Ius Gentium: Comparative Perspectives on Law and Justice 59

Cornelis Hendrik (Remco) van Rhee
Yulin Fu *Editors*

Supreme Courts in Transition in China and the West

Adjudication at the Service of Public Goals

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Contents

Introduction

C.H. (Remco) van Rhee and Yulin Fu

Abstract When can a court be classified as a supreme court? This question is rarely asked in discussions about supreme courts, which is surprising. Very often it is assumed that courts high up in the judicial hierarchy that produce influential case law can be classified as such, but obviously more is needed if one uses the notion 'supreme'. This introduction discusses some of the additional requirements that need to be met in order to classify a court as 'supreme' as well as the access filters that have been introduced in various jurisdictions in order to allow supreme courts to concentrate on their main tasks. The starting point of the discussion is the Chinese Supreme People's Court in relation to a selection of Western supreme courts.

1 The Definition of a Supreme Court

When can a court be classified as a supreme court? This question is rarely asked in discussions about supreme courts, which is surprising see however Yessiou-Faltsi (1998). Very often it is assumed that courts high up in the judicial hierarchy that produce influential case law can be classified as such, but obviously more is needed if one uses the notion 'supreme'. For the purposes of the present volume, a court can be described as a 'supreme court' if:

1. its main task is deciding individual cases according to rules of procedure by way of a judgment;
2. its judgments are not subject to reconsideration by another court of law or another authority, i.e. if its decisions are final and cannot be attacked or submitted to be reconsidered elsewhere;

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3. its judgments are highly authoritative in the sense that they are not only aimed at providing justice in an individual case but interpret and/or clarify the law, provide for the unity of the law and/or shape the development of the law.

1.1 Deciding Individual Cases

The first element of the definition concentrates on the characterization of an institution as a court of law. A court of law decides cases by way of a judgment (adjudication) and in order to do so follows an established procedure. If we take this element of the definition into consideration, we must conclude that all of the supreme courts discussed in this volume are indeed courts of law since they decide individual cases according to a set procedure. However, the additional tasks of supreme courts are sometimes considerable. The Supreme People's Court of China is a good example. Apart from administering justice both at first instance and on appeal (as a second instance), examples of the additional tasks of the court are as follows.

1. Together with the Standing Committee of the National People's Congress and the Supreme People's Procuratorate, the Supreme People's Court is responsible for issuing binding interpretations of the law. These can be issued in individual cases (in which event they are called, in a manner which brings to mind Roman law, 'reply') or have a more general character. Nearly every Chinese statute has a corresponding general judicial interpretation issued by the Supreme People's Court. Although the hierarchy of a judicial interpretation is lower than that of law, in practice it is almost as effective as law. Here we have a task of the Supreme People's Court outside the area of the adjudication of individual cases.
2. The Supreme People's Court supervises the lower courts. As is stated in the chapter on China, 'As a political organ and for the administration of justice, the Supreme People's Court strongly influences the lower courts through its regulations in respect of policy relating to the justice system, the assessment of courts, and judicial reforms. … The Court applies the laws and implements the policies and orders issued by the National People's Congress.' Obviously, this task is not situated in the area of adjudication. It can be qualified as a political task.
3. Where the court handles petitions and letters of complaint about the public authorities relative to litigation (*she su xin fang*), this cannot be qualified as adjudication in the strict sense either.
4. The court is responsible for the selection and publication of so-called 'guiding cases', a task that is also situated outside the area of adjudication in individual cases. These guiding cases can be cases that have been decided by the Supreme People's Court itself or by lower courts. Guiding cases are very significant since courts at all levels of the Chinese judicial hierarchy should refer to these cases when they are trying similar cases. The system has been characterized as a 'precedent system with Chinese character' but it is obviously different from a system in which the rulings of the supreme court themselves serve as (binding) precedents.

To what extent is the Supreme People's Court where it concerns the first defining element different from the supreme courts that follow Western models (the similarities with the supreme courts of the Socialist Federal Republic of Yugoslavia as described in the chapter on Croatia and Slovenia in this volume should be noted)? It seems that the difference does not so much concern the additional tasks performed by the Chinese court, but the type and number of the additional tasks the court performs. For example, due to a strict separation of powers in Western countries, supreme courts are not allowed to act as political organs (at least, not in theory). Politics is often kept at a distance, which also appears where in various Western countries traditional tasks of the Ministry of Justice have been transferred to Councils for the Judiciary. These stand between the ministries and the courts and are in charge of, e.g., finances, court staff, court administration and court infrastructure (sometimes the Council for the Judiciary is only responsible for the lower courts, as in the Netherlands, or there is no such Council, as in Chile, where the supreme court exercises these powers, although not as a political organ). These Councils are conceived as non-political bodies. Furthermore, the number of tasks outside the domain of strict adjudication seems to be rather extended at the Supreme People's Court. Most of the Western supreme courts have a less extensive number of tasks outside the sphere of adjudication and this allows them to concentrate on the uniform interpretation and development of the law through case law sensu stricto. It should be mentioned here, however, that some Western supreme courts (e.g. in France and the Netherlands) have been given the task to answer preliminary legal questions of lower courts and in this way they also influence the uniform interpretation and development of the law outside the sphere of strict adjudication.

