Some Observations About "Judicial Independence" in Post-Mao China

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I. INTRODUCTION

The Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party, held in December, 1978, was epoch-making in the legal history of the People's Republic of China (P.R.C.). The goal of this article is to clarify the character of adjudication since that meeting. At that meeting, strengthening “Democracy and the Legal System” was declared to be a major goal of the Party. In order to understand P.R.C. adjudication fully, it is necessary to consider the role of the judiciary and the impact of the Party upon that role. Thus, this article focuses on the question of who is the judicial decision-maker in the P.R.C.? In addition, the article will touch briefly upon the related question of the fundamental nature of P.R.C. judicial decision-making. Namely, is P.R.C. judicial decision-making truly judicial, or merely administrative?

In bourgeois society, judicial independence is regarded as the most important component of impartial justice. The judge, or often the jury in Anglo-American systems, decides the case under consideration. It is a fundamental aspect of the legal system that a judge answers to no one, and the only constraint he acknowledges is that he must remain faithful to the existing body of legal doctrine and legislative enactments.

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 almost all aspects of social life.

The P.R.C. does not take such a skeptical attitude toward state power. In China there can be no separation of state power because the state embodies the will of the proletariat. According to official political theory, the National People’s Congress represents this will, and is thus the highest organ of state power. The judiciary is by definition subordinate to this highest organ of state power. In this sense, the judiciary in Communist

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China is not independent. However, this does not necessarily mean that judicial independence is entirely nonexistent. The 1954 Constitution provided “People’s courts shall conduct adjudication independently and shall be subject only to the law.” The 1982 Constitution also provided that “People’s courts shall exercise their authority independently according to the law and shall not be interfered with by any administrative organ, organization, or individual.” Thus, at least as far as formal legal provisions are concerned, there is little difference between Western and Chinese Society.

However, as mentioned above, the People’s courts must accept the supervision of the People’s congresses. This constitutes a major distinction between the Chinese brand of judicial independence and the Western one. However, the People’s congresses have held no real power. As in other communist countries, it is the Communist Party that is the real source of power in China. What must be addressed, therefore, is the relationship between the Party and the court.

II. THE RELATIONSHIP BETWEEN THE PARTY AND THE COURT

A. The Practice Prior to the 1978 Third Plenary Session of the Eleventh Central Committee

It was not until the 1954 Constitution that judicial independence appeared in codified form in Communist China. Even after the Communists assumed national power, as well as during the Chinese Soviet Republic (1931–1934) and Yenan (1935–1945) eras, the courts were integrated into the governmental structure. This is shown in the Organic Law of the Chinese People’s Government (1949) and the Provisional Organic Regulations of People’s Courts (1951). Article 78 of the 1954 Constitution prohibited for the first time interference in cases by any administrative organ, organization, or individual. However, neither the Constitution nor commentaries on it mentioned the applicability of Article 78 to Party interference. According to one commentator, this silence reflected the tension between the Party and the judiciary. Could the Party intervene directly in individual cases? And if so, for what reason? The Anti-Rightist Movement answered this question explicitly in favor of the Party when it declared that Party leadership was absolute, extending even to the adjudication of individual cases. The official position is illustrated in the article *Refute Jia Qian’s Anti-Party Nonsense about ‘Independent Adjudication’*, wherein the author notes:

> The working class carries out its leadership of the state through its vanguard, the Party. Since the court is a state organ, the Party as a matter of course leads the court. As shown by the facts, only the Party’s intervention in adjudication has made it possible to correct illegalities and to apply the law correctly. Party leadership is carried out through the Party organization within the court. All important judicial matters should be decided by the Party organization, including not only problems of political ideology or policy, but also concrete cases. By correctly handling individual cases, the Party can demonstrate how to carry out its policies and guidelines effectively. If

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the Party limits itself to passing on policies and guidelines, its leadership will become abstract and useless.\(^2\)

Even after the Anti-Rightist Movement, however, there remained, at least formally, a functional separation between the Party and the judiciary. However, the Cultural Revolution led to the total disintegration of the system of law enforcement, as the slogan “smash gong-jian-fa [police-procuracy-court]” plainly illustrates. From the beginning of the Cultural Revolution to the promulgation of the Code of Organizations of the People’s Court in 1979, there had been no reason to inquire into the problem of a politically separate judiciary, since neither the 1975 nor the 1978 Constitution provided for “judicial independence.”

B. The Third Plenary Session of the Eleventh Central Committee

Despite its absolute leadership during this period, the Party did not intervene uniformly in all judicial matters, but rather limited its intervention to cases with far-reaching implications and to criminal cases involving a sentence of three or more years of imprisonment. This intervention in judicial decision-making was accomplished through a system of examination and approval by a Party committee. This system was not abolished by the Eleventh Central Committee at the end of 1978, even though it emphasized the strengthening of democracy and the legal system.

The communique of the Third Plenary Session of the Eleventh Central Committee proclaimed the independence of the judicial and the procuratorial organs, as well as the consolidation of the socialist legal system. However, the communique did not mention the role of the Party at all. This is due to the fact that the Party’s intervention through the examination and approval system was still regarded as vital. This is illustrated by many contemporaneous statements:

The People’s courts as an instrument of the proletarian dictatorship must . . . positively and voluntarily ask for instructions from the Party committee, or report their works to that committee, and strictly implement the system of examination and approval of cases by the Party committee.\(^3\)

When the People’s court decides to arrest a suspect in the course of its investigation, it must get the Party committee’s approval in accordance with internal Party regulations concerning the authority of approval of arrest.\(^4\)

[The People’s court] must regularly report on the situation of criminal justice to the Party committee and listen to instructions from the committee. [The courts] must strictly carry out the system of having cases examined and approved by the Party committee. In submitting cases to the Party committee,


the courts must accurately report the facts of the cases, the grounds of sentencing, and their opinions on the handling of the cases.\(^5\)

