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Review of Judicial Decision-making in the People's Republic of China—An Overview of Unique Developments

Mark Findlay*

I. Introduction

Article 78 of the first Constitution of the People's Republic of China (1954) directed that: 'The administration of justice by the People's Courts is only subject to the law'. As Brady observed:

This judicial independence clause was not strictly observed, and Party Leaders continued to 'advise' judges on sentences and procedure in cases of political significance ... The party continued to play a major role in the selection of judges at People's Congresses, and the four-year judges' term of office could be ended by the Congress ... The mass line survived at least in the language of government directives which cautioned judges to avoid a bureaucratic style which might separate them from common people, and the Party still urged that political ideology and socialist education be woven into court decisions and judicial argument.¹

While the constitutional injunction to independence is general, specific legislative provisions do not directly preclude the overall governance of the Party. In fact, the initial articles of the 1982 Constitution celebrate the 'dignity of the socialist legal system' (Article 5), and as the preamble confirms, the construction and maintenance of Chinese socialism remains under the leadership of the Communist Party of China. Therefore it might be argued that the protection of judicial power from the 'interference by administrative organs, public organisations or individuals' (Article 126) does not envisage the intervention of the Party.

The political dominance over the judiciary in the PRC took on destructive proportions during the Anti-rightist Movements, and the period of Cultural Revolution.² From the late 1950s until the death of Mao, the judicial system was attacked as revisionist and class biased.³ The downgrading of the influence of formal legality was clearly demonstrated by the dramatic reduction in its constitutional coverage. For example, in the 1954 Constitution there were twelve articles which set out the workings of the judiciary. In the 1975 version only one such article appeared. Provisions containing 'bourgeois concepts' of due process, equality before

the law, open trials, rights to a defence, and protections against arbitrary arrest, were eliminated.⁴

Article 123 of the present Constitution stipulates that: 'The People's Courts of the PRC are the judicial organ of the state' and in that respect exercise its judicial powers. The Law of Criminal Procedure of the PRC (Article 3) designates the separate powers and responsibilities of the principal agencies of criminal justice. Through exclusion, 'judicial powers' (in the court's criminal jurisdiction) seem to be limited to adjudication in both first instance and appellate review situations, and the passing of sentence. According to Article 128 of the Constitution, the Courts are responsible for the exercise of judicial powers, to the National People's Congress and its Standing Committee.

This essential integration of judicial power within the framework of government is reinforced by the court's responsibility to the People's Congresses. Article 3 provides that: 'All administrative, judicial, and prosecutorial organs of the state are created by the People's Congresses to which they are responsible, and under whose supervision they operate'. The courts are, however, said to be expressly independent, and not subject to the interference of the administrative and procuratorial arms of government or individuals.⁵ The contradiction inherent within such arrangements is a major concern for this paper.

Through a broad analysis of the procedures whereby a judge's decision can be reviewed in the PRC, it is intended to expose the potential and extant forces at work on the exercise of judicial discretion within the Chinese justice process.

For example, whatever its functional significance for 'socialist legality', judicial independence is unlikely to progress beyond constitutional discourse in a system of government which does not aspire after a separation of powers.⁶ Such separation of powers is expressly provided for within the Constitution, and the organic and procedural laws. Remembering, however, that modern Chinese legality has relied on civil rather than common law sources, the conceptualisation of 'independence' for Chinese lawyers and legislators may be one of responsibility to government through accountability for the individual exercise of judicial power.⁷

The dilemma for judicial independence in China may be compounded by the contentious assumption that discretionary decision-making remains a responsibility for most sentencing functionaries, whether legally trained, judicially empowered, or otherwise. In order to appreciate the actual dynamics of judicial discretion in China it becomes necessary to critically analyse the political utility of judicial hierarchies, appeal mechanisms, and case review facilities.

II. Influences on Judicial Decision-making in China

General Judicial Administration

The *Organic Law of the People's Courts* (as well as of the People's Procuratorates) substantially recreated a system of judicial administration which originated from the relevant Organic Laws in 1954. Broadly, the system in 1978, with minor modifications, also relied on public trials, the right to a defence, people's assessors, adjudication committees, and the two-trial (one appeal) system. 'One significant change in the revised court law is to make the court accountable only to the people's congresses and free the court from direct supervision by local governments'.⁸ Articles 35 and 36 of the *Organic Law of the People's Courts* (1979) provide that the presidents of the people's courts are elected and recalled by the corresponding people's congresses, and their vice presidents and judges are appointed and dismissed by the standing committees of these congresses.

This selection process, and the structure to which it leads, makes China somewhat different from other socialist legality models.⁹ For example, assistant judges, rare as they are in other systems, are appointed to support the judge in his work, and in some instances may temporarily serve as judges. They are appointed and removed by their respective judicial committee (Article 37 of the *Organic Law of the People's Courts*).

