JUDICIAL INDEPENDENCE AND CONSTITUTIONAL REFORM*

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Introduction

In September of 1997, the Fifteenth National Congress of the Communist Party of China (CPC), in its issuance of the fundamental guiding document of the party, proposed

the advancement of judicial reform in order to ensure that judicial organs may exercise adjudicational and procuratorial authority independently and impartially under the rule of law.

This proclamation sparked a heated debate among scholars of jurisprudence on issues of judicial independence and reform that continues today. However, few scholars have explored the fundamental theoretical issues related to judicial independence or discussed the constitutional revisions necessary to advance the reform of the judicial system. In the winter of 2002, the Sixteenth Party Congress furthered the program of advancing the reform of the judicial system, indicating that China’s judicial reform would ultimately advance beyond the realm of academic discussion to the sphere of legal practice. Thus, research conducted on these issues is of great practical and theoretical significance.

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1 Judicial independence herein refers to the conducting of independent trials, and judicial organs shall be used to mean the courts. However, the term judicial shall also be used in the broader sense of its meaning.

2 The authors have encountered only the following article on constitutional revision as it related to judicial reform: Liu Zuoxiang 刘作翔, “Zhongguo sifadifang baohuzhuyi zhhipan 中国司法地方保护主义之批判 [A Critique of China’s Judicial Regional Protectionism: An Exploration of Judicial Reform and the Nationalization of Judicial Authority],” Faxue yanjiu 法学 [Legal Research] 1 (2003).
1. Judicial Independence within the Current Constitution

Modern judicial independence must be understood in two respects. First, the principle of judicial independence is fundamental to the governance of a nation under the rule of law, meaning that judicial organs must be free to exercise judicial authority according to established procedures and subject to legal boundaries alone without any external interference. Second, judicial independence is an internationally recognized fundamental human right, under which all citizens are entitled to a fair and transparent trial conducted by an independent and impartial court. However, in both of these respects, the core of judicial independence lies in the maintenance of judicial impartiality, which serves as a precursor for the realization of justice through legal means. Thus, judicial independence, in essence, allows existing laws to “independently” determine right from wrong without being distorted by external forces or wills.

Judicial independence necessarily relies upon systematic guarantee. First, judicial organs constitute the weakest components of a nation’s political power structure, for possessing only the power to judge and lacking economic or military authority, these are frequently susceptible to the interference of the executive and legislative branches. Second, the parties involved in a judicial dispute are rarely equal in power and authority; one party inevitably mobilizes the various social forces at its disposal in order to influence the court’s decision in its favor. Thus, it is seen that the judicial process is itself vulnerable to interference, for without an effective system to guarantee the independence of judicial bodies, a biased and superficial judgment is legitimized and the judicial process becomes no more than a charade. It is, therefore, of utmost importance that judicial independence be protected through establishing the necessary systems whereby the structure and finances of the courts continue to be independent and the system of appointments and high salaries of justices remain unchanged. However, all

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3 See also articles 8 and 10 of the Universal Declaration of Human Rights, Section 1 of Article 14 of the International Covenant on Civil and Political Rights, and the United Nations’ Basic Principles on the Independence of the Judiciary. As suggested by L. V. Singhvi, both the independence and impartiality of the courts constitute a political right of legal consumers rather than a privilege of the courts themselves. 司法公正与权利保障 [Judicial Impartiality and the Guarantee of Rights], ed. Human Rights Research Center of the Peking University Law School (Beijing: China Legal Publishing House, 2001), 145.