Some cases in the courts must be submitted to the Party committee for examination and approval. At present, cases involving the death penalty are to be submitted to the provincial Party committee. Ten categories among those, (the contents are unknown), and criminal cases committed by foreigners are to be reported directly to the Supreme People's Court, which must submit them to the Central Committee of the Party for approval. If in the next National People's Congress the Criminal Code and the Code of Criminal Procedure are adopted, the Supreme Court will officially hear or ratify death penalty cases, but the actual power of sentencing a criminal to death is still in the hands of the Party Central Committee. . . . If conflict occurs between the Party and the courts with regard to the problem of how to deal with the cases, . . . the courts must ask for the approval of the Party committee as much as possible. When conflicts are not resolved, the courts must report to the Party committee correctly, consult with it un hurriedly, explain the facts and the reasons clearly, respect its leadership, and adhere to its principles.\(^6\)

As to the Party's leadership over the court, the courts should put into practice the principle of Mao Zedong that all powers are monopolized by the Party, and minor issues are delegated to other organizations. As far as important matters such as the Party's line, guidance, and policy are concerned, the Party must strengthen its leadership over the courts. The People's courts must voluntarily ask for instructions from the Party.\(^7\)

Once the Code of Criminal Procedure is promulgated, the Party must strengthen its leadership over the courts. . . . But it would be mistaken to interpret Party leadership as the substitution of the Party for the courts, and the examination and approval of individual cases by the Party. . . . But if important and specific cases such as crimes committed by foreigners are brought before the courts, the courts must submit them to the Party committee for discussion.\(^8\)

Must the Party committee examine and approve judicial cases? As to ordinary cases, it need not. . . . But as to important, complicated cases or those in which the discipline of the Party or the government is combined with criminal responsibility, it would be impossible for the police, the procuracy, and the court to grasp the facts and the truth very clearly without the direct leadership and inquiry of the Party committees at local levels and the Party Central Committee.\(^9\)

How does the Party exercise the leadership? First of all, the Party committee should not examine concrete cases. . . . [But this] does not necessarily


\(^7\) Xu Wulin, Judicial Independence and the Party's Leadership, Guangming Ribao, April 21, 1979, at 3.

\(^8\) SUN YINGJIE & FENG CAIJIN, ZHONGHUA RENMIN GONGHEGUO XINSHI SUSONGFA JIANGHUA, [A GUIDE TO THE LAW OF CRIMINAL PROCEDURE IN THE PEOPLE'S REPUBLIC OF CHINA], 4 (1980).

mean that the Party does not intervene at all. In some special cases, the Party committee cannot help intervening. Those cases include: cases related to the Party and the Army such as those of Lin Biao and the "Gang of Four"; cases of far-reaching implications; cases involving foreigners; and cases relating to the United Front. Thus the Party committee can take the initiative and concentrate its energy on dealing with major cases. You, the Party committees, will be able to monopolize all power for yourselves. If you try to deal with every kind of case, you would be too concerned with trivial cases to deal adequately with important matters. 10

From these statements, we can see that many types of cases came under the examination and approval system. They include death penalty cases; crimes committed by foreigners; cases relating to the Party's line, guidance or policy; cases of far-reaching implications; and cases relating to the United Front. The scope of the examination and approval system extends from the arrest decision to the death penalty. This is chiefly because the system's criteria have not been codified. We can also see that the Party possibly had its own internal regulations on arrest. Furthermore, President Jiang Hua of the Supreme People's Court surprisingly acknowledged the Party's primary jurisdiction over the death penalty, even after the implementation of the Code of the Criminal Procedure.

C. An Instruction of the Central Committee of the Chinese Communist Party on September 9, 1979

There is little doubt that the examination and approval system, although originally regarded as temporary, has existed continuously since the Communists' assumption of nationwide power in 1949. Thirty years later, for the first time, this system was officially abolished by 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. 11 This instruction was aimed at guaranteeing the full implementation of the Law of Criminal Procedure. It consists of five items. First, the courts must properly handle cases in accordance with the criminal law and the law of the criminal procedure and fully correct all thoughts and customs that contradict those laws. Second, the Party must intensify its leadership over the judiciary and make sure that the judicial function is exercised in accordance with the Constitution and laws. Third, the Party must quickly reestablish the judicial organs at all levels and make an effort to reconstruct a contingent of judicial workers. Fourth, the Party must broadly and profoundly propagate the laws and prepare for the full implementation of the criminal law and the law of criminal procedure. Fifth, the Party organization at all levels, including the Party's leading cadres and all Party members, must exercise leadership in observing the laws.

The contents of the second item, which relates to the matter of "judicial independence," are as follows:

... The Party committees and the judicial organs must each carry out their own special functions. One must neither replace nor become confused

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11 See, Reference Materials, supra note 3, vol. 1, at 49–56. This report is reproduced in full as an appendix to this article.
with the other. For this reason, the Central Committee of the Party decides to abolish the system of examination and approval by the Party committees at all levels . . . except for the very few cases committed by cadres of county-level . . . and well-known personages, which would then require instructions from higher [courts] because of specific and important considerations . . . . The Party leadership over the judiciary is limited to that of guidance and policy. The Party committee at all levels must firmly correct habits and manners, including those of judicial administrations, in which the Party substitutes for the government or law is replaced by words, or cases are handled without regard to the law.12

However, this epoch-making instruction aimed at judicial autonomy was of no effect. There is evidence that Party officials still continued to interfere in adjudication. For example, one commentator noted:

In spite of the proclamation of the abolishment of the system of having cases examined and approved by the Party committee, there still remains the idea that "the Party is superior to the law." Therefore, it is very difficult to abolish this system completely. In some localities, a few cases are dealt with by means of this system. Cases of far-reaching implications are handled not by the courts, but by the members of Party committees. Moreover, there are even cases in which comrades of Party committees or units refuse to execute the legally effective judgements passed by the courts, or attempt to change those judgements.13