Review through Court Hierarchies

The *Organic Law of the People's Courts* introduced a four-tiered structure¹⁰ which generally services two strata of administration. The Local People's Courts are convened at basic, intermediate, and higher levels. The Supreme People's Courts are part of the central government beyond the Provinces.

After mediation or conciliation has failed, matters may be presented at any level for judicial deliberation¹¹ depending on their perceived degree of seriousness, or of general importance. Although courts in the PRC do not operate under the strict domination of precedent, past determinations of law and penalty may influence the minds of the court at first instance:

The Higher People's Courts have an enlarged appellate jurisdiction, and operate, like the lower two courts, in provinces, autonomous regions, and municipalities. The Supreme People's Court hears appeals...The Supreme People's Court has the duty to interpret laws.¹²

It would appear to be the case in the PRC that either the prosecutorial organs or the citizen parties to an action can seek review at a higher judicial level. The outcome of the matter may be the subject of appeal either in terms of penalty, or mistake. A higher court may also, on its own initiative, seek to review the decision of an inferior tribunal.¹³

Under the two-trial system as stipulated in Article 12 of the Organic Law of the People's Courts, a judicial ruling of the court of first instance may be appealed to the court of the next highest level ... In the past, the fear of incurring heavier punishment seriously deterred the Chinese from exercising their right of appeal. To remedy the situation, Article 137 of the Criminal Procedure Law specifically provides that in its judgement of a case based on appeal by the accused or his advocate, the court of second instance is not allowed to aggravate the original punishment.¹⁴

A legally effective judgement in the PRC can be subject to 'judicial supervision' if some definite error in the determination of the facts or application of the law is found (see article 149 of the *Criminal Procedure Law*).

The Annual Report of the President of the Supreme People's Court, delivered at the First Session of the National People's Congress (NPC) (1st April 1988), provides some details of the judicial appeal process from the sentencer's perspective.¹⁵ Appeals or review can be initiated by a citizen through letters of complaint to a superior court, or through the regular supervisory function of the Supreme Court. In relation to the latter, the president remarked:

We use a method of 'examining the Oracles' to assess the quality of trial cases. Each year we send out a third of our judicial personnel to sit together with lower courts, and randomly select cases and types of case for review in co-operation with the instant court. If errors are found they are altered accordingly.

As reported by the President of the Supreme Court, to the 7th NPC Meeting in April 1989, the Ministry of Justice had formulated guidelines for the operation of this one-third 'spot check' system.¹⁶

This level of judicial review is supported by the examination and approval system, being as it is the province of a court president or the chief judicial officer.

The more informal and individualised process of review has been criticised¹⁷ for compromising the authority of the president over his bench, challenging the finality of a verdict, challenging competence and independence, and running against the concept of 'democratic centralism' (see, Constitution of the PRC 1982, Article 3).

Article 149 of the *Criminal Procedure Law* links judicial oversight with the workings of appointed adjudication committees. If the presidents of the people's courts at various levels discover that the determination of facts or the application of the law in judgments of their courts which have become legally effective, contain actual error, they must send the case to the adjudication committee 'to be handled'. The Supreme People's Court, and Procuratorate have authority to bring up any decision of the lower courts which contains 'actual error', for review, rehearing, direction for rehearing, or 'protest'.

In cases where a sentence of capital punishment has been the result, there exist special review procedures. Article 43 of the *Criminal Law of the PRC* stipulates that except for those capital sentences imposed by the Supreme People's Court all other death sentences should be submitted to it for review.

A new collegiate panel shall be formed for the new adjudication of the people's courts in accordance with the procedure of adjudication supervision (*see*, Part V of the *Criminal Procedure Law of the PRC*).

Courts and the Judiciary

At the level of ideology in China, there can be no separation of state power because, as guiding principles behind the *Criminal Law* and of the *Law of Criminal Procedure* identify (Articles 1), the law is intended to protect the 'people's democratic dictatorship, led by the people and based on the worker/peasant alliance'. The state then is conceived of as the embodiment of the will of the proletariat, and all its administrative forms are subservient to it.

The National People's Congress (NPC) is the highest organ of state power and both by definition and through the provisions of the Constitution, and the *Organic Law of the People's Courts*, the judiciary must be subordinate to it. The President of the Supreme People's Court represents all court levels in carrying out their reporting responsibilities to the NPC.

