

Advancing the Rule of Law through Education? An Analysis of the Chinese National Judicial Examination

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It is generally assumed that a competent legal profession is a necessary precondition for the establishment of the rule of law. This article explores the role of the Chinese national uniform judicial examination in promoting the development of the rule of law in China. Based on an analysis of the examination papers, the article concludes that the judicial examination is mostly aimed at the technical requirements of law reflected in a formal or "thin" rule of law. The questions indicate a turning away from the rule-by-law model. Only a few questions touch on issues that differentiate competing substantive or "thick" conceptions of the rule of law. This small part of the examination generally reflects a non-liberal conception of the rule of law, although some points are so broadly stated that they can even be reconciled with a liberal rule-of-law model. The legal knowledge and technical legal skills that are the subjects of the examination reflect an increased professionalism of the law in China and have the potential to develop an independent legal profession similar to that in liberal rule-of-law systems.

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Outline of the Problem: Relationship between the Judicial Examination and the Rule of Law



The following analysis of the Chinese state judicial examination (國家司法考試, *guojia sifa kaoshi*) is part of a broader question about the effects of the current system of legal education on the establishment and development of the rule of law. To set the background, I will begin with an overview and discussion of other examinations one has to pass in order to get access to the legal profession and then turn to the core subjects of this enquiry, namely, the questions and exercises of the unified national judicial examination. I will end with an assessment of the judicial examination with regard to the development of the rule of law.

Although the link between a legal education that produces competent and professional legal practitioners and the rule of law seems to be self-evident, there has been no in-depth analysis focusing on the connection between the legal knowledge and the technical skills candidates have to prove in order to pass the state judicial examination on the one hand, and the development of rule of law in China on the other. It is generally assumed that improving the education of judges, public prosecutors, and lawyers is a necessary condition for the implementation of legal and institutional structures promoting the rule of law.¹ A precondition for limiting

¹Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), 343. For the development of the Chinese legal profession see Gao Lingyun, "What Makes a Lawyer in China? The Chinese Legal Education System after China's Entry into the WTO," *Willamette Journal of International Law and Dispute Resolution* 10 (2002): 197-237; and Qizhi Luo, "Autonomy, Qualification and Professionalism of the PRC Bar," *Columbia Journal of Asian Law* 12 (1998): 1-38. For judicial independence in China see: Nanping Liu, *Judicial Interpretation in China* (Hong Kong: Sweet & Maxwell Asia, 1997), 224; Albert Chen, *An Introduction to the Legal System of the People's Republic of China* (Singapore: Butterworths Asia, 1994), 117; and Jerome Cohen, "The Chinese Communist Party and 'Judicial Independence': 1949-1959," *Harvard Law Review* 82 (1969): 967-1006.

government power by law is the existence of law and statutes. If these statutes are to be not only law on the books but also law in action, they need people who understand, interpret, and implement the law. Therefore, a good knowledge of law and technical legal skills is essential.

Until the revision of the Court Organization Law (法院組織法) in 1983, legal knowledge was not mandatory even for prospective judges in China.² And even today, most judges still do not have four-year bachelor's degrees in law. Since the amendment of the Judges Law (法官法), the Prosecutors Law (檢察官法), and the Lawyers Law (律師法) in 2001, judges, prosecutors, and practicing lawyers should, in principle, have either received university-level law school education or have graduated from other university-level programs and subsequently obtained the knowledge of a legal professional.³ In 2001, the Supreme People's Court (最高人民法院) together with the Supreme People's Procuracy (最高人民檢察院) and the Ministry of Justice (司法部) enacted provisions introducing the judicial examination, a unified national entrance examination for anyone who wants to be qualified to work as a judge, prosecutor, or practicing lawyer.⁴ Before the introduction of the unified examination, various kinds of professional examinations existed that were administered by different institutions. Judges and prosecutors had to pass internal examinations that were administered by courts and procuracies. Those who wanted to become practicing lawyers had to take the lawyers qualification examination organized by the Ministry of Justice.⁵

²Art. 34 (2) of "Zhonghua renmin gongheguo fayuan zuzhi fa" (Court organization law of the PRC) (September 2, 1983).

³Art. 9 of "Zhonghua renmin gongheguo faguan fa" (Judges law of the PRC) (February 28, 1995; amended June 30, 2001); Art. 10 of "Zhonghua renmin gongheguo jianchaguan fa" (Prosecutors law) (February 28, 1995; amended June 30, 2001); and Art. 6 of "Zhonghua renmin gongheguo lishi fa" (Lawyers law of the PRC) (May 15, 1996; amended December 29, 2001).

⁴Art. 2 of "Guojia sifa kaoshi shishi banfa" (State judicial examination implementation provisions) (October 31, 2001), <http://www.cer.net/article/20011101/3045365.shtml>.

⁵Vincent Cheng Yang, "Judicial and Legal Training in China: Current Status of Professional Development and Topics of Human Rights" (Background paper for the United Nations Office of the High Commissioner for Human Rights, August 2002), 19.

Because the Chinese legal order is in a process of transformation, it is not an easy task to assess these developments in terms of the rule of law. If one were to evaluate China's legal system against the background of the constitution of a Western liberal-democratic state—for instance, against the background of the rule-of-law principle of the German Basic Law—one would easily come to the conclusion that the Chinese legal system falls far short of the rule of law.⁶ This paper will follow another approach that uses a broader rule-of-law conception taking into account alternatives to a liberal-democratic rule of law.

From another perspective, this paper will adopt a narrow approach—it will attempt to attribute the public law questions of the judicial examination to different rule-of-law models or a rule-by-law system. The result of this exploration can only indicate possible current or future development of the rule of law in China. Without further empirical research it is impossible to establish causal links, such as that the process of preparing for the judicial examination indoctrinates the test-takers into the values that are reflected in the correct examination answers and that, as a result, the candidates are going to apply, interpret, or draft legal provisions in accordance with these values. If the question papers fit the pattern of a liberal rule of law, it is not possible to draw the direct conclusion that China is in reality a liberal rule-of-law state, because the questions may only reflect the attitudes of the persons who drafted the examination. Although there is no solid empirical basis from which to draw the above conclusions, the results of attributing the examination questions to different models can still be seen as indications of the development of the rule of law in China. At the same time, one has to be careful not to expect the examination questions to bear too much analytical weight, because some of them are too broad to draw very precise conclusions.

⁶Björn Ahl, "Cong Deguo shijiao kan Zhongguo sifa gaige" (Reform of the Chinese judiciary from a German perspective), *Zhong-De faxue luntan* (Yearbook of the Sino-German Institute for Legal Studies) 2 (2003): 69-82; and Björn Ahl, "China auf dem Weg zum Rechtsstaat?" (Is China becoming a rule-of-law state?), *Die Politische Meinung* (Political Opinion) 423 (2005): 25-30.