At the same time, it should also be noted that there are some judicial officials who are reluctant to carry out their duties independently. Commentators have noted:

Some political-judicial cadres hesitate to decide cases themselves as soon as they receive a different opinion from the units concerned, or from higher level Party committees or individual leaders. There are also those who are unwilling to carry out their functions given by law and ask for examination and approval by the Party in order to avoid the suspicion that "they do not obey the Party leadership."14

When the opinions of the police and the court are divided, the judicial officers ask for examination and approval by political-legal subcommittees [within the Party committee] before deciding cases.15

These examples indicate a lack of judicial autonomy. Why are judicial officers apt to rely upon the Party in handling cases? Chiefly because they do not like to come into conflict with the Party. Furthermore, the judicial officers' level of knowledge and legal acumen is not sophisticated enough to perform the judicial function independently. China has been enacting many laws with considerable speed. However, it would be foolish to attempt to strengthen the legal system without enough legal experts skilled in handling the law. The situation is not much better than it was in the pre-cultural

12 Id. at 52.
14 Guo Buyue, supra note 13, at 8–9.
15 Political-Legal Group Can Neither Examine Nor Approve Cases Any Longer, Zhongguo Fazhi Bao, March 13, 1981, at 3.
revolution period. At that time, it was said that there were judicial officers who did not understand technical legal matters.\textsuperscript{16}

Modern commentators have noted similar problems with today's legal system. For example, one commentator noted that there are many judicial officers who cannot conduct trials according to legal procedure, and that there are even those who have court verdicts written by primary school teachers.\textsuperscript{17} Another commentator notes that few judicial officers are able to administer justice independently and draft court verdicts by themselves.\textsuperscript{18} Moreover, there are even the following reports on illegal activities by judicial officers:

Some judicial officers in Yulin county of Shanxi province unjustly handcuffed the plaintiff's attorney and forced him to sign his assent in court.\textsuperscript{19}

The president of the Guannan County Court of Jiangsu province mistakenly sentenced an innocent person to five years imprisonment. The intermediate court reversed this sentence and declared the defendant not guilty. But the president of the county court disregarded this final decision and did not release the defendant.\textsuperscript{20}

As long as such conditions persist, it will be extremely difficult to realize judicial autonomy in China. It is very understandable that the Party Central Committee emphasized the retraining of judicial workers. However, it seems that the education of legal experts is not making much progress.

In 1985 there were 3000 or more People's courts throughout the country, yet sixty percent lacked the necessary facilities.\textsuperscript{21} In 1979, very few among the 58,000 judicial officers throughout the country had what may be considered specialized legal knowledge. In 1985, only three or four percent of the police, the procuracy, and the court were graduates of institutes of political science and law or university law departments.\textsuperscript{22} Even in Beijing, as of 1982, those who had been trained for the legal profession in institutes and universities constituted only ten percent of the workers. Those who had received shortened training constituted twenty percent, and the rest had received no legal education at all.\textsuperscript{23} It is thus important to train legal experts as quickly as possible. However, little progress seems to have been made, as illustrated by a 1982 report which found that law department students constituted only six or seven percent of all college students nationwide.\textsuperscript{24}
Why are there so few candidates for the legal profession? One reason is that the social standing of judicial officers and lawyers remains very low. Undoubtedly, in a bureaucratic society like China, a chief concern of social members is social ranking. This ranking system is politically, economically, and socially of vital importance in a bureaucratic society. In China, this ranking is divided into 24 grades, and those lower than the 17th grade are regarded as the ordinary class, 17th–14th as the middle class, 13th–8th as the upper class, and 7th or higher the senior upper class. Among these rankings, the ranking of a judicial officer is not high, a situation unlike bourgeois society. Even the ranking of a judicial officer in a higher court is lower than the 17th grade, a ranking which is very low.

In spite of the instruction from the Central Committee of the Party to enforce judicial independence, the People’s courts do not have enough power or prestige to solve legal conflicts. This is due mainly to their low level of professional ability, and their related low ranking in the bureaucratic hierarchy. As long as the conditions of courts in China remain unimproved, the authority of the Party will incessantly intrude in the field of adjudication.

Since 1981, opinions defending the system of examination and approval by the Party have once again appeared. One article in the People’s Daily as early as 1980 asserted that the intervention of the Party committee was indispensable for handling important and complicated cases, or cases with far-reaching implications. By the end of 1981, even President Jiang Hua of the Supreme People’s Court, who was said to have had personally opposed it, acknowledged the importance of Party intervention. In the Third National Working Conference of Criminal Justice, he delivered a speech advocating that the People’s courts voluntarily seek instructions from the Party committee, or submit reports on their work to the Party committee when the cases brought before the court are difficult ones. As one commentator noted:

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 have socially far-reaching implications. . . . When serious conflicts arise as to factfinding or the application of the law among the police, the procuracy, and the court, [the court] must strive for an agreement among those by asking for instructions from the Party.

This statement is strange from the point of view of the adversary system of bourgeois society. Why should three organizations; the police, the procuracy and the court, be consistent as to factfinding or applications of law? Moreover, why must the courts ask the Party for instructions when serious conflict arises among these three organizations? There is no doubt that the Party, and not the court, was, and is, the real decision-maker in P.R.C. adjudication. The Party is clearly the center of judicial power.