1.2 Final Judgments

The second element of the definition of a supreme court implies that the court issues the last and binding decision on the matters in dispute. If we take this element into consideration, none of the courts discussed in the present volume can be classified as 'supreme'.

Let us first consider the Supreme People's Court. From a Western perspective, the classification of this court as a supreme court is problematic. First of all, the court is answerable to the National People's Congress and its Standing Committee. This means that the court does not act autonomously, but is subject to political bodies or powers. Obviously this is not problematic from a Chinese perspective, since a separation of powers in the Western sense is absent and this is in line with the leading political ideas of the country.

Another reason why the Supreme People's Court's (ordinary) judgments are not really final is the existence of the judicial supervision procedure by which cases that have been decided by way of a final judgment and have become *res judicata* can be reopened. This procedure seems to be related to the procedure of *Nadzor* that existed in the Soviet Union and remnants of which can still be found in the Russian

Federation and some former Eastern Bloc states. *Nadzor* is found to be problematic by the European Court of Human Rights (Ryabykh v Russia, Application no. 52854/99, 24 July 2003). In China, the judicial supervision procedure can be started on request of the parties, on the basis of an order of the adjudication committee of the court that made the flawed decision, and by way of a complaint of the Supreme People's Procuratorate (see in this context also the chapter on Croatia and Slovenia in the present volume where the Soviet-style supervisory review *протест прокурора в порядке надзора* is discussed), and its outcome directly binds the original parties to the action. During the last decade or so, the Supreme People's Court has concentrated on judicial revision proceedings, something that is facilitated by the fact that the Court has succeeded in reducing the number of ordinary appeals that are brought before it. In these cases, of course, it can be claimed that the court has the last say in matters, but its ordinary decisions are never completely final due to the existence of the judicial supervision procedure.

Finality is also a problem at the Western supreme courts discussed in this volume. This is not so much the result of the fact that in some jurisdictions the public prosecutor may initiate cassation in the interest of the uniform application of the law. After all, the outcome of such proceedings does not affect the original parties to the action and is only relevant for future cases. It is more the result of the fact that for many Western jurisdictions discussed in this volume there is the possibility to file a constitutional complaint against the rulings of the supreme court with the national constitutional court. The situation is different in the Netherlands and the United Kingdom, which do not know constitutional review nor a constitutional court. It may also be different in Switzerland and the Scandinavian jurisdictions discussed here, since constitutional review in these jurisdictions is not the domain of a separate court but is one of the tasks of the supreme court itself. However, even for these jurisdictions there is the European Court of Human Rights in Strasbourg (Council of Europe Member States) and the European Court of Justice (European Union Member States). Although these courts cannot rule on all aspects of the cases brought before them (the former being limited to human rights complaints based on the European Convention on Human Rights and the latter to issues of EU law and answering preliminary questions), the mere possibility of some kind of scrutiny of a ruling of the national supreme court by a different court renders the epithet 'supreme' problematic.

1.3 Authoritative Judgments

The last defining element in the definition of a supreme court is that it issues judgments that are highly authoritative. These judgments are meant to guard the unity of the law and to shape the development of the law. This element of the definition is also problematic for several supreme courts discussed in this volume.

As can be read in the chapter on China, in many cases the Supreme People's Court may function as an ordinary court in the sense that it may hear cases at first instance (which never happens) and on appeal, and in both instances it is not limited

to a consideration of points of law: it is also a court of facts. On appeal it needs to fully review the factual and legal issues of the action and it may accept new evidence including the interrogation of new witnesses. Even though the Supreme People's Court has jurisdiction over cases that have a major impact on the whole country and cases that the court deems it should adjudicate itself, its case law is not more authoritative than the case law of lower courts. It seems that at least in the area of adjudication the court concentrates on providing justice in individual cases, whereas the interpretation and/or clarification of the law, the unity of the law and the development of the law takes place outside the area of strict adjudication.

The supreme courts according to the Western models perform their tasks in respect of the interpretation and/or clarification, unity and development of the law traditionally in the area of adjudication. For some of the Western courts, however, serious difficulties arise due to their extraordinary caseload (the Italian Court of Cassation is the most extreme example) which hinders these courts in concentrating on the interpretation and/or clarification, unity and development of the law. Overburdened supreme courts usually only succeed in providing justice to individual litigants (with considerable delays), and the large number of cases means the odds are not very high that their judgments will become leading. The sheer size of the workload of the courts even has the effect that their case law is sometimes contradictory. It is this aspect of supreme courts that merits attention, and in fact in all of the jurisdictions discussed in this volume (even in Italy, but without much success) measures have been taken to make the workload of the court more manageable in order to allow it time and resources to produce authoritative case law aimed at the interpretation and/or clarification of the law, the unity of the law and the development of the law. These measures will be the subject of the next section of this introduction.

