Contents

Abbreviations

ADR	Alternative Dispute Remedy
art.	article
BL	Hong Kong Basic Law
BGE	Judgment of the Federal Supreme Court (Switzerland)
CC	Chinese Constitution
CFA	Court of Final Appeal (Hong Kong)
CP	Communist Party (China)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
e.g.	for example
etc.	etcetera
EU	European Union
GATT	General Agreement of Tariffs and Trade
HK SAR	Hong Kong Special Administrative Region
HRC	Human Rights Committee (UN)
ICCPR	International Covenant on Civil and Political Rights (UN)
I.C.J.	International Court of Justice
i.e.	that is
lit.	littera
no.	number
NPC	National Peoples Congress (China)
NPCSC	National Peoples Congress Standing Committee (China)
p.	page
par.	paragraph
PRC	Peoples Republic of China
SC	Swiss Constitution
SPC	Supreme People's Court (China)
UDHR	Universal Declaration of Human Rights (UN)
UK	United Kingdom
UN	United Nations
USA	United States of America
v.	versus
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Introduction

The aim of this paper is to compare access to justice in China, Hong Kong and Switzerland. The starting point is the content of the three written "constitutions". But a comparison of one specific (human) right can't be limited to the words of the law - it has to include the de facto situation too. What are the gaps between access to justice de jure, respectively de facto? And, what influence had and still has the international context, e.g. globalization or the international law? In the light of what different philosophic traditions are human rights seen in Asia and Europe, and what is their impact on the legal situation? Comparing access to justice in so fundamentally different places as China, Hong Kong and Switzerland are, can't stop at the last article of the written constitutions. Furthermore, it is my goal to treat the issue of this paper not exclusively from a European point of view but to include domestic opinions, especially in the case of the PRC. As most literature on the topic is not domestic, fulfilling this task in a satisfying manner is almost impossible.

The structure of this paper is pervaded by the premises outlined above. The first chapter gives an overall view of different concepts and contents of and restrictions on access to justice. This is then followed by the specific question whether access to justice is recognized as an autonomous human right itself or just the necessary support for any other asserted-one. Chapter two focuses on access to justice as a right granted by the international law, especially the two most important documents ICCPR and ECHR and their effect on China, Hong Kong and Switzerland. The most specific part on the topic of this paper is the third chapter. It gives a survey on the historic and/or recent developments of the right on access to justice in each of the three regions. It lines out the de jure, esp. the constitutional, situation and the practical implementation – what leads obviously to the question of discrepancies between the latter and the first. As the key-problems and most typical topics differ, I will set different focuses concerning China, Hong Kong and Switzerland. In the last chapter, I will draw a concluding comparison, mainly based on chapter three.

As a paper of this briefness can't cover all the aspects of a topic, I will not address the issue of the possibility of abstract judicial review and only touch upon the whole judicial/court systems. Excluded will be as well differentiations like natural persons – legal entities, citizens – aliens, etc. Even it might be of high interest under the aspect of fair trial, I will exclude as well criminal cases and focus mainly on administrative and civil law.

1. General Remarks

1.1 Content and Limits

In a most basic and grammatical interpretation access to justice might mean the bare possibility to present your case before a judge. But it contains more than that.[1] Even the terms used are different,[2] nowadays a wider interpretation is generally recognized.[3] The judicial referencing to judgments based on alien legal sources, rated as equal interpretations, indicates a common interpretation[4]. Two main aspects of access to justice have to be distinguished: "the judicial procedure (...) and the organization of the judiciary."[5] Albeit the exact guarantees depend on the referred legal basis, some aspects as fair, public, impartial and independent tribunal established by law, due process of law, presumption of innocence and right to appeal are widely acknowledged.[6]

Restrictions of constitutional or convention-based rights are often regulated in the respective legal basis itself.[7] As access to justice is the key to the other fundamental rights it is at least a legitimate question if these general rules shall be applicable the same way, adjusted or not at all.[8] Francioni pleads that limitations should be based on the two criterias reasonableness and proportionality, and that diminishing the extent is to be prefered to total denying.[9] In my eyes limitations shall be extremely limited and be based upon defined criterias. Widely acknowledged are: state emergency,[10] matters of policy, immunity of politicians and a few other professions and vexatiousness.

Apart from the de jure guarantees, access to justice may not be granted due to lack of *(practical) premises*. Fundamental are the existence of a system of judicial institutions, separation of powers and accomplishable procedural requirements. Extremely problematic are structural restrictions like high costs, language barriers or lack of knowledge about ones' rights to keep out unwanted groups. As a political instrument, structural restrictions inhere no legitimacy.

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1 Francioni, p.11.
2 Francioni, p.24.
3 See e.g. HRC, General Comment.
4 Ma Wan case; Haller speaks in this context of „internationalization of human rights' court rulings"; Lehtimaja, Lauri/Pellonpää, Matti, in: Alfredsson/Eide, p.225; Weissbrodt lists loads of „principal sources of interpretation of the right to a fair trial", p.111.
5 Lehtimaja, Lauri/Pellonpää, Matti, in: Alfredsson/Eide, p.223.
6 In a comparative law paper, it's useless to act on the assumption of one single definition. For this reason I renounce one fixed-one along the whole paper.
7 E.g. for Switzerland art. 36 SC.
8 In Switzerland - and I agree with this argumentation – art. 36 SC is not fully applicable on procedural guarantees; only the restriction of rights not setting a minimal standard may be judged in the light of art. 36 SC. See Häfelin/Haller/Keller N869; Rhinow, p.154; Steinmann, Gerold, in: Ehrenzeller et.al., art.29 N6.
9 Francioni, p.44.
10 See as well HRC, General comment, N6.

1.2 Access to Justice in the System of Human Rights

1.2.1 The Occidental and the Asian Concept on Human Rights

Human rights can and have to be seen in relation to a nation's cultural and philosophic background.[11] Hence, a one-to-one transfer of our occidental understanding on another-one doesn't work.[12] Or expressed in the words of Angle, "moralities are plural."[13]

European countries look back on a common history, „have a common heritage of political traditions, ideals, freedom,"[14] values that serve as base for the occidental human rights concept and catalog.[15] Historical occurrences like the French Revolution, the struggle for the Habeas Corpus Act[16] as well as the opuses of philosophers like Locke or Rousseau, led to the acceptance of fundamental freedoms or defensive rights against the states power ("status negativus"), inherent in every human-being and inalienable. Additionally, positive obligations („status positivus") of a welfare-state get more and more accepted as human rights.