Furthermore, this article is neither going to argue that the introduction of the unified national judicial examination is a turning point in China's development of the rule of law, nor that the new examination is more important than introducing new substantive or procedural laws or advancing institutional reforms.⁷ This enquiry is only trying to offer an additional perspective on the development of the rule of law in China.⁸

Models of Rule by Law and the Rule of Law

Following Randall Peerenboom's book *China's Long March toward Rule of Law*, this section introduces a rule-by-law model, a formal or "thin" description of rule of law, and two representative models of statist socialist rule of law and liberal-democratic rule of law. These different ideal types are constructed according to the present realities in China and therefore do not provide categories that can be applied to all legal systems.⁹ There will be no attempt to answer the empirical question of whether the Chinese legal system is best described as a rule-by-law system or one of the rule-of-law types.

⁷Some Chinese authors argue that the introduction of the unified examination is a "break-through" in the reform of the judicial system. See, for example: Zhang Pinze, "Tongyi sifa kaoshi dui Zhongguo sifa tizhi de yingxiang" (The impact of the unified judicial examination on the Chinese judicial system), *Zhongguo sifa* (Judicature of China), 2004, no. 6: 72-75; and Xin Chunying, "Guojia sifa kaoshi xuyao xiangying de zhidu zhichi" (The state judicial examination needs corresponding systemic support), *Zhongguo lüshi* (Chinese Lawyer), 2002, no. 4:17-18.

⁸For the development of the Chinese legal system as a whole toward the rule of law see: Peerenboom, *China's Long March*; Robert Heuser, "Sozialistischer Rechtsstaat" und Verwaltungsrecht in der VR China 1982-2002 (Socialist rule-of-law state and administrative law in the People's Republic of China 1982-2002) (Hamburg: Institut für Asienkunde 2003); Michael William Dowdle, "Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China," *New York University School of Law Journal of International Law and Politics* 35 (2002): 1-200; Shen Kui, "Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's 'First Constitutional Case'," *Pacific Rim Law and Policy Journal* 12 (2003): 199-231; Albert Chen, "Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law," *UCLA Pacific Basin Law Journal* 17 (1999): 125-65; and Eric Orts, "The Rule of Law in China," *Vanderbilt Journal of Transnational Law* 34 (2001): 43-115.

⁹Peerenboom, *China's Long March*, 71.

Rule by Law

Rule by law refers to a form of instrumentalism in which law is merely a tool to be used by the state to control others without it imposing meaningful restraints on the state itself. The economic regime is dominated by government intervention and the distinction between a public and a private sphere is nonexistent. The political regime is characterized by single-party rule, no elections, and a totalitarian or authoritarian state. The party's role is not defined in the law and the law is only a tool in the hands of the party-state leadership; it is not intended to limit state and party interests. Law enhances government efficiency and is not meant to protect individual rights. Rights exist as programmatic goals only; they are granted by the state and receive no real protection against the state. Duties are emphasized, particularly duties to the state. The state enforces strict thought control and there exist very strict limits on attacks against the ruling party. Disputes are settled administratively or by party leaders rather than courts, and the formal legal system is mainly used to suppress enemies. Party members are not subject to the courts. Party policies supplant and trump laws, courts are not independent, and the party determines the outcome of particular cases.¹⁰

"Thin" and "Thick" Descriptions of the Rule of Law

Thin rule of law: Before turning to the substantive or "thick" rule-of-law models, the standards of a "thin" theory of rule of law that every rule-of-law system has to meet will be introduced. A thin rule of law requires that law imposes meaningful limits on state actors. Government of law, supremacy of the law, and equality of all before the law constitute core notions of the concept. Furthermore, there must be procedural rules for law-making and laws must be made by an entity with the authority to make them in accordance with such rules, otherwise the laws are not valid. Laws must be made public and be readily accessible and generally applicable. Provisions must be relatively clear, prospective rather than re-

¹⁰Ibid., 64, 108 et al.

trospective, and must be consistent on the whole and relatively stable. The gap between law on the books and law in action should be narrow. Of course, in reality there are no freestanding thin rule-of-law legal systems that exist independently of a political and social context and a set of particular values.¹¹

Statist socialist rule of law: The socialist rule-of-law state combines a market economy with much state regulation, a high level of public ownership, and more restrictions on private ownership. The political system is dominated by single-party rule. There are no elections at all or only at the lowest levels. Instead, there is a nomenclature system of appointments. The state plays a major role. There is no civil society, or only a very limited one, and rights are granted by the state. Unity of thought is preferred to freedom of thought. The state has a tendency to exercise strict thought control; at minimum there are strict limits on attacks against the ruling party. "Thought work" (思想工作, *sixiang gongzuo*) is emphasized to ensure common ground and consensus on important social issues. The party influences the law-making process. Although the judiciary is functionally independent, the judges are subject to adjudicative supervision, and courts have to serve party interests. The legal professions are subject to political requirements. Broad laws exist to protect the state and there are harsh administrative penalties such as re-education through labor (勞動改造, *laodong gaizao*).¹²

Liberal-democratic rule of law: The economic regime of the liberal-democratic rule of law is characterized by a free market, minimum government interference and regulation, clear distinction between public and private, and limited administrative discretion. The state in a liberal-democratic context is neutral and limited, and civil society is independent from the state. The emphasis lies on civil and political rights; freedom is privileged over order and autonomy over social solidarity and harmony. The purposes of the rule of law are to limit governmental power, to prevent

¹¹Ibid., 65.

¹²Ibid., 106.

government arbitrariness, and to ensure predictability and certainty. Civil and political rights are highly protected through the formal legal system. As far as the institutions are concerned, there is a clear separation between law and politics and an independent and elected legislature. The judiciary is independent and the appointment and removal of judges is relatively non-politicized. In addition, the legal profession is independent and self-governing.¹³

Both thick descriptions of rule of law share a belief in a market economy, but differ in the degree of government intervention. It is therefore difficult to attribute the contents of the examination to a particular rule-of-law model. However, a high quota of questions concerning civil law as well as a clear distinction between public law and private law could indicate a reduced involvement of the state in economic matters.

As far as the political order is concerned, the state is neutral and limited in a liberal rule-of-law context whereas statist socialists favor a large role for the government in controlling social activities. The degree to which society is controlled is reflected in the content of the judicial examination, because the examination itself is an instrument for controlling society through the selection of people qualified for the legal profession. The examination would be an indicator of a large role for the state if it explicitly or implicitly tests the candidates' knowledge of Marxist-Leninist ideology in a way that excludes other ideologies. This could stand for an effort to exercise thought control.

Another aspect that could imply the rejection of a civil society is the form of questions in the judicial examination. If the style of the questions is very formalistic and their content scarcely touches upon real legal problems with practical relevance, this will be a sign of advancing political apathy and the intention of educating "state legal workers" who are only capable of working under the tight supervision of the state and are unable to think on their own. If, on the contrary, the questions deal with the application and interpretation of law and emphasize procedural aspects in-

¹³Ibid., 103.

stead of "correct results," this will imply autonomy of law, something that is fully developed only in the liberal-democratic rule-of-law model.