Proponents of the view that the courts and the judiciary must exercise their power subject to designated levels of examination and approval, see the people's court as *youji zengti* (an organic whole). Under this view, judicial independence does not attach to individual judicial officers, but to the people's court as a whole.¹⁸ The court as a whole might be independent from outside influence, but internally it is subject to the principle of majority decisions, hierarchical precedent, individual subservience to the organisation, and local courts to the central court.¹⁹ Since each individual bench is only one link in the organic whole, its decision does not have legal effect until it is approved either by the president or the chief judicial officer, and/or the judicial committee, and goes out under the official court seal. These levels of approval obviously have an important impact on the status of the accused who cannot participate in their preceding deliberations.

It has been argued that it is the people's courts rather than the judiciary in China which are pronounced independent:

Therefore the approval of the court is necessary to effectuate the judgements rendered. When a collegiate bench tries a case the decision that it renders is only

preliminary in nature. This is because the people's court must sanction all its decisions before they may become final.²⁰

In this respect the individual institutions of judicial power are viewed as above influence, beyond the mechanisms of internal approval. Those individuals charged with the exercise of such power must do so responsibly, and be accountable to those who might later approve their decision.

Courts and the Party

It is generally accepted amongst critical 'China watchers' that the People's Congresses have no real power, and because actual authority resides within the Party, for the purpose of analysing independence one must examine the relationship between the Party and the judiciary.²¹ This is made all the more significant when one appreciates the interconnections between the state and Party Constitutions in China.²²

Although on paper the judiciary was formally distinct from other state organisations and the Party, in practice it remained essentially undifferentiated from the administrative apparatus of the state. The Party with its tools of mobilisation, the voluntaristic mass movements spearheaded by party members and 'activists', dominated the judiciary as well as other state hierarchies.²³

Lubman further asserts that courts of law under the Communist Party in the PRC, 'have been seen and used as active participants in the implementation of Party and state policies'. For example, it is common to hear publicly broadcast in China the principal current policy goals with which the courts are charged by their political masters.

The articulation of short term goals for the courts is nothing new in the People's Republic of China; it has been a characteristic of law administration since 1949. However the technique raises obvious questions about the independence of the courts. Not only is the allocation of scarce judicial resources effected, but more importantly the courts can expect to be evaluated by higher authorities on the basis of their responsiveness to demands to meet short term goals.²⁴

The theme of socialist legality gained strength following the Cultural Revolution, as evidenced through its inclusion in the language of the most recent Constitution. Article 5 of that instrument sets down that no organisation or individual may be elevated above the Constitution and the law is limited to a contrast with individual citizens, and their organisations. As for the Party, the omnipotence of its policy as the prime basis of all state-centred decision-making is manifest both in theory and practice.

Even after the celebration of legality in the 1956 Constitution, senior representatives of the legal profession extolled the virtues of Party involvement.

For example, in 1958 the Deputy Chairman of the China Politics and Legal Affairs Society observed:

The rightists have said that the Party is a 'layman' on legal matters and that as such should not head legal works. This is absurd. In China the legal system has been created under the leadership of the Communist Party, in accordance with the principles of Marxist-Leninism and the experience of the people themselves in the course of class struggle. . . . The rightists have accused the Party of interfering with the trial work of the court. This is likewise absurd. We all know that the laws have to be administered according to the policies of the state, and it is the Communist Party which is most capable of deciding such policies in the interests of all the people. The Party does not interfere with the court's independent trial as long as they adhere to the policies of the state. Is there anything wrong with such leadership and supervision?²⁵

Kim refers to the position put abroad in the Chinese press prior to the 1978 Constitution that the leadership of the Communist Party are guardians of socialist legality:

The Party's role in dealing with the judiciary is threefold. First, the Party conducts education programmes to ensure its ideology and the maintenance of the Party line by the judiciary. Second, the Party selects a number of able cadres to run the judicial organs. Third, the Party constantly supervises whether or not the judicial organs strictly execute the law. Thus, the Party becomes the guardian of the law.²⁶

Koguchi cites those types of cases which, at least as late as 1979 (and in practice, beyond that date), had to be submitted to Party committees for examination and approval.²⁷ These included cases involving the death penalty, and those dealing with crimes committed by foreigners. At this point of the development of socialist legality it was for the Supreme People's Court to hear and ratify capital cases, but the actual power of sentencing a criminal to death is still in the hands of the Party Central Committee.²⁸

The system of direct examination and approval of law cases by the Party was abolished through an instruction of the Central Committee.²⁹ The instruction required firstly that the courts properly handle cases within the *Criminal Law* and the *Law of Criminal Procedure*, and fully correct all thoughts and customs that contradict these laws. Second, the Party was to intensify its leadership over the judiciary, and make sure that the judicial function is exercised in accordance with the Constitution and the laws. Third, the Party must quickly re-establish the judicial organs at all levels, and reconstruct a contingent of judicial operatives. Fourth, the Party must broadly and profoundly propagate the laws and prepare for the full implementation of the new criminal codes. Finally, the Party organisation at all levels must set the example in full observation of the laws.