In contrast the so called "*Asian values*" have never justified individual rights in this way. The individual enjoys no rights „inherent in nature";[17] they are always connected to and correlating with responsibilities, with duties, in favor of society, the interest of the collective, the family, the state.[18] Collective oder and harmony are more important than individual freedom - a heritage from Confucianism. Rights are granted by the state through law – but in the case of not fulfilling its duties the individual may see its rights derogated or amended by the states power („conditional nature of rights").[19]

1.2.2 A Free Standing Right and a Servant to other Rights

On the one hand, access to justice is listed itself as a granted legal right in almost all international human rights catalogues and in many national constitutions.[20] On the other hand, its function as a servant of other human rights raises the question if access to justice shall be qualified as a free standing right itself or a pending one. Its tremendous im-

11 Francioni, p.29; an interesting article on this topic in general was published as well by Bielefeldt, Heiner, in: AI, p.31 ff.
12 Roetz, Heiner, in: Paul/Robertson, p.39; Lenk broaches this issue as well, focusing on the contrast occidental background v. claim to universal recognition of the HRD: Lenk, Hans, in: Paul/Robertson, p.25.
13 Angle, p.6; interesting is as well his well argumented pleading, not to loose track of the recent history when putting Chinese Confucianism and Chinese human rights concept in relationship.
14 ECHR Preamble.
15 Haller.
16 Haller e.g. calls the existence of art.5 and 6 ECHR „unthinkable without the English concept of Habeas Corpus".
17 Biddulph, Sarah, in: Holbing/Ash, p.207; Chow, p.107ff.
18 Biddulph, Sarah, in: Holbing/Ash, p.207; Choi, Chongko, in: Leiser/Campbell, p.515ff.; Copper, John F., in: Wu et.al., p.11; Roetz, Heiner, in: Paul/Robertson, p.40.
19 Biddulph, Sarah, in: Holbing/Ash, p.207.
20 Francioni, p.2.

portance for a striking human rights protection is undoubted.[21] In my eyes, access to justice has to be qualified as an independent fundamental right. In consequence of its key-function it is in need of special protection, e.g. restrictions have to be set under special rules. Same as the other human rights, access to justice is acknowledged as an individual's right.[22]

Based on the general discussion if a status positivus may be inherent in human rights, the question of a possible welfare-state ideal concerning access to justice has been raised. This may include the "states responsibility for providing support and funding for less fortunate litigants,[23] (...) structure of the judicial system, (...) specialized courts, procedures, or judicial compositions."[24]

2. Access to Justice in the International Law

Art.26 VCLT enshrines the basic principle "pacta sunt servanda". By getting the status of party to a treaty a country has to fulfill the resulting duties. Especially on the field of human rights, including access to justice, the standards set by international treaties play a key-role. Fundamental principles have been established of what fair trial shall contain, while on a national level divers systems of procedure have been generated.[25] The most important treaties are the ICCPR and the ECHR. Additionally, the UDHR from 1948 is of great historical relevance and has reached the status of costumary law. As it is neither self-executing nor a binding declaration with a supervisory mechanism, it is not as strong as the two others. For this reason, I will not get into its details.

Individuals' rights granted on an international level (often) suffer one severe handicap: the lack of a global institution[26] empowered to enforce them. As contracting parties or under customary law, only other countries may prosecute gross breaches by a state.[27] Therefore, what is still most important for the realization of human rights, is an effective practical implementation on the domestic level.[28] If an international convention does allocate a remedy to individuals, the preceding exhaustion of all national remedies is conditional – what in turn requires the existence of effective national remedies.[29]

21 HRC, General Comment, N2; Haller/Kölz, p.313 see administrative and constitutional jurisdiction as the most important ones; Lehtimaja, Lauri/Pellonpää, Matti, in: Alfredsson/Eide, p.223; Weissbrodt, p.153.
22 Avena case.
23 E.g. free legal aid was supported by the European Court in the Airey case.
24 Storskrubb, Eva/Ziller, Jacques, in: Francioni, p.179.
25 Weissbrodt, p.153.
26 The European Court of Human Rights is not a global body.
27 Francioni, p.41.
28 Møse, Erik, in: Alfredsson/Eide, p.187.
29 Møse, Erik, in: Alfredsson/Eide, p.203.

2.1 International Covenant on Civil and Political Rights

The two UN-Covenants are the masterpieces in global human-rights protection. They created the binding effect the UDHR had lacked.[30] The rights codified in the ICCPR are not imperatively self-executing, but pledge the contracting parties to implement them on a domestic level.[31] Interpretation and supervision lie in the hands of the *HRC*. Its main instruments are concluding observations about states' reports (art.40 ICCPR),[32] general comments and its judgings of individuals' (first optional protocol) and states' complains (art.41 ICCPR). While the latter is of no great relevance in practice, individuals' complaints are not rare.[33]

Access to justice is primarily codified in *art.14 ICCPR*. Its goal sounds quite simple: "proper administration of justice."[34] It contains mainly:[35]

- equality of all individuals before courts and tribunals, including equal access, equality of arms, treating of the parties without any discrimination, available legal assistance,[36] prohibition of special tribunals
- fair and public hearing by a competent, independent and impartial tribunal, i.e. a body established by law, independent of the other state organs or enjoying judicial independence in making its decisions. Furthermore, independence refers to the procedure of judges' appointment and conditions causing their leave. Impartiality has to be read in a subjective and an objective sense. Fairness includes the requirement of expeditiousness.[37] These requirements are absolute rights, except that under certain conditions the public may be excluded.
- pars.2-7 refer to persons charged with a criminal offense

The requirements of art.14 ICCPR have to be granted at least at one stage of the proceeding, but not necessarily at all stages.