2 Access to the Supreme Court

2.1 Tasks of the Supreme Court

The supreme courts discussed in the present volume are, roughly speaking, allotted two tasks. In the first place they offer legal protection to individual litigants; and in the second place they have a more public function where the interpretation and/or clarification of the law, the unity of the law and the development of the law is concerned. In some jurisdictions, for example Italy and Croatia, the first task seems to prevail, whereas in other jurisdictions (the UK is the best example) the second task prevails. In some jurisdictions a choice between the two tasks seems to be problematic, for example in the German-speaking territories. In Mainland China the situation is rather diffuse, and it seems that in adjudication it is the task of the court to provide justice in individual cases, whereas especially in its non-adjudicatory tasks the Supreme People's Court seems to concentrate on interpretation and/or clarification of the law, the unity of the law and the development of the law.

2.2 United Kingdom

Supreme courts that are restrictive in the issues or cases that they accept for scrutiny usually issue judgments that are authoritative and significant beyond the case at stake. These courts cannot be viewed as just another instance for individual litigants to obtain justice. The champion in this respect is the youngest court that is discussed in this volume, the Supreme Court of the United Kingdom, a court that started its work in 2009 and that currently serves a population of ca. 64 million people. Even though the court is young, it has a long tradition since it replaced and in many respects copied the role of the Appellate Committee of the House of Lords. The UK Supreme Court is not restricted to points of law: it may deal with both factual and legal questions. It has a total of twelve judges (including the President) who usually sit in panels of different numbers of judges according to the importance of the case. The court controls its caseload with the help of a system of leave to appeal. This system originated in 1934 and is currently known as 'permission to appeal'. As appears from the contribution on the UK Supreme Court in this volume, permission to appeal is only granted if the case 'raises an issue of public or other special importance'. When permission to appeal is refused 'formulaic' reasons suffice, and this allows the court to concentrate its time and energy on the small number of cases that pass the access filter (ca. 60 cases per year; the majority of these are civil cases). The judgments of the court form binding precedents, although the court may overrule itself. The judgments themselves are lengthy, something which is also the result of the fact that dissenting and concurring opinions are included.

The other courts discussed in the present volume deal with considerably larger numbers of cases. This is due to the fact that these courts often have weaker access filters than the selection mechanism used at the Supreme Court of the United Kingdom. Apart from systems of leave to appeal and the possibility to dismiss motions for leave without giving reasons or with only providing 'formulaic' reasons, we will encounter a variety of other methods of keeping the caseload of the supreme court under control. Sometimes access filters do not work or are even absent due to constitutional constraints, and what happens in these cases is illustrated foremost by Italy and its supreme cassation court.

Let us first have a look at some supreme courts that just like the UK Supreme Court are able to control their caseloads well. In this volume the obvious examples are the supreme courts of the Nordic countries and the Netherlands. These supreme courts are followed by a selection of other supreme courts, *roughly* in an order which is based on an impression as to how well these courts are able to manage their caseload, provide uniformity in the law and guide the development of the law. It is clear that Italy should be placed at the bottom of this list.

2.3 Nordic Countries

The supreme courts of the Nordic countries all deal with both factual and legal questions (they are not courts of cassation or revision). The countries concerned are Iceland (9 judges on the Supreme Court; the country has ca. 323,000 people), Sweden (16 judges; ca. 10 million people), Denmark (19 judges; ca. 6 million people), Finland (19 judges; ca. 6 million people) and Norway (20 judges; ca. 5 million people). The relatively small number of judges (perhaps with the exception of Iceland when compared with the size of the population; this is most likely a result of the fact that for historical reasons the Icelandic Supreme Court is actually a court of appeal dealing with cases at second instance) is due to the successful access filters which have been put in place at these courts. These filters allow the judges to concentrate on issues that matter. Only the Icelandic Supreme Court uses a quantitative criterion (the value of the disputed object is decisive), whereas the Swedish, Finnish, Danish and Norwegian supreme courts use a qualitative criterion. The central question is whether the case can serve as a precedent for future cases. In Sweden, whether or not a case passes the access filter is decided by one or 3 judges, in Finland by 2 or 3 judges, in Norway by 3 judges and in Denmark there is a special board of 7 members assisted by 15 clerks who decide on the matter. The resulting number of civil cases decided by the supreme courts of the Nordic countries on a yearly basis is as follows: Sweden 29, Finland 75, Norway 79, Iceland 205 and Denmark 224.