This instruction specified that the Party leadership of the judiciary is limited to that of

guidance and policy. Observers have it that the instruction was honoured more in the breach.³⁰ Perhaps as a result, some judicial officers appeared reluctant to exercise their duties in any independent fashion. Judicial autonomy was also impeded by the inexperience and lack of adequate legal training possessed by some judges, and the gross inadequacy of their resourcing. Added to this was the widespread inability of the courts to adjudicate a great range of problems due to the low level of power and prestige of the judiciary both within and without the bureaucracy.

Since 1981 opinions defending the system of examination and approval by the Party have once again emerged. As early as 1980 the *People's Daily* asserted that the intervention of the Party committee was essential for handling important or complicated cases.³¹ Even the then President of the Supreme People's Court, Jiang Hua, who personally opposed Party intervention, acknowledged its importance. His compromise position was that the courts should voluntarily seek the advice and instruction of the Party committee, or submit reports to it, on the Third National Working Conference on Criminal Justice, in which these matters were canvassed. A commentator observed:

Does the Party committee have the authority to handle individual cases? Of course it has. In practice, the Party committee must intervene whenever that committee finds the case to be important and difficult or to have socially far-reaching implications When serious conflicts arise as to factfinding or the application of the law among the police, the procuratorate, and the court, (the latter) should strive for an agreement amongst those by asking for instructions from the Party.³²

Leng identifies the following as the problems to the system of direct Party interference with court determinations:³³

- (i) it is impossible for a Party committee (or its political-legal secretary) to investigate all cases, and to do so would cause unreasonable delays in the administration of justice, or the making of careless and erroneous decisions;
- (ii) the Party committee's direct involvement in concrete court cases tended to weaken the spirit of enthusiasm of judicial personnel in their work;
- (iii) this had the effect of rendering court trials a mere formality, causing the community to lose confidence in the PRC's legal system.

This last issue assumes that such confidence was either likely or possible, and that to some extent the independence of the courts was instrumental for its generation and maintenance. This is difficult to establish with any historical or cultural certainty in China.

Open Court

One Chinese writer maintains that the public trial not only serves a broad community education function, but it also puts adjudication under the supervision of the people.³⁴

Assertions such as this rely on some fundamental assumptions, the simplest of which is that public trials will occur with sufficient frequency to allow for the achievement of any such purpose.

Public trials are not held in China unless the court is convinced, on the basis of the pre-trial evidence, that the facts will be proven in such a forum. If there is a doubt about the defendant's guilt, an open trial will not usually take place.

If a case is publicly in progress, and inconsistencies arise in the prosecution, the trial will usually be adjourned for investigations and hearings to continue in private. The function of a public trial in China is to demonstrate guilt and contrition rather than to view the contest over innocence.³⁵ It is also not seen as an essential opportunity for the community to scrutinise the workings of the judiciary and the people's court process.

Lay Assessors

Among those features of popular legality which were revived from the 1954 Constitution by its 1978 successor was the participation of the people's assessors in the public administration of justice (see Article 41).

Except for minor cases, trials are conducted in cases of original jurisdiction by a collegiate bench of a judge and two assessors. Lay participation is not a feature of the collegiate benches in appeal courts.

Article 9 of the *Organic Law of the People's Courts* sets down the procedure for the election of lay assessors. The franchise attempts to emphasise local knowledge or, in certain situations, particular expertise which might assist in the resolution of special issues.

Lay members of the bench enjoy equal judicial power as that possessed by the professional judges (Article 38). In this regard the inquisitorial and decision-making processes have a potential to be truly collegiate. And despite the fact that lay participation does not extend to appeals, the assessors may have a real influence over deliberations at first-instance trials. Such influence may be more significant than expected by those with experience of a more professionalised judiciary. In China there remains a considerable proportion of judges without formal or sophisticated legal training. Also the division between lay assessors and the judicial elite will be less marked in China, when one appreciates the relatively modest social status of judges and lawyers.

This is another opportunity in theory for the community to participate in the formal process of justice at all levels in the PRC. It strives to provide a bridge between the people and the courts, where bias should be less likely and the assessors are in a position to educate their constituency about the working of the justice process.³⁶

The Judicial (Adjudication) Committees

As part of the selection process of higher judges and judicial officers, the president of the respective courts consults with Judicial Committees (*zhengfa weiyuanhui*) which are bodies set up at each judicial level and consist of the president and vice president of the court, the local Party secretary, and other responsible Party members. This formalisation of influence for Party officials goes to further nullify the effect of the Central Committee's Instruction against examination and approval.

These judicial committees have grown to become highly influential as review mechanisms, far beyond the limit of judicial appointments.