References:
26 Wan Chengzhi, People’s Courts, Too, Must Implement the Policy For Intellectuals, Zhongguo Fazhi Bao, August 10, 1984, at 3.
27 Ma Rongjie, Is Government Officer Stronger or is Law Stronger?, Renmin Ribao, July 29, 1980, at 5.
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III. ARGUMENTS FOR AND AGAINST THE EXAMINATION AND APPROVAL BY THE PRESIDENT WITHIN THE PEOPLE'S COURT

A. Arguments Against Examination and Approval

Soon after the Central Committee of the Party issued the instruction for the abolishment of the examination and approval system by the Party, another examination and approval system, this time by the president or the chief judicial officer, was also criticized. Liu Chunmao initiated this movement and he noted at the time:

To be sure, this system played an important role in the early periods of the P.R.C., when the legal system was not well-organized. But even in those periods, there were abuses. Now that the legal system has become well-organized, the examination and approval system is irrational, illegal, and a barrier to the construction of the legal system. Accordingly, it should be abolished for the following reasons:

First, according to the legal provisions, the president or the chief judicial officer has the authority only to appoint judicial officers to the bench, to bring the decision which has already taken legal effect up to the judicial committee for reconsideration when he feels the decision is wrong as to factfinding or application of law, and to decide whether the judicial officer in charge of the case should be withdrawn. No law gives him the authority to override the function of the bench. This system therefore conflicts with the legally stipulated judiciary system.

Second, this system is a barrier to the implementation of the jury system which, strictly speaking, is more similar to the schöffengericht system in Germany than the Anglo-American system. For the president or the chief judicial officer to overturn the jurors' judgment would change the role of jurors.

Third, this system is contrary to the principle of democratic centralism, since it will enable the president or the chief judicial officer personally to overturn decisions made by the bench.

Fourth, this system impedes judicial independence. It is reported that in a certain county a deputy secretary of the Party committee ordered the president of the county court to rearrest a citizen who was found not guilty and released by the intermediate court. The president of the county court illegally petitioned the intermediate court for reconsideration of the decision. As illustrated by this example, it is likely that this system results in interference from the outside.

Fifth, this system will prevent judicial officers from developing political responsibility and professional skill.

Finally, this system does not ensure the correction of incorrect decisions. The president participates in neither the trial nor the investigation, and cannot be familiar with the case in detail. Therefore, his decision, relying only on the oral report and the transcript, is likely to bring about mistakes.30

The most critical assertion made by the commentators is that the system causes the abuse known as xianpan houshen [first decide and then try]. In other words, it makes the rights of a defendant meaningless in a public trial. With regard to this point, the

30 Inquiry Into the System of Examination and Approval of Cases by the President or the Chief Judicial Officer, [1982] 2 FAXUE ZAZHI 34-36.
comments by He Lunqi, a member of a higher People's court in Hubei province, are helpful:

A criminal case is in fact predetermined through the system of examination and approval by the president or the chief judicial officer prior to a public trial. As a result, the judgment at trial must follow the prior decision of the president or the chief judicial officer, however reasonable and persuasive the defendant's legal and factual defense may be.  

As long as critics regard the trial and the decision by the bench as fundamental, it is only natural that they have criticized not only the intervention by the president or the chief judicial officer, but also that of the judicial committee. The basic functions of this committee are to sum up judicial experience and to discuss important or difficult cases or other problems concerning judicial work. However, in performing these functions, they asserted that the judicial committee should not determine guilt and sentence prior to a public trial. Yet in fact, they say, the judicial committee discusses and decides every kind of case, regardless of importance, and then the trial in the court starts. As a result, the judicial officers can do nothing but try a case nominally in the court, with the role of counsel extremely diminished.

Of course a lushi, or lawyer, in the P.R.C. is quite different from one in bourgeois society, where he is expected to defend the accused or his client with partisan zeal. In a totalitarian society like China the lawyer is expected to reconcile his activity with the interests of the state and the people. There is little that a lushi in China can do for the protection of the defendant, especially in cases involving political offenses. Nevertheless, functional differences among the lawyer, the procurator, and the judicial officer are indispensable for accurate factfinding and fair adjudication. In this sense, this criticism of the examination and approval system by the president or the chief judicial officer is of importance, because the system nullifies the full implementation of the law of criminal procedure by rendering a public trial a mere formality.

B. Counter-Criticism By Proponents of the System

As mentioned above, the examination and approval system has been in use since the founding of the P.R.C. As early as the 1950s commentators have defended this system. This trend has continued through the 1980's. For example, Wen Shi, who was then the judicial officer of the higher court in Beijing city, responded to criticism of the system as follows:

31 He Lunqi, Views and Opinions on the System of Examination and Approval of Cases by the President or the Chief Judicial Officer, [1981] 3 FAXUE ZAZHI 46.
33 Li Shenyao, Preliminary Analysis on the Abuses of 'Being Determined Prior to Trial', [1985] 3 FAXUE 29.
34 Song Fanxiu, A Talk About a Decrease of Cases in Which Lawyers Appear in Criminal Court, [1984] 10 FAXUE 41.
35 Song Zhansheng, The Stand of Lawyer Chosen as an Advocate, [1982] 4 FAXUE YANJU 42.
36 See e.g., Zhu Yun, Implement the Principle of Collective Leadership and Strengthen the Judicial Work Based on the Collegiate System, [1957] 3 ZHENGFA YANJU 30.
Although Liu Chunmao attacks this system on the grounds that no law provides for it, non-existence of a legal provision does not necessarily equal illegality. If this was true, any criminal justice undertaken prior to the enactment of the criminal law and the law of criminal procedure would become invalid. This would be ridiculous. Next, the critics presuppose that the examination and approval system allows the president or the chief judicial officer to reject the decision made by the bench. This is not true . . . . The majority of opinions presented by the bench or independent judicial officer are approved by the president or the chief judicial officer. If conflict occurs between them and the bench, the president generally submits that case to the judicial committee for discussion. Neither the president nor the chief judicial officer can decide at his own discretion . . . . [Furthermore], with regard to the criticism that this system is detrimental to judicial independence because the judge is easily controlled by ‘forces’ which intervene in independent adjudication, the social ‘forces’ here are in fact the leadership of the Party committee, although Liu talks about the ‘will of the commanding officer’ and the ‘feudalistic privilege’ . . . . The leadership of our party committee at every level aims to support and guarantee judicial independence. The Party committee rarely interferes wrongfully.37