2.4 Netherlands

In the Netherlands, a medium-sized European country of ca. 17 million people, the supreme cassation court has 36 judges who sit in panels of 5 or 3 judges. The civil division has 11 judges and these judges handle ca. 500 civil cases per year. Since 1986 cases that do not qualify as complicated are decided by a panel of three judges. Although judgments are given by the panel, the legal questions at stake can be discussed by all members of the division, either in writing or orally each Thursday. In this way divergence between the panels can be prevented. The court gets independent advice in each case from the Procurator-General and his Advocates-General, and this guarantees that the various aspects of the case are well researched. There is a legal research bureau attached to the court which assists the judges, the Procurator-General and the Advocates-General. Cases can be remitted as was usual practice in the French cassation model, but they can also be decided by the court itself, which may be more efficient in several cases. Although there is no leave requirement, access filters are: (1) dismissing a case which is obviously unfounded without a reasoned judgment and (2) the selection of cases at the gate. In the latter case, cassation appeals that are not fit for cassation are identified and subsequently dismissed by a panel of three judges. Other filters are a specialized

supreme court bar advising on the suitability of a case for cassation and the preliminary rulings on legal questions posed by the lower courts that the Dutch Supreme Court may provide.

2.5 Spain

The number of cassation appeals decided on the merits in Spain, a country of ca. 47 million people, is ca. 800 per year. Real access filters did not exist until 2001. Since that date there is a threshold of 600,000 euros above which cassation appeals are granted as of right. Cassation appeals are also granted as of right where these proceedings concern the protection of constitutional rights. Apart from these cases, appeal in cassation is only available in proceedings when the case exhibits what is called 'cassational interest'. Such interest only exists if the judgment a quo (1) contradicts the Supreme Court's case law, (2) rules on points on which the case law from the provincial courts is contradictory, and (3) applies a recent statute. The introduction of this access filter has reduced the number of cases at the Spanish Supreme Court considerably, allowing the court to concentrate on cases that have a public interest. The so-called Technical Cabinet, a collegial body of judges and other jurists assisting the Court in granting or denying leave to appeal, also helps the Court to function very efficiently.

2.6 German-Speaking Countries

The German and Austrian supreme courts are courts of revision (Germany has ca. 80 million people; Austria has ca. 9 million). The German Supreme Court has 92 judges for civil matters. In Austria, 41 judges hear civil matters. The Swiss Federal Court (Switzerland has ca. 8 million people) is smaller, it only has 11 full-time judges and 5 part-time judges. Both the German and the Swiss supreme courts have a significant number of additional staff members who contribute to the judicial work by preparing and drafting decisions. Such additional staff is not present to a large extent in Austria. All of the courts deal with several thousands of cases per year. All three courts have access filters. In Switzerland, the value in dispute is relevant and above that value the litigants have access to the court as of right. Below the relevant value litigants only have access where a fundamental question of law is at stake or where the case concerns the violation of constitutional rights. In Austria, there is a minimum value under which no appeal is allowed. For higher amounts permission to appeal is necessary, and above a certain value appeal as of right exists. However, there is always the additional requirement that there should be a question of law involved and that question should be of significant importance. In Germany, the monetary thresholds have been abolished. Access to the supreme court will be granted if there is a question of law of fundamental importance involved or if a

decision is called for in the interests of the development of the law or to ensure the uniformity of case law. All courts are to some degree formally bound by their own decisions; a bigger panel of judges is required where a court wants to depart from its own case law.

2.7 Chile

Chile has ca. 18 million people. The Supreme Court of Chile is a cassation court. Currently, the court has 21 judges who sit in panels of 5 judges. Beginning in the 1970s the court witnessed an enormous increase in its caseload (up to that time the number of cases was ca. 2,000 on an annual basis) and in reaction the judges of the court started to interpret the admissibility criteria for cases in a very strict manner. In the 1990s two new access filters were proposed: cassation appeals should be excluded when the case was manifestly unfounded and cases should not be admitted when they were irrelevant for the proper interpretation and application of the law. However, the latter access filter was declared unconstitutional by the Constitutional Court, because it was of the opinion that due to this access filter the equality of litigants before the law would not be safeguarded anymore. Although subsequently in criminal law and in labour law new access filters have been introduced, this is not the case in the area of civil law. Currently, reforms are under discussion that would restrict access to the supreme court to cases of general interest (only cases which can serve as precedent or in which violations of constitutional rights are at issue). When a cassation appeal is declared to be inadmissible, the court issues a brief decision written by court assistants, and this obviously is an efficient way of dealing with such cases. At the court a *plenum* is convened when a contradiction in the case law is argued.