It is known that where a court encounters problems, judges will, rather than seek advice or (*sic*) remit the case to the court of a higher jurisdiction, simply consult the Judicial Committee, which may decide to hear the case itself.³⁷

Some commentators do not go so far as to represent these committees as having any original jurisdiction, but there is agreement on their appellate and review significance.

These adjudication committees have responsibility for matters which might come before their particular court. Prior to trial for example they may consider those cases of some importance to the area, or which are of doubtful merit. They may recommend that important matters be referred to a higher court.³⁸

Judicial Committees also play a pre-appellate role in that they will often be called upon to mediate following a decision made by a court against which a procuratorate or public security bureau may wish to appeal.³⁹

Caldwell suggests that these committees are merely the modern-day incarnation of 'trial by Party Secretary' (*shuji-pian*).⁴⁰ This is perhaps unduly cynical in that the role of the committees is formally limited by legislation to specified areas of advice, consultation and review. Article 11 of the *Organic Law of the People's Courts* gives them the less sinister purpose to 'sum up judicial experience, and to discuss major or difficult cases as well as other issues regarding judicial work'. This is consistent with the interdependence of Chinese socialist legality as suggested in Article 17; 'the judicial executive work of various levels shall be administered by the judicial executive organs'.

Under the *Criminal Procedure Law* the functions of the adjudication committees are thus specified:

- (i) to decide whether or not to disqualify the chief judge if he is challenged by the parties to the matter or their representatives on the grounds of a personal interest in the case;

- (ii) to discuss and decide upon all difficult cases which are referred by the president of the people's court. The collegiate bench is to execute the decisions of the adjudication committee;
- (iii) if definite errors are found by the presidents of the people's courts in the determination of the facts or the application of the law in decisions of their courts, they are to submit the determinations to the committee for its final disposition.

In these respects judges are not guaranteed independence in their case-by-case exercise of discretionary decision-making in that they may be usurped by the collective decision of a committee which may not have been involved in the actual trial.

Review Function of the Procuratorates

In the legal system of the PRC the people's procuratorates are much more than simply the prosecutorial organ. Article 1 of the *Organic Law of the People's Procuratorates* defines these agencies as 'organs of the State supervising the administration of justice' and as such are empowered to 'carry out investigations of criminal process, institute prosecutions, scrutinise the trial activities of the courts, and supervise the execution of judgements and the activities of correctional institutions' (Article 5).

In an administrative sense within the wider government of the PRC, the procuratorates may not possess the keenest review potential in that they are responsible both vertically and horizontally to their respective local level governments and the hierarchy of their own organisation (see *Organic Law of the People's Procuratorates* (1979), Article 10). In addition they no longer possess a general power to oversee the legality of all state organs. Article 9 of the *Organic Law*, however, recites the independence of the procuratorate 'in accordance with the law, and shall not be subject to interference by other administrative organs, organisations or individuals'.

Along with their wider investigative role, the procuratorates have a responsibility to activate the review of judicial decision-making. As suggested in Article 14 of the *Organic Law of the People's Courts*, this is more significant than a prosecutor's right to initiate an appeal against sentence:

... If the Supreme People's Procuratorate finds some definite error in a legally effective judgement or order of the people's courts at any level, or if the people's procuratorate at a higher level finds such error in a legally effective judgement or order of any people's court at a lower level it has the authority to lodge a protest in accordance with the procedure of judicial supervision.

This final phrase provides for a very wide scope of review. The 'protest' might be lodged with a higher people's court (should one be appropriately available) or with the relevant

judicial committee. Further, the procuratorate could work through its own administrative hierarchy, up to the Ministry of Justice and on to the appropriate Standing Committee of the NPC.

The Internal Judicial Committee

The Internal Judicial Committee is the seventh Special Committee of the State Council and has been given a variety of legislative and procedural review responsibilities. These include:

- (i) Receiving for examination and assessment, motions to be placed before the Standing Committee, concerning legislative enactment
- (ii) Drafting laws on social order and citizen protection
- (iii) Suggesting revisions of criminal penalties and punishment
- (iv) Proposing policy initiatives on socio-legal concerns such as corruption, youth safety, prostitution.

The committee has the oversight of any amendments to go before the Standing Committee of the NPC regarding the Courts and judicial practice.

As a sub-committee of the NPC Standing Committee, it is unlikely that the judicial committee could receive reports directly from the President of the Supreme People's Court. This reporting obligation, as referred to in legislation, would not be subject to delegation either from the perspective of the nominated judicial official, nor from the NPC and its executive.