In addition to Wen Shi’s opinion, proponents eagerly defended the system on other grounds. First, owing to the Constitution and the Organizations of the People’s Courts Code, the court is responsible to the National People’s Congress and has the responsibility of reporting on its activities. The president represents the court and carries out this responsibility and, in order to do so, has the authority of examination and approval. According to article 107 of the law of criminal procedure, any important or difficult case shall be brought to a judicial committee for discussion and decision. No one but the president can determine whether the case is important or difficult or whether the case should be brought to the judicial committee or not.38 Second, Article 14 of the Organizations of the People’s Courts Code provides that when the president of any level discovers that there is a definite mistake in any decision made by his court which has already taken legal effect, he has the authority to supervise and correct it. Thus, it is natural that his authority extends to any decision which has not yet taken legal effect.39 Third, the law allows the president to organize, take leadership of, and supervise judicial work. Therefore, before the bench starts the trial, the president can hear the report as to the details of the case and can express his own preliminary view on the scope of the determination of guilt and the resultant penalty.40

These proponents all view the people’s court as youji zhengti [organic whole]. Under this view, judicial independence means not that of the individual judicial officer, but that of the People’s court as a whole.41 While the court as an organic whole composed of the president, chief judicial officer, and the individual judicial officer, is independent of the outside, internally it is subject to the principle that the minority should be subordinate

37 Wen Shi, The Examination and Approval of Cases by the President or the Chief Judicial Officer of People’s Court is Never Illegal, [1981] 2 Faxue Zazhi 39.
38 Id. at 40.
39 Sun Changli, The Examination and Approval of Cases by the President or the Chief Judicial Officer of People’s Court is Completely Lawful, [1981] 3 Faxue Zazhi 45.
40 Tao Mao, supra note 29, at 50.
41 Wen Shi, supra note 37, at 40.
to the majority, the lower to the higher, the individual to the organization, and the locality to the center.\textsuperscript{42} Since the bench is only \textit{huanjie} [one link] in the organic whole, its decision does not have any legal effect until it has received the approval of either the president or the chief judicial officer and/or the judicial committee, and been stamped with the official seal of the court.\textsuperscript{43}

President Jiang Hua of the Supreme Court is one of the proponents of this system and has delivered speeches concerning it in some People's courts. For example, in Wuqing county court, he stated that a collegiate bench within the court is not a standing organization. The court verdict made by the collegiate bench does not have legal effect until it has been publicly announced in the name of the People's court.\textsuperscript{44} In the Hexi District Court of Tienjin he also stated that:

\begin{quote}
[A collegiate bench] is neither an organ nor a fixed organization. It has no authority to exercise judicial power as a representative of the People's court. A court verdict would not have any legal effect without the seal of the court . . . . A case which the president considers to be important or disputable is submitted to the judicial committee for discussion. After that the president affixes his signature and seal. A court verdict has no effect until the above steps are taken. This is the actual manner in which we have been dealing with the cases thus far.\textsuperscript{45}
\end{quote}

His statements are undoubtedly based upon the idea of "an organic whole." Views such as these lead to the justification of the system of examination and approval by the president. The difficulty is, however, that the idea of the organic whole is likely to nullify the right of the defendant. It is unclear if proponents of the organic whole understand the serious problem that exists because the accused and the defense lawyer cannot participate in the examination by the president or in the discussion of the judicial committee.

\section*{IV. Conclusion}

In answering the question of who is the judicial decision-maker in China, I have examined adjudication in the P.R.C., especially in the post-1978 period. Both the 1954 and 1982 Constitutions provided for judicial independence. Yet it would be incorrect to interpret this independence as meaning the elimination of the Party's intervention in the judicial decision-making process. Rather, the court was, and is, required to seek instructions from the Party in handling important or difficult cases. Officially, the court is the sole judicial decision-maker, however substantially decisive in judicial decision-making the role of the Party may be. And yet, curiously, it is extremely difficult to identify the judicial decision-maker in a court which is composed of an individual judicial officer, the collegiate bench, the chief judicial officer, the president, and the judicial committee. More accurately, it would be impossible and perhaps foolish to try to identify

\textsuperscript{42} Weh Shi, \textit{Is the Manner of the Examination and Approval of Cases by the President or the Chief Judicial Officer of People's Court Illegal?}, Zhongguo Fazhi Bao, April 24, 1981, at 1.

\textsuperscript{43} Sung Changli, supra note 39, at 45.

\textsuperscript{44} Comrade Jiang Hua's Speech on the Problem of Judicial Independence in the People's Court, [1981] 6 MINZHU YU FAZHI 4.

\textsuperscript{45} Id. at 4–5.
the decision-maker as long as adjudication in Communist China is based on the idea of "an organic whole."

How should this manner of decision-making be characterized? With regard to this question, the opinion of Liu Chunmao that the prevalence of the examination and approval system results from the customary practice of administrative handling in the court is helpful. In what sense is it administrative? He does not elaborate on that point. In this respect, the arguments set forth by W. Robson are useful. In his book *Justice and Administrative Law*, Robson identifies the differences between the judicial and the administrative decision-making process. He enumerates nine points concerning the judicial process. The first is the independence of the judge. The second is the immunity of the judge. The third is the integrity of the judge. The fourth is that a judge must act personally. The fifth is the *lis inter partes* [a suit between parties]. The sixth is the right to be heard. The seventh is to render a decision according to the evidence. The eighth is the case in hand. And the last is a final decision. As to the first and the fourth point among these, he explains as follows.

