g., 徐来, 充分发挥职能作用全面落实司法为民 [Xu Lai, *Fully Utilize Courts' Functions, Completely Implement "Administering Justice for the People"*], 法制日报 [LEGAL DAILY], Dec. 18, 2003, available at [http://www.legaldaily.com.cn/bm/2003-12/18/content\\_65665.htm](http://www.legaldaily.com.cn/bm/2003-12/18/content_65665.htm); 徐来, 围绕“公正与效率”坚持司法为民 [Xu Lai, *Revolves Around "Fairness and Efficiency," Insists on Administering Justice for the People*], 法制日报 [LEGAL DAILY], Dec. 16, 2003, available at [http://www.legaldaily.com.cn/bm/2003-12/16/content\\_65220.htm](http://www.legaldaily.com.cn/bm/2003-12/16/content_65220.htm); see also 郑发, 肖扬在美国耶鲁大学发表演讲时强调保证司法的公正与效率 [Zheng Fa, *Xiao Yang Emphasized Safeguarding "Justice and Efficiency" of the Judiciary When He Spoke at Yale University*], 法制日报 [LEGAL DAILY], Oct. 12, 2004, available at [http://www.legaldaily.com.cn/bm/2004-10/12/content\\_139589.htm](http://www.legaldaily.com.cn/bm/2004-10/12/content_139589.htm).

<sup>116</sup> 王银胜等, 少年审判要实现法律效果和社会效果最佳统一 [Wang Yinsheng et al., *Adjudication of Juvenile Cases Has to Realize the Best Unification of Legal Effects and Social Effects*], 中国法院网 [CHINESE CTS. NET], Mar. 3, 2003, available at <http://www.chinacourt.org>.

<sup>117</sup> *Id.* (emphasis added).

violation of the spirit of law to partially meet some thoughts appearing in society that are in contempt of law . . . .<sup>118</sup>

The real problem is that most Chinese judges, with low average competence levels, can hardly employ “thorough consideration and prudent judgment.” Judges who feel incapable of finding “the point of convergence” are likely to seek assistance from their court’s adjudication committee,<sup>119</sup> which may, in turn, consult the CCP’s political-legal committee. Even if judges feel capable of finding the point of convergence, adjudication committees and political-legal committees, by categorizing the case under consideration as “major and complex,” can always step in to decide issues of law.<sup>120</sup>

In Shanghai, for example, three types of cases that require close examination of social effects and legal effects are “new types of cases,” “cases brought by large groups of plaintiffs,” and “cases that are likely to spark controversies in society such as labor disputes and eviction cases.”<sup>121</sup> These cases are, as explained above, usually treated as major and complex cases.

Hence, excessive emphasis on the integration of legal effects with social effects, coupled with the lack of clear guidance on integration and the many ambiguities in Chinese legislation, gives the CCP’s political-legal committees ample opportunity to put policy choices above rule of law during adjudication in the name of seeking such integration.

## ii. Control of Courts’ Financial and Personnel Arrangements

Judges in China are susceptible to interference from local governments and Party organizations that control the financial and personnel arrangements of courts.<sup>122</sup> Judges in Shanghai are subject to this problem, despite some improvement in these arrangements.<sup>123</sup>

Since 1998, the Shanghai High Court has worked with district and county Party committees to appraise the performance of leaders of basic courts. While the court has also been allowed to nominate candidates to

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<sup>118</sup> *Id.* (emphasis added).

<sup>119</sup> The likelihood has increased because of judges’ concern over being punished for making erroneous decisions. See discussion *infra* Part II.C.

<sup>120</sup> See *supra* Part I.D.2.a.

<sup>121</sup> See Chen & Ni, *supra* note 50.

<sup>122</sup> See generally Hung, *supra* note 4, at 96-99.

<sup>123</sup> Thirty Interviews, *supra* note 32.



be presidents of basic and intermediate courts,<sup>124</sup> these nominations require the endorsement of local Party leaders (who are often government leaders) before the nominees are finally appointed by legislatures at the corresponding levels. The court is not given absolute freedom.<sup>125</sup>

Reform in personnel arrangements has had some impact. From 1998 to 2002, the Shanghai High Court, together with local Party organizations, selected thirty five persons to be leaders of basic courts. In most cases, local Party organizations agreed with nominations made by the court. In some cases, they did not.<sup>126</sup> The Shanghai High Court, for example, nominated a candidate to the basic court in Jing'an District. The Party organization of that district objected and nominated another candidate. The court commented that the Party organization's nominee was not qualified because the person had never had formal legal education and had been employed only at a workers' union. The Party organization responded, "There's no problem. The current President of the High Court also only used to work for a workers' union!"<sup>127</sup>

Some progress has also been made in the financial arrangements of the Shanghai courts. Budgets of basic courts are no longer totally reliant on their district governments. Part of each basic court's budget is from the high court, which, in turn, receives its budget from the municipal government. This practice helps reduce local judges' susceptibility to local governments.<sup>128</sup>

The Shanghai High Court has attempted, without much success, to make a specific improvement regarding financial arrangements. In Shanghai, some local governments have followed a practice of allowing courts at the corresponding level to keep a certain percentage (usually 30%) of fees that those courts have collected from litigants. As a result, courts are inclined to handle cases in favor of the governments' interests, in hope of getting the governments' continued support for such practice. To stop this practice, the Shanghai High Court requires that all fees

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<sup>124</sup> Interview with Judge 6, *supra* note 33; *see also* Shanghai High Court Reports 2000 & 2003, *supra* note 16.

<sup>125</sup> Interview with Shen Guoming, *supra* note 33; Interview with You Wei, *supra* note 33; Interview with Zou Jialai, *supra* note 41.

<sup>126</sup> Interview with Shen Guoming, *supra* note 33; Interview with You Wei, *supra* note 33; Interview with Zou Jialai, *supra* note 41; Interview with Judge 6, *supra* note 33; Interview with Professor 2, *supra* note 49; Interview with Professor 3, *supra* note 49; *see* Shanghai High Court Report 2003, *supra* note 16.

<sup>127</sup> Interview with Zou Jialai, *supra* note 41.

<sup>128</sup> Interview with Shen Guoming, *supra* note 33; Interview with You Wei, *supra* note 33; Interview with Judge 6, *supra* note 33.

collected be passed on to the local government. However, some local governments and courts defy the high court's requirement.<sup>129</sup>

Overall, Shanghai judges are still susceptible to local governments' and Party organizations' control, although the problem in Shanghai may not be as serious as it is in other places. The city's governments and Party organizations seem to have loosened their control over the judiciary, enabling judges to enjoy more independence in adjudicating cases that are not categorized as "major and complex."