General reservations to art.14 ICCPR are not possible. Even it is not listed as non-derogable in art.4 par.2 ICCPR, "the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights."[38]

China has signed the ICCPR in September 1998, but not yet ratified. As a consequence

30 Thomsen, Bernd, in: AI, p.19.
31 Nowak, Manfred, in: Kälin et.al., p.19; Thomsen, Bernd, in: AI, p.19.
32 Concerning Hong Kong, China and Switzerland, only about the first-one a states report is available.
33 Nowak, Manfred, in: Kälin et.al., p.25.
34 HRC, General Comment, N2.
35 This listing goes along the HRC, General Comment, N7–30.
36 See e.g. Golder case.
37 See e.g. Muñoz Hermoza case.
38 HRC, General Comment, N 6.

of art.18 VCLT, this entails "binding international legal obligations on China."[39] The signing respectively its consequences provoked intense discussions in China.[40] Foreign authors seem to be extremely skeptical whether China's leaders will implement the resulting duties.[41] In *Hong Kong*, as a result of having been part of the UK, the ICCPR came into force in 1976. Art.39 BL states that it "shall remain in force and shall be implemented through the laws of the HK SAR." What has been realized in the Hong Kong Bill of Rights Ordinance. *Switzerland* has ratified both UN-Covenants; they came into force in 1992, but only the ICCPR is self-executing. Due to the monistic system, it is part of the Swiss legal order from the moment of the ratification on.[42]

2.2 European Convention on Human Rights

The ECHR was drawn by the Council of Europe and came into force in 1953, for *Switzerland* in 1974. The Swiss Federal Supreme Court treats the rights defined in the ECHR equal to those in the SC.[43] As the UK made no declaration of extension under art.56 par.1 ECHR with respect to *Hong Kong* the ECHR was and is not effective[44] there. Nevertheless, the courts do incorporate its interpretations and the respective judgments.

Against states that have violated the convention, individuals may bring their case to the *European Court of Human Rights* – an effective and often used remedy. It is as well this court playing the main role in the interpretation of the convention. In relation to rights and freedoms guaranteed in domestic law, the ECHR only wants to set a minimal standard and does not intend to downsize them. The higher standard of both prevails (art.53 ECHR).

Especially *art.6 ECHR* is relevant, the right to a fair trial. „Its sphere of application has gradually been extended by way of judicial interpretation, giving the autonomous concepts of „civil rights" and of „criminal charges" a sense which clearly exceeds the original understanding."[45] Nowadays the rights provided in the ECHR are quite similar to art.14 ICCPR, except that the right to appeal and the ne bis in idem principle concerning criminal law are stipulated not in the main document but in Protocol no.7.[46]

39 Chow, p.106.
40 Heuser, VRÜ, p.148ff.
41 E.g. Saich, p.130.
42 Malinverni, Giorgio, in: Kälin et.al., p.71.
43 On the relation ECHR – SC, illlustrated with links to cases, see: Häfelin/Haller/Keller, N241.
44 Van Thanh case.
45 Haller.
46 The remaining differences are listed in Malinverni, Giorgio, in: Kälin et.al., p.57ff; quite congruent is as well the adjudication of the ECHR and the HRC: Achermann, Alberto/Caroni, Martina/Kälin, Walter, in: Kälin et.al., p.187.

3. Access to Justice in the Domestic Law

In this chapter I will deal with each of the three "countries" separately. My main focuses are the sources of law, especially the constitution, administrative jurisdiction, specific problems and solutions with the practical implementation and ADR.

3.1 China

The Chinese Constitution and the legal system as a whole must not be examined without regard to the social and political background.[47] Aspects such as the role of the CP, the changes provoked by Mao's death in 1976 or the influence of globalization have to be borne in mind anytime.

3.1.1 Chinese Constitution

The CC includes no specific right on access to justice. In section VII "The People's Courts and the People's Procuratorates" we find some aspects of fair trial: public hearing (except in special circumstances described by law) and right to defense before People's Courts in art.125 CC and independence in art.126 CC, resp. art.131 CC. Since the 1999 amendment rule of law is formally incorporated in art.5 par.1 CC.[48] Protection of human rights in general, not only for citizens, got integrated as art.33 par.3 CC in the 2004.[49] Even the chapter on fundamental rights and duties of citizens is now placed second in the constitution – what may be interpreted as will to strengthen them[50] – art.51 CC[51] relativizes this. Additionally, exercising a constitutional right is categorized unlawful if conflicting with one of the four basic principle of the Preamble.[52]

The main hurdle for constitutional rights to get effective is that they need to be transformed into a domestic law and that there is no "transparent and effective legal process for adjudicating citizen constitutional claims."[53] The debate about *constitutional jurisdiction* has started years ago: attempts to draft a Supervision Law have been made,[54] and even the leadership mentioned the importance of the constitution's authority.[55] The

47 Chow, p.68.
48 A lot has been written about this amendment; see e.g. Feng, p.40; Heuser, VRÜ, p.142; Werner, p.66, p.83ff.
49 Skeptical about the practical implementation e.g.: Schulte-Kulkmann, et.al., p.354f.
50 Saich, p.130.
51 "Citizens of the PRC, in exercising their freedoms and rights, may not infringe upon the interests of the state, of society or of the collective, or upon the lawful freedoms and rights of other citizens." Decisions based on art.51 are not justiciable. Additionally, see: Heuser, VRÜ, p.147.
52 Chow, p.108
53 Biddulph, Sarah, in:Holbig/Ash, p.207; Chow, p.111f., referring to the failed attempt of two citizens trying to register a political party as part of their right of association; Holbig, p.259; Kellogg/Hand, p.6f.
54 Biddulph, Sarah, in: Holbig/Ash, p.221.
55 Kellogg/Hand, p.5, referring to Hu Jintao's speech on the occasion of the 20 year anniversary of the constitution in 2002 and the SPC's hints in the Qi Yuling judgment.

power to supervise the enforcement of the constitution lies not in the courts, but in the NPC (art.62 par.2 CC) and the NPCSC (including interpretation, art.67 par.1 CC).