2.8 France

The French *Cour de cassation* has a total of ca. 200 judges for a population of ca. 66 million people and mainly renders decisions in civil matters (70 per cent of all decisions). It has a workload of circa 25,000 civil cassation appeals per year, which is perhaps not alarming but rather high when compared with some of the other supreme courts in this volume. Although there is no system of leave to appeal, the court can work rather efficiently for a number of reasons. For example, panels of only three judges decide that a case is clear or that it is not based on serious grounds for quashing the challenged decision. When the panel of three judges decides that cassation appeal is not admissible, no reasons for this decision need to be given in the judgment. The parties only receive a report drafted by a judge and on this basis they may ask that the case be heard by the court. There are also other features that allow the court to work efficiently. Amongst them are the continuing legal

education of lower judges so as to make them aware of the cassation technique, the possibility for lower courts to ask preliminary legal questions of the *Cour de cassation*, and a special cassation bar with cassation lawyers who can adequately advise clients on the merits of their case. Cases are decided by a *chambre mixte* or the plenary assembly to resolve possible divergences in the case law of the different divisions of the court.

2.9 Croatia and Slovenia

The civil divisions of the supreme courts of Croatia (ca. 4 million people) and Slovenia (ca. 2 million) differ considerably as regards the number of judges: 8 judges in the civil division in Slovenia and 28 judges in the civil division in Croatia. This reflects the relative success of measures to reduce the caseload of the Supreme Court of Slovenia, and the failure of measures to do so at the Croatian Supreme Court.

The history of the courts of the two countries is rooted in the history of the administration of justice at the highest level in the former Socialist Federal Republic of Yugoslavia, to which both countries belonged until they declared their independence in 1991. Before 1991, the role of the supreme courts in Yugoslavia can, to a certain extent, be compared to the role of the Supreme People's Court in China in that 'the public function of the supreme courts was … constitutionally linked only to an activity that was closer to (quasi)legislation than to adjudication. General opinions of the supreme courts, binding for all judges who participated in their passing, were issued in an abstract manner, at departmental or plenary sessions different from the panels that had jurisdiction to rule in the concrete case.' The constitutional changes introduced after the countries gained their independence included 'the abandoning of the doctrine of unity of state power and (re)embracing the doctrine of separation of powers, according to which judicial power forms a separate branch of government, headed by the supreme court'.

The supreme courts of Croatia and Slovenia are courts of revision (*revizija*), understood as final appeal on points of law and aimed at the uniform application of the law. A system of leave to appeal without the need to state reasons for the dismissal of a motion for leave was considered to be the solution for the heavy caseload at the supreme courts of both countries. The system of leave has indeed resulted in fundamental improvements in Slovenia, but in Croatia the Constitutional Court declared that the absence of reasons in dismissals of motions for leave is unconstitutional. As a result, considerable problems continue to exist at the supreme court level in Croatia. This is not the case in Slovenia, where the court is now 'released from the obligation to state reasons for the rejection of motions for leave to appeal'. The result is that the court can better concentrate on its public function as regards the uniform application of the law and the development of the law with a relatively small number of judges in the civil division of the court.

2.10 Italy

The Italian Court of Cassation (Italy has ca. 60 million people) deserves to be mentioned as the last court in this introduction because it should not serve as a model for any other supreme court. It is a court that has a staggering 359 judges plus 378 judges who, according to the author of the chapter on Italy, act as US Supreme Court clerks. The court sits in panels of five judges. There is a cassation bar of 60,000 (*sic*) attorneys. Access filters do not exist, which is due to the fact that the Italian Constitution provides that litigants have access to the court as of right. This is based on the fact that the uniform interpretation of the law is a basic condition to ensure the equality of citizens. Ironically, however, due to its large size the Italian cassation court can hardly be called a court that guarantees the uniform interpretation of the law, although it knows a so-called *Sezioni Unite* of nine judges to decide cases if the case law of the court is not consistent. Cases are declared inadmissible when the judgment under review decided issues of law in accordance with the Court of Cassation's case law and it contains no elements to overrule, or if the ground for review is the Italian due process guarantee if such ground is manifestly unfounded.

3 Final Remarks

This introduction has highlighted some of the differences and similarities between the Supreme People's Court of China and supreme courts that follow the Western models of supreme courts, as well as the differences and similarities between a selection of Western supreme courts. A major theme argued for all of these courts is that they should be well equipped to give guidance to the development of the law (by way of precedents or by way of case law that is authoritative in another manner) and to provide for the unity of the law. However, as regards how this should be done, there is no unanimity.

For China it is argued that there should be selection mechanisms where the procedure of reopening cases (i.e. the judicial supervision procedure) is concerned (a major task of the Supreme People's Court at this moment, not to be compared with ordinary adjudication at first instance and on appeal). When selecting these cases, the public aims of the administration of justice such as uniformity in the application of the law should be leading and not the aim of providing justice in the individual case.

The authors of the chapters on the Western-style supreme courts argue along similar lines, although obviously not in regard to the procedure of reopening cases, a technique that is considered to be problematic from the perspective of the finality of the administration of justice, as is demonstrated by the case *Ryabykh v Russia* of the European Court of Human Rights. All of these authors discuss measures that have been taken to allow the supreme court to deal with its existing caseload,

to reduce this caseload and to avoid divergences in the case law of the court (obviously, some measures may serve multiple goals).