## II. LESS INTRA-COURT AND INTER-COURT INFLUENCE

Like interference from the CCP and administrative agencies, intra-court and inter-court influence within the Chinese court system is another major cause of judges' lack of independence. A lower-ranking judge is quite willing to report to and seek *qingshi* (请示, instructions) from higher-ranking judges whenever the judge of the lower rank encounters difficulties such as conflicting legislation or major and complex cases. Sometimes, senior judges simply step in to instruct junior judges.<sup>130</sup>

*Qingshi* is particularly prevalent at the basic court level because, at this level, judges are less competent and interference from local governments and Party organizations is more serious. Judges usually resort to *qingshi* to let their court leaders and upper-level courts deal with the interference.<sup>131</sup>

Influence within the court system in Shanghai is perceived as less serious than in the rest of the country because judges in Shanghai are of better quality and local governments prescribe clearer rules for judges to follow. Judges in Shanghai are, therefore, less likely to need supervision from senior judges. Yet, such influence still occurs in Shanghai. Like their counterparts elsewhere in China, judges in Shanghai are wary of being unfairly held accountable for making decisions considered by higher-ups to be erroneous and, thus, engage in *qingshi* to avoid making

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<sup>129</sup> Interview with Cao Jinqing, Professor, East China University of Science and Technology, in Shanghai, P.R.C. (Apr. 7, 2003); Interview with Zou Jialai, *supra* note 41.

<sup>130</sup> See Hung, *supra* note 4, at 99-105; 胡伟, 不要给下级法官太多压力 [Hu Wei, *Don't Give Judges at Lower Levels Too Much Pressure*], 法制日报 [LEGAL DAILY], July 29, 2004, available at [http://www.legaldaily.com.cn/bm/2004-07/29/content\\_120751.htm](http://www.legaldaily.com.cn/bm/2004-07/29/content_120751.htm); Li & Cheng, *supra* note 98.

<sup>131</sup> See Hung, *supra* note 4, at 99-105; 徐爱民, 也谈上下级法院的关系 [Xu Aimin, *Also Discuss the Relationships Between Upper and Lower Level Courts*], 法制日报 [LEGAL DAILY], Aug. 12, 2004, available at [http://www.legaldaily.com.cn/bm/2004-08/12/content\\_124651.htm](http://www.legaldaily.com.cn/bm/2004-08/12/content_124651.htm); Wang et al., *supra* note 26.

mistakes. But with *qingshi*, they subject themselves to influence from senior judges.<sup>132</sup>

A. *Better Judges*<sup>133</sup>

China has approximately 300,000 judges and other court employees.<sup>134</sup> Slightly more than 90,000 judges, representing approximately 43% of all 210,000-odd judges, have attained at least a bachelor's degree. Only about 4000 judges (2% of all judges) have master's or doctoral degrees.<sup>135</sup> Shanghai judges are more qualified than average: approximately 87% of all judges in Shanghai have attained at least a bachelor's degree, although not necessarily in law. Of this group, about 8% have master's or doctoral degrees.<sup>136</sup> Shanghai judges are generally more qualified and competent because the city is able to recruit top candidates from all around the country and organize intensive training for incumbent judges.

Similar to its recruitment of officials, Shanghai's prosperity allows it to offer attractive employment packages to lure good candidates from all over the country to apply for positions in its courts.<sup>137</sup> To select the best candidates, the city has set up a competitive selection process. In addition to basic requirements prescribed by the Judges Law, such as passing a "unified national examination for judges and assistant judges," the Shanghai High Court requires applicants to sit for another written test.<sup>138</sup> This test is followed by a comprehensive examination in which

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<sup>132</sup> Thirty Interviews, *supra* note 32.

<sup>133</sup> See generally Hung, *supra* note 4, at 99-101.

<sup>134</sup> See CHINA LAW YEARBOOK 2003, *supra* note 15, at 155; *China's Supreme People's Court Announces Stricter Standards For Judges*, BBC MONITORING INT'L REP., Oct. 27, 2003.

<sup>135</sup> See *China's Supreme People's Court Announces Stricter Standards for Judges*, *supra* note 134; Supreme People's Court Report, 2003, *supra* note 7; 郭恒忠, 知名学者担纲法院院长 硕士博士法官趋近四千 [Guo Hengzhong, *Famous Scholars Become Court Presidents, the Number of Judges With Master's or Doctoral Degrees Is Close to 4000*], 法制日报 [LEGAL DAILY], May 25, 2005, available at [http://www.legaldaily.com.cn/bm/2005-05/25/content\\_138966.htm](http://www.legaldaily.com.cn/bm/2005-05/25/content_138966.htm); 王斗斗, 我国法官检察官学历大幅提高 [Wang Doudou, *Qualifications of Our Country's Judges and Prosecutors Have Greatly Improved*], 法制日报 [LEGAL DAILY], July 18, 2005, available at [http://www.legaldaily.com.cn/bm/2005-07/18/content\\_168821.htm](http://www.legaldaily.com.cn/bm/2005-07/18/content_168821.htm).

<sup>136</sup> See Shanghai High Court Report 2005, *supra* note 16. Of 5200-odd judges and other court employees in Shanghai, 4268 (81.4%) have attained at least a bachelor's degree. Of this group, 334 have master's degrees and 18 have doctorates. See 法官每年培训不得少于 60 课时 [*Judges Must Have At Least 60 Hours of Training Every Year*], 新闻晨报 [SHANGHAI MORNING POST], Dec. 10, 2004.

<sup>137</sup> See *supra* Part I.D.1.a.

<sup>138</sup> 中华人民共和国法官法 [Judges Law] (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995, as amended through June 30, 2001) 07/2001 全国人民代表大会常务委员会公报 [STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.] 388 (P.R.C.).

each candidate's work performance, professional abilities, political thoughts, and moral conduct are assessed.<sup>139</sup>

Judges in Shanghai also have better training, in part, because they are exposed to a wide variety of legal disputes stemming from the city's robust development; judges in less-developed areas do not have similar learning opportunities.<sup>140</sup> The municipal government has organized numerous judicial training programs that fall into three broad categories: qualifications-oriented, skills-oriented, and other training acquired through research and exchange programs.