3.1.2 The Accession to the WTO's Effect

Since 1978, China opened its doors more and more to the global market. In 1986, they applied for WTO-membership and in December 2001 China reached its goal. While the motivation to get an equal player in the WTO was simply economics[56] - the consequences hit as well governance[57] and the legal system. Courts got and get confronted not only with an enormous increase of cases[58] esp. in civil law,[59] the need of the economy lies in approximation with international practices and new topics like patent law or intellectual property and international cases.[60]

The *Protocol on the Accession of the PRC to the WTO* contains in section D "Judicial Review" the duty to "establish or designate tribunals, contact points and procedures for rapid review of administrative actions,"[61] to grant access to justice for individuals and (foreign) firms, in accordance with art. X and VI GATT. The impact of this treaty may be rated as China's turn-around toward access to fair justice. There are several suggestions on how China's accession to the WTO may influence the legal system: projects and partnerships in know-how transfer esp. from the USA and the EU,[62] a "flow on effect" from the economic sphere to the law, or a top-down mechanism through obligations in the WTO Constitution.[63]

3.1.3 Reform of the Legal and Judicial System after 1978

The heritage of the Cultural Revolution concerning the judicial system was nearby a tabula rasa; not rule of law, but rule by man, was in the lead. After the Fifth NPC in 1978, re-establishing began in various sectors.[64]

Litigation laws, existing and professional courts and lawyers are basic requirements for effective access to justice. The steps China has made in the last (only) 30 years on these fields are enormous. In 1978, only six law colleges were residing in China, 178 teachers were employed and 99 students graduated. In 1987, there were 86 colleges, 5'216 teachers and 12'639 graduates. In 2006, more than 200'000 students were matriculated

56 For numbers and forecasts see: Saich, p.273ff.
57 Saich, p.273.
58 Accepted cases in 1978: 445'755, in 1990: 2.9mio, in 1996: more than 5mio, in 1999: 5.7mio, in 2005: 5.16mio. Liang, p.45 and Chow, p.202.
59 Liang, p.46.
60 Liang p.43; Saich, p.123.
61 Nell, p.10.
62 Schulte-Kulkmann, VRÜ, p.529ff.
63 Biddulph, Sarah, in: Holbig/Ash, p.207ff.
64 Liang, p.42ff.; Saich, p.126; Wu, et.al., p.4.

in law.[65] In 1995, the Judges Law and the Procurators Law came into effect; their goal was to raise the professional level by introducing an exam every judge, procurator and lawyer has to pass.[66] As well the number of People's Courts nationwide was increasing. Right after 1978, about 2'000 were newly established, reaching the mark of 3'500 in the 1990s.[67]

The SPC itself played an active part too. In 1999, it published a five-year plan[68] and "regulations to guarantee open trials to the public," two years later regulations on rules of evidence in civil litigations and in 2002 "evidential rules in administrative litigations."[69] The NPC passed procedural laws to strengthen the independence of courts. States leader expressed this severe problem too and announced solutions.[70]

3.1.4 Administrative Jurisdiction

The Administrative Litigation Law from 1989 offers the then new possibility to citizens to *sue government agencies*; the list of suable decrees covers only administrative penalties and sanctions, interference in a firms autonomy and ignorance or denying to issue specific certificates[71] – never constitutional rights. In 2004, 100'000 cases were brought to court under the this law. The tendency of judges not to decide against the agencies is quite obvious: only 15 percent of the claimants win their case, 25 percent get dismissed and 60 percent discontinue the action.[72] The first number might be seen as a success, the latter statistic as an indicator of non-implemented impartiality.[73] The State *Compensation* Law from 1994 allows citizens to demand monetary compensation for governmental misconduct. Here, the statistics present no clear chart.[74] Both laws are based on art.41 CC and aim at a governance according to law, as stated in art.5 CC.

3.1.5 Practical Implementation

The key-problem lies in the alliance one-party system and authoritarian regime, resulting in a lack of *separation of powers*. Theoretically, a one-party system could go along with horizontal separation of powers.[75] But as soon as it conjuncts with an authoritarian

65 Liang, p.55.
66 White paper; Liang, p.65f.
67 Liang, p.48.
68 Heuser, VRÜ, p.141.
69 Liang, p.145.
70 Liang, p.64; Biddulph, Sarah, in: Holbig/Ash, p.215, spots a "political will to continue the development and reforms of the legal system".
71 Heuser, VRÜ, p.142f.
72 Heuser, C.a., p.1222; Liang, p.46.
73 Remarkable is the hard-striking judgment in the Sun Zhigang case: 23 people from police and a clinic were punished for not fulfilling their duties properly causing Sun's death. The decision provoked large debates.
74 Liang, p.46.
75 In the original concept of separation of powers by Locke ("The Second Treatise of Civil Government") and Montesqieu ("De l'esprit des loix") this is unthinkable. Abbreviated: Concentration of

or totalitarian regime, asymmetry results inevitably. At least in all questions labeled "concerning states interests" the central executive does take the lead. In China, "the interference of the party at all levels of the political system"[76] perverts independent judges and agencies. I see four main problems: a) the People's Courts and the Procuratorates are responsible to the legislative power (art.128 CC, art.133 CC), b) the power to interpret the constitution and laws lies within the NPC and its Standing Committee (art.62 CC, art.67 CC) – judges are "limited to the straightforward and mechanical application,"[77] c) the selection of judges – as any other job vested with states-power – happens mainly party-internal,[78] d) the judges' period of office is not fix and dismissal lies in the hands of legislative organs (art.63, art.67 and art.101 CC);[79] additionally they are evaluated yearly whereas one criteria is their ideology. In a political system like this one either gets a member of the party to stimulate his career or one joins it because one shares the values; but quite no one will pronounce judgments contrary to the party's will. The CP as organ "avoids direct involvement in the review of individual cases" but it "sets overall policy guidelines."[80] Independence of the courts and protection of individual rights are made practically impossible.

Another practical problem results from the fact that over 90 percent of all cases are conferred by Basic People's Courts.[81] Therefore the proper, independent and impartial functioning of these bodies is fundamental. The existence of *regional disparity* as such is not problematic as long as the (basic) rules are followed everywhere. In China, local government enjoys a high degree of autonomy. Their main concerns are local needs, including economic development. In a case involving e.g. an important investor, a conflict of interest results and it seems not to be rare that the looser is the principle of impartiality.[82] Furthermore, underpaid judges are a risk to nurture *corruption*, a serious problem[83] in close connection with *citizens' very poor legal knowledge*. Therefore, they are at high risk not to claim their rights at all or to become the pawn of governance, court and/or opponents. Comparing texts of scholars written in the nineties with more recent-ones, leads to the conclusion that Chinese citizens get more and more aware of their rights. But there is still a long way to go, especially in rural areas.[84]

powers can't go together with negative rights.