Of course, it is possible that knowledge and skills tested in the judicial examination can only be attributed to a thin rule of law and are indifferent to both of the thick rule-of-law conceptions, so that they could relate both to a liberal-democratic rule of law with a Western imprint as well as to a socialist authoritarian one-party state. However, such a conclusion would imply that the current judicial education system in China has the potential to train legal practitioners who are qualified to manage the manifold legal problems of a civil society that is governed by a liberal-democratic rule of law.

The Context of the Judicial Examination

The unified national judicial examination is only one of a number of examinations that candidates have to pass in order to be admitted to the Chinese legal profession. With few exceptions, a four-year university degree is a mandatory condition for becoming a judge, prosecutor, or lawyer.¹⁴ In order to become a judge or a prosecutor in China, it is also necessary to pass the civil service examination. Lawyers only need one year of practical work and the state examination.

National university entrance examination: Candidates for the national judicial examination require a university degree. That is why the national university entrance examination is also an important means of pre-selecting candidates for judicial occupations. The function of the university entrance examination is in some respects similar to that of the imperial examination system that was abolished in 1905. The entrance examination mirrors the structure and organization of the imperial examination, although the latter was not designed to promote education but to select officials for the civil service. The imperial examination played an

¹⁴In the 2003 judicial examination only about three hundred successful candidates had no bachelor's degree.

important role in traditional Chinese culture in that it established a clear conception of the structure and organization of knowledge, thus contributing to the remarkable continuity of the Chinese imperial system. The aim of today's examination system is to select candidates for admission to universities who are politically trustworthy, academically well-prepared, and physically healthy. Since the founding of the PRC, the entrance examination system has been an instrument of political discrimination that severely damaged the social development of the country. During the 1990s, there was still a strong emphasis on political qualifications as the first condition for university admission.¹⁵

In general, the examination subjects for students of the social sciences group include politics, Chinese language, mathematics, foreign languages, history, and geography. In recent years, however, the entrance examination has been reformed several times. For instance, Jiangsu Province (江蘇省) has an examination with three compulsory subjects: Chinese, mathematics, and foreign languages. Additionally, the candidates, depending on their preferences and the universities' requirements, have to choose two further subjects from the six disciplines of politics, history, geography, physics, chemistry, or biology.¹⁶ A positive effect of the entrance examination is its function as a lever to raise academic standards in secondary education. On the other hand, it limits the interests and creativity of teachers and students.¹⁷

¹⁵See Yuan Feng, "National College Entrance Examinations: The Dynamics of Political Centralism in China's Elite Education," *Boston University Journal of Education* 181, no. 1 (1999): 39-56, at 40. For education in China see further: Michael Agelasto and Bob Adamson, eds., *Higher Education in Post-Mao China* (Hong Kong: Hong Kong University Press, 1998); Benjamin Elman, *A Cultural History of Civil Examinations in Late Imperial China* (Berkeley: University of California Press, 2000); Suzanne Pepper, *Radicalism and Education Reform in 20th-Century China* (Cambridge: Cambridge University Press, 1996) Glen Peterson and Ruth Hayhoe, eds., *Education, Culture, and Identity in Twentieth-Century China* (Michigan: University of Michigan Press 1999); and Xuewei Yang, "On Reforming the College and University Entrance Examinations," *Chinese Education & Society* 26 (1993): 6-24.

¹⁶"Jinnian gaokao gedi kemu zuhe xuanding" (今年高考各地科目組合選訂, Regulations of this year's combination of subjects concerning the university entrance examination at different places), February 13, 2003, <http://www.sina.com.cn>.

¹⁷Feng, "National College Entrance Examinations," 46.

Law school education: Legal education at Chinese universities has the most important impact on developing the legal knowledge and technical skills of candidates of the national judicial examination.¹⁸ During the 1980s and 1990s, most judges and court officials were appointed to the bench without having a university law degree. Therefore, legal training at universities is important not only to ordinary students, but also to those who are already working as judges.

At the end of 2005, there were 559 universities in China offering bachelor's degrees in law. All in all there are about 300,000 law students enrolled at university. More than 200,000 are undergraduates, around 80,000 are graduate students on master of law programs, and around 6,000 are doctoral students.¹⁹ The largest law schools in China are the five specialist law universities.²⁰ In addition, there are colleges for judges and prosecutors that form a network of specialized on-the-job training centers, like the National Judges College (國家法官學院) or the National Prosecutors College (國家檢察官學院). These institutions have local branches in all provinces.

The objectives of law school education have yet to be precisely defined. For instance, the curriculum is neither clearly designed to train students to become legal practitioners, nor is it clearly orientated toward the skills and arguments needed to decide court cases. At most Chinese law schools, theoretical lecturing is still the main method of instruction; case method and Socratic dialogue are not practiced.²¹ University education is

¹⁸Hong Hao, *Fazhi lixiang yu jingying jiaoyu: Zhongwai faxue jiaoyu zhidu bijiao yanjiu* (The ideal of the rule of law and elite education: a comparative study of Chinese and foreign judicial education systems) (Beijing: Beijing daxue chubanshe 2005); Yang, "Judicial and Legal Training"; and Pamela N. Pham, "Note from the Field. Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice," *Yale Human Rights and Development Law Journal* 8 (2005): 117-54.

¹⁹http://www.webo.cn/webo/html/2006-3-8/content_206986.html.

²⁰These five universities are: China University of Politics and Law, Beijing (北京中國政法大學); East China University of Politics and Law, Shanghai (上海華東政法學院); Southwest China University of Politics and Law, Chongqing (重慶西南政法大學); Northwest Institute of Political Science and Law, Xi'an (西安西北政法學院); and Zhongnan University of Economics and Law, Wuhan (武漢中南財經政法大學).

²¹Gao, "What Makes a Lawyer in China?" 217.

still aimed at educating excellent socialist legal practitioners and government administrators who have firm political beliefs, behave according to high ethical standards, and specialize in law.²² The first university law degree is the Bachelor of Law degree, awarded after four years of undergraduate study. Applicants for the degree must have completed high school and passed the university entrance examination. Students who have completed four years of undergraduate education are eligible to apply for three-year Master of Law programs. The entrance examinations for graduate students are strict; the applicants must pass unified national tests in politics and a foreign language as well as other tests decided by each law faculty individually. For a three-year Ph.D. program, applicants have to pass examinations similar to entrance examinations for graduate study and must have finished their Master of Law degree.²³

Civil service examination: The Civil Servants Law (公務員法) provides that civil servants be recruited on the basis of public examinations, rigorous inspection, equal competition, and selection of the best.²⁴ Civil service examinations are held at national and provincial levels. In November 2005, 365,000 people participated in the national civil service examination; this means that on average 48 candidates were competing for each available government position.²⁵ The written examination is divided into two parts: in the first part logical and analytic skills are tested, and in the second, the candidates have to write an essay about political matters.²⁶ This

²²East China University of Politics and Law, "Jiuwu fazhan guihua he 2010 nian yuanjing mubiao" (九五發展規劃和 2010 年遠景目標, The ninth five-year development plan and long-term target until 2010), *Zhengfa gaojiao yanjiu* (Research on Higher Legal Education), 1996, no. 2-3:2.