III. The Reality of Judicial Decision-making in China

Unlike the Anglo-American model in which courts are theoretically impartial agencies for adjudicating conflicts, Chinese courts under the Communist Party have been seen and used as active participants in the implementation of Party and state policies. As in other Chinese governmental activities, it has long been common to announce publicly the principal current policy goals which the court should aim to realise, and to link their work with implementing those policies.⁴¹

An example of the public policy utility of the people's courts was the recourse had to legal form in ending the excesses of the Cultural Revolution. The trial of the 'gang of four' powerfully represented a political propitiation. It is significant that a court (special as it was) formed the mechanism for such an important political transition. More significant perhaps was the application of the trial process to an apparently political resolution. This trend has continued across the recent development of judicial adjudication in China.⁴²

The use of the courts to review political challenge and dissent, rather than to rely on the activation of the 'mass line', reflects an appreciation by the state of the legitimisation potential of legality. The Chinese leadership since the days of Mao, in a symbolic sense at least, has turned away from the promotion of popular violence in favour of the more formalised and predictable controls offered by the courts. In the course of this transition the prestige of the courts may have been raised. Also, through such state recognition, the language and institutions of trial-centred legality became a recognised option within the state's control agenda. For instance, the prompt use of the people's courts (and their military counterparts) to substantiate claims of a return to normality after the Tiananmen violence in 1989, confirms the acceptance by Chinese officials that, at least in their dealings with the international community, the imprimatur of the judicial process raises tangible evidence of democratic government.⁴³

It is no coincidence that this reactivation of the courts occurred at a time when Chinese legislatures were implementing codes of criminal law and procedure. In addition the atmosphere of legalism was structured around a discourse of constitutional rights and responsibilities.⁴⁴

Having said this, the position of the courts in translating this new legality is openly circumscribed in political terms. The role of the courts, and more particularly that of the judiciary, in meeting the standards set by these new laws, is still viewed in terms of a revised notion of 'correct' politics.

For example, the courts have been enlisted to 'deal with' social problems which have been endemic traditionally in Chinese commercial and administrative relations,⁴⁵ as well as the growing adverse consequences of a centralised economy in transition.

Reports of decisions by the courts in cases involving conduct of the type discussed in the (Party) 'circular' not surprisingly proliferated soon after it was promulgated. There had been no shortage of reports of such cases before the State Council directive, presumably reflecting the growing concern which led to that high level expression. More reports appeared around the time of the circular ...⁴⁶

One can speculate on the direction of influence between political pronouncement and case law, but there can be little doubt about the significance of their interrelationship in the PRC.

The connection between judicial decision-making and the direction of politics in the PRC has always been obvious. For example, when the Chinese leadership was endeavouring to reconstruct the excesses of the Cultural Revolution, the judges played their part. As reported by Jiang Hua, President of the Supreme People's Court, by the end of June 1980, the people's courts at various levels had reviewed over 1.13 million criminal convictions handed down during the Cultural Revolution, and had redressed more than 251,000 cases in which people

were 'unjustly, falsely and wrongly charged and sentenced.'⁴⁷ Remembering the extreme limitations on the newly rehabilitated judiciary, one might suspect that a review process of this relative magnitude was more politically motivated and productive than it was an active and actual pursuit of individualised judicial re-examination.

IV. Judicial Discretion and the Institutional Boundaries of Justice in the PRC

Professor Tay observes that within the present world climate of socialist reorganisation China will have to substantially modify, and to some extent create its legal culture afresh in the face of both internal and external pressures for more a more complex and professional legality.⁴⁸ This is made difficult to realise not only because of the historical aversion in Chinese culture and politics to the supremacy of formal legality,⁴⁹ but also it is due to the conflation of arms of administration for the advancement of centralised control.

Such complications are well evidenced in the recent struggle to regenerate the institutions of justice which might do more than symbolise constitutional legality. This focus on the judiciary as part of the latest period of institution-building in China provides an insight into the conflicting values which the legal system embodies, within the tangled imperatives of Chinese modernisation.

It is the close connection between the courts and campaigns for social mobilisation which has tended to give the judiciary a somewhat compromised appearance. This may stand as less of a problem inside Chinese administration than it may be perceived by those from bourgeois legal traditions. Even so, 'campaigns also may tend to infect the legal system with precisely the kind of unevenness in the rhythms of bureaucratic and political life that law is supposed to reduce.'⁵⁰

This will eventually pose problems when the connection between the bureaucracies of politics and justice operate with fundamental and public institutional connection. The tradition within the PRC of substituting Party policy and personal views for legal determinations, reveals the tenuous status of judicial discretion.

Associated with this are the judicial review, and the review of the judiciary. As to the former, the re-establishment of a formalised justice bureaucracy in China raises the issue of the extent to which the law should reach out to punish officials who previously may only have been open to the administrative sanction of either government or the Party. If Law is to support bureaucratic discipline and defend social order, then its primacy needs to be manifested through vital functionaries such as the judge.