76 Saich, p.125.

77 Chow, p.204.

78 Over 90% of all judges are party members. Cohen, J.A., in: Nell, p.11.

79 Chow, p.196.

80 Chow, p.198.

81 Feng, p.219.

82 Biddulph, Sarah, in: Holbig/Ash, p.213; Cohen, J.A., in: Nell, p.10.

83 See as well Hu Jintao's most actual urging to implement the anti-corruption responsibility system: http://english.gov.cn/2008-10/21/content_1126437.htm (visited: October 21, 2008).

84 Heuser, VRÜ, incl. references to Chinese studies, p.148; Kellogg/Hand, p.5; Liang, p.61ff; Schulte-

Saich points at the problem of cooperation among judiciary and the agencies *enforcing the judgments*. As long as court decisions get ignored by the enforcing administrative agency, judgments risk to end as a farce. The highly needed augmentation of trust in Chinese courts suffers a setback every-time their judgment remains unenforced.

In 1994, the Ministry of Justice started a *legal aid* program. Free legal assistance or reduced fees shall be offered by legal aid centers and foundations. Factors taken into account are: need for assistance "to safeguard the lawful rights and interests" and the financial situation."[85] The program developed quickly. While in 1996, three legal aid organizations at the provincial level were established, 10 years later there were 3'150 nationwide. In 2006, 310'000 cases got assistance with a total sum of 370 mio. Yuan. The greatest problems that were spotted are regional disparity and financing.[86]

3.1.6 Alternative Dispute Resolutions

Traditionally, law in China focused mainly on criminal law. To solve a civil dispute, remedies like *mediation and conciliation* were preferred.[87] This tradition is still an important part of China's judicial system. People's Courts dealing with civil cases are asked to do the best they can to find a solution through mediation in the first place – and they do succeed.[88] Art.111 par.2 CC enshrines that "the residents' and villagers' committees establish subcommittees for people's mediation (...), mediate civil disputes". *Arbitration* is highly esteemed too. "Unless a people's court revokes an arbitration award or makes a ruling that the arbitration award shall not be implemented, the parties concerned may not request a second arbitration on the same dispute or bring the case again to a people's court."[89]

Interesting to note is that as a result of the lack of independence of the courts, *foreign litigants* often prefer ADR instruments because they may keep larger control.[90]

3.2 Hong Kong

Hong Kong's big issue is the struggles arising from the simultaneity of the common law, including the international law, as a UK heritage and the newer impact and dependence from Bejing. My main interest in this chapter lies in the consequences of this mixture and the gaps between these two diametrically opposed legal and judicial sys-

Kulkmann, C.a., p.647 and VRÜ, p.549; Werner, p.85.

85 Http://www.china.org.cn/english/Judiciary/31005.htm (visited: October 20, 2008).

86 Liang, p.49f.

87 Chow, p.280f.

88 Chow, p.288: "in recent years, approximately 99% of all civil actions were resolved by mediation"; White paper: in 2006, 56% civil cases in first instance solved through mediation.

89 White paper.

90 Liang, p.141.

tems.

3.2.1 Hong Kong's Legal System between the UK and Mainland China

July, 1st 1997 marks a mile-stone in Hong Kong's history: it is no longer part of the UK but a Special Administrative Region of the PRC. For a 50 years transitional period under the slogan "*one Country, two Systems*" Hong Kong shall maintain "its current social, economic and legal system,"[91] a high degree of autonomy within socialist China under the CP leadership. The political system was implemented within the legal frame of the Hong Kong Basic Law. The latter is the highest of all HK SAR laws (art.11 BL), often called "mini-constitution". As Hong Kong got part of the PRC the CC came into force as top ranking law – in contrast to national Chinese laws which are not applied except for those listed in Annex III to the BL (art.18 par.2f BL).

Art.8 BL states that the *law previously in force* in Hong Kong shall be *maintained*; art.81 par.2 BL codifies the same for the judicial system. Inevitable was only the replacement of the Privy Council as final court of appeal by the CFA[92] - taking over all previous judges, an expression of the will for continuity of judiciary and rule of law.[93] The most important effect is the automatic staying in force of the common law,[94] its basic principles, functions and legal norms.[95]

The basic dispute concerns art.158 BL, the NPCSC's power to interpret the BL. This raises concerns about *separation of powers in a horizontal and a vertical sense,* a conflict over priority and the inherent risk for Hong Kong's independent judicial power granted by art.19 BL. In the PRC, courts enjoy no power of interpretation, while the common law vests them exclusively with it.[96] Obviously, the Hong Kong courts are not willing to give away their power to Beijing's legislature. As early as 1997, the question was decided by the CFA in favor of the NPC,[97] but only two years later it changed its mind in the Ng Ka Ling case. One month after releasing this judgment and a hectic debate, the CFA revoked it. The consequence[98] is quite fatal in processes the government is involved as party. In case of their loosing, the NPCSC may circumvent the CFA's argumentation. The NPCSC's duty to consult the Basic Law Committee (art.158 par.4 BL) in the process of interpreting the BL is no effective remedy in this. Additionally,

91 David Ma case, N13.
92 Ghai, p.303; Jones/Vagg, p.574.
93 Horlemann, p.172.
94 David Ma case, N100-111, 195, 226.
95 Werner, p.214.
96 Chan, Johannes, in: Chan et.al., p.62ff.
97 David Ma case.
98 A lot has been written on this. See e.g.: Ahl, p.771f; Chan, Johannes, in: Chan et.al., p.70; Fu/Cullen, p.3; Gittings.

the rivalry with the mainland appears in questions of competence for a case. In the case of the murderer of a Hong Kong citizen, who had committed the crime in Hong Kong but was caught in the mainland, China brought him to its own courts. Gittings[99] rises the question "if China could circumvent the restrictions on how national laws should apply in Hong Kong".

3.2.2 Common Law, Basic Law and Bill of Rights

Access to justice, the equal right to a fair trial is one of the fundamental principles in the common law and therefore basic imperative for Hong Kong's judiciary.[100] The most precise article in the BL is art.35. In par.1 it lists "confidential legal advice, access to justice, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies". The respective article in the Bill of Rights is art.10. Its content corresponds to art.14 ICCPR. Art.19 BL vests the HK SAR with independent (from the PRC) judicial power, including final adjudication, and arts.80ff. BL enshrine the basic principles concerning the judiciary. The BL and the Bill of Rights adopt the rights granted in Hong Kong before 1997 and resulting from the ICCPR.