²³Gao, "What Makes a Lawyer in China?" 219.

²⁴Art. 21 of "Zhonghua renmin gongheguo gongwuyuan fa" (Civil servants law) (April 27, 2005).

²⁵Feng Jianhua, "In a Tight Job Market, More and More Young Chinese Are Opting for the Civil Service," *Beijing Review* 49, no. 2 (January 12, 2006), <http://www.bjreview.com.cn/06-02-e/china-3.htm>.

²⁶Tang Xiaoyang, "Lun 'Gongwuyuan fa' dui gongwuyuan kaoshi luyong zhidu de jicheng yu chuangxin" (On the civil servants law's legacy and innovation concerning the examination system for recruiting civil servants), *Guangdong xingzheng xueyuan xuebao* (Journal of Guangdong Institute of Public Administration) 17, no. 4 (2005): 47; Liu Xiaonian,

last step toward being appointed a judge or prosecutor can be easily used to select candidates according to ideological criteria.

The National Judicial Examination

Background

In October 2001, the Supreme People's Court, the Supreme People's Procuracy, and the Ministry of Justice enacted provisions to introduce a national unified state examination, namely, the State Judicial Examination Implementation Provisions. These three bodies form the coordination committee that deals with important questions concerning the state examination. The Ministry of Justice is responsible for implementing the examination, which is held once a year on a date announced at least three months in advance.²⁷ The purpose of the examination is to test the candidates' professional legal knowledge (法律專業知識, *falü zhuan ye zhishi*) and the skills necessary for practicing law (充實法律執業的能力, *chongshi falü zhiye de nengli*). The examination includes a broad range of questions including theoretical legal science (理論法學, *lilun faxue*), applied legal science (應用法學, *yingyong faxue*), provisions of current laws and legal practice (法律實務, *falü shiwu*), and professional ethics (法律職業道德, *falü zhiye daode*).²⁸

In order to take part in the examination, candidates have to meet the following conditions: they have to be of Chinese nationality, loyal to the constitution, entitled to vote, and legally competent. Furthermore, the candidates have to hold the required university degrees and have the

"Gongwuyuan kaoshi luyong zhidu xianzhuang de xitong fenxi" (Systematic analysis of the current situation of the examination system for recruiting civil servants), *Anhui gongye daxue xuebao* (Journal of Anhui University of Technology) 20, no. 1 (2003): 36-37; and Sun Hongli, "Dui wanshan gongwuyuan kaoshi luyong zhidu de tantao" (On improving the examination system for recruiting civil servants), *Shandong xingzheng xueyuan Shandong sheng jingji guanli ganbu xueyuan xuebao* (Journal of Shandong Administration Institute and Shandong Economic Management Personnel Institute) 66 (2005): 6-8.

²⁷Art. 4 of "Guojia sifa kaoshi shishi banfa."

²⁸*Ibid.*, Art. 7.

knowledge necessary for becoming a judge, prosecutor, or lawyer, and to be of good behavior (品行良好, *pingxing lianghao*).²⁹ In addition to the judicial examination, the Judges Law prescribes a Bachelor of Law or other four-year bachelor's degree as a mandatory qualification. The State Council can lower the level to a college degree (專科學歷, *zhuanke xueli*) in regions where conditions are difficult.³⁰ This latter degree can be obtained over a period of two years, including half a year of studying non-legal courses and a three-month internship. In order to be admitted to the bar, one year of practical work in a law firm is required.³¹

Over 360,000 candidates participated in the first unified judicial examination held in March 2002. This was a nearly 65 percent increase over the 220,000 candidates for the previous qualifying examination for lawyers held in 2000. One-third of the participants were staff members of the courts, the procuracy, and police departments. However, the pass rate was only 7 percent.³² In 2003, the pass rate was 10.2 percent and in 2004, 20,000 candidates (11.2 percent) gained the minimum of 360 credits necessary to pass the state examination. In under-privileged areas of western China, the credit requirement was decreased to 335. Of the qualified candidates, 19,700 (97.7 percent) had a four-year bachelor or even a higher university degree, although not necessarily in law. This is an increase of 2.2 percent over the previous year. More than 3,500 candidates who had been working in the courts passed the examination (17.4 percent). From the procuracy, more than 2,100 candidates (10.7 percent) were successful.³³ With the introduction of the unified judicial examination, the requirements for entering the legal profession have become much higher than before. The examination has been criticized for being out of step

²⁹Ibid., Art. 13.

³⁰Art. 6 of "Zhonghua renmin gongheguo lüshi fa."

³¹Ibid., Art. 8.

³²Yang, "Judicial and Legal Training in China," 20.

³³"2004 nian sifa kaoshi canjia renshu ji tongguo lü" (2004 年司法考試參加人數及通過率, Number of participants and rate of successful candidates in the 2004 judicial examination), http://education.163.com/edu2004/editor_2004/training/041223/041223_1709_87.html.

with the system of law school education because of the high failure rate.³⁴ On the other hand, the rise in professional standards has been applauded because it has the potential to encourage law schools to adopt unified curricula and standards.³⁵

Form and Execution of the Examination

According to the Ministry of Justice, the aim of the state examination is to test whether candidates have the required knowledge and skills to practice as judges, prosecutors, or lawyers by means of a rational, fair, and just examination procedure.³⁶ The examination includes legal theory, history of law, constitutional law, administrative law and administrative litigation law, criminal law, criminal procedure law, civil law, civil procedure law, international public law, international private law, international economic law, and professional ethics.

It is a written, closed-book examination that generally takes place over two days in September. The examination consists of four papers. The first paper (150 credits, 3 hours) comprises 100 multiple-choice questions. Fifty of those questions consist of four statements of which only one is correct, with one credit for each correct answer. The remaining 50 questions are also composed of four statements. In some of these, two statements are correct; in others the number of correct statements is undefined. For each correct answer the candidate gets two credits. The first paper covers legal theory, history of law, constitutional law, economic law, public interna-

³⁴For an assessment from Chinese perspective see: Xu Henan and Guo Lixin, "Tongyi sifa kaoshi yantaohui zongshu" (Summary of the seminar on the unified judicial examination), *Huanqiu falü pinglun* (Global Law Review), 2002, no. 2:88-94; He Weifang, "Tongyi sifa kaoshi er ti" (On two topics of the unified judicial examination), *Falü kexue* (Legal Science), 2001, no. 5:3-6; Yao Jianzong, "Guojia sifa kaoshi yu woguo sifaguan linxuan" (The state judicial examination and the selection of Chinese legal officials), *Fazhi yu shehui fazhan* (Legal System and Social Development), 2002, no. 2:3-9; and He Qinhuo and Chen Linghai, "Tongyi sifa kaoshi hou de faxue jiaoyu" (Legal education after the unified judicial examination), *Huadong zhengfa xueyuan xuebao* (Journal of the East China University of Politics and Law), 2003, no. 1:3-12.