Examples of measures to deal with the existing caseload are:

- smaller panels of judges to deal with certain subject matter;
- independent legal advice to the court from the *ministère public* or comparable bodies;
- assistance of support staff in legal research or in writing court decisions (e.g. legal research bureau in the Netherlands, Technical Cabinet in Spain);
- dismissing cases which are manifestly unfounded without a reasoned judgment.

Examples of measures to reduce the caseload of the supreme court are:

- selection criteria based on public interest beyond the individual interests of the litigants;
- applying existing selection criteria narrowly;
- increasing value-based thresholds (not preferred, since value does not reflect legal importance);
- a specialized supreme court bar advising clients on the feasibility of their case;
- preliminary rulings on legal questions;
- continuing legal education of lower judges in order to prevent mistakes at lower courts giving rise to appeal before the supreme court.

Finally, divergences in case law at the supreme courts are avoided either by convening all members or a bigger panel of the court to deal with problematic issues (*Chambre mixte*, *Assemblée plénière*, *Sezioni Unite*, *plenum*) or by a less formal, weekly meeting for a discussion of legal questions with all the judges of a division, either in writing or orally (Netherlands).

It is hoped that the present volume will provide ideas that will assist supreme courts in both the East and the West to remove unmanageable caseloads and, as a result, they will be better able to assist in the interpretation and/or clarification of the law, to provide for unity of the law and to give guidance to the development of the law. After all, it is these tasks which a real supreme court, especially but not only if it serves as a third instance in the judicial hierarchy, should perform.

Reference

P. Yessiou-Faltsi (ed.), The Role of the Supreme Courts at the National and International Level, Thessaloniki: Sakkoulas, 1998, and especially the general report by J. A. Jolowicz, pp. 37–63

The Chinese Supreme People's Court in Transition

Yulin Fu

Abstract In China, the court system consists of four-level ordinary courts that lie at the core of the system, special courts and military courts. The next higher court to the first instance court has appellate jurisdiction as the second instance, and the decision by this court is final and cannot be appealed a second time, which explains the so-called 'two-instance trial system' in China. The Supreme People's Court sits at the apex of the court system pyramid. Its functions fundamentally focus on trying influential cases, formulating interpretations of the law and regulatory documents within the scope of its official duties as well as supervising lower levels of courts. In respect of adjudication, the Supreme People's Court specifically concentrates on screening petitions for reopening proceedings and on trying such proceedings. The reopening proceedings aim to correct substantial and significant procedural flaws of judicial decisions. With regard to its interpretive function, the Court interprets the law and its 'judicial interpretations' have binding effect for all courts throughout the country. From the political perspective, with regard to its supervisory function, the Supreme People's Court strongly influences the lower courts through its regulations in respect of policy related to the justice system and judicial reform, so as to achieve a better administration of justice.

1 Overview

1.1 The Four-Level and Two-Instance Court System in China

The Chinese court system consists of ordinary courts, special courts, and military courts (as shown in Fig. 1). At the core of the structure of the Chinese court system are the ordinary courts, which exist at four different levels: the basic people's

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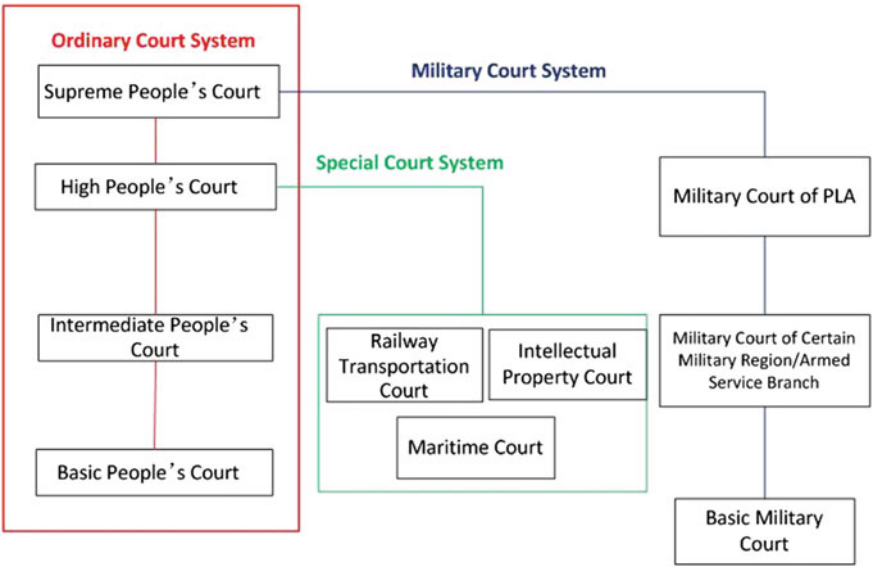