The *justiciability* of the Basic Law as a whole is not clear. Ghai[101] mentions two reasons for exclusion: provisions not worded precisely enough to "lend itself to judicial interpretation" and issues the court itself regards as inappropriate for its intervention. Access to fair trial does not fit into either of these categories and therefore should be justiciable. It is undoubted hat the Bill of Rights is justiciable.

3.2.3 Administrative Jurisdiction

Art.35 par.2 BL provides the right to bring to court acts of the "executive authorities and their personnel." Art.19 par.3 BL restricts this guarantee heavily: "Acts of state" are excluded.[102] For appeals against *administrative decisions*, the body in charge is the Administrative Appeals Board,[103] while for "issues arising from *maladministration* in the public sector" the Ombudsman is the one to bring a complain to.[104] Both are not judicial bodies. Objectionable are the stages of appeal against *police misconduct*. As probably the most sensitive issue in agencies' liability, complaints against the police's

99 Gittings.

100 A newer example of a case referring to common law principles - as a matter of course – being in force in Hong Kong is Michael Treloar Rowse case, N128.

101 Ghai, p.306.

102 For a definition of "acts of state" in China and the common law see: Ghai, p.318ff.

103 http://www.doj.gov.hk/eng/legal/index.htm (visited: October 28, 2008).

104 http://www.gov.hk/en/residents/government/channel/index.htm (visited: October 28, 2008). Interesting is that on the government's official website the possibility of court proceedings is not listed.

acting need granted access to a completely impartial court. But in the HK SAR, it is a police internal body, which is in charge of investigations of police misconduct.[105]
In this issue, the requirements to bring a case to *court* based on art.10 Bill of Rights, resp. art14 ICCPR and art.6 ECHR are of interest. In the Ma Wan Case, the Court of Appeal of the High Court had to deal with this question. As the common law draws no line between public and private law, the question which cases fall under art.14 ICCPR is fundamental.[106] Essential is "the character of the right at issue,"[107] that the outcome is directly decisive for one of the applicant's civil rights. The judgment questions as well if it has to affect the civil right directly or if "preparatory steps" are sufficient if the consequences rising from them do affect the respective right. The judges come to the conclusion that only administrative decisions having a direct connection with the plaintiffs civil rights fall under art.10 Bill of Rights and therefore enjoy the full granting of access to a fair trial.[108] Art.10 Bill of Rights is applicable in all cases deciding or affecting such a civil right, no matter whether an administrative organ or court is involved.[109] The monitoring of executive discretion is excluded.[110]

3.2.4 Practical Implementation

As we have seen above, the influence from mainland China, namely the NPCSC, rises the key-problem concerning *separation of powers.*[111] The latter as part of the common law's judiciary, is quite well established in the HK SAR. While art.92 BL, the possibility to recruit judges from other common law jurisdictions, may strengthen the independence, art.90 BL, the requirement of Chinese citizenship for the Chief Justice of the CFA and the Chief of the High Court, does the contrary. In one point the principle of personal separation of powers is broken: The Secretary for Justice unifies the political mandate and the function of Attorney-General in one person culminating in his responsibility to himself.[112] To act truly independent the tenure of a judge needs protection. But art.89 par.1 BL, the Chief Executive's power to remove a judge for inability or misbehavior, involves the risk of replacing one not suiting the PRC.[113]

105 HRC, Concluding Observations on HK SAR, N9.
106 Art.14 ICCPR reads "suit at law", art.6 ECHR "civil rights and obligations".
107 Ma Wan case, referring to Y.L. v. Canada, N18f.
108 Ma Wan case, referring to Bodén case, Sporrong and Lönnroth case and Harris et.al. "Law of the European Convention on Human Rights", 1995, N24f.
109 Ma Wan case, N1ff., referring to the formula in: Y.L. v. Canada, N9.2:"based on the nature of the right in question rather than on the status of one of the parties"; See as well: Benthem case, Casanovas case; Zumtobel case; Achermann, Alberto/Caroni, Martina/Kälin, Walter, in: Kälin et.al., p.187ff.
110 Ma Wan case, N15.
111 Ghai points on the inherent problem of the gap between the "PRC constitution's referring to the mainland courts as exercising judicial power independently" and reality, p.314.
112 Horlemann, p.183.
113 Ahl, p.773; Ghai, p.315.

A conflict with the rule of law arises from the *immunity for political reasons*[114] in favor of several PRC state's organs settled in Hong Kong and influential people closely connected with the PRC central government.[115] The respective cases, Xinhua and Sally Aw, "left the impression that there was one law for the poor and one for the rich and powerful."[116]

Legal aid and advice are available. Services are provided by private practitioners and the Legal Aid Department's staff.[117] The claim has to be asserted in a request before the main proceeding; appeal in case of refusal is possible. The ordinary legal aid scheme provides support in a larger number of cases (numerus clausus) than the supplementary legal aid scheme.[118] In both cases, the applicant has to pass a means and a merits test, factoring the applicant's disposable capital, income, the number of people depending on him and if they are reasonable grounds for taking or defending proceedings. Usually, a contribution on a sliding scale is asked from the applicant. In cases concerning the Bill of Rights or the ICCPR, some more generosity is possible.[119]

To grant fair access to justice, one has to have the right to present his case in his own *language,* to be understood by the court and vice versa – or get free assistance from a translator. In the Re Cheng Kai Nam case, the court denied a non-English-speaking defendant's constitutional right to a Cantonese speaking judge based on art.9 BL. Both are equal official languages, as well in courts,[120] but while only 3.1 percent of Hong Kong's population are English speakers, 88.7 percent are Cantonese speakers.[121] Bearing in mind this extreme imbalance, the judge's arguing in the Re Cheng Kai Nam case and the fact that only few cases are tried in Cantonese[122] has to be rated at least as disputable. The main problem and strongest counter-argument in this discussion rises from the fact that English is the language within the common law system.[123]

3.2.5 Alternative Dispute Resolutions[124]

Alternative dispute resolutions exist in the HK SAR but they seem to be of no great