³⁵Yang, "Judicial and Legal Training in China," 19.

³⁶"2005 nian sifa kaoshi dagang" (2005 年司法考試大綱, Overview over the judicial examination of 2005), April 2005, <http://www.chinafakao.com.cn/Article/ksdg/200504/405.html>.

tional law, private international law, international economic law, and professional ethics. The second paper is structured in the same way as the first. It covers criminal law, criminal procedure law, administrative law, and administrative procedure law. The third paper covers civil law, business law, and civil procedure law, including arbitration.

The fourth paper must be marked manually, as it is an essay paper. The candidates have three and a half hours to complete this paper and they can gain a maximum of 150 credits. It comprises legal theory, constitutional law, administrative law and administrative procedure law, criminal law, criminal procedure law, civil law, business law, and civil procedure law. The fourth paper demands that the candidate show their technical legal skills and their writing abilities. They have to answer so-called analysis questions (分析題, *fēnxítí*) in the form of short essays. Some of the questions test the candidate's ability to make a case analysis. In addition, there are questions concerning formal legal documents (法律文書題, *fālǜ wénshū tí*). In this part, the candidates have to structure a case according to the question and have to create a legal document. The analyzing of case records and the drafting of indictments and judgments is aimed at testing the candidates' practical skills.

The marking of the papers should take into account the standard form, clarity and uniformity of language, punctuation, and grammar. In the discussion exercises, the candidates have to apply their knowledge of law and legal theories to the analysis of a specific topic. The marking of these exercises should take into account the ability of candidates to clearly present their own point of view and elaborate their reasoning, as well as their language ability, logic, and exactness of expression.

Evaluation of the Examination Papers with Regard to the Rule-of-Law Models

Many crib books for the judicial examination can be found in Chinese bookstores. They contain questions, together with model answers, taken from the lawyer qualification examinations of the 1990s and previous

years' national unified judicial examinations.³⁷ As this paper is assessing the examination questions with regard to different conceptions of the rule of law, the qualitative analysis of examination questions is confined to those in the categories of legal theory, constitutional law, administrative law, and professional ethics, because they throw the most light on the development of rule of law in China. The other categories of questions are dealt with in the following analysis of the quantitative distribution of questions among different legal subjects.

Quantitative Relationship between the Various Fields of Law in the Judicial Examination

The quantitative share of the relevant fields of law in the entire score for the judicial examination is also significant in assessing the rule of law. The four judicial examinations from 2002 to 2005 and the last lawyer qualification examination of 2000 are the subjects of this quantitative analysis. The five examinations will be analyzed as a whole; differences in the distribution of obtainable credits between the examinations are not taken into consideration.

The first remarkable point is that Marxist-Leninist ideology is not a formal part of the judicial examination. This is evidence of the high professional standard of the examination. Furthermore, the wide range of different legal subjects covered is impressive. The subjects include important practical fields, such as banking law and securities law. The importance of international economic relations is underlined by the inclusion of a high proportion of questions relating to public and private international law, and international economic law (9.0 percent). Public law, constitutional law, administrative law, and environmental law account for 12.1 percent; legal history, legal theory, and professional ethics total 11.2 percent. Civil law, including consumer protection law, auction law, and the civil

³⁷Zhang Shuyi, *Guojia sifa kaoshi* (The state judicial examination) (Beijing: Zhongguo jingji chubanshe: 2002); and Sui Pengsheng and Yang Xiuqing, *2006 nian sifa kaoshi linian shiti fenlei jingjie* (2006 explanations of categorized questions of the judicial examinations from the past years) (Beijing: Zhongguo fazhi chubanshe 2006).

procedure law, accounts for 27.0 percent; business law, including the law of associations, adds up to 10.5 percent of the entire score. Tax law, labor law, and social welfare law amount to 1.5 percent and the writing of documents accounts for 2.0 percent. Finally, criminal law and criminal procedure law are very important with 24.1 percent (see table 1).

The distribution of obtainable credits among the different subject areas is quite balanced. Civil and economic law is the most important subject area, accounting for over one-third of obtainable credits. This corresponds with the aim of legal reform in China to give priority to safeguarding economic growth. Currently, civil law and economic law are the most developed areas of law in China. The credits candidates can gain in the category of case analysis amount to half of the obtainable credits in some branches of civil or economic law.

Criminal law accounts for about one-fourth of obtainable credits. It may be regarded as a positive development that legal theory and legal history only account for a small percentage of credits; in the past these subject areas were mainly dominated by Marxist-Leninist ideology. The relatively small percentage dedicated to public law may be attributed to this area's slower development compared with civil law and its less important role in practice.

Questions Concerning Legal Theory

The questions listed in the category of legal theory deal with a wide variety of subjects, including questions about judicial review, hierarchy of norms, and constitutional or administrative law. Marxist theory of law is not the only subject in this category.

One example of a formalistic exercise, which underlines the authoritative value of patriotism, is the question asking about different explanations of the term "legal system" (法律體系, *falü tixi*).³⁸ The introduction to this question states that, although the concept of a legal system can be understood, explained, and used in many different ways, the candidate

³⁸Question 1, paper 1, judicial examination 2002.

Table 1
The Distribution of Credits among Different Legal Subject Areas

Subject area	Overall points 2000, 2002-05	Points for case analysis	Percentage
Criminal Law	314	91 (29%)	13.1%
Criminal Procedure Law	261	68 (26%)	11.0%
Administrative Law	192	37 (19%)	8.0%
General Principles of Civil Law	53	26 (49%)	2.2%
Securities Law (擔保法, <i>Danbao fa</i>)	48	15 (31%)	2.0%
Intellectual Property Law	59	22 (37%)	2.5%
Marriage Law and Succession Law	45	5 (11%)	1.9%
Contract Law	165	52 (32%)	6.9%
Civil Procedure Law	250	79 (32%)	10.5%
Arbitration Law	54	26 (48%)	2.3%
Companies Law	153	69 (45%)	6.4%
Land Law and Real-Estate Law	17	–	0.7%
Environmental Protection Law	12	–	0.5%
Negotiable Instruments Law	19	–	0.8%
Insurance Law	27	–	1.1%
Law Against Unfair Competition	13	–	0.5%
Auction Law	3	–	0.1%
Invitation of Tenders Law	4	–	0.2%
Consumer Protection Law	10	–	0.4%
Product Quality Law	10	–	0.4%
Banking Law	12	–	0.4%
Securities Law (證券法, <i>Zhengquan fa</i>)	17	3 (18%)	0.7%
Tax Law	12	–	0.5%
Labor Law and Social Law	25	–	1.0%
Legal Theory	182	105 (58%)	7.6%
Constitutional Law	85	–	3.6%
Public International Law	55	–	2.3%
Private International Law	68	–	2.8%
International Economic Law	93	–	3.9%
History of Law	32	–	1.3%
Drafting of formal legal documents (only from the fields of Criminal Law and Criminal Procedure Law)	47	–	2.0%
Professional Ethics	55	–	2.3%
Overall points	2,392		