Fig. 1 The Chinese court system

courts, the intermediate people's courts, the high people's courts, and the Supreme People's Court. The ordinary courts sit, respectively, in county-level administrative regions, municipal administrative regions, provincial administrative regions, and in the capital Beijing. The courts at each level have jurisdiction over criminal cases, civil cases, and administrative cases as court of first instance. The 'jurisdiction by level of courts', meaning a specific level of courts has original jurisdiction in a certain kind of case, depends on (in non-criminal cases) the amount of the claim and the importance of the case. The next higher court to the first instance court has appellate jurisdiction as the second instance. The decision made by this second instance court is final and cannot be appealed. Thus, appeals are handled within two levels of the court hierarchy, which is why the court system in China is referred to as a 'two-instance court system'.

The special courts are intermediate courts specialized in certain kinds of cases. Their establishment is generally authorized by the Supreme People's Court in accordance with civil procedural law. At present, the special courts comprise maritime courts, intellectual property courts, and railway transportation courts. These special courts are not established in every administrative region; instead, they have trans-regional jurisdiction over cases. Their decisions may be appealed to the high court in the province where the special court sits. As an ordinary court, the high court usually assigns cases from special courts to the adjudication divisions that are responsible for civil cases.

Military courts are distinct from ordinary courts and have their own court system. The military court system has its own basic court (basic military court), intermediate court (military court of a certain military region or armed services branch), and high court (military court of the PLA (People's Liberation Army)).

In addition to the two-instance court system, China has a special procedure against legally effective decisions, which is called 'judicial supervision procedure' or reopening of proceedings. The high courts and the Supreme People's Court hear most cases of retrial and some appeals, while the basic courts and the intermediate courts hear most of the cases at first instance.

1.2 The Constitutional Position of the Supreme People's Court

The Chinese Constitution establishes the Supreme People's Court and the court system. It states, 'The people's courts of the People's Republic of China are the judicial organs of the state' (Chapter III, Section 7, Article 123); it describes the basic structure of the judicial system (Article 124); it upholds the principle that all cases brought before the people's courts are heard in public (Article 125); and it confirms the independence of the people's courts in the exercise of their judicial authority (Article 126).

The Constitution declares that the Supreme People's Court is the highest judicial organ. The Supreme People's Court supervises the administration of justice by the people's courts at various local levels and by the special people's courts. People's courts at higher levels supervise the administration of justice by courts at lower levels (Chapter III, Section 7, Article 127). The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local people's courts at various levels are responsible to the organs of state authority that created them (Article 128). The term of the President of the Supreme People's Court is the same as that of the President of the National People's Congress. The President shall serve no more than two consecutive terms (Article 124). The Standing Committee of the National People's Congress exercises the power to elect and remove from office the President of the Supreme People's Court (Chapter III, Section 1, Article 63), appoint or remove from office, at the recommendation of the President of the Supreme People's Court, the Vice-Presidents and judges of the Supreme People's Court and members of its Judicial Committee (Article 67).

Accordingly, the Supreme People's Court is responsible to and supervised by the National People's Congress. Thus the Court applies the laws and implements the policies and orders issued by the National People's Congress. In performing its function of interpreting the law the Court cannot contradict any of these. Since the Constitution does not confer on the Court the power to review constitutionality, it has no authority to review any laws made by the National People's Congress (Chapter III, Section 7, Article 128).

Just as the Supreme People's Court is the highest judicial organ of the state so is the Supreme People's Procuratorate the highest prosecutorial organ of the state. Like the Court, but separately from it, the Supreme People's Procuratorate is responsible to and supervised by the National People's Congress. Both supreme organs of the state legal system have the right to interpret the law, that is, to make

judicial interpretations; the interpretations made by the Supreme People's Court are not superior to those made by the Supreme People's Procuratorate. As the supreme state organ for legal supervision, the Supreme People's Procuratorate has the authority to lodge a protest with the Supreme People's Court in accordance with the procedures of legal supervision if it finds a definite error in a legally effective decision or order made by a people's court at any level, including the Supreme People's Court. The Supreme People's Court is required to reopen the proceedings after receiving the protest from the Supreme People's Procuratorate.

1.3 The Fundamental Function of the Supreme People's Court

As the highest judicial organ of the state, the Supreme People's Court supervises the administration of justice by the local people's courts at various levels and by the special people's courts. It also formulates interpretations of the law and regulatory documents within the scope of its official duties.