114 Gittings.
115 Horlemann, p.181f.
116 Jones/Vagg, p.581.
117 Ghai, p.338.
118 The supplementary legal aid scheme provides assistance in cases probably exceeding 60'000HK$ for those who can't afford it on their own but achieve the ordinary scheme's limit. http://www.lad.gov.hk/english/las/fcic.htm (visited: October 28, 2008).
119 Ghai, p.345; http://www.lad.gov.hk/english/las/fcic.htm (visited: October 28, 2008).
120 Official Languages Ordinance, Section 5 "Judicial Proceedings".
121 http://www.gov.hk/en/about/abouthk/facts.htm (visited: October 28, 2008).
122 The rates in lower-level courts are higher than e.g. in the CFA. Werner, p.344ff.
123 Werner, p.345, he identifies a trend towards a higher rate of use of Cantonese. On this topic see as well: Dowdle, Michael W., in: Fu et.al., p.56.
124 http://www.doj.gov.hk/eng/legal/index.htm (visited: October 28, 2008).

relevance. Several *tribunals* are installed to deal with specific issues as labor, obscene articles, administrative conflicts or small claims. In civil cases, *mediation* gains in importance. The Secretary for Justice set up a project to apply mediation "more effectively and extensively" in "commercial disputes and disputes at the community level." Similar can be said about *arbitration*. The government supports a reform to strengthen this instrument. Still, it seems that the focus lies more on international than domestic arbitration; the Hong Kong International Arbitration Center is concerned with both. Among the PRC and the HK SAR arbitration awards are mutually recognized.

3.3 Switzerland

Switzerland's written legal sources of access to justice are broad and quite well established. Therefore, my interest and focus lie more on subjects less prominent like ADR or personal (in)dependence of judges.

3.3.1 Swiss Constitution

The Swiss Constitution contains procedural guarantees mainly as part of the fundamental rights catalog in the arts.29 – 32 SC. In the 1999 amendment, art.4 old SC and the respective practice of the courts got united with the requirements of the ECHR and the ICCPR.[125] The combination of these five articles provides a wide protection of procedural guarantees to every individual. They have to be seen as strongly connected and be treated like one basic principle to ensure the rule of law.[126] The general procedural guarantees provided by art.29 SC are binding for all authorities on all levels of the state. They are neither limited to civil and criminal law nor to courts.[127] Art.29a SC is everyone's right to present his case to at least one judicial authority[128] enjoying full jurisdiction. This article does not include necessarily access to the Federal Supreme Court.[129] Art.30 regulates the judicial proceedings, i.e. refers only to proceedings in court.[130] Its intentions are implementation of separation of powers, fair trial and in consequence a fair judgment.[131] Beside these fundamental individuals' rights, the SC codifies the basic principles concerning the Federal Supreme Court and all other judicial authorities in arts.188-191c.

In Switzerland, most constitutional rights are *justiciable*. The minimal guarantees out-

125 Botschaft, p.181; Steinmann, Gerold, in: Ehrenzeller et.al., art.29 N1.
126 Steinmann, Gerold, in: Ehrenzeller et.al., art.29 N4.
127 BGE 130 I 269, 272; Hottelier, Michel, in: Thürer et.al., §51 N1f.; Rhinow, p.215.
128 The second sentence allows few restrictions based on law within the limits of art.6 ECHR. It points mainly on political questions.
129 Häfelin/Haller/Keller, N845b; Kley, Andreas, in: Ehrenzeller et.al., art.29a N10; Rhinow, p.195.
130 Definition of court see: BGE 126 I 228, 230f.
131 Botschaft, p.183, referring to BGE 114 Ia 50, 55.

lined above have to get transferred into procedural laws. The latter may grant even more rights than the constitution demands.[132]

3.3.2 Administrative Jurisdiction

Art.146 SC says "the Confederation shall be liable for damage or loss unlawfully caused by its organs in the exercise of official activities." This principle got substantiated in the Law on *Liability* , but as well in the Civil Law and in several other laws we find articles concerning the liability of public officials.[133] We differentiate between proprietary, criminal and disciplinary liability. According to art.146 SC, paying compensation for damages is primarily the state's duty, what does not exclude state's recourse on the fallible public officer (art.3 Law on Liability). Criminal prosecution of federal officers needs permission by the Department of Justice and Police (art.15 Law on Liability), also if it concerns a retired person. This restriction's aim is to ensure proper functioning of the administrative agencies, to protect them against causeless and malicious denunciations.[134] Similar privileges in favor of public officials are granted in most Cantons.

Regarding cases concerning administrative acts the new *art.25a Law on Administrative Procedure* is of interest. Access to justice to contradict decisions and decrees had been granted already before it came into force, but it was disputed whether art.29a SC, access to court, included as well claims against other administrative acts.[135] Under art.25a Law on Administrative Procedure, anyone confronted with an administrative act affecting his rights or duties may now demand a voidable decree resulting in access to court.[136]

3.3.3 Practical Implementation

Art.29 par.3 SC grants a minimum of *free legal advice and assistance* for those who need it; the federation and the cantons often concede more assistance. Usually, the person in need has to submit a request to get this support, even he or she is entitled to it;[137] the decision lies in the hands of the court. This request is part of the main procedure, hence not requiring an additional effort of the petitioner. The factors taken into account are: prospect of success, financial situation and, concerning legal representation, addi-

132 Steinmann, Gerold, in: Ehrenzeller et.al., art.29 N7; at the moment, civil and criminal procedural laws are still cantonal, but as part of the reform of justice new laws on federal level are being developed.

133 The Law on Liability is applicable not only concerning state officials. It is sufficient that the persons' employer was put in charge of a public task. See: BGE 106 Ib 273, 274ff.

134 BGE 106 Ib 273, 277.

135 Häfelin/Müller/Uhlmann, N1718e.

136 Kley, Andreas, in: Ehrenzeller et.al., art.29a N12.

137 BGE 131 I 350, 355f., referring to BGE 95 I 356.

tionally the complexity of the case.[138] Subject of art.29 par.3 SC is everyone, irrespective his citizenship or legal residence, except legal entities.[139] The entitlement is granted in all kind of procedures and not limited to judicial ones.[140] The exemption from these costs is only provisional; in case of the parties getting sufficient money later on he or she has to reimburse it.[141] In 2002/03 the annual budget spent on legal aid was 39 mio Euros for a total number of 36'709 cases.[142]

Art.191c SC, *independence of the judiciary*, is complementary to the individuals' right in art.30 par.1 SC. All judicial authorities, regardless whether federal, cantonal or communal, "shall be independent in the exercise of their judicial powers and shall be bound only by the law." Independence compasses: impartiality, independence from the other state's powers, from the other judicial bodies, from political and social influences, inner freedom of decision.[143] The Federal Supreme Court enjoys self-administration (art.188 par.3 SC), an important precondition to independence, but is supervised by the Federal Assembly (art.169 SC). The points I would classify as the most problematic ones are: a) the role of the political parties and b) the interference of politics and medias in running proceedings.