should be able to define the basic criteria of this notion. Four statements are given and the candidate has to identify the false one: (1) the current national law should work as a basis for examining the Chinese legal system; (2) the modern legal system in China stems from the law reforms of Shen Jiaben (沈家本); (3) the legal system in China is a unified system, although there are some differences between the legal system in Hong Kong and that of the mainland; and (4) China lacked a legal system during the imperial period because there was no division into different fields of law. The fourth answer is false. In answering this question, candidates have to bear in mind that the term "legal system" has a broad meaning and that it relates to the entire state, as the part concerning Hong Kong shows. Candidates who took the view that Hong Kong and the mainland have two separate legal systems deviated from the "patriotic line" and were disqualified. However, such questions are quite rare.

Questions on the relationship between legal and moral norms appear more frequently. One question emphasizes that morals and laws are both norms of society that are valid and have compulsory character, but that there are differences between moral and legal norms. The candidates have to identify which out of four answers concerning the relationship between moral and legal norms are correct. The three correct answers are: legal norms emphasize both duties and rights, whereas moral norms only emphasize duties; the compulsory character of moral norms is a purely psychological one; and Marxist jurisprudence argues against a one-sided emphasis on the priority of the stability of law. The wrong answer states that moral norms that are reflected in legal norms are always abstract. The comment on this question is that moral norms as they are reflected in legal norms are always concrete. Because they constitute a historic concept, the contents of which change over the course of time, moral norms reflect the interests of the ruling class, and these interests are concrete.³⁹ This exercise reveals that candidates have to be familiar with the main features

³⁹Question 4, paper 1, judicial examination 2002; for the relationship between moral and legal norms see question 6, paper 1, judicial examination 2005.

of Marxist jurisprudence. However, it is interesting that one statement is explicitly attributed to Marxist legal theory and therefore is distinguished from non-Marxist or Western legal theory. Thus, Marxist legal theory is to some extent qualified.

In another part, the candidate has to identify which out of four opinions about the character and function of law correspond with the Marxist point of view. The candidate has to recognize that law is not the expression of the common will of the members of society. In addition, the idea of law being determined by tradition, morals, customs, the structure of the state, the international environment, and other circumstances, does not accord with the Marxist point of view. Instead, the candidates have to realize that law has a political and social function.⁴⁰ Furthermore, there are also similar formalistic questions concerning the relationship between rights and duties,⁴¹ and that between rights and interests.⁴² A series of questions deals with the application of law, for example, the *lex-posterior* rule⁴³ or the different methods of interpretation.⁴⁴ Other questions deal with the relationship between international public law and Chinese national law,⁴⁵ and the hierarchy of norms.⁴⁶ Interestingly, questions of comparative law are touched upon; for instance, the differences between the Anglo-American legal systems and continental legal systems.⁴⁷ One question deals with unwritten law as a source of law. The candidates have to be able to recognize that most unwritten law is customary law and that case law is not considered to be written law. The candidates have to identify as wrong the statement that unwritten law is not a formal legal source of a state and that

⁴⁰Question 1, paper 1, judicial examination 2004; for the nature of law see question 53, paper 1, judicial examination 2005.

⁴¹Question 2, paper 1, judicial examination 2002.

⁴²Question 1, paper 1, judicial examination 2005.

⁴³Question 6, paper 1, judicial examination 2004.

⁴⁴Question 7, paper 1, judicial examination 2005; question 2, paper 1, judicial examination 2003.

⁴⁵Question 46, paper 1, lawyers qualifications examination 2000.

⁴⁶Question 54, paper 1, judicial examination 2004.

⁴⁷Question 54, paper 1, judicial examination 2005; question 37, paper 1, judicial examination 2002.

the PRC is a state that denies unwritten law.⁴⁸

Another question concerns the concepts of human rights and fundamental rights. Candidates have to know that fundamental rights are a way of realizing human rights. Human rights as such have to be distinguished from fundamental rights because in some states human rights are considered as rights which "should be enjoyed" (應該享有的權利, *yinggai xiangyou de quanli*) by human beings.⁴⁹ That expresses the Marxist understanding of human rights that does not recognize them as inherent rights that are inseparable from human beings.⁵⁰ Another question requires the distinction between rule of law (法治, *fazhi*) and legal system (法制, *fazhi*). Candidates have to recognize that the core of rule of law consists of legal protection of citizens and the limitation of government power. They are wrong to identify rule of law as requiring the integration of law completely into society, implying that law replaces other mechanisms of control in society. Another wrong answer is that the distinction between rule of law and legal system (rule by law) is only a matter of the degree of importance of law in society.⁵¹

Candidates could obtain up to 25 credits for writing an essay on the following topic: "States practicing a common law system adhere to a system of binding precedents; i.e., the primary source of law is judicial opinion and judges are bound by their previous decisions. In China, written law and judicial interpretations are the main sources of law; at the same time, the Supreme People's Court exercises supervision over lower courts by publishing model cases. Please give your point of view relating to precedents, model cases, and judicial interpretations."⁵² This exercise requires profound knowledge of the functions of decisions and so-called

⁴⁸Question 51, paper 1, judicial examination 2005.

⁴⁹Question 55, paper 1, judicial examination 2005.

⁵⁰Gong Peixiang, "Hefaxing wenti: quanli gainian de fazhexue sikao" (The problem of legitimacy: legal philosophic thoughts about the notion of subjective rights), *Shehui kexue zhanxian* (Social Science Front), 1992, no. 3:137.

⁵¹Question 51, paper 1, judicial examination 2004; for the rule of law see also question 4, paper 1, judicial examination 2004.

⁵²Question 8, paper 4, judicial examination 2005.

judicial interpretations in the Chinese judicial system. This part of the judicial examination emphasizes its openness and its progressive approach to the Chinese legal system, requiring a comparison with the common law system.