Two important questions arise out of the foregoing analysis of court review procedures in

China. First, what is the actual significance of judicial decision-making for the administration of justice within the PRC justice system? Second, assuming that judges do have an important deliberative function, what are the consequences of the varied influences previously identified for the exercise of judicial discretion?

The latter issue must be addressed from an appreciation of Chinese 'socialist legality'. This ideology has developed through endeavours to reconcile a principle of independent courts and individualised judicial discretion with the reality of Party supremacy. The Chinese administration holds that insofar as their judicial system operates within a framework of Party leadership, it would be wrong to equate the socialist principle of 'independent judicial power' with a separation of powers, or judicial independence as proclaimed by the bourgeoisie.⁵¹ Equally mistaken from their perspective is to interpret Party leadership as a substitute for the decision-making responsibilities of judicial organs.

Moreover they stress the fact that insistence on the principle of 'administering justice independently according to the law' (Article 4 of the Organic Law of the People's Court) is consistent with strengthening the Party leadership in legal work.⁵²

Unfortunately from the voice of the 'official account' the contradictions apparent in such a position remain unanswered beyond statements of faith. Those who will be immediately aware of the limitations necessitated by such posturing are those justice operatives who would claim the power to make individual decisions.

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ENDNOTES

- 1 J Brady, *Justice and Politics in People's China: Legal order or continuing revolution* (1982) pp 120–21.
- 2 *Ibid.*
- 3 The developments towards legalism in post-revolution China came to an abrupt halt in the autumn of 1987, as a result of the 'Hundred Flowers Blooming and Contending' movement. Under the leadership of the Party elite, this 'anti-rightist' movement condemned and emasculated the fledgling legal system provided for in the Constitution of 1954. Leading lawyers and members of the judiciary were purged as part of the attack on revisionists. Notions of an independent judiciary and rights for the defendant were seen as bourgeois, and a rigid system as taking away the rights of the Party and the

mass organisations. Over the ensuing decade, the predominance of the Party was restored. The criminal justice process was administered, for example, almost entirely through Party committees.

See CW Chiu et al, *Legal Systems of the PRC* (1991) pp 30–32.

- 4 SC Leng and H Chiu, *Criminal Justice In Post-Mao China* (1985).
- 5 See Article 4 of the *Organic Law of the People's Court*, and Article 126 of the Constitution of the PRC (1982).
- 6 Judicial independence is said to be of vital importance in contemporary society where executive-administrative power has become predominant. Liberal society presupposes the separation of powers. Whether such a system works or not depends upon the independence of the judiciary, because under an administrative state legislative power has been usurped by executive power. Without judicial independence the state would tighten its control incessantly and eventually dominate all aspects of social life.

H Koguchi, 'Some Observations About Judicial Independence in post-Mao China' (1987) 7 *Boston College Third World Law Journal* 195.
- 7 M Cappelletti, *The Judicial Process in Comparative Perspective* (1989) Chap 2.
- 8 Leng Shao-chuan, 'Criminal Justice in Post-Mao China: Some preliminary observations' (1982) 73/1 *Journal of Criminal Law and Criminology* 204.
- 9 M Glendon et al, *Comparative Legal Traditions* (1985) pp 814–817.
- 10 In addition to these, Article 2 of the *Organic Law of the People's Courts* provided for Special People's Courts (covering specialised jurisdictions) including Military Courts, Railway Transport Courts, Water Transport Courts, Forestry Courts, and Maritime Courts. More recently a wide range of Economic Courts have developed to satisfy China's burgeoning commercial law needs.
- 11 See R Utter, 'Dispute Resolution in China' (1987) 62 *Washington Law Review* 383.
- 12 R Caldwell, 'Chinese Administration of Criminal Justice: Return to a Jural model?' (1987) *Lawasia* 61.

For a more detailed overview of the court structure in the PRC, *see* CW Chiu *et al.*, *op cit* n 3 Chap 2.

- 13 Article 12 of the *Organic Law of the People's Court of the PRC* (1979, as amended in 1983) somewhat over-simplistically stipulates that:

In the administration of justice the people's courts adopt a system whereby the second instance is the last instance.

From a judgement or orders of first instance of a local people's court, a party may bring an appeal to the people's court at the next highest level in accordance with the procedure prescribed by law, and the people's procuratorate may present a protest to the people's court at the next higher level ...

Article 14 lays down a process for reviewing the decisions of the people's court through presidential initiative:

If the president of a people's court finds, in a legally effective judgement or order of his court, some definite error in the determination of facts or application of law he must submit the judgement or order to the judicial committee for disposal.

If the Supreme People's Court finds some definite error in a legally effective judgement or order of the people's court at a lower level, it has the authority to review the case itself or to direct the lower level people's court to conduct a retrial ...