At first, of all primitive ideas of justice, none is more fundamental than an impartial judge. The first condition of the impartiality is independence. The meaning of a judge's independence is that no one can give him orders as to the manner in which he is to perform his work. In this respect, the administrator is quite different. He is an employed person in the sense that employment involves a subordination to higher authority, a responsibility to receive instructions as to the work to be done. Next, as to the fourth point that the judge must act personally, one noteworthy characteristic of judicial functions is the fact that the work of a judge is essentially personal to himself. One of the conditions which attaches to formal judicial proceedings is the rule that the judge shall himself personally hear and determine the matter to be decided. In this respect, the office of judge presents a sharp contrast to that of administrator. The typical administrator is a single link in a long chain of delegated work. His work which is to be done, and the manner of doing it, are in all cases ordered from above. He has no autonomy in decision-making.

If, as Robson argues, the manner in which a judge is subordinated to higher authority and receives instructions from that authority is proper to an administrative function, then judicial decision-making in China is undoubtedly administrative. In China, judges are expected to seek instructions from higher authorities in handling important and difficult cases. The standard of importance or difficulty remains vague. Furthermore, judges are also expected to make decisions in a long chain consisting of many links, including an independent judicial officer, the collegiate bench, a chief judicial officer, the president, a judicial committee, and the Party committee. The final decision is substantially made by the president, judicial committee and the Party committee, all of which discuss and decide in secret. It is therefore impossible to truly identify the decision-maker. Because of all these factors, the manner of decision-making is indeed administrative rather than judicial.

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46 Inquiry Into the System of Examination and Approval of Cases by the President or the Chief Judicial Officer, [1982] 2 Faxue Zazhi at 34.
48 Id. at 43–44.
49 Id. at 67–69.
Appendix

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

A. Introduction

This is a complete translation of the instruction issued from the Central Committee of the C.C.P. on Sept. 9, 1979. As discussed in the body of this article, it was not until this instruction was issued that the Party was prohibited from intervening in the process of judicial decision-making. In this sense, this instruction, although its effect was short-lived, has great significance in the legal history of the P.R.C. This document also illustrates the difficulties the P.R.C. is now facing in strengthening the socialist legal system.

B. Text

This is addressed to provincial, municipal, and autonomous regions’ Party committees; to greater, provincial, and field military area commands; to the Party committee and to the Party’s leading group within the central and state organ; to the general headquarters of the military commission and the Party committee within the armed services; and to the Party groups within the people’s organizations. Seven important laws, including the criminal law and the law of criminal procedure, all passed in the Second Session of the Fifth National People’s Congress, enjoyed the enthusiastic support of all nationalities within the country. Everyone is now concerned whether these laws can be put into effect or not. Among these important laws, the criminal law and the law of criminal procedure are closely related to the people’s immediate interest in their everyday lives. The question of whether these laws can be strictly carried out or not is the touchstone for the socialist rule of law in our country. Therefore this is also what the broad masses of the people pay close attention to. The Party committee at all levels, the Party’s leading cadres at all levels, and all members of the Party must fully recognize that this is vital because it is directly related to the prestige of the state and of the Party. Only by providing that the law be reliable, by relying on the law whenever it exists, by applying the law strictly, and by investigating illegalities, can it become possible to uphold the people’s regular work and the order of production and life, and to strengthen and develop stability, unity, and political prospects. Only then does it become possible to develop the superiority of our socialist system effectively, and to strengthen the proletariat dictatorship further. Only then does it become possible to bring every positive factor into full play, and to pool the wisdom and the strength of hundreds of millions of the masses, and to carry out socialist modernization smoothly.

Since the crushing of the “Gang of Four,” especially the Third Plenary Session of the Eleventh Central Committee of the Party, we have accomplished much and created many conditions for strengthening the socialist democracy and legal system. However, there still remain such legacies of the old society as feudalism, bureaucracy, the “special privilege” mentality, and patriarchal behavior. Our Party has never placed an emphasis on establishing and strengthening the socialist legal system since the founding of the People’s Republic of China. As a result, many cadres have been accustomed to disregarding the law, underestimating the legal system, substituting the Party for the govern-
ment, replacing the law by words, and disobeying the existing laws. There are prevalent views among the Party cadres that law is not essential, or that the law binds the hands and feet of the Party, or that policy is everything because policy is nothing but law. Since the pernicious influence of Lin Biao and the "Gang of Four," who practiced the ultra-left line and frenetically destroyed democracy and the legal system, has not yet been liquidated, we must seriously struggle against the factionalism and the anarchism which were caused by them and are detrimental in many localities. If we do not make up our minds to resolve these problems, it will be difficult to put the laws enacted by the state into effect, and as a result, our Party will break its promise to the people.

The criminal law and the law of criminal procedure passed in the Second Session of the Fifth National People's Congress are of vital importance for strengthening the socialist legal system. Accordingly, the Central Committee of the Party issues the following instructions for the purpose of the full implementation of these two laws.

1. To handle cases strictly according to the criminal law and the law of criminal procedure, and resolutely correct all views and manners which contradict those laws:

The task of the criminal law is to fight against all anti-revolutionary and other crimes by means of punishment. The task of the law of criminal procedure is to ascertain the criminal facts accurately and timely and to fight against the crimes actively by applying the law correctly. From now on, the judicial and police organs at all levels must strictly handle the cases according to the laws, protect the people, strike at the enemy, and punish criminals by utilizing legal weapons so that they may guarantee the successful construction of socialist modernization.