Questions about Constitutional Law

In the field of constitutional law, there are a number of different categories of questions. First, there are questions that only test knowledge of the wording of specific constitutional provisions. For example, the delimitation of the local competences of government agencies,⁵³ the provisions on state ownership of national resources⁵⁴ and on social benefits,⁵⁵ the competences of the president,⁵⁶ and the protection of private property.⁵⁷ Meanwhile, the binding effect and the supremacy of the Chinese Constitution play an important role in a number of questions. For example, candidates have to identify as correct the statement that the Constitution is the basis for law-making, and statutes or other legal provisions are null and void insofar as they contradict the Constitution, and that the Constitution is the highest guiding principle for all state actions.⁵⁸

A series of exercises deals with the Law-Making Law (立法法).⁵⁹ This law was enacted in March 2000 as a kind of "substitute constitution" that includes not only provisions on law-making, but also regulates the delimitation of legislative competences and the hierarchy of norms. It also contains provisions that specify the principle or requirement of law and the prerequisites for legislative interpretation.⁶⁰ Because contradic-

⁵³Question 5, paper 1, judicial examination 2002.

⁵⁴Question 6, paper 1, judicial examination 2002.

⁵⁵Question 8, paper 1, judicial examination 2002.

⁵⁶Question 10, paper 1, judicial examination 2005.

⁵⁷Question 7, paper 1, judicial examination 2004.

⁵⁸Question 38, paper 1, judicial examination 2005; for the supremacy of the constitution see: question 11, paper 1, judicial examination 2005.

⁵⁹"Zhonghua renmin gongheguo lifa fa" (Law-making law of the PRC), March 15, 2000; and Li Yahong, "The Law-Making Law: A Solution to the Problems in the Chinese Legislative System?" *Hong Kong Law Journal* 30 (2000): 120-40.

⁶⁰Questions 34 and 36, paper 1, judicial examination 2002.

tions between national statutes and local legislation are still a very serious problem, many questions are concerned with the principles of the application of law.⁶¹

Questions on the Special Administrative Regions (SARs) of Hong Kong and Macao are also part of the examination. For example, the delimitation of legislative competences of the central government and the SARs is examined.⁶² The fundamental rights contained in the Basic Laws of Hong Kong and Macao are the subject of one question.⁶³

With respect to the fundamental rights contained in the Chinese Constitution, candidates have to recognize that personal freedom⁶⁴ must not be infringed upon by security guards checking bags or clothing in supermarkets, for example.⁶⁵ Some questions use cases that are not only practically relevant but also sensitive to test candidates' legal knowledge. One example is that of a Ms. Liu who had violated the one-child policy by giving birth to three daughters and as a result was forced out of her bed and taken before the village committee for "education measures." The candidates had to identify that Ms. Liu's personal freedom and home had been violated.⁶⁶

Questions about Administrative Law

In comparison to legal theory and constitutional law, questions categorized by the textbooks as "administrative law" are more specific and of

⁶¹Question 84, paper 1, judicial examination 2004; question 13, paper 1, judicial examination 2004, question 54, paper 1, judicial examination 2004, question 7, paper 1, judicial examination 2002.

⁶²Question 9, paper 1, judicial examination 2004; question 41, paper 1, judicial examination 2003; for the competences of the Special Administrative Regions see: question 49, paper 1, judicial examination 2000; for the treaty-making competence see: question 50, paper 1, judicial examination 2000.

⁶³Questions 55 and 56, paper 1, judicial examination 2004.

⁶⁴Art. 37 (1), Chinese Constitution of 1982.

⁶⁵Question 60, paper 1, judicial examination 2005; question 57, paper 1, judicial examination 2004.

⁶⁶Question 43, paper 1, judicial examination 2003; for fundamental rights see: question 42, paper 1, judicial examination 2002; question 47, paper 1, lawyers qualifications examination 2000.

greater practical relevance. They overlap partly with questions concerning legal theory and constitutional law. One question about the severe acute respiratory syndrome (SARS) epidemic demands detailed knowledge of administrative regulations on epidemic control.⁶⁷ The subject of another question is the case of a school that was deprived of its teaching permit. The candidates have to identify how the pupils can take legal action.⁶⁸ Other subjects are the rights and duties of civil servants⁶⁹ and administrative organization.⁷⁰ Concerning administrative litigation, questions about the jurisdiction of courts,⁷¹ the burden of proof,⁷² and judicial review of administrative acts are most numerous.⁷³ The protection of the rights of the individual by procedural means is the subject of detailed questions about the enforcement of administrative acts,⁷⁴ particularly the enforcement of administrative penalties.⁷⁵ The candidates have to answer questions on state responsibility law,⁷⁶ including compensation payments for deprivation of liberty⁷⁷ and the extent of legal accountability.⁷⁸ Although the relationship between the Communist Party and state is not part of the examination, this relationship is implicit in one case that is mentioned, where a village government established a security organ on the orders of

⁶⁷Question 48, paper 2, judicial examination 2004.

⁶⁸Question 60, paper 1, lawyers qualifications examination 2000.

⁶⁹Question 100, paper 2, judicial examination 2004; generally on civil servants law see: question 90, paper 2, judicial examination 2005.

⁷⁰Question 74, paper 2, judicial examination 2004; question 69, paper 2, judicial examination 2002.

⁷¹Question 98, paper 2, judicial examination 2005; question 99, paper 2, judicial examination 2004.

⁷²Question 97, paper 2, judicial examination 2004.

⁷³Question 1, paper 4, judicial examination 2005.

⁷⁴Question 82, paper 2, judicial examination 2005; question 41, paper 2, judicial examination 2004.

⁷⁵Question 44, paper 2, judicial examination 2004; question 75, paper 2, judicial examination 2002.

⁷⁶Question 80, paper 2, judicial examination 2004.

⁷⁷Question 39, paper 2, judicial examination 2004; question 27, paper 2, judicial examination 2002; question 20, paper 1, lawyers qualifications examination 2000.

⁷⁸Question 69, paper 2, judicial examination 2003.

the village Party committee.⁷⁹

One question about the application of law concerns a case that attracted some attention in Chinese judicial circles because it touched upon the independence of courts and judges in relation to local governments. In this case, a national law provided for the imposition of an administrative penalty of between 10,000 and 50,000 *yuan*, whereas the corresponding implementation provisions issued by the provincial government provided for a penalty of 30-50,000 *yuan*. The judge decided not to apply the provincial implementation provisions because he found them to be in contradiction to the national statute. Later, this judge was removed from office. The candidates have to know that any provincial regulation contravening a national statute is void and that regulations of local governments can be declared void by the State Council.⁸⁰

Questions Concerning Professional Ethics

The questions in this category deal with the ethical standards judges, prosecutors, and lawyers have to adhere to. In 2001, the Supreme People's Court enacted the Rules on the Professional Ethics of Judges, containing provisions on the impartiality of judges, the promotion of judicial efficiency, the preservation of the honesty and respectability of judges, and court etiquette.⁸¹ The candidates have to know the different "moral sanctions" (道義責任, *daoyi zeren*) that apply to judges. Existing sanctions are: criticism by colleagues or public opinion, and self-criticism (自我良心的

⁷⁹Question 1, paper 1, lawyers qualifications examination 2000.