Cases that fall within the Court's jurisdiction are as follows: (a) cases assigned by laws and decrees to its jurisdiction and those which the Court itself considers it should try as the court of first instance; (b) cases of appeals and of protests lodged against judgments and orders of high people's courts and special people's courts; (c) cases of protests lodged by the Supreme People's Procuratorate in accordance with the procedures of legal supervision; (d) examination and approval of all death penalty sentences, apart from those that should be adjudicated by the Court according to law; (e) cases of state compensation that require the Court to make a compensation decision; and (f) penalties which are below the legally prescribed punishment and thus need to be approved. In addition to its trial responsibilities, the Supreme People's Court oversees the uniform operations of all the courts in China. The Executive Board of the Supreme People's Court manages, supervises, and coordinates the massive number of enforcement cases throughout the country.

Furthermore, as a political organ and for the administration of justice, the Supreme People's Court strongly influences the lower courts through its regulations in respect of policy relating to the justice system, the assessment of courts, and judicial reforms.

1.4 The Inner Structure/Departments of the Supreme People's Court

The departments of the Supreme People's Court include a docketing division, five criminal divisions, four civil divisions, one administrative division, one environmental resources division, one judicial supervision division, two circuit tribunals

(circuit divisions), as well as the office of compensation (for compensation to be paid by the State), the executive board, the general office, the political department, the research department, the supervisory bureau, the bureau of foreign affairs, the information bureau, the bureau of judicial executive equipment, the party committee, and the bureau of retired personnel. There is a single president and 9 vice-presidents, 13 presiding judges, 41 vice-presiding judges, and 179 ordinary judges (54 of them in the civil divisions).[1]

1.4.1 The Docketing Division

The functions of the Docketing Division are many and include the following: accepting and reviewing petitions and letters of complaint about the public authorities (' SHE SU XIN FANG'); hearing appeals against the decision of a court to refuse to accept a case and against a decision that a court lacks jurisdiction; trying cases that involve a dispute over jurisdiction; filing all the cases that the Supreme People's Court accepts; providing judicial aid; conducting case management of all cases before the Supreme People's Court; organizing the court police; guiding the lower level courts in the fields of case filing, case acceptance, jurisdiction, settlement in the docketing stage, and case management; reviewing all the applications of judicial supervision against legally effective decisions or orders and transferring them to the lower courts when the reopening of proceedings is needed; guiding the review of the reopening of proceedings in the lower courts; and participating in the formulation of the Court's interpretations of the law.

1.4.2 The Criminal Divisions

The first, third, fourth, and fifth criminal divisions try cases involving crimes of endangering public security; infringing on the rights of the person and the democratic rights of citizens; infringing on property rights; encroaching on property; disrupting public order; and endangering the interests of national defense. The second criminal division tries cases involving the crimes of endangering national security; undermining the order of the socialist market economy; graft and bribery; dereliction of duty; violation of duty by military personnel; and also crimes involving foreign affairs, Hong Kong, Macao, Taiwan, and overseas Chinese citizens. Review of the death sentence is assigned to different criminal divisions according to territorial jurisdiction.

[1]Website of the Supreme People's Court of the People's Republic of China, Personnel in the Inner Departments of the Supreme People's Court (中华人民共和国最高人民法院网站, 最高人民法院内设机构主要人员), available at: <www.court.gov.cn/jigou-fayuanbumen.html> (in Chinese) (last accessed on 2 May 2016).

1.4.3 The Civil Divisions

The first civil division tries cases involving marriage and family, labour disputes, unjust enrichment, *negotiorum gestio*, real estate, neighbour relations, easement, rural land contract, contract and tort involving natural persons; it sets aside revocation of arbitration; and it guides the work of the divisions. The second division tries cases involving contract and tort disputes between legal persons, and between legal persons and other organizations; security; future goods; bills; companies; domestic bankruptcy; and applications for the setting aside of domestic arbitration awards. The third division tries intellectual property cases involving copyright (including that of computer software), trademark, patent, technical contract, unfair competition, right of scientific and technological achievements, and reconsideration of intellectual property rights applications. The fourth division tries cases involving maritime litigation; Hong Kong, Macao, Taiwan and related affairs that include contract and infringement disputes between natural persons, and between legal persons and other organizations; it reviews applications for setting aside, accepting, and enforcing international arbitration awards and judgments; and it reviews the effect of arbitration clauses related to foreign matters.

1.4.4 The Administrative Division

The Administrative Division tries administrative cases and administrative compensation cases; and it reviews the application of enforcement of administrative organs.

1.4.5 The Judicial Supervision Division

The Judicial Supervision Division retries cases reopened in a supervision procedure (this does not include intellectual property and maritime cases).

1.4.6 The Trial Management Office

The trial management office was established on 23 November 2010 and its main function is coordinating the entire trial management system and providing data and analysis reports.[2]

[2]<www.news.cn>, 'The Supreme People's Court Sets Up an Office of Trial Management', 23 November 2010 (新华网, '最高人民法院成立审判管理办公室',2010年11月23日), available at: <http://news.xinhuanet.com/2010-11/23/c_13619132.htm> (in Chinese) (last accessed on 2 May 2016).