Qualifications-oriented training programs aim to prepare judges for acquiring academic qualifications. The previous target was preparing judges for acquiring a bachelor's degree. However, with the increased pool of better-qualified applicants, the Shanghai High Court launched a five-year plan in 2002 to set a higher goal: preparing judges to attain the master's degree.<sup>141</sup>

Skills-oriented training programs aim at equipping judges with practical skills needed during adjudication. In 2000, Shanghai courts launched a five-year training plan to bolster Shanghai judges' competence in presiding over trials, preparing judgments, applying law, and understanding civil evidence rules. From 1998 to 2002, the Shanghai High Court organized sixty eight classes with more than 4000 trainees. Because Shanghai has only about 5000 judges and court employees, this means that about 80% received training. In contrast, during the same 1998 to 2002 period, only two-thirds of all judicial staff in China received training.<sup>142</sup>

Shanghai judges acquire other training through research and exchange programs. Research work appears to be quite organized. The High Court identifies a list of the most important research topics, and courts at all levels submit their proposals to bid for a research project. A review committee composed of experts, professors, and senior judges decides which proposals should be approved. Because all topics are directly related to judges' work, they can acquire useful knowledge and

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<sup>139</sup> See 陈忠仪 & 高万泉, 初任法官遴选考核 [Chen Zhongyi & Gao Wanchuan, *Selection and Examination of Newly Recruited Judges*], 上海法治报 [SHANGHAI RULE OF L. DAILY], Apr. 28, 2003. Interview with Judge 9, Administrative Division, Shanghai No. 1 Intermediate Court, in Shanghai, P.R.C. (Nov. 10, 2004); Interview with Judge 10, Adjudication Supervision Division, Shanghai No. 1 Intermediate Court, in Shanghai, P.R.C. (Nov. 10, 2004).

<sup>140</sup> Interview with Judge 2, *supra* note 49; Interview with Judge 3, *supra* note 49.

<sup>141</sup> See 杨金志, 上海法院全面推行审判改革 [Yang Jinzhi, *Shanghai Courts Fully Implement Adjudication Reform*], 中国法院网 [CHINESE CTS. NET], Oct. 23, 2002, available at <http://www.chinacourt.org>.

<sup>142</sup> See Supreme People's Court Report, 2003, *supra* note 7.

skills during the research process, and research results are conducive to improving their performance.<sup>143</sup>

Judges in Shanghai also seem to have more opportunities to participate in exchange programs. They were among the first batch of judges to receive World Trade Organization related training, which was conducted in Hong Kong, Europe, the United Kingdom, and the United States.<sup>144</sup>

### B. Clearer Rules

Improper influence within Shanghai's court system is less serious than in the rest of the country because Shanghai's local legislature prescribes clearer rules for judges to follow and the practice of *qingshi* is therefore less frequent.<sup>145</sup>

Deficiencies in Chinese legislation, such as ambiguous and conflicting provisions or the absence of legislation in certain areas, have long been criticized.<sup>146</sup> To fill the legal vacuum, China has been enacting more legislation and issuing more judicial interpretations. During the past two decades, the National People's Congress and its Standing Committee have adopted more than 500 laws and law-related resolutions.<sup>147</sup> From 1998 to 2004, the SPC formulated approximately 210 judicial interpretations.<sup>148</sup>

To improve the quality of legislation, China, prompted by its accession to the World Trade Organization, requires all local governments to file their legislation with the State Council. Private parties are allowed to request that the State Council review whether a piece of filed local legislation violates national laws.<sup>149</sup> By the end of

<sup>143</sup> See 全国部分法院调研工作经验交流会在南京召开 [Some Courts in the Country Exchanged Their Experiences in Research Work at a Meeting Held in Nanjing], 中国法院网 [CHINESE CTS. NET], Oct. 24, 2002, available at <http://www.chinacourt.org>.

<sup>144</sup> See *Chinese Supreme Court Vice-President Says Judiciary Ready for WTO Entry*, BBC MONITORING ASIA PAC. – POL., Nov. 24, 2001.

<sup>145</sup> Thirty Interviews, *supra* note 32.

<sup>146</sup> See Hung, *supra* note 4, at 101-04.

<sup>147</sup> See 吴坤, 加强宪法宣传教育维护宪法权威尊严 [Wu Kun, *Strengthen Publicity and Education on Constitution, Safeguard the Authority and Dignity of the Constitution*], 法制日报 [LEGAL DAILY], Dec. 4, 2003, available at [http://www.legaldaily.com.cn/bm/2003-12/04/content\\_63091.htm](http://www.legaldaily.com.cn/bm/2003-12/04/content_63091.htm); 2005 全国人民代表大会常务委员会工作报告 [National People's Congress Standing Committee Work Report 2005], available at [http://www.legaldaily.com.cn/bm/2005-03/17/content\\_196856.htm](http://www.legaldaily.com.cn/bm/2005-03/17/content_196856.htm).

<sup>148</sup> See Supreme People's Court Reports, 2003-2005, *supra* note 7.

<sup>149</sup> 法规规章备案条例 [Rules on Filing of Regulations and Rules] (promulgated by the State Council, Dec. 14, 2001, effective Jan. 1, 2002) art. 9 (P.R.C.), available at <http://www.chinaiprlaw.com/flfg/flfg129.htm> (last visited Feb. 20, 2004) (“**第九条** 国家机关, 社会团体, 企业事业组织, 公民认为地方性法规同行政法规相抵触的, 或者认为规章以及国务院

2003, all 2026 pieces of local legislation passed during the year were reportedly filed.<sup>150</sup>

These efforts are impressive, but many problems remain. Some important areas are still unregulated. Private parties have not adequately taken advantage of the review process even though official sources acknowledge that some filed local rules violate national laws.<sup>151</sup>

Although these problems are widespread in China, they are of a lesser magnitude in Shanghai, where legislation is often among the most advanced in the country. In 2002, for example, Shanghai took the lead in bringing its legislation in line with China's World Trade Organization obligations by enacting two major pieces of legislation: one on the operation of business associations in the city and the other on the administration of publication distributors.<sup>152</sup>

Shanghai's efforts to maintain a better body of legislation are largely driven by a desire to strengthen its competitiveness by creating a more favorable legal environment for economic development.<sup>153</sup> Of sixty eight pieces of legislation enacted or revised by the Shanghai Municipal People's Congress from 1998 to 2002, approximately 60% concerned commercial law.<sup>154</sup>

Shanghai's better system of legislation is due to the city's structured legislative mechanism that involves a series of internal reviews and allows more participation from experts and the general public in developing and reviewing legislation. Shanghai's legislative work is carried out by specialized committees and the Legal Affairs Commission

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各部门,省,自治区,直辖市和较大的市的人民政府发布的其他具有普遍约束力的行政决定,命令同法律,行政法规相抵触的,可以向国务院书面提出审查建议,由国务院法制机构研究并提出处理意见,按照规定程序处理。")

<sup>150</sup> See 谢远东等, 2003 政府法治十大热点 [Xie Yuandong et al., *Ten Hot Issues About the Government and the Rule of Law in 2003*], 法制日报 [LEGAL DAILY], Jan. 7, 2004, available at [http://www.legaldaily.com.cn/ztd/2004-01/07/content\\_77200.htm](http://www.legaldaily.com.cn/ztd/2004-01/07/content_77200.htm).