⁸⁰Question 70, paper 2, judicial examination 2003; for conflict of laws see question 40, paper 2, judicial examination 2004. See also Kong Xiangjun, "Lun faguan zai falu guifan chongtu zhong de xuanze shiyong quan" (About the right of the judge to choose the application in cases of conflicts of norms), *Falü shiyong* (Application of Law), 2004, no. 4:3. Concerning this case: Chen Liguó, "Shi panjue weifa, haishi biaoshu qiantuo" (Is the judgment contradicting the law or are its utterances unresonable?), *Fazhi ribao* (Legal Daily), November 27, 2003; and Li Kejie, "Fayuan you quan jujue shiyong difangxing fagui ma?" (Are the courts entitled to refuse the application local regulations?), *Nanfang dushi bao* (Southern Urban Daily) (Guangzhou), November 8, 2003.

⁸¹"Zhonghua renmin gongheguo faguan zhiye daode jiben zhunze" (Rules of the PRC on the professional ethics of judges) (October 18, 2001), *Zeitschrift für Chinesisches Recht* (Journal of Chinese Law) 12, no. 1 (2005): 46.

譴責, *ziwo liangxin de qianze*). There is no moral sanction in the form of criticism published in the courts' circular (法院通報, *fayuan tongbao*).

Candidates should also be able to identify what kind of clients can be represented by lawyers who have previously worked as prosecutors. Another question refers to forms of advertising by law firms that are regarded as unfair competition.⁸² The question about the behavior of judges outside the court asks about the purpose of limiting the actions of judges during their spare time. The candidates have to identify that this is done in order to uphold the dignity of the court, not to emphasize judicial independence or the administration of justice in open court.⁸³ The question on the independence of the judiciary makes it clear that courts have to submit reports on specific cases at the request of the People's Congress at the corresponding level.⁸⁴

Results of the Evaluation of the Examination Papers

As far as the quantitative distribution of the fields of law in the examination is concerned, the obvious importance of civil law might point to a diminishing involvement of the state in economic matters, whereas the absence of a category of questions concerning Marxism and related state ideology indicates that thought control of the legal profession is not one of the purposes of the judicial examination. The quantitative distribution of the fields of law is balanced and orientated toward practical needs. It is therefore aimed at the technical requirements of law as reflected in the thin rule of law.

The questions on legal theory present a mixed picture: some questions refer to Marxist legal theory, but at the same time they qualify its exclusiveness. Other questions cover the legal systems of Western societies

⁸²Questions 28 to 30, paper 1, judicial examination 2002.

⁸³Question 47, paper 1, judicial examination 2005.

⁸⁴Question 48, paper 1, judicial examination 2002; for another case on judicial independence see question 96, paper 1, judicial examination 2004.

or emphasize the role of law in limiting government actions. This indicates that the claim of the state to control society is not absolute and that the questions reflect a statist socialist rule of law rather than the rule-by-law model. They cannot be attributed to a liberal rule-of-law model, however, because they still tend to stress a binding set of values in the form of Marxist legal theory.

The diminished role of Marxist-Leninist ideology in the judicial examination shows that China has the potential to develop a legal profession that is more autonomous and independent from politics, at least from the perspective of the judicial examination. In order to practice law one has to pass the very high threshold of a professional examination, and a correct political attitude is not a decisive factor in passing the test. From the content of the judicial examination, one can conclude that access to the legal profession has been relaxed in recent years. For example, a student whose university major is a subject other than politics only has to attend obligatory political lectures during his/her undergraduate studies. If the student decides to become a practicing lawyer, there will be no further examination of his/her political attitudes. This indicates a less important role for the government in controlling society. That is why the examination questions reflect the statist socialist model rather than a rule-by-law model.

The questions concerning constitutional law point to the normative character of the constitution. This is further emphasized by the inclusion of the Basic Laws of Hong Kong and Macao in the field of Chinese constitutional law, because the Basic Laws reflect the liberal constitutional tradition. Interestingly, many questions refer to real and severe problems in the Chinese legal system—for instance, the inconsistency of norms and the disadvantages of the centralized system of review of the legality of norms. Stressing the role of the constitution as a meaningful legal document corresponds with the thin rule of law. Furthermore, emphasizing "real problems" of constitutional law means that the constitution is not merely a set of programmatic goals, and that law in action should correspond with constitutional stipulations.

Although some legal theory questions assume a Marxist understanding of fundamental rights, other cases, like those concerning the

searching of bags and the treatment of Ms. Liu for breaching the one-child policy, imply a different understanding of the relationship between the individual and the state where the interest of the individual prevails. The questions on the meaning of rule of law make it clear that candidates have to recognize that at the core of the rule of law is the legal protection of citizens and the limitation of government power. This goes against an instrumentalist understanding of law.

The compensation of citizens for injustice caused by government action crops up among the administrative law questions and is an important part of the thin rule of law. The questions about the supremacy of the constitution, hierarchy of norms, and the Law-Making Law can also be attributed to the thin conception of rule of law. Only the omission of questions concerning the Party-state relationship points to the rule-by-law model where the role of the Party is not defined by law.

The selection of questions in the different fields of law is orientated toward practical requirements. This distinguishes the judicial examination from university law examinations which often consist of more formalistic questions—for example, about the classification of a statute or a provision as belonging to economic law or civil law. The inclusion of aspects of international law reflects the importance of international business relations for China and must be seen as a positive development. Moreover, the form of the questions is orientated toward the demands of practice, because they are often presented as cases. Candidates have to identify the applicable legal norm and must subsume the facts under the rule.

However, one can criticize the fact that candidates are not given access to the relevant legal texts during the examination. This means that questions have to be relatively simple because the answers can only rely on a vague knowledge of statutory provisions rather than on the exact wording of legal texts. The multiple-choice method that is used in three of the four examination papers does not favor the kind of knowledge needed for the application of legal provisions. Only the fourth examination paper tests the technical skills necessary for the application of law, namely, logically strict conclusions and well-considered and convincing legal argument. The interpretation of a legal text according to its wording, system, origin, and

purpose is not part of the fourth examination paper. This shows that law is still not understood as autonomous. Instead, its correct interpretation is given by the state organ that enacts the statute, or by the Supreme People's Court. When in doubt, judges are not allowed to interpret provisions themselves but have to question these organs. Therefore, the analytical abilities necessary to interpret and apply legal norms, as well as independent decision-making and thinking in terms of alternatives, are not among the technical skills needed to pass the judicial examination. This indicates that in China, judges are not expected to play the role envisaged by the liberal rule-of-law model.

Despite the aforementioned disadvantages, the introduction of the unified national judicial examination marks an important step toward rule of law and a relatively independent legal profession in China. Most of the questions are aimed at the technical requirements of law reflected in a thin rule of law. The questions indicate a turning away from the rule-by-law model. Only a few questions touch on issues that differentiate competing thick conceptions of rule of law. This small proportion of questions generally reflects a non-liberal conception of rule of law, although some points are so broadly stated that they can even be reconciled with a liberal rule-of-law model.

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