In dealing with crimes, judicial organs at all levels must concretely analyze them and accurately impose the penalties according to the facts and the law. Guilt must be accurately distinguished from innocence in those cases. When the boundary between guilt and innocence remains unclear, judicial organs should not rashly condemn defendants as guilty. In struggling against all anti-revolutionary and other crimes which are harmful to society, judicial organs should strictly distinguish contradictions between the enemy and ourselves from those among the people. Judicial organs should correct the incorrect manner in which some cadres regard all crimes as contradictions between the enemy and ourselves. Regardless of socio-political status, class status, or political records of the accused, regardless of whether the accused committed the crime or not, or whether his crime belongs to the contradiction between the enemy and ourselves or not, all persons should be equal under the law. No organs or individuals except the police, the procuracy and the court should be allowed to arrest the person, set up an illegal court, search a house, restrict the freedom of the person, or infringe upon the just rights and interests of the people. Furthermore, no organs or individuals should instruct the police or the procuratorial organ to violate the legal boundary and procedure provided in the criminal law and the law of criminal procedure. Nor should they arrest the person illegally for various reasons. No organs or individuals should deviate from the rule of law and arbitrarily increase or decrease punishment. It is strictly forbidden for the police, the procuracy or the court to resort to any illegal means such as insulting a person, inflicting corporal punishment in disguised form, or forcing confessions by torture in treating criminals or suspects who are arrested and detained. The judicial personnel who mete out the punishment according to the law must decide
such problems as whether to deprive the convicted of political rights, whether to deprive the person partly or totally, or how long one can be deprived in light of the circumstances. Once a person has cast off the label of the landlord, rich peasant, reactionary or criminal, he belongs to the category of “the people.” Therefore he should be guaranteed the democratic rights of the people.

The violations of Party discipline, or political or other discipline should be strictly dealt with under the law. In as far as those violations are not concerned with the criminal law, [the Party organ] must avoid confusing them with criminal offenses. Among disciplinary actions within the Party, there is nothing more severe than expulsion from the Party. Since Party members are the advanced elements among the people, their political consciousness and behavior are usually of a higher level than those of the masses. Accordingly they will be good citizens, or even good working personnel in the state organs, even if they are expelled from the Party for various reasons. Only a few members of the Party who committed crimes should be punished according to criminal law. The Party members are able to discuss the Party line, guiding principle, and policy, or make suggestions according to the Party constitution. It is a normal practice of democratic life in the Party to supervise and criticize the ideology, the work, and the style of the Central Committee of the Party and the Party organizations at all levels. What should be done to the Party members who committed errors in their speeches and actions is not to retaliate, but to criticize and educate. It would be incorrect to deem them anti-Party, anti-Socialist, or guilty of “counter-revolutionary” crimes. This is true of the cases committed by the masses, too. The Party and the government members at all levels, regardless of their rank and authority, must not replace the law with words, and must not arbitrarily force private orders upon others. If this happens one should resist, expose, and denounce them.

2. To strengthen the Party leadership over the judiciary and earnestly guarantee that the judicial organs exercise the functions for which the constitution and the law provide:

From now on, what is most important in strengthening the Party leadership over the judiciary is to earnestly guarantee the implementation of laws, to make the people’s procurate and the people’s court exercise their authority independently and see that they are not interfered with by any administrative organs, organizations or individuals. It is under the Party leadership that state laws are enacted and judicial organs established. Accordingly, everybody cannot help respecting the law and the function of the judicial organ. This makes it possible to increase Party leadership and prestige. The Party committees and the judicial organs must each carry out their own special functions. One must neither replace nor become confused with the other. For this reason, the Central Committee of the Party decides to abolish the system of examination and approval by the Party committees at all levels. Every case should be tried independently according to the laws of the courts with jurisdiction over the cases, except for the very few cases committed by county-level or higher cadres or well-known personages, which would then require instructions from higher [courts] because of specific and important considerations. The individuals concerned must firmly carry out the decisions and the rulings issued by the judicial organs according to the law. If [the units and individuals] disagree, [those units and individuals] must lodge an appeal to higher judicial organs, and those organs are responsible for accepting an appeal. The public security organs at all levels must firmly obey the Party leadership, and, at the same time, [the public security organs]
must strictly observe the law when they exercise functions for which the law provides. There is no contradiction between obeying the Party leadership and observing the law. The view that the two may contradict each other is absolutely erroneous, and therefore should be resolutely corrected. The Party leadership over the judiciary is limited to that of guidance and policy. The Party committee at all levels must firmly correct habits and manners, including those of judicial administrations, in which the Party substitutes for the government, or law is replaced by words, or cases are handled without regard to the law. What should be noticed is that such old habits and manners are being reproduced under the condition that the socialist legal system in our country is still imperfect.

In the past, there were many judicial mistakes, including one in the period of Lin Biao and the “Gang of Four.” When they were on a rampage, the socialist legal system was very seriously damaged. Today, since our country has already enacted a body of important laws including the criminal law and the law of criminal procedure, the old habits and manners cannot remain in force.

The Party committee at all levels must strengthen the leadership over the judiciary, especially on the following points. First, by understanding and studying the situations of the judiciary incessantly, by leading the Party organizations within the judicial organs to analyze the enemy’s situations, the social situations and other related situations, by deciding the focal point of the work, and by solving the actual difficulties we may improve the legal system. Second, by analyzing and supervising the implementation of Party guidance, policy and law by judicial organs, and by helping them to sum up experiences, improve their manner, add to their achievements, correct their errors and fight resolutely against illegal activities, we may strengthen the system for all. Third, by conscientiously choosing and allocating judicial cadres, by improving the quality of education of the Party cadres in the judicial organs, and heightening their level of ideology, policy and business, we can further improve the legal system. The Party organizations and cadres of all judicial organs must submit reports to the Party committee and must bring initiative and creativeness into full play. [The Party organizations and cadres] must praise judicial personnel who are selfless, upright and proficient in business. On the other hand, [the Party organization and cadres] must strictly investigate and discern cadres who illegally interfere and exert their influence on the works of judicial organs, or the judicial personnel who commit malfeasance, yield to power, practice favoritism and pervert justice for bribes.