<sup>151</sup> See 刘行, 让备案真正起作用 [Liu Xing, *Let Filing Be Really Effective*], 法制日报 [LEGAL DAILY], Aug. 26, 2003, available at [http://www.legaldaily.com.cn/bm/2003-08/26/content\\_44729.htm](http://www.legaldaily.com.cn/bm/2003-08/26/content_44729.htm).

<sup>152</sup> Interview with Xia Shanchen, Shanghai University, Member of the Shanghai Committee of the Chinese People's Political and Consultative Conference, in Shanghai, P.R.C. (Nov. 9, 2004 and July 5, 2005); see CHINA LAW YEARBOOK 2003, *supra* note 15, at 920.

<sup>153</sup> See, e.g., CHINA LAW YEARBOOKS 1994-2003, *supra* note 15.

<sup>154</sup> See 2003 上海市人大常委会工作报告 [Shanghai Municipal People's Congress Standing Committee Work Report 2003]. Comparable national statistics could not be found, but it is worth noting that from 1998 to 2002, the Standing Committee of the National People's Congress reviewed twenty eight commercial bills. This number accounted for 23% of all the bills reviewed by the committee during that period. See CHINA LAW YEARBOOK 2003, *supra* note 15, at 98. For a discussion of how Guangdong province has also tried to compete for investment by improving its legal institutions, see Linda Li, *The "Rule of Law" Policy in Guangdong: Continuity or Departure? Meaning, Significance and Processes*, THE CHINA Q., March 2000 at 161. The author thanks Randall Peerenboom for drawing her attention to this article.

(法制工作委员会, *fazhi gongzuo weiyuanhui*), which was established under the municipal legislature in 1998 and has since been led by legal experts. Specialized committees are responsible for reviewing bills drafted by government departments. When the Commission receives a bill from a government department, the relevant specialized committee examines the bill and identifies major problems in the draft. The committee then submits a report to the municipal legislature's standing committee and makes necessary amendments to the bill after the standing committee finishes its first review. The Legal Affairs Commission is responsible for amending the bill after the standing committee finishes its second review. Some bills are passed after the first review, but most must go through the entire cycle of review.<sup>155</sup>

To further ensure the quality of legislation, the specialized committees and the Legal Affairs Commission may also, at any point in the legislative process, organize meetings to solicit opinions from drafting departments, relevant law enforcement departments, law professors, judges, lawyers, and ordinary citizens.<sup>156</sup> Since 2000, the municipal legislature and municipal government have identified the Shanghai Lawyers Association as a work unit with which they must consult when any local regulations and rules are made.<sup>157</sup>

The legislature also publishes in newspapers legislation that is closely related to ordinary citizens' lives in order to solicit their views. Sometimes, the legislature also organizes legislative hearings.<sup>158</sup> Wang Xixin, a leading expert from Peking University who has conducted field research on public participation in rule-making in seven provinces and cities in China, found Shanghai's achievements among the most impressive of all Chinese jurisdictions.<sup>159</sup> In early 2004, Shanghai took the lead in adopting a piece of legislation on freedom of information, under which the municipal government is required to allow residents to have access to public information such as all local rules and regulations.

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<sup>155</sup> See CHINA LAW YEARBOOK 2000, *supra* note 15, at 813.

<sup>156</sup> See CHINA LAW YEARBOOK 1999, *supra* note 15, at 742-43; CHINA LAW YEARBOOK 2001, *supra* note 15, at 846-47.

<sup>157</sup> See 刘建, 上海律师走上政治舞台 [Liu Jian, *Shanghai Lawyers Walk Up to the Political Stage*], 法制日报 [LEGAL DAILY], Mar. 25, 2003, available at [http://www.legaldaily.com.cn/gb/misc/2003-03/25/content\\_20403.htm](http://www.legaldaily.com.cn/gb/misc/2003-03/25/content_20403.htm); 刘福元, 律师仍需登高望远 [Liu Fuyuan, *Lawyers Still Need to Climb Higher to See Farther*], 法制日报 [LEGAL DAILY], Mar. 16, 2005, available at [http://www.legaldaily.com.cn/bm/2005-03/16/content\\_196450.htm](http://www.legaldaily.com.cn/bm/2005-03/16/content_196450.htm).

<sup>158</sup> See CHINA LAW YEARBOOK 1999, *supra* note 15, at 742; CHINA LAW YEARBOOK 2000, *supra* note 15, at 813; CHINA LAW YEARBOOK 2002, *supra* note 15, at 824. For example, the bills of the Shanghai Natural Gas Management Regulation, Housing Rental Regulation, and Labor Contract Regulation were published for comments.

<sup>159</sup> Interview with Wang Xixin, Associate Professor of Law, Peking University, in Beijing, P.R.C. (Mar. 18, 2003 and Nov. 4, 2004) and in Washington, D.C. (Dec. 12, 2003).

If implemented properly, this legislation would further help ensure the quality of local legislation.<sup>160</sup>

### C. *Influence Still Exists*

Despite progress, influence from senior judges in the court still exists in Shanghai because much still needs to be done to improve rules and judges' overall competence.<sup>161</sup> Influence persists because Shanghai judges are, like other judges in China, wary of being unfairly held accountable for making erroneous decisions. To avoid making mistakes, they still *qingshi*, which creates opportunities for influence from court leaders.<sup>162</sup>

In defiance of the SPC's guidance, some courts in China have broadly defined the term "erroneous decision" to cover a wide range of decisions, including those that were reversed on appeal or sent for retrial.<sup>163</sup> Official reports show that Shanghai courts seem to have adopted the correct definition of erroneous decisions.<sup>164</sup> Nevertheless, in practice, some courts in Shanghai do consider in their internal performance appraisals the frequency with which a judge's decision is not upheld because these courts believe that this is a gauge of the judge's competence. Some courts may even categorize first-instance decisions that are reversed on appeal or returned for retrial as "erroneous."<sup>165</sup>

To minimize the chance of being disciplined, judges in Shanghai are quite willing to resort to *qingshi*.<sup>166</sup> Moreover, they prefer to keep their judgments simple. One scholar observed, "Judges in Shanghai are not stupid. They can give critical comments during private conversations. But their judgments look so silly because they don't want to make mistakes. The more they write, the more easily they will get caught.