a) Elections of judges are done by popular votes or by parliaments. Theoretically, any citizen could make use of his passive suffrage. In practice, the political parties propose their candidates in a number relating to the results in the most recent election of the legislation. On the one hand, this leads to a close connection between judge and party and on the other hand, to a factual pressure to be a member of a party. Numerous elected politicians are working as judges on another level of the state. In BGE 118 Ia 282, 284ff. the Federal Supreme Court rated this combination as compatible with the law. In my eyes, the arguing is too grammatical instead of facing reality. Even in a multi-party system, these circumstances raise the question if Swiss judges are really independent from political influences.

b) Art.144 SC regulates the incompatibilities on the federal level: no one can be a member of more than one state's powers. About the same rules are in force on the lower levels. This includes as well that members of the council and the parliaments shall neither suggest judgments nor comment it while a proceeding is still running. In the last

138 For more details on these factors see: BGE 128 I 225.
139 Rhinow, p.218.
140 Botschaft, p.182; Hottelier, Michel, in: Thürer et.al., §51 N15.
141 Specifically on the reservation Switzerland made on art.6 par.3 lit.c and e ECHR and art.14 par.3 lit.d and f ICCPR resulting from this rule, see Achermann, Alberto/Caroni, Martina/Kälin, Walter, in: Kälin et.al., p.194.
142 Based on answers from 17, resp. 9 of 26 Cantons. CEPEJ, question 4.
143 Rhinow, p.200.

couple of years, we may survey a tendency in the opposite direction. The most prominent case was the visit of the then Federal Council member Blocher in Turkey in 2006. According to the press,[144] he announced the outcome of a pending case concerning four Turkish citizens imprisoned in Switzerland in favor of Turkey. In several prominent cases, e.g. "Seebach", especially members of the legislation and the medias commented pending criminal cases in a most inappropriate way. This may result in an enormous pressure on a court to impose a verdict of guilty.

3.3.4 Alternative Dispute Resolutions

Even in Switzerland, ADR – or at least similar institutions – are of greater significance than one might think: All of the 26 Cantons[145] installed alternatives complementing traditional (civil) court proceedings.[146] Additionally, the parties may make a compromise at any time before or during the process.

Probably the "youngest" instrument is *mediation.* The first association was founded in 1992.[147] Starting-point was the field of family law, specifically marriage crises (art. 171f. Civil Law). Nowadays, mediation gains more and more importance.

For more than 200 years already, *justices of the peace* have been part of the judicial system.[148] Often, they are the first contact point parties have to bring their civil case to.[149] The success rate in some places is quite impressing: in 2007, in the City of Zurich 52.4 percent of all cases presented before them could be closed successfully.[150] The other successful and widespread ADR-similar instrument is *conciliation*. Specialized on one topic like law of tenancy, with equal representation tenants and lessors suggest a solution to the parties.

In the draft of the new Federal Civil Procedure Law, pre-court settlements of disputes are foreseen.[151] It shall be up to the parties if they prefer mediation or a justice of the peace.

In *administrative law*, the new art.33b Law on Administrative Procedure allows the agency to try mediation to come to an agreement with its opponent. Basically, mediation in an administrative process is always possible and not in need of a specific legal basis. Obviously, the one limit is the law in force.[152]

144 E.g. Van Gent.
145 Mertens Senn, p.256.
146 For an overview see: Schweizerische Richtervereinigung für Mediation und Schlichtung.
147 Bieri, Isabelle, in: Schweizerische Richtervereinigung für Mediation und Schlichtung, p.9.
148 Mertens Senn, p.255.
149 See e.g. §93 Zurich's Civil Procedure Law.
150 Yearbook of 2007 Friedensrichteramt der Stadt Zürich: http://www.stadt-zuerich.ch/internet/fraz/home/aktuelles/jahresberichte.html (visited: October 28, 2008).
151 Contrary in the draft of the new Criminal Procedure Law mediation is of quite no importance.
152 Pfisterer, p.121.

Comparative Conclusions

Resulting from international treaties, China, Hong Kong and Switzerland act within one common frame. Nevertheless, extent and quality of the guarantees differ a lot. Within different restrictions, a minimum on access to a remedy is granted and implemented everywhere. In all of the three "constitutions" we find the principle of rule of law and some minimal aspects of fair trial. Only Hong Kong and Switzerland codified access to justice in the broad sense of the ICCPR and the ECHR; but it has to be added, that the latter's written constitution included a lot less only ten years ago. In the actual situation, it may be said that the wideness of the catalog of the constitutionally granted rights is an indicator for the practical implementation. The situation in China, esp. concerning independence of the courts and effectiveness, is still dissatisfying, even though the progress the judiciary and the legal system made are enormous. Acceptance of the need to provide access to justice is expressed by all governments in offering legal aid and assistance.

Everywhere, claims against administrative bodies undergo further restrictions than against individuals. While Hong Kong follows the rather narrow Strassbourg's decisions, Switzerland allows more complaints against agencies' decisions esp. under the new art.25a Law on Administrative Procedure. Common ground is that highly political matters shall be excluded from access to courts. In all of the three "constitutions" we do find articles enshrining the courts responsibility to another states power. Depending on the practical implementation, the grade of unwanted influence resulting from these clauses varies highly. The most negative example is China, including its influence in the HK SAR.

It is interesting to compare Switzerland within Europe and Hong Kong within China. While the first became part of a bigger body based on the same human rights tradition, the latter changed to subordination under a completely different system than the UK's was. In Switzerland, only a tiny minority spots a conflict arising from Switzerland's subordination under the ECHR. In Hong Kong, the restrictions on the courts' independence arising from the mainland's influence culminated in big debates. While Switzerland is bound by Strassbourg's decisions, Hong Kong bears the interpretation of art.6 ECHR, art.14 ICCPR and other alien judgments more or less voluntarily in mind.

Concerning alternative dispute resolutions, the pattern is reverse. China looks back on an old tradition still alive. Switzerland incorporated a few related instruments such as justices of the peace long time ago, but it is more correct to say that ADR is seen as something modern – and attractive.

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Zurich, October 29, 2008 Anja Recher