- 14 Leng, *op cit* n 8 p 232.
- 15 As cited in the Gazette of the National People's Congress Standing Committee No 4, 30 May 1988: pp 31–33.
- 16 *Ibid*, p 33.
- 17 Koguchi, *op cit* n 6 p 193.
- 18 Wen Shi, 'The Examination and Approval of Cases by the President or the Chief Judicial Officer of the People's Court is Never Illegal' (1981) *2Faxue Zazhi* 39.

- 19 Wen Shi, 'Is the Manner of the Examination and Approval of Cases by the President or the Chief Judicial Officer of the People's Court Illegal' (1981) *Zongguo Fazhi Bao* 24 April 1981, p 1.
- 20 Chin Kim, 'The Modern Chinese Legal System' (1987) 61 *Tulane Law Review* : pp 1413–1452.
- 21 Koguchi, *op cit* n 6 pp 196–202.
- 22 As regards the original Constitutions, Blaustein wrote; 'China is unique in having two Constitutions' and the 'highest law of the land must include the 1956 Constitution of the Communist Party of China, as well as the 1954 Constitution of the People's Republic of China.'
- A Blaustein, *Fundamental Legal Documents of Communist China* (1962) p xiv.
- 23 S B Lubman, 'Emerging Functions of Formal Legal Institutions in China's Modernisation' (1983) *China Law Reporter* 195.
- 24 *Ibid*, p 247.
- 25 An address 'On the Preservation of the socialist Legal System' in January 1958, reported in *The Bulletin of the Commission of International Jurists* No 8, December 1958, p 7.
- 26 Kim, *op cit* p 1422.
- 27 Koguchi, *op cit* p 198.
- 28 Zeng Hanzhou, 'Report in the National Criminal Justice Working Conference' (1978) 1 *Zhonghua Renmin Gongheguo Xinshi Susongfa Xuexi Cankao Ziliao (The Reference Materials for Studying the Law of Criminal Procedure in the People's Republic of China)* 326.
- 29 9 September 1979 — *see*: 'An Instruction of the Central Committee of the Chinese Communist Party Concerning the Full Implementation of the Criminal Law and the Law of Criminal Procedure', translated text in Koguchi *op cit* n 6.
- 30 Leng Shao-chuan, 'Criminal Justice in Post-Mao China: Some Preliminary Observations' (1981) *The China Quarterly* 458.

- 31 'Is government officer stronger or is law stronger' *People's Daily* 29 July 1980.
- 32 Tao Mao, 'Comments on the Principal of Judicial Independence' (1982) 4 *Beijin Zhengfa Xueyuan Xuebao* 51.
- 33 Leng, *op cit* n 8 p 224.
- 34 Liao Zengyun, 'On Public Trial' (1980) 5 *Faxue Yanjiu* 35.
- 35 See M Findlay, 'Show Trials in China: After Tiananmen Square' (1989) 16/3 *Journal of Law and Society* 352.
- 36 Chiu *et al*, *op cit* n 3 p 77.
- 37 Caldwell, *op cit* n 12 p 62.
- 38 Chiu *et al*, *op cit* Chap 2.
- 39 Caldwell, *op cit* n 12 p 62.
- 40 This was a process whereby a criminal sanction was imposed by a secretary in charge of political and legal affairs, from within the local Party committee. It was officially abolished in accordance with Central Committee instructions in September 1979. See: Lia Junchang, 'The Independence of Trials and Deciding Cases by the Secretary' (1979) 1 *Xinan Zhengfa Xueyuan Xuebao* 7. See also the section on a 'Question of judicial independence', in Leng, *op cit* n 8 pp 224-228.
- 41 Lubman, *op cit* n 23, pp 245 – 246.
- 42 See Findlay, *op cit* n 35.
- 43 *Ibid*.
- 44 M Findlay & CW Chiu, 'Constitutional Rights and the Constraint of Populist Dissent: Recent resort to legalism in China' (1991) 19 *International Journal of the Sociology of Law* 67.
- 45 M Findlay & CW Chiu, 'Sugar-Coated Bullets: Corruption and the new economic order in China' (1989) 13 *Contemporary Crisis* 145.

- 46 Lubman, *op cit* n 23, p 247.
- 47 Leng, *op cit* n 8, p 206.
- 48 A Tay, 'Communist Visions, Communist Realities, and the Role of Law: The demand for democracy' (1990) 17/2 *Journal of Law and Society* 155
- 49 See Chiu et al, *op cit* n 3, 1991 Intro.
- 50 Lubman, *op cit* n 23, p 238.
- 51 Liu Guangming, 'The People's Courts Administer Justice Independently' (1979) 3 *Faxue Yanjiu* 31.
- 52 Leng, *op cit* n 8, p 226.