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<sup>160</sup> See *City to Open Government Archives to Public*, CHINA DAILY, Aug. 23, 2004; 刘建, 行进在依法行政的大道上 – 上海打造法治政府见闻 [Liu Jian, *Entering into the Path of "Conducting Administration According to Law" – A Look at Shanghai's Building of a Rule-of-Law-Based Government*], 法制日报 [LEGAL DAILY], Oct. 25, 2004, available at [http://www.legaldaily.com.cn/bm/2004-10/25/content\\_143731.htm](http://www.legaldaily.com.cn/bm/2004-10/25/content_143731.htm).

<sup>161</sup> Thirty Interviews, *supra* note 32.

<sup>162</sup> See Hung, *supra* note 4, at 104-05; Hu, *supra* note 130.

<sup>163</sup> See 蒋安杰, 说说错案追究制 [Jiang Anjie, *Talk about Accountability for Erroneous Cases System*], 法制日报 [LEGAL DAILY], July 9, 2005, available at [http://www.legaldaily.com.cn/bm/2005-07/09/content\\_165514.htm](http://www.legaldaily.com.cn/bm/2005-07/09/content_165514.htm). Interview with You Wei, *supra* note 33; Interview with Zhu Mang, *supra* note 44.

<sup>164</sup> See, e.g., Shanghai High Court Reports 1999 (Part VII), 2000 (Part IV), 2003 (Part III), *supra* note 16.

<sup>165</sup> Interview with You Wei, *supra* note 33; Interview with Zhu Mang, *supra* note 44.

<sup>166</sup> Interview with You Wei, *supra* note 33.



Thus, the ‘accountability for erroneous cases’ system only encourages more *qingshi*.<sup>167</sup>

### III. LESS JUDICIAL CORRUPTION

Judicial independence in China is also hampered by judicial corruption, but official information and interviewees’ impressions show that the problem is less serious in Shanghai than in other areas of China.<sup>168</sup>

From 1998 to 2004, about 8000 judges and other court employees in China—approximately 2.7% of China’s judicial staff—were punished for violating laws or discipline.<sup>169</sup> About 100 of them were from Shanghai courts, representing 2% of all judicial staff in the city.<sup>170</sup> None of these 100-odd judges are from the administrative divisions within the Shanghai courts.<sup>171</sup> Exactly how many of these violators were punished for corruption is unknown; however, most official references to violations of laws or discipline in courts are put in the context of corruption. Such special mention of corruption probably indicates that a significant number of these violators were punished for this violation. If this is the case, the lower percentage of judicial staff in Shanghai being disciplined may indicate that judicial corruption is less serious in the city.

Although reported data are incomplete, all interviewees opined that judicial corruption is less serious in Shanghai. Surveyed residents in Shanghai shared similar views. About 46% of 715 surveyed Shanghainese agreed or strongly agreed that corruption is less serious in Shanghai when compared with other places in China. Only 22% disagreed with this view.<sup>172</sup> According to interviewed experts, the situation in Shanghai is better not only due to Shanghai judges’ greater legal awareness but also because of Shanghai judges’ better pay and social status, as well as their being subject to stricter discipline.<sup>173</sup>

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<sup>167</sup> Interview with Zhu Mang, *supra* note 44.

<sup>168</sup> See Hung, *supra* note 4, at 105-08; Thirty Interviews, *supra* note 32.

<sup>169</sup> See 广州日报, 广州 [GUANGZHOU DAILY, GUANGZHOU], Oct. 8, 2002, in *Chinese Crime and Punishment Round-Up July 2002 to January 2003 – Part Two*, BBC MONITORING INT’L REP., Mar. 19, 2003; Supreme People’s Court Reports, 2004-05, *supra* note 7.

<sup>170</sup> See Shanghai High Court Reports 2003 (Part III), 2004 (Part III), 2005 (Part II), *supra* note 16.

<sup>171</sup> See 高远, 上海法院行政审判成绩斐然 [Gao Yuan, *Shanghai Courts Compile Distinguished Record in Administrative Adjudication*], 中国法院网 [CHINESE CTS. NET], Apr. 28, 2004, available at <http://www.chinacourt.org>.

<sup>172</sup> See Survey, *supra* note 14.

<sup>173</sup> Thirty Interviews, *supra* note 32.

A. *Better Pay and Social Status*

Judges in Shanghai are probably less likely than other judges in China to take bribes because doing so would risk losing a career that offers relatively good remuneration and high social status.<sup>174</sup>

The basic salaries of judges of the same rank are the same throughout China. Differences in remuneration lie in additional benefits, the amounts of which vary but are directly proportional to the standard of living of the locality in which the court is situated. In Shanghai, a holder of a bachelor of laws degree who has worked as a judge for four to five years earns about ¥70,000 (US\$8750) per year including benefits. Very experienced and senior judges can earn as much as ¥110,000 (US\$13,750) per year.<sup>175</sup> Many judges in other places in China earn only ¥20,000 (US\$2500) per year or even less.<sup>176</sup> Because the average annual income of Shanghainese is ¥49,180 (about US\$6150)—the highest average annual income in China<sup>177</sup>—the incomes of most Shanghai judges are above average in the city and much above most areas of the country.

The attractiveness of being a judge in Shanghai is also reflected in law graduates' career choices. Many law graduates in China prefer to work for foreign law firms instead of administrative agencies or courts because foreign firms offer higher salaries.<sup>178</sup> However, many law graduates in Shanghai would rather join courts than foreign law firms. Although the basic annual salary is only about ¥30,000 (US\$3750), courts in Shanghai can offer very attractive benefits, such as interest-free mortgages.<sup>179</sup>

One interviewee personally knew a judge who, on a salary of only about ¥30,000 per year, was able to use the housing benefits to purchase an apartment in the vicinity of the People's Square, one of the most

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<sup>174</sup> *Id.*

<sup>175</sup> See 司法改革探寻新目标 [*Seeking New Objectives for Judicial Reform*], 北京青年报 [BEIJING YOUTH], May 12, 2000, available at <http://www.bjyouth.com.cn/Bqb/20000512/GB/4246%5ED0512B2204.htm>; interview with Zhang Biao, Vice Department Chief, Lawyers Administration Department, Shanghai Municipal Bureau of Justice, in Shanghai, P.R.C. (Nov. 10, 2004).