3. To strengthen judicial organizations quickly and to establish a firm contingent of judicial work:

The Central Committee calls for the department of central organization, jointly with each judicial organ and the state organization committee, to study and work out concrete plans with regard to the strengthening of judicial organizations at all levels. In addition, they are to transfer cadres in the Party, government organizations, the armed forces and the department of economy who are in good ideology, behavior and health, and who reach a high level of policy and culture, to the judiciary after necessary training. After a general survey of the personnel shows who had been legally trained or had been engaged in legal teaching and researching. Every effort must be made to retain those personnel in the judiciary.

[The department of central organization] must try to investigate and replenish the leading groups of judicial organs at provincial, district and county levels this year. The chief of the public security bureau, the president of the court and the chief procurator
at these three levels should be selected out of cadres who correspond to the members of the Party standing committee at the same level. Nothing is more important than the strengthening of the organizations of the court and the procuracy. It is necessary to reorganize a contingent of judicial cadres in office, as well as to adjust and replenish a leading body of judicial organs at all levels.

The office for the administration of justice established by the State Council shall be coordinately responsible for training the judicial cadres, as well as for judicial administration. The department of public security takes charge of the task of training capable policemen and professional personnel. Institutes or schools of political science, law and public security which were once abolished should be reestablished as quickly as possible. If possible, it is desirable to set up a department of law or a vocational school of law in colleges specializing in liberal arts. If necessary, every province, city and autonomous region may establish various kinds of institutes of political science and law, and bring professional personnel up through the various training courses as well as training in rotation the judicial and the public security cadres who are already in office. In order to maintain the stability of key members of the public security and the judicial organs at the county level or higher, it is necessary to restore the system that requires the higher authorities of those organs to supervise and check on the cadres concerned, in cooperation with the regional Party committees. The regional Party committees must ask for the approval of higher organs with regard to the allocation of leading cadres among the Party members in the public security, the procuratorial, and the judicial organs.

4. To make propaganda for the law widespread and profound and to prepare for full implementation of the criminal law and the law of criminal procedure:

It is necessary to create legal propaganda and intensify the legal education of vast numbers of Party members, cadres and the masses through the media. Every university, middle school and primary school must practice legal education. The Party school and the cadre school at each level must put legal education on the curriculum. All the working personnel in the public security, the procuratorial, and the judicial organs at all levels, including the people's police and the working personnel in the prisons and labor reform camps, must willingly study the criminal law and the law of criminal procedure. The emphasis of education for the masses should be placed on the criminal law and the law of criminal procedure, so that every household may fully understand the contents of these laws. It is necessary to make everybody aware of such questions as what these laws protect, what they are opposed to, how the observance of law can be distinguished from a violation of law, and how to heighten the level of consciousness of the law.

The Party organizations and the judicial organs at all levels must incessantly implement the spirit of the Party's Third Plenary Session, earnestly fulfill the Party's policy, and firmly grasp the work of sorting out long-pending cases and of correcting wrong, false, and misjudged cases. [The Party organizations and the judicial organs] must correct any custom which conflicts with the criminal law and the law of criminal procedure. [The Party organization and the judicial organs] must revise any rules and regulations which are contrary to the criminal law and the law of criminal procedure. Any criminals in custody who are neither prosecuted nor tried yet should be prosecuted or tried as quickly as possible according to the law of criminal procedure. If there are cases in which the evidence of a crime is not sufficient to prosecute, those cases should be properly dealt with according to the law. In short, [the Party organizations and the
judicial organs] must earnestly prepare for the official enforcement of the criminal law and the law of criminal procedure on January 1, 1980.

5. The Party organizations at all levels, leading cadres and all Party members must exercise leadership in observing the law:

Since the laws in our country were enacted by the highest organ of the state power on the basis of the Party leadership and widespread democracy, it is natural that they represent the will and interest of the people of the country. They embody the policy and proposition of the Party and therefore must be highly respected. Accordingly, from the Party Central Committee on down to organizations on the most basic level, and from the Chairman of the C.C.P. to the individual Party member, all of them should, without exception, conform to the law. [The Party organizations and leading cadres] must adhere to the principle that all people are equal before the law, and that there cannot be any exceptions. No one may place himself over the law. All Party members, especially its leading cadres at all levels, must study, understand and exercise leadership in observing the law.

Most cadres in our Party are good or relatively good. However, there still exist a small number of cadres, especially leading cadres and their relatives, who adhere to the "special privilege" mentality, that eagerly seek personal privilege, and disregard Party discipline and the law. They engage in malpractice for selfish ends by resorting to the authority of their offices, suppressing democracy, and retaliating against others. They also bring the decadent ways of old style officialdom and the bad habits of government office in feudal China into the Party and state organs, seriously contaminating the body of the Party, damaging the relationship between the Party and the masses, and destroying the dignity of the socialist legal system in our country. The Party Central Committee deems it necessary to sound the alarm to all comrades of the Party, and to check resolutely all of the unhealthy tendencies mentioned above. Disciplinary sanctions should be taken against those persons who do not heed repeated admonitions, and who seriously violate the law and discipline, no matter how high their positions are, or how great their contributions in the past were. Criminals who violate the criminal law should be dealt with according to the law, and those violations should never be covered up or ignored.

Implementation of the law is in keeping with that of the Party line, guidance and policy. From now on, any resolutions or instructions issued from the Party organizations at all levels must not go against the law, but be advantageous to the implementation of the law. If the content of a law does not fit the needs of the circumstances any longer, the law should be revised only according to established legal procedure.

Once Party committees have received this instruction, they must at all levels combine it with practice, discuss it and conscientiously carry it out. If [you, the Party committees] find some important circumstance or problem in implementing it, we hope that [you, the Party committees] will immediately report the problem to us, the Central Committee of the Party.

The Central Committee of the Chinese Communist Party
September 9, 1979