<sup>176</sup> See 万鄂湘: 高法将继续加强队伍建设 [*Wan Exiang: Supreme People's Court Will Continue Strengthening Judicial Personnel*], 中国法院网 [CHINESE CTS. NET], Mar. 12, 2004, available at <http://www.chinacourt.org>.

<sup>177</sup> See *Shanghai's Annual Income*, *supra* note 43; Xu, *supra* note 43.

<sup>178</sup> See, e.g., David Hsieh, *The New Fad Is Job Hopping*, THE STRAITS TIMES, Feb. 10, 2003; 席锋宇, 大学生就业难的深层原因 [Xi Fengyu, *The Fundamental Reasons for College Graduates' Difficulties in Finding Employment*], 法制日报 [LEGAL DAILY], Mar. 16, 2005, available at [http://www.legaldaily.com.cn/bm/2005-03/16/content\\_196429.htm](http://www.legaldaily.com.cn/bm/2005-03/16/content_196429.htm).

<sup>179</sup> Interview with Zhang Jie, Graduate, Department of Law, Fudan University, in Shanghai, P.R.C. (Apr. 8, 2003).

expensive areas in Shanghai.<sup>180</sup> This benefit as well as stability, regular working hours, greater opportunities to handle different types of litigation cases, and the higher social status of being an official make the employment packages of foreign law firms less attractive to Shanghai graduates.<sup>181</sup>

Surveyed residents in Shanghai shared similar views about their impression of judges and lawyers. About 73% of 831 surveyed Shanghaiese considered judges to be the “most respected,” “very respected,” or “relatively more respected” profession. Only 62% felt this way about lawyers.<sup>182</sup>

### B. *Stricter Discipline*<sup>183</sup>

Judicial corruption is less serious in Shanghai because the city subjects its judges to a stricter discipline than in other parts of the country.<sup>184</sup>

In China, judges’ discipline is primarily governed by thirteen prohibitions stipulated in the Judges Law that prohibit judges from, *inter alia*, taking bribes or engaging in business for profit. In June 2003, the SPC issued a judicial interpretation that stresses that any judge who violates any of the thirteen prohibitions will be dismissed or disciplined in various ways.<sup>185</sup> At the same time, the SPC launched judicial inspections to ensure that these disciplinary rules were properly enforced.<sup>186</sup>

Even before these rules were promulgated, the Shanghai High Court in 1999 had prepared the 130-article Shanghai Courts Disciplinary Rules to regulate the discipline of judges in Shanghai.<sup>187</sup> Interviewees spoke highly of the strict enforcement of these rules in Shanghai.<sup>188</sup> For

<sup>180</sup> Interview with Fu Hao, *supra* note 48.

<sup>181</sup> Interview with Han Ying, student of the Master of Laws program, Shanghai University, in Shanghai, P.R.C. (July 5, 2005); Interview with Huang Liangcai, student of the Master of Laws program, Shanghai University, in Shanghai, P.R.C. (July 5, 2005); Interview with Wang Ye, student of the Master of Laws program, Shanghai University, in Shanghai, P.R.C. (July 5, 2005); Interview with Xia Shanchen, *supra* note 152; Interview with Zhang Jie, *supra* note 179; Interview with Professor 1, *supra* note 53; Interview with Judge 9, *supra* note 139; Interview with Judge 10, *supra* note 139.

<sup>182</sup> See Survey, *supra* note 14.

<sup>183</sup> See Hung, *supra* note 4, at 120-22.

<sup>184</sup> Thirty Interviews, *supra* note 32.

<sup>185</sup> 最高人民法院, 关于严格执行“中华人民共和国法官法”有关惩戒制度的若干规定 [Supreme People’s Court, Several Rules Concerning the Strict Enforcement of the Severe Punishment System Enshrined in the P.R.C. Judges Law] (June 10, 2003), available at [http://news.xinhuanet.com/zhengfu/2003-06/20/content\\_928774.htm](http://news.xinhuanet.com/zhengfu/2003-06/20/content_928774.htm).

<sup>186</sup> See *China’s 300,000 Court Personnel to Inspect Judicial “Justice and Efficiency,”* BBC MONITORING INT’L REP., June 25, 2003; Supreme People’s Court Report, 2005, *supra* note 7.

<sup>187</sup> See Shanghai High Court Reports 2000 & 2003, *supra* note 16.

<sup>188</sup> Thirty Interviews, *supra* note 32.

example, in 1999, a judge who was responsible for enforcing a judgment was invited to dinner by one of the parties involved in the case. Because the judge suspected that it might be an expensive dinner, the judge declined the invitation and went alone to a small restaurant to have noodles. The party saw the judge and offered to pay for the judge's bowl of noodles. The bowl of noodles cost only about ¥12 (US\$1.50) and the judge accepted without realizing it was wrong. The incident was reported to the High Court, at which point the judge confessed and was reprimanded.<sup>189</sup>

#### IV. LESSONS FOR JUDICIAL REFORM IN CHINA

Administrative litigation in Shanghai has been hampered by interference from government officials and CCP members, influence within the court system, and judicial corruption. These problems are less substantial in Shanghai than in China as a whole.

Shanghai judges have experienced less interference mainly because government officials and CCP members in Shanghai have greater respect for the rule of law and because the problems of *guanxi* and local protectionism are less prevalent in the city. Shanghai officials' and Party members' greater respect for the rule of law is due to the city's success in recruiting better-qualified officials as well as providing them with training and law enforcement advice. *Guanxi* is less serious in Shanghai primarily because the culture of the Shanghainese places less emphasis on *guanxi* than that of other Chinese. Shanghai practices less protectionism because the city's prosperity makes the government less susceptible to any particular investor's will.

Less intra-court and inter-court influence exists in Shanghai's judiciary because the city has better judges and clearer legal rules. Judges are more capable of handling a case without seeking clarification from senior judges or judges of upper-level courts. Shanghai judges are generally more competent because the city is able to offer more competitive employment packages to attract excellent candidates and organize intensive training for incumbent judges. Shanghai's better system of legislation stems from the city's desire to strengthen its competitiveness by creating a more favorable legal environment for economic development. The city's structured legislative mechanism that involves a series of internal reviews and allows more participation from experts and the general public also leads to a higher quality end-product.

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<sup>189</sup> Interview with You Wei, *supra* note 33.

Judicial corruption is less serious in Shanghai because the city has judges with greater legal awareness, offers better remuneration and social status to discourage corruption, and subjects judges to stricter discipline.

Notwithstanding these improvements, problems still exist in Shanghai. Interference still exists, especially in major and complex cases such as eviction cases, because judges' uncertainty about how to integrate social effects with legal effects in adjudication opens the door to interference. In addition, judges in Shanghai, like their counterparts in the rest of China, are still susceptible to local governments' and Party organizations' control. These bodies still retain a high degree of control over the Shanghai court system's financial and personnel arrangements, even though some improvements have been made.

Inter-court and intra-court influence still exists in Shanghai partly because the quality of judges and legal rules needs further improvement. The existence of influence also stems from the fact that judges in Shanghai are, like other judges in the country, afraid of being unfairly held accountable for making erroneous decisions, and they therefore *qingshi* their leaders to avoid making mistakes.

Four observations and some useful lessons about judicial reform in China can be derived from Shanghai's experiences in tackling interference, inter-court and intra-court influence, and judicial corruption.

A. *Shanghai's Cultural and Economic Advantages.*

Shanghai enjoys some cultural and economic advantages that are conducive to judicial reform, but these advantages cannot be easily developed nationwide. The Shanghainese culture of placing more emphasis on rules than on *guanxi* helps reduce interference. Shanghai's prosperity enables it to practice less protectionism, organize intensive training for judges and officials, offer attractive employment packages to lure China's best talents to join Shanghai's bench and government, and discourage judges from taking bribes. All of these help alleviate interference, influence, and judicial corruption. These cultural and economic advantages cannot, however, be easily developed nationwide because their development depends on other conditions such as cultural traditions, educational systems, and economic structures.

B. *Essential Reforms*

Shanghai's judiciary still suffers from interference and intra-court and inter-court influence because some essential reforms have yet to be implemented in China. China, including Shanghai, needs at least four

essential reforms. First, individual judges must be guided clearly on how to integrate legal effects with social effects in adjudication without compromising the rule of law.

Second, the current practice of using CCP policies to guide adjudication of a particular case if that case covers an area where no law exists or the existing law no longer reflects new Party policies should be prohibited.

Third, a transparent and independent mechanism should be established to review the legality and constitutionality of legislation. Under Chinese law, judges cannot do so. If they are uncertain about the validity of a piece of legislation, they must seek advice from their court leaders, which gives rise to opportunities for inter-court and intra-court influence and interference. The need for a transparent, independent, and functional constitutional body is, therefore, pressing.<sup>190</sup> The Standing Committee of the National People's Congress claimed that it had already established a "constitution review body" in 2004.<sup>191</sup> But details about this body, especially surrounding its power and authority to operate with a high degree of transparency and independence, remain unclear.<sup>192</sup>

Fourth and most importantly, institutional reform should be implemented to redefine the relationships among courts, local governments, and Party organizations to stop the courts' financial and personnel arrangements from being controlled by local governments and Party organizations.<sup>193</sup> Approximately 73% of 722 surveyed Shanghainese agreed or strongly agreed that such reform is the best way to help achieve judicial justice and independence in China. Only 5% disagreed with this view.<sup>194</sup>

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<sup>190</sup> See also Hung, *supra* note 4, at 116-17.

<sup>191</sup> See *Chinese Entitled to Ask Legislature to Review Constitution Breaches – Official*, BBC MONITORING ASIA PAC. – POL., Dec. 2, 2004. The "constitutional review body" referred to in this article is probably the much less august Office of Filing and Review of Regulations (法规备案审查室), which was established in May 2004 under the Legal System Working Committee (法制工作委员会) of the National People's Congress Standing Committee. See 焦洪昌, 违宪违法审查的重要进展 [Jiao Hongchang, *Important Development of Constitutional and Legislative Review*], 法制日报 [LEGAL DAILY], Dec. 26, 2005, available at [http://www.legaldaily.com.cn/bm/2005-12/26/content\\_241429.htm](http://www.legaldaily.com.cn/bm/2005-12/26/content_241429.htm).

<sup>192</sup> In December 2005, the Standing Committee of the National People's Congress adopted two sets of rules to prescribe procedures on legislative review to be followed by the Office of Filing and Review of Regulations. It first amended the 行政法规, 地方性法规, 自治条例和单行条例, 经济特区法规备案审查工作程序 [Working Procedures on Filing and Review of Administrative Regulations, Local Rules, Rules of Autonomous Regions and Individual Rules, and Regulations of Special Economic Zones] and then passed the 司法解释备案审查工作程序 [Working Procedures on Filing and Review of Judicial Interpretations]. See Jiao, *supra* note 191. However, other details remain unclear.

<sup>193</sup> See Hung, *supra* note 4, at 122-32; Fifty Interviews, *supra* note 20.

<sup>194</sup> See Survey, *supra* note 14.

The SPC's first five-year reform plan touches on this issue but confines any initiatives relating to reform of courts' financial and personnel arrangements to "explorations" only. Since the release of that plan, some signs of change have emerged. In the report of the CCP's Sixteenth National Congress, the Party explicitly vowed to reform the courts' financial and personnel arrangements. This seems to mark the end of the exploratory stage and the beginning of actual reforms. Whether this is really the case depends on the implementation of the SPC's second five-year court reform plan, which was issued late in 2005,<sup>195</sup> and the proposed amendment to the Organic Law of People's Courts.<sup>196</sup> Interviewed experts believe that current Chinese leaders, though seen as moderate reformers, are not ready to allow fundamental reforms in these areas.<sup>197</sup>

### C. *Interim Measures Already Adopted in Shanghai*

Training judges, officials, and Party members as well as improving legislation are quite effective interim measures, and they should be applied nationwide. Shanghai has taken two major interim measures: training of officials, Party members, and judges as well as improving the quantity and quality of legislation to tackle interference, influence, and judicial corruption. Although critics express reservations about these interim measures, claiming that there is little point in introducing new laws or training programs while political interference and corruption remain rampant,<sup>198</sup> the Shanghai experience shows that these interim measures, though imperfect, have some positive effect. Leaders in the rest of China should, therefore, consider these interim

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<sup>195</sup> The second five-year court reform plan (人民法院第二个五年改革纲要 (2004-2008)) was released in October 2005. See 倪晓, 以改革的思维推进司法改革 [Li Xiao, *Use Revolutionary Thinking to Promote Judicial Reform*], 法制日报 [LEGAL DAILY], Oct. 27, 2005, available at [http://www.legaldaily.com.cn/bm/2005-10/27/content\\_211177.htm](http://www.legaldaily.com.cn/bm/2005-10/27/content_211177.htm).

<sup>196</sup> See 郑发, 在宪法和法律的框架内进行 – 最高人民法院研究室负责人谈人民法院改革问题 [Zheng Fa, *Proceed within the Constitutional and Legal Framework – Spokesperson of the Supreme People's Court's Research Office Spoke on Issues Relating to Reform of People's Courts*], 法制日报 [LEGAL DAILY], Dec. 8, 2004, available at [http://www.legaldaily.com.cn/bm/2004-12/08/content\\_165429.htm](http://www.legaldaily.com.cn/bm/2004-12/08/content_165429.htm); Alice Yan, *Professors Propose Broad Judicial Reforms; Judges Should Give Rulings Independent of Their Bosses or Higher Courts, They Say*, S. CHINA MORNING POST, Dec. 8, 2004; *Spokesman for China's Supreme People's Court Addresses Reforms*, BBC MONITORING ASIA PAC. – POL., Dec. 8, 2004.

<sup>197</sup> Interview with Jiang Huiling, Judge, Research Office, Supreme People's Court, in Beijing, P.R.C. (Nov. 1, 2004); Interview with Li Yayun, Professor, Central Party School, Beijing, P.R.C. in Beijing, P.R.C. (Nov. 1, 2004); Interview with Ying Songnian, *supra* note 27.

<sup>198</sup> See, e.g., Boris Cambreleng, *China's Justice System Remains Hampered by Political Interference*, AGENCE FRANCE-PRESSE, Mar. 11, 2003. Eric Cheung, a law professor at the University of Hong Kong, expressed similar views. See also Hung, *supra* note 4, at 109-12.

measures as priority tasks and strive to provide resources for their implementation.

Leaders of poor localities may need to set priorities. If resources for training are limited, officials and Party members who could interfere with basic courts, where interference is most severe, should be trained first. In addition, judges at all levels should be equipped with knowledge about substantive and procedural laws. With limited resources, leaders could confine advanced legal training to judges at intermediate courts or above and provide basic court judges with basic training only. At intermediate or higher levels, interference is less prevalent because officials and Party members have greater legal awareness and their professional interests discourage them from interfering with judges.

Leaders of poor localities, unlike their counterparts in Shanghai, may not be able to organize costly legislative hearings for the purpose of improving legislation,<sup>199</sup> but they may regularly consult experts such as law professors and lawyers, many of whom are willing to offer their views for free.

#### D. *Proposed Additional Interim Measures*

China, including Shanghai, should take two other interim measures: abolish, or at least fundamentally reform, the system of accountability for erroneous cases and strengthen citizens' access to the justice system. While the establishment of a system of accountability for erroneous cases to improve the quality of judgments may be well-intended, experience shows that the system can be easily manipulated and has been improperly used to discipline judges. To avoid making mistakes, judges *qingshi* senior judges, which leads to additional inter-court and intra-court influence. This is true in Shanghai even though Shanghai judges are believed to be competent enough to handle many problems on their own. The difficulty of ensuring proper implementation of this system, together with the fact that the ills generated by this system have outweighed the intended benefits, makes abolition, or at least fundamental reform, of the system worthy of serious consideration.<sup>200</sup>

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<sup>199</sup> Wang Xixin, Associate Professor of Law, Peking University, Remarks at the Carnegie Endowment for International Peace on Public Participation in China's Regulatory Process and Reform of Governance in China (Dec. 15, 2003), available at <http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=689>.

<sup>200</sup> See Jiang, *supra* note 163 (discussing measures that should be taken to overcome problems presented by the current system of accountability for erroneous cases). In November 2005, the Beijing First Intermediate People's Court announced that it would take the lead in replacing the "system of accountability for erroneous cases" with another punishment system. While the decision of discarding the "system of accountability for erroneous cases" is welcome, it is too early to assess



Legal aid for administrative litigation is still limited, even in Shanghai, where legal aid service is relatively well-established. In addition, although some positive changes have occurred in Shanghai, as previously discussed, it is not uncommon for lawyers to be reluctant to take up administrative cases because they still fear retaliation from local governments and Party organizations. Reforms are needed to strengthen Chinese citizens' access to the justice system.

Such reforms would benefit the central government, which is most concerned about social instability and local officials' arbitrary exercise of power. Litigation is a better way than demonstrations in the streets for citizens to express their discontent. The central government should devote more efforts to reforming its legal aid system and should encourage more assistance from the non-government sector.<sup>201</sup>

The CCP should also loosen its control over lawyers. In December 2003, the Ministry of Justice decided to require law firms to establish CCP groups if the firms have Party-member attorneys. The Ministry claimed that this mechanism would help reduce lawyers' professional misconduct by "plac[ing] every Party member under the management and supervision of Party organs."<sup>202</sup> This move, however, makes lawyers more wary, if anything, of handling sensitive cases such as administrative cases. The CCP should let bar associations handle professional misconduct matters.

The past several years have seen some progress in judicial reform in China. Progress in Shanghai is particularly impressive but, as the Chinese government has acknowledged, more needs to be done. Lessons derived from the Shanghai experience illustrate the directions that future reform efforts should take. Successful implementation of recommended actions discussed herein will likely provide Chinese citizens with a fairer judiciary. More importantly, reform will allow China to present itself as a growing power that is dedicated to sustaining peace and prosperity by justice. Such dedication is essential for stopping the rest of the world from viewing China as a threat.

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whether the new system provides a fairer punishment mechanism. See 阮占江, 取消错案追究制有利于维护法律尊严 [Ruan Zhanjiang, *Abolishing the Accountability for Erroneous Cases System Is Beneficial to Safeguarding the Dignity of Law*], 法制日报 [LEGAL DAILY], Nov. 22, 2005, available at [http://www.legaldaily.com.cn/bm/2005-11/22/content\\_222820.htm](http://www.legaldaily.com.cn/bm/2005-11/22/content_222820.htm).

<sup>201</sup> See Arwen Joyce & Tracey Winfrey, *Taming the Red Dragon: A Realistic Assessment of the ABA's Legal Reform Efforts in China*, 17 GEO. J. LEGAL ETHICS 887 (2004) (discussing legal aid programs run by the American Bar Association).

<sup>202</sup> See 王宇, 全国律师队伍党建工作座谈会要求有三名党员律师所要建支部 [Wang Yu, *The National Seminar on the Party Construction Among Lawyers Requests Law Firms with Three Party-Member Lawyers to Establish a Branch Division*], 法制日报 [LEGAL DAILY], Dec. 12, 2003, available at [http://www.legaldaily.com.cn/bm/2003-12/12/content\\_64710.htm](http://www.legaldaily.com.cn/bm/2003-12/12/content_